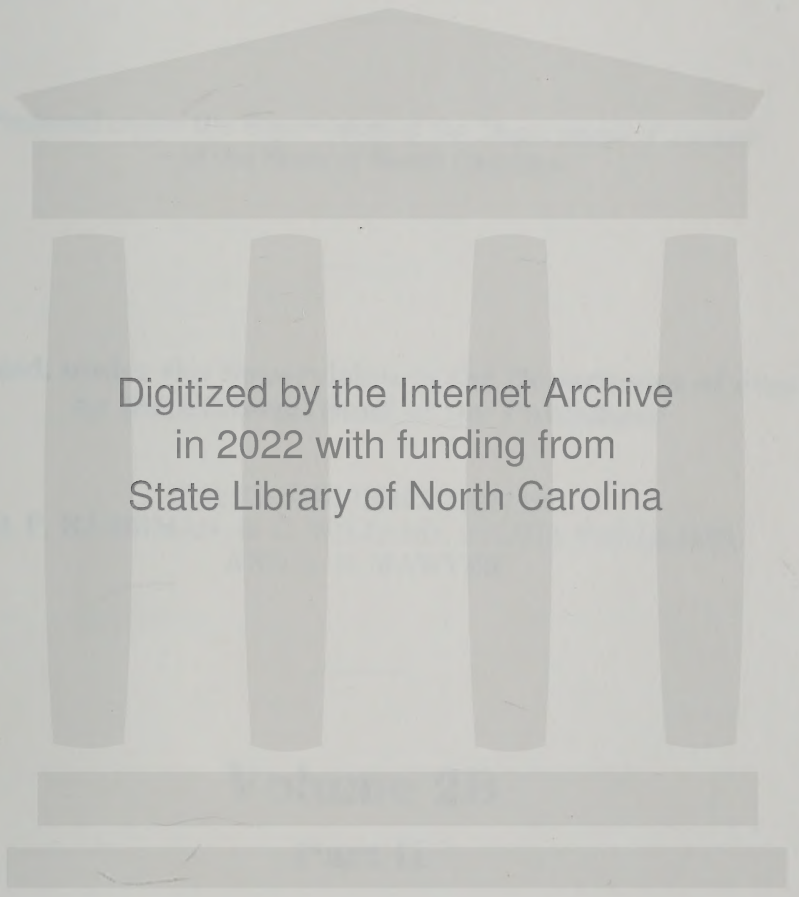
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THE GENERAL STATUTES OF NORTH CAROLINA

CONTAINING GENERAL LAWS OF NORTH CAROLINA
ENACTED THROUGH THE SESSION LAWS OF 1981
(REGULAR SESSION, 1982)

Prepared under the Supervision of the Department of Justice
of the State of North Carolina

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
D. P. HARRIMAN, S. C. WILLARD, SYLVIA FAULKNER
AND K. S. MAWYER

Volume 2B

Part II

1982 Replacement Volume

THE MICHIE COMPANY
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1982

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Scope of Volume

Statutes:

Full text of Chapters 58 through 62 of the General Statutes of North Carolina, including all enactments through the Session Laws of 1981 (Regular Session, 1982), heretofore contained in 1975 Replacement Volume 2B of the General Statutes of North Carolina and the 1981 Cumulative Supplement and 1982 Interim Supplement thereto.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 302, p. 222.
North Carolina Court of Appeals Reports through Volume 50, p. 567.
South Eastern Reporter 2nd Series through Volume 291, p. 488.
Federal Reporter 2nd Series through Volume 677, p. 882.
Bankruptcy Reports through Volume 19, p. 123.
Federal Supplement through Volume 537, p. 323.
Federal Rules Decisions through Volume 93, p. 253.
United States Reports through Volume 453, p. 691.
Supreme Court Reporter through Volume 102, p. 2048.
North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated States (1919, 1924)

Preface

Volume 2B, last replaced in 1975, accumulated a supplement approaching the bound volume in size and including, among other things, extensive changes in the statutes relating to financial institutions, corporations and insurance. Due to the substantial increase in the amount of material incorporated in Volume 2B, the current replacement is accomplished by the division of the volume into two separate volumes, Volume 2B, Parts I and II. These 1982 Replacement Volumes are issued to incorporate the new material in the bound volumes and to eliminate what is obsolete.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, such opinions which construe a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

RUFUS L. EDMISTEN
Attorney General

November 1, 1982

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Article 33.

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Article 34.

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SUBCHAPTER I. INSURANCE DEPARTMENT.

ARTICLE 1.

Title and Definitions.

§ 58-1. Title of the Chapter.

This Chapter may be cited and shall be known as the Insurance Law. (1899, c. 54; Rev., s. 4677; C.S., s. 6260.)

Cross References. — For provisions applicable to corporations governed by this chapter which relate to the elimination of discrimination in treatment of handicapped and disabled persons, see § 168-10. As to hospital, medical, and dental service corporations, see Chapter 57. For the Health Maintenance Organization Act of 1979, see Chapter 57B.

Legal Periodicals. — For article on the 1945 revision of the Insurance Law, see 23 N.C.L. Rev. 283.

For discussion of changes made by the Session Laws of 1947, see 25 N.C.L. Rev. 429.

For case law survey as to insurance, see 44 N.C.L. Rev. 1022 (1966); 45 N.C.L. Rev. 955 (1967).

CASE NOTES

Purpose of Chapter. — The statute law makes elaborate and minute provisions for the protection of the people from imposition under the guise of insurance, and the Department of Insurance is charged with the special duty of seeing that these provisions are complied with. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-2. Definitions.

In this Chapter, unless the context otherwise requires,

(1) "Alien company" means a company incorporated or organized under the laws of any jurisdiction outside of the United States.

(2) "Commissioner" means Commissioner of Insurance of North Carolina.

(3) "Company" or "insurance company" or "insurer" shall be deemed to include any corporation, association, partnership, society, order, individual or aggregation of individuals engaging or proposing or attempting to engage as principals in any kind of insurance business, including the exchanging of reciprocal or interinsurance contracts between individuals, partnerships and corporations.

(4) "Department" means Department of Insurance of North Carolina.

(5) "Domestic company" means a company incorporated or organized under the laws of this State.

(6) "Foreign company" means a company incorporated or organized under the laws of the United States or of any jurisdiction within the United States other than this State.

(6a) "Nuclear insured" means a public utility procuring insurance against radioactive contamination and other risks of direct physical loss at a nuclear electric generating plant.

(7) "Person" includes an individual, aggregation of individuals, corporation, company, association and partnership.

(8) The singular form shall include the plural, and the masculine form shall include the feminine wherever appropriate. (1899, c. 54, s. 1; Rev., s. 4678; C.S., s. 6261; 1945, c. 383; 1971, c. 510, s. 1.)

CASE NOTES

The Insurance Law clearly contemplates both incorporated and unincorporated companies. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

§ 58-3. Contract of insurance.

A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest. (1899, c. 54, s. 2; Rev., s. 4679; C.S., s. 6262; 1945, c. 383.)

Legal Periodicals. — For comment entitled, "Insurance Contract and Policy in General as it Relates to North Carolina," see 3 N.C. Cent. L.J. 259 (1972).

CASE NOTES

Contract to Indemnify Assured for Loss Is Insurance Contract. — That portion of a contract under which a company agrees to indemnify the assured for loss or damage from perils therein defined, with provision for subrogation of the company to the right of the assured against third persons, constitutes a contract of insurance. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

But Contract to Pay Claims for Which Assured Is Liable Is Surety Contract. — A contract under which a company obligates itself to pay, to any shipper or consignee, claims for which the assured would be liable by provision of § 62-111, with stipulation that the assured should reimburse the company for any such payment, is a surety contract and not a contract of insurance. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

Cited in Charleston & W. Carolina Ry. v. Robert G. Lassiter & Co., 207 N.C. 408, 177 S.E. 9 (1934).

§ 58-3.1. Motor vehicle warranties.

Any motor vehicle warranty issued by a person as defined in this Article, other than a warranty made solely by the manufacturer or seller without charge or an extended warranty offered as an option by a manufacturer or seller or authorized distributor of foreign manufactured automobiles for charge, guaranteeing indemnity for defective parts, mechanical breakdown and labor shall be a contract of insurance, provided that a product guaranty or warranty which accompanies the sale of a product used in the maintenance or operation of a motor vehicle shall not be a contract of insurance under this Chapter. (1959, c. 866; 1975, cc. 643, 788; 1977, c. 185.)

§ 58-3.2. Real property warranties.

Any warranty relating to tangible personal property or fixtures to real property issued in connection with the sale of real property by a person as defined in this Article shall be a contract of insurance, except the following, which shall not be contracts of insurance:

(1) A warranty made by a builder or seller of the real property;

(2) A warranty incidental to the sale of real property providing for the repair or replacement of the items covered by the warranty for defective parts and mechanical failure or resulting from ordinary wear and tear, which warranty excludes from its coverage damage from recognizable perils such as fire, flood, and wind, which perils do not relate to any defect in the items covered nor result from ordinary wear and tear. (1979, c. 773, s. 1.)

Cross References. — As to surety bond required for warrants of real property, see § 58-188.9.

ARTICLE 2.

Commissioner of Insurance.

§ 58-4. Department established.

The Insurance Department is hereby established as a separate and distinct department, which is charged with the execution of laws relating to insurance and other subjects placed under the Department. (1899, c. 54, s. 3; 1901, c. 391, s. 1; Rev., s. 4680; C.S., s. 6263.)

Legal Periodicals. — For note discussing changes in automobile rate regulation and the role of the Insurance Commissioner in North Carolina, see 17 Wake Forest L. Rev. 822 (1981).

CASE NOTES

Quoted in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Cited in O'Neal v. Wake County, 196 N.C. 184, 145 S.E. 28 (1928).

§ 58-5. Commissioner's election and term of office.

The chief officer of the Insurance Department shall be called the Commissioner of Insurance; whenever in the statutes of this State the words "Insurance Commissioner" appear, they shall be deemed to refer to and to be synonymous with the term "Commissioner of Insurance." He shall be elected by the people in the manner prescribed for the election of members of the General Assembly and State officers, and the result of the election shall be declared in the same manner and at the same time as the election of State officers is now declared. His term of office begins on the first day of January next after his election, and is for four years or until his successor is elected and qualified. If a vacancy occurs during the term, it shall be filled by the Governor for the unexpired term. (Rev., ss. 4680, 4681; 1907, c. 868; C.S., s. 6264; 1943, c. 170.)

Cross References. — As to Commissioner's taking of oath and induction into office, see § 147-4. As to penalty for failure to take oath, see § 128-5.

CASE NOTES

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-6. Salary of Commissioner of Insurance.

The salary of the Commissioner of Insurance shall be the same as for superior court judges as set by the General Assembly in the Budget Appropriation Act. (1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; c. 771, s. 3; Rev., s. 2756; 1907, c. 830, s. 10; c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; C.S., s. 3874; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 342; 1945, c. 383; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 6; 1967, c. 1130; c. 1237, s. 6; 1969, c. 1214, s. 6; 1971, c. 912, s. 6; 1973, c. 778, s. 6; 1975, 2nd Sess., c. 983, s. 21; 1977, c. 802, s. 42.12.)

§ 58-7: Repealed by Session Laws 1981, c. 884, s. 2.

§ 58-7.1. Chief deputy commissioner.

The Commissioner shall appoint and may remove at his discretion a chief deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the Commissioner, or in case the office of Commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Commissioner. He shall receive such compensation as fixed and provided by the Budget Bureau. (1945, c. 383.)

Editor's Note. — The State Budget Bureau, referred to in this section, no longer exists. For present statute, see the Executive Budget Act, Article 1 (§ 143-1 et seq.) of chapter 143.

CASE NOTES

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-7.2. Chief actuary.

The Commissioner shall appoint and may remove at his discretion a chief actuary, who shall receive such compensation as fixed and provided by the Budget Bureau. (1945, c. 383.)

Editor's Note. — The State Budget Bureau, referred to in this section, no longer exists. For present statute see the Executive Budget Act, Article 1 (§ 143-1 et seq.) of Chapter 143.

CASE NOTES

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-7.3. Other deputies, actuaries, examiners and employees.

The Commissioner shall appoint or employ and may remove at his discretion such other deputies, actuaries, examiners, clerks and other employees as may be found necessary for the proper execution of the work of the Insurance Department, at such compensation as shall be fixed and provided by the Budget Bureau. If the Commissioner finds it necessary for the proper execution of the work of the Insurance Department to contract with persons, except to fill authorized employee positions, all those contracts shall be made pursuant to the provisions of Article 3C of Chapter 143 of the General Statutes regarding contracts to obtain consultant services. (1945, c. 383; 1981, c. 859, s. 94.)

Cross References. — As to assistant attorney general assigned to Commissioner and Insurance Department, see § 114-4.2A.

Editor's Note. — The State Budget Bureau, referred to in this section, no longer exists. For present statute see the Executive Budget Act, Article 1 (§ 143-1 et seq.) of Chapter 143.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the second sentence.

Session Laws 1981, c. 859, s. 97, contains a severability clause.

CASE NOTES

Quoted in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-8. Seal of Department.

The Commissioner of Insurance, with the approval of the Governor, shall devise a seal, with suitable inscription, for his office, a description of which, with the certificate of approval by the Governor, shall be filed in the office of the Secretary of State, with an impression thereof, which seal shall thereupon become the seal of office of the Commissioner of the Insurance Department. The

seal may be renewed whenever necessary. (1899, c. 54, s. 11; Rev., s. 4682; C.S., s. 6266.)

§ 58-9. Powers and duties of Commissioner.

The Commissioner shall:

(1) See that all laws of this State governing insurance companies, associations, orders or bureaus relating to the business of insurance are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Chapter, and to make such further rules and regulations not contrary to any provision of this Chapter which will prevent practices injurious to the public by insurance companies, fraternal orders and societies, agents, adjusters and motor vehicle damage appraisers. The Commissioner may likewise, from time to time, withdraw, modify or amend any such regulation: Provided, however, that the provisions of this subsection shall not apply to the provisions of Article 34 of this Chapter.

(2) Have the power and authority to make and promulgate rules and regulations pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.

(3) Furnish to the companies, associations, orders or bureaus required by this Chapter to report to him, the necessary blank forms for the statements required, which forms may be changed by him from time to time when necessary to secure full information as to the standing, condition and such other information desired of companies, associations, orders or bureaus under the Insurance Department.

(4) Receive and thoroughly examine each annual statement required by this Chapter.

(5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance, and he shall have power to institute civil actions or criminal prosecutions either by the Attorney General or such other attorney as the Attorney General may select, for any violation of the provisions of this Chapter.

(6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to such citizen.

(7) Administer by himself or by his deputy all oaths required in the discharge of his official duty.

(8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 33 of this Chapter. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721;

1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq. As to certain duties of commissioner with regard to fire inspection and prevention, see §§ 69-1 to 69-7. As to commissioner's duties with regard to the Firemen's Relief Fund, see § 118-1 et seq.

Effect of Amendments. — The 1981 amendment, effective July 1, 1982, added the proviso at the end of subdivision (1).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Rate-making authority, as distinguished from purely administrative functions, must be derived from a clear statutory enactment granting the Commissioner of Insurance such power. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

The Commissioner of Insurance has no authority to prescribe or regulate premium rates except insofar as that authority has been conferred upon him by statute. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 24 N.C. App. 223, 210 S.E.2d 441 (1974), cert. denied, 286 N.C. 412, 211 S.E.2d 801 (1975).

Commissioner Has No Express or Implied Power to Set Rates. — Clearly, subdivision (1) contains no express grant of authority to set rates and it is not such an implied power as is reasonably necessary for the Commissioner's proper functioning. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

The Commissioner's power to make "rules and regulations" can in no way grant him the authority to carry out the "legislative power" of setting rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Or to Make Substantive Law. — An administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Nothing in § 58-54.3 grants authority to the Commissioner of Insurance to take any action whatsoever. It merely prohibits unfair methods of competition or unfair or deceptive acts or practices in the insurance industry, which are exhaustively defined in § 58-54.4. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Clearly Article 3A of this Chapter generally and § 58-54.3 specifically contain no authority to issue orders setting premium rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Power to Remedy Unfair Trade Practices under §§ 58-54.5 through 58-54.7 Limited. — Sections 58-54.5, 58-54.6 and 58-54.7, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 . . .," grant no remedial power to the Commissioner to remedy unfair trade practices, other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Effect of Companies' Acquiescence in Rating Setting. — Commissioner's contention that acquiescence by companies writing credit life insurance in rates set by prior Commissioners of Insurance gave present Commissioner the authority to fix credit life rates was untenable. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Commissioner of Insurance had no authority to enjoin an insurance company from entering into an agreement to lease property owned by the company's president and treasurer. Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Applicability of Rule-Making Provisions of Administrative Procedure Act. — A requirement by the Commissioner of Insurance that audited data be submitted in a ratemaking case was a legislative rule and therefore subject to the rule making provisions of the North Carolina Administrative Procedure Act, §§ 150A-1 through 150A-64. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 287 N.C. 192, 214 S.E.2d 98 (1975); State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965); State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Cited in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

§ 58-9.1. Orders of Commissioner; when writing required.

Whenever by any provision of this Chapter, the Commissioner is authorized to grant any approval, authorization or permission or to make any other order affecting any insurer, insurance agent, insurance broker or other person or persons subject to the provisions of this Chapter, such order shall not be effective unless made in writing and signed by the Commissioner or by his authority. (1945, c. 383.)

CASE NOTES

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-9.2. Examinations, investigations and hearings; notice of hearing.

All examinations, investigations and hearings provided for by this Chapter may be conducted by the Commissioner personally or by one or more of his deputies, investigators, actuaries, examiners or employees designated by him for the purpose. If the Commissioner or any investigator appointed to conduct such investigations is of the opinion that there is evidence to charge any person or persons with a criminal violation of the insurance laws he may arrest with warrant or cause such person or persons to be arrested. All hearings shall, unless otherwise specially provided, be held at such time and place as shall be designated in a notice which shall be given by the Commissioner in writing to the person cited to appear, at least 10 days before the date designated therein. The notice shall state the subject of inquiry and the specific charges, if any. It shall be sufficient to give such notice either by delivering it to such person or by depositing the same in the United States mail, postage prepaid, and addressed to the last known place of business of such person. (1945, c. 383; 1969, c. 1009.)

CASE NOTES

Arbitrary and Capricious Procedure. — Where no notice whatever was given by the Commissioner to the Rating Bureau of his intent to convert contemplated hearing on the Bureau's motion to vacate "letter order" into an independent investigation of the reasonableness of existing premium rates for extended coverage insurance pursuant to former § 58-131.2, Commissioner's action in proceeding without such notice and an adequate opportunity to the Bureau to present evidence as to the merits of the existing premium rate level would be deemed arbitrary and capricious. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-9.3. Court review of orders and decisions.

(a) Any order or decision made, issued or executed by the Commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets and except an order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory, or not in the public interest, shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person. A copy of such petition for review as filed with and certified to by the clerk of said court shall be served upon the Commissioner or in his absence upon someone in active charge of the Department within five days after the filing thereof. If such petition for review is not filed within the said 30 days, the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to which application may be made by petition or otherwise, to enforce or restrain the enforcement of the same.

(b) The Commissioner shall within 30 days, unless the time be extended by order of court, after the service of the copy of the petition for review as provided in subsection (a) of this section, prepare and file with the clerk of the Superior Court of Wake County a complete transcript of the record of the hearing, if any, had before him, and a true copy of the order or decision duly certified. The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper. The court may change the place of hearing,

(1) Upon consent of the parties; or

(2) When the convenience of witnesses and the ends of justice would be promoted by the change; or

(3) When the judge has at any time been interested as a party or counsel.

The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only. It shall be the duty of the trial judge to hear and determine such petition with all convenient speed and to this end the cause shall be placed on the calendar for the next succeeding term for hearing ahead of all other cases except those already given priority by law. If on the hearing before the trial judge it shall appear that the record filed by the Commissioner is incomplete, he may by appropriate order direct the Commissioner to certify any or all parts of the record so omitted.

(c) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof.

(d) Appeals from all final orders and judgments entered by the superior court in reviewing the orders and decisions of the Commissioner may be taken to the appellate division of the General Court of Justice by any party to the action as in other civil cases.

(e) The commencement of proceedings under this section shall not operate as a stay of the Commissioner's order or decision, unless otherwise ordered by the court. (1945, c. 383; 1947, c. 721; 1969, c. 44, s. 55; 1971, c. 703, s. 1.)

Legal Periodicals. — For comment on the 1947 amendment which rewrote subsection (b), see 25 N.C.L. Rev. 439.

For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

CASE NOTES

Differentiation between This Section and § 58-9.4. — This section omits any grant to the Commissioner of the authority to seek judicial review, whereas § 58-9.4 expressly grants him such authority, which indicates a clear legislative intent to differentiate between these two sections. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

The powers of the Commissioner are not to be construed broadly so as to include a right of appeal under this section. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

The Commissioner was not intended to be the representative of the public or to be deemed an aggrieved person so as to permit him to appeal pursuant to the provisions of this section. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Or under § 58-248.33. — The Commissioner is not expressly granted the power to appeal by § 58-248.33. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Applicability of Standing Requirement in Court of Appeals. — Where a case involves the right of the Commissioner to seek review before the Court of Appeals and not before the superior court, this section is not expressly applicable. However, since by statutory interpretation and implication this section would extend its application to the analogous, higher appeal to the Court of Appeals, its requirement that the person must be aggrieved in order to appeal still applies. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Order Not Excepted From Review. — An order by the Commissioner in which, without notice or hearing, he abruptly directed that the Automobile Rate Administrative Office could not follow the standard rule of application for placing into effect changes, whether increases or decreases, in insurance premium rates was not such a decision as is described in § 58-9.4, nor did it fall within any of the categories excepted from review by petition to the Superior Court of Wake County under this section. North Carolina Auto. Rate Admin. Office v. Ingram, 35 N.C. App. 578, 242 S.E.2d 205 (1978).

Issuance of Mandatory Injunction Requiring Commissioner to Approve Reorganization. — The trial court did not exceed its power and authority by issuing its mandatory injunction requiring the Commissioner of Insurance to approve a domestic insurance corporation's plan to reorganize under a holding company structure where the Commissioner acted arbitrarily and capriciously when he disapproved the plan. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Review under Article 4 of Chapter 150A. — Since the scope of review provided in Art. 4, Ch. 150A is substantially broader than that provided by this section, the scope of judicial review applicable to a denial by the Commissioner of Insurance of a plan by a domestic insurance company to reorganize under a holding company structure is that provided for in Art. 4 of Ch. 150A. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Presumption Favoring Commissioner's Future Projections. — The Commissioner's projection of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence and if he has taken into account all of the relevant facts which he is directed by statute to consider. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Applied in In re Blue Bird Taxi Co., 237 N.C. 373, 75 S.E.2d 156 (1953); In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957); State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975); North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965); In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Stated in Elmore v. Lanier, 270 N.C. 674, 155 S.E.2d 114 (1967); In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971); American Guarantee & Liab. Ins. Co. v. Ingram, 32 N.C. App. 552, 233 S.E.2d 398 (1977).

Cited in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-9.4. Court review of rates and classification.

Any order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification or classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory or not in the public interest may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby. Any such order shall be based on findings of fact, and if applicable, findings as to trends related to the matter under investigation, and conclusions of law based thereon. Any order or decision of the Commissioner, if supported by substantial evidence, shall be presumed to be correct and proper. For the purposes of the appeal the Insurance Commissioner, who shall be represented by his general counsel, shall be deemed an aggrieved party. (1971, c. 703, s. 2.)

Cross References. — As to jurisdiction of the Court of Appeals to review orders or decisions of the Commissioner of Insurance, see § 7A-250.

CASE NOTES

Differentiation between § 58-9.3 and This Section. — Section 58-9.3 omits any grant to the Commissioner of the authority to seek judicial review, whereas this section expressly grants him such authority. This indicates a clear legislative intent to differentiate between these two sections. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

This section applies only to orders affecting premium rates on any class of risks or the propriety of a given classification or classification assignment. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Inapplicability to Appointment of Agent Representative. — Where a case involves the appointment of an agent to represent an insurance company, neither this section nor the exceptions to § 58-9.3, other than that for an order covered by this section, are applicable. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Construction of This Section with Article 12B of This Chapter. — Prior to the 1977 legislation enacting Article 12B of Chapter 58, it was held that the reviewing court had no inherent authority to fix rates nor to continue them in effect pending a hearing on remand. Under the 1977 legislative scheme, however, the Court of Appeals is not setting a workers' compensation rate when it reverses Commissioner's order of disapproval. The rate is set by the Commissioner in failing to carry the burden of showing affirmatively and specifically that the filing does not comply with statutory standards. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Burden on Commissioner in Disapproving Rate Filing. — The Commissioner can no longer effectively disapprove a rate filing by inaction or a bare assertion that the Rate Bureau has not carried its burden of proof. Though the new statutory scheme does not shift the ultimate burden of proof from the Rate Bureau to the Commissioner, it does place on the Commissioner, in disapproving a filing, the burden of affirmatively and specifically showing how the bureau has not carried its burden of proof, and, if the Commissioner fails to do so by substantial evidence, the presumption of prima facie correctness given to an order of the Commissioner by this section and § 58-9.6 is rebutted. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Duty of Court of Appeals on Appeal from Commissioner's Order of Disapproval of Rate Filing. — If the Commissioner fails to perform the affirmative duties imposed upon him by Article 12B of Chapter 58 after a filing by the Rate Bureau, the filing shall be deemed to be approved, just as there is a deemed approval upon his failure to give notice of hearing within 30 days under § 58-124.21(b). If the Court of Appeals, on appeal from the Commissioner's order of disapproval, finds that the order is not supported by material and substantial evidence, it is then the duty of the court to determine whether the filing complies with the statutory standards and methods and is supported by substantial evidence. If no such compliance is found the disapproval order will be vacated and the filing approved, and this will constitute a final determination under § 58-124.22, which will require an order distributing the escrowed funds to the members

of the Rate Bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Findings of Fact Prerequisite to Review. — Without appropriate findings of fact, as required by this section, an order of the Commissioner cannot be judicially reviewed by an appellate court. State ex rel. Commissioner of Ins. v. Compensation Rating & Inspection Bureau, 30 N.C. App. 332, 228 S.E.2d 264 (1976), rev'd on other grounds, 292 N.C. 471, 234 S.E.2d 720 (1977).

Order Not Excepted from Review. — An order by the Commissioner in which, without notice or hearing, he abruptly directed that the Automobile Rate Administrative Office could not follow the standard rule of application for placing into effect changes, whether increases or decreases, in insurance premium rates was not such a decision as is described in this section, nor did it fall within any of the categories excepted from review by petition to the Superior Court of Wake County under § 58-9.3(a). North Carolina Auto. Rate Admin. Office v. Ingram, 35 N.C. App. 578, 242 S.E.2d 205 (1978).

Meaning of "Substantial Evidence." — Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976), aff'd in part, rev'd in part, 292 N.C. 1, 231 S.E.2d 867 (1977); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979), modified and aff'd, 300 N.C. 485, 269 S.E.2d 602 (1980).

Substantial evidence is more than a scintilla or a permissible inference. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976), aff'd in part, rev'd in part, 292 N.C. 1, 231 S.E.2d 867 (1977); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979), modified and aff'd, 300 N.C. 485, 269 S.E.2d 602 (1980).

Application of "Substantial Evidence" Standard. — In the application of the "substantial evidence" standard, courts will generally defer to the expertise of the administrator in his specialized field if there is reasonable evidence to support his decision. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 19 N.C. App. 263, 198 S.E.2d 575, appeal dismissed, 284 N.C. 252, 200 S.E.2d 659 (1973).

As to the statutory scheme for Workers' Compensation rate-making, see State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Applied in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 287 N.C. 192, 214 S.E.2d 98 (1975); State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975); North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976); State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977).

§ 58-9.5. Procedure on appeal under § 58-9.4.

Appeals to the North Carolina Court of Appeals pursuant to G.S. 58-9.4 shall be subject to the following provisions:

(1) No party to a proceeding before the Commissioner may appeal from any final order or decision of the Commissioner unless within 30 days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commissioner, by order made within 30 days, the party aggrieved by such decision or order shall file with the Commissioner notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commissioner.

(2) Any party may appeal from all or any portion of any final order or decision of the Commissioner in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commissioner, to each party to the proceeding to the addresses as they appear in the files of the Commissioner in the pro-

ceeding. The failure of any party, other than the Commissioner, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(3) The Commissioner may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commissioner.

(4) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The procedure for the appeal shall be as provided by the rules of appellate procedure.

(5), (6) Repealed by Session Laws 1975, c. 391, s. 11.

(7) The Court of Appeals shall hear and determine all matters arising on such appeal, as in this Article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals.

(8) Unless otherwise provided by the rules of appellate procedure, the cause on appeal from the Commissioner of Insurance shall be entitled "State of North Carolina ex rel. Commissioner of Insurance (here add any additional parties in support of the Commissioner's order and their capacity before the Commissioner). Appellee(s) v. (here insert name of appellant and his capacity before the Commissioner), Appellant." Appeals from the Insurance Commissioner pending in the superior courts on January 1, 1972, shall remain on the civil issue docket of such superior court and shall have priority over other civil actions. Appeals to the Court of Appeals under G.S. 7A-29 shall be docketed in accordance with the rules of appellate procedure.

(9) In any appeal to the Court of Appeals, the complainant in the original complaint before the Commissioner shall be a party to the record and each of the parties to the proceeding before the Commissioner shall have a right to appear and participate in said appeal.

(10) An appeal under this section shall operate as a stay of the Commissioner's order or decision until said appeal has been dismissed or the questions raised by the appeal determined according to law. (1971, c. 703, s. 3; 1975, c. 391, s. 11.)

Legal Periodicals. — For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

CASE NOTES

Applicability of §§ 58-9 through 58-27.2 to Judicial Review of Ratemaking Procedures. — While the North Carolina Administrative Procedure Act, §§ 150A-1 through 150A-64, controls judicial review of insurance ratemaking procedures, the review provisions of §§ 58-9 through 58-27.2 should also apply insofar as those provisions are compatible with the act. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 287 N.C. 192, 214 S.E.2d 98 (1975); North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976).

§ 58-9.6. Extent of review under § 58-9.4.

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of the Court of Appeals, and any alleged irregularities in procedures before the Commissioner, not shown in the record, shall be considered under the rules of the Court of Appeals.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any action of the Commissioner. The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or
(2) In excess of statutory authority or jurisdiction of the Commissioner, or
(3) Made upon unlawful proceedings, or
(4) Affected by other errors of law, or
(5) Unsupported by material and substantial evidence in view of the entire record as submitted, or
(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commissioner.

(d) The court shall also compel action of the Commissioner unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commissioner under the provisions of this Chapter shall be prima facie correct. (1971, c. 703, s. 4.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Applicability of Review Standards to Ratemaking Cases. — Section 150A-51 is the controlling judicial review statute in insurance ratemaking cases. However, to the extent that subsection (b) of this section adds to the judicial review function and in light of the virtually identical thrust of the two statutes, the Supreme Court applied the review standards of both this section and § 150A-51, where those standards could be construed as being consistent with each other. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Subsection (b)(1) and § 150A-51(1) do not contemplate constitutional review where appellants, the rate bureau and member companies make no assertion that their rights have been prejudiced because any of the findings or conclusions of the Commissioner of Insurance were in violation of any constitutional provisions. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Prohibitions in Subdivisions (2) and (3) of Subsection (b) Distinguished. — The prohibition against agency action "in excess of statutory authority" under subsection (b)(2) of this section and § 150A-51(2) refers to the general authority of an administrative agency properly to discharge its statutorily assigned responsibilities, while the prohibition against agency action "made upon unlawful procedure" under subsection (b)(3) and § 150A-51(3) refers to the procedures employed by the agency in discharging its statutorily authorized acts. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

The "whole record" test is applicable to judicial review of administrative decisions in North Carolina, and both subsection (b)(5) of this section and § 150A-51(5) put forth that test as a proper standard of judicial review of insurance ratemaking proceedings. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

When evidence is conflicting, the standard for judicial review of administrative decisions in North Carolina is that of the "whole record" test. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Construction with Article 12B of This Chapter. — Prior to the 1977 legislation enacting Article 12B of Chapter 58, it was held that the reviewing court had no inherent authority to fix rates nor to continue them in effect pending a hearing on remand. Under the 1977 legislative scheme, however, the Court of Appeals is not setting a workers' compensation rate when it reverses the Commissioner's order of disapproval. The rate is set by the Commissioner in failing to carry the burden of showing affirmatively and specifically that the filing does not comply with statutory standards. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Burden on Commissioner in Disapproving Rate Filing. — The Commissioner can no longer effectively disapprove a rate filing by inaction or a bare assertion that the Rate Bureau has not carried its burden of proof. Though the new statutory scheme does not shift the ultimate burden of proof from the Rate Bureau to the Commissioner, it does place on the Commissioner, in disapproving a filing, the burden of affirmatively and specifically showing how the bureau has not carried its burden of proof, and, if the Commissioner fails to do so by substantial evidence, the presumption of prima facie correctness given to an order of the Commissioner by § 58-9.4 and this section is rebutted. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Duty of Court of Appeals on Appeal from Commissioner's Order of Disapproval of Rate Filing. — If the Commissioner fails to perform the affirmative duties imposed upon him by Article 12B of Chapter 58 after a filing by the Rate Bureau, the filing shall be deemed to be approved, just as there is a deemed approval upon his failure to give notice of hearing within 30 days under § 58-124.21(b). If the Court of Appeals, on appeal from the Commissioner's order of disapproval, finds that the order is not supported by material and substantial evidence, it is then the duty of the court to determine whether the filing complies with the statutory standards and methods and is supported by substantial evidence. If no such compliance is found the disapproval order will be vacated and the filing approved, and this will constitute a final determination under § 58-124.22, which will require an order distributing the escrowed funds to the members of the Rate Bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Sufficiency of Evidence Is for Agency to Determine. — It is for the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Meaning of "Substantial Evidence." — Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 287 N.C. 192, 214 S.E.2d 98 (1975); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976), modified, 292 N.C. 1, 231 S.E.2d 867 (1977); State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979), aff'd in part and rev'd in part, 300 N.C. 381, 269 S.E.2d 547 (1980).

A finding that a fact is true because the fact finder finds no reason to believe it is not true is not supported by "material and substantial evidence." State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 24 N.C. App. 223, 210 S.E.2d 441 (1974), cert. denied, 286 N.C. 412, 211 S.E.2d 801 (1975).

Substantial evidence is more than a scintilla or a permissible inference. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 287 N.C. 192, 214 S.E.2d 98 (1975); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976), aff'd in part, rev'd in part, 292 N.C. 1, 231 S.E.2d 867 (1977).

Order Held Not in Excess of Statutory Powers. — An order of the Commissioner of Insurance that data submitted in a ratemaking case be audited was not in excess of his statutory powers as contemplated by subsection (b)(2) of this section or § 150A-51(2). State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Ad Hoc Rulemaking Held Improper. — Though administrative agencies can establish rules through the case-by-case process of administrative adjudication, ad hoc rulemaking requiring audited data was not proper where: (1) the lack of unaudited data was not a problem unforeseen by the Commissioner, (2) absence of a relevant general rule did not prohibit this ratemaking, (3) the Commissioner had sufficient experience with the problem, and (4) the problem of auditing was not so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Commissioner's attempt to establish a rule requiring audited data in an insurance ratemaking hearing was "made upon unlawful procedure" as contemplated by subsection (b)(3) of this section and § 150A-51(3) where the Commissioner sought to establish the rule on an ad hoc adjudication basis rather than following normal North Carolina Administrative Procedure Act rulemaking requirements, since the process of rulemaking would have presented no danger that its use would frustrate the effective accomplishment of the agency's functions. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Action Held Arbitrary and Capricious. — Where the Commissioner of Insurance did nothing more, in adopting a complicated and novel formula for determining underwriting profit, than listen to one employee of an insurance department in a sister state, such an approach was a clear example of an arbitrary and capricious action by an administrative agency as contemplated by the North Carolina legislature in establishing that criterion for judicial review in subsection (b)(6) of this section and § 150A-51(6). State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

The Commissioner's action ordering audited data in a ratemaking case was arbitrary and capricious as contemplated by subsection (b)(6) of this section and § 150A-51(6), where: (1) the order was vague and uncertain in that it did not establish the extent to which examination of "original source documents" was required; (2) it did not make clear whether the auditing must be performed by certified public accountants, other accountants, or actuaries; (3) it did not specify the degree of precision and reliability required of "statistical sampling"; (4) it generally did not provided adequate guidelines for compliance with the general conclusion that data in a ratemaking hearing be audited; (5) it included no determination by the Commissioner as to the possibility of performance of his new rule nor whether implementation of the rule would be economically feasible; (6) it included no determination whether the statutory time limits could be complied with in face of the new rule; and (7) it included no determination whether the "original source data" contemplated by the new rule was even available for the past years involved in the filing or whether such data, if available, was located in North Carolina or outside the State in the case of the several hundred companies writing insurance in this State. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Speculative Statements as Inadequate for Rates. — The effects on automobile liability insurance costs in this State, if any, of the so-called "energy crisis" and economic conditions, including the unemployment rate, are difficult, if not impossible, to quantify. Rates cannot be based upon such speculative statements. Hence, order of the Commissioner was not based on material and substantial evidence and would be reversed. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976), aff'd in part, rev'd in part, 292 N.C. 1, 231 S.E.2d 867 (1977).

It is proper for the Commissioner to consider investment earnings on capital invested by insurers in reviewing the ratemaking formula. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979), aff'd in part and rev'd in part, 300 N.C. 381, 269 S.E.2d 547 (1980).

As to the statutory scheme for workers' compensation ratemaking, see State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 24 N.C. App. 228, 210 S.E.2d 439 (1974); State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976); Foremost Ins. Co. v. Ingram, 292 N.C. 244, 232 S.E.2d 414 (1977); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 293 N.C. 365, 239 S.E.2d 48 (1977); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 295 S.E.2d 922 (1979); State ex rel Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 485, 269 S.E.2d 602 (1980).

Quoted in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 19 N.C. App. 263, 198 S.E.2d 575 (1973); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 54 N.C. App. 601, 284 S.E.2d 339 (1981).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-10. Commissioner to supervise local inspectors.

The Commissioner shall exercise general supervision over local investigators of fires and fire prevention inspectors. Whenever the Commissioner has reason to believe that the local inspectors are not doing their duty, he or his deputy shall make special trips of inspection and take proper steps to have all the provisions of the law relative to the investigation of fires and the prevention of fire waste enforced. (1905, c. 506, s. 6; Rev., s. 4690; C.S., s. 6270; 1925, c. 89; 1969, c. 1063, s. 2.)

§ 58-11. Office of Commissioner a public office; records, etc., subject to inspection.

The office of the Commissioner shall be a public office and the records, reports, books and papers thereof on file therein shall be accessible to the inspection of the public, except that the records compiled as a part of an investigation for the crime of arson, that of unlawful burning, or of fraud, shall not be considered as public records and may be made available to the public only upon an order of court of competent jurisdiction. Provided that such records shall upon request be made available to the district attorney of any district if the same concerns persons or investigations in his district. (1899, c. 54, ss. 9, 77; Rev., s. 4683; 1907, c. 1000, s. 1; C.S., s. 6271; 1945, c. 383; 1951, c. 781, s. 11; 1955, c. 456; 1973, c. 47, s. 2.)

Legal Periodicals. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-12. Original documents and certified copies as evidence.

Every certificate, assignment, or conveyance executed by the Commissioner, in pursuance of any authority conferred on him by law and sealed with his seal of office, may be used as evidence and may be recorded in the proper recording offices, in the same manner and with like effect as a deed regularly acknowledged or proved before an officer authorized by law to take the probate of deeds; and all copies of papers in the office of the Commissioner, certified by him and authenticated by his official seal, shall be evidence as the original. (1899, c. 54, s. 11; Rev., s. 4684; C.S., s. 6272.)

§ 58-13. Admissibility of certificate as evidence of agent's authority.

In any case or controversy arising in any court of original jurisdiction within this State wherein it is necessary to establish the question as to whether any insurance or other corporation or agent thereof is or has been licensed by the State Insurance Department to do business in this State, the certificate of the Commissioner of Insurance under the seal of his office shall be admissible in evidence as proof of such corporation or agent's authority as conferred by the State Insurance Department. (1929, c. 289, s. 1.)

§ 58-14. Reports of Commissioner to the Governor and General Assembly.

The Commissioner shall biennially submit to the General Assembly, through the Governor, a report of his official acts, including a summary of official rulings and regulations. The Commissioner shall, from time to time, report to the General Assembly any change which in his opinion should be made in the laws relating to insurance and other subjects pertaining to his department. On or before the first day of February of each year in which the General Assembly is in session he shall make to the Governor the recommendations called for in this section, to be transmitted to the General Assembly, with the last annual report of this Department, including receipts and disbursements. (1899, c. 54, ss. 6, 7, 10; 1901, c. 391, s. 2; Rev., ss. 4687, 4688; 1911, c. 211, s. 2; C.S., s. 6273; 1927, c. 217, s. 5; 1945, c. 383.)

§ 58-15. Authority over all insurance companies; no exemptions from license.

Every insurance company must be licensed and supervised by the Commissioner of Insurance, and must pay all licenses, taxes, and fees as prescribed in the insurance laws of the State for the class of company, association, or order to which it belongs. No provision in any statute, public or private, may relieve any company, association, or order from the supervision prescribed for the class of companies, associations, or orders of like character, or release it from the payment of the licenses, taxes, and fees prescribed for companies, associations, and orders of the same class; and all such special provisions or exemptions are hereby repealed. It is unlawful for the Commissioner of Insurance to grant or issue a license to any company, association, or order, or agent for them, claiming such exemption from supervision by his Department and release for the payment of license, fees, and taxes. (1903, c. 594, ss. 1, 2, 3; Rev., s. 4691; C.S., s. 6274; 1945, c. 383.)

Cross References. — As to review and evaluation of the programs and functions authorized under this section, see § 143-34.26.

CASE NOTES

A fraternal insurance order incorporated under the laws of another state, but with branch offices in this State, comes within the meaning of this section and must be licensed and supervised by the Commissioner of Insurance. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

Cited in Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

§ 58-16. Examinations to be made.

Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the Commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that the company is otherwise duly qualified under the laws of the State to transact business therein. As often as once in three years he shall personally or by his deputy visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so, or upon the request of five or more of the stockholders, creditors, policyholders,

or persons pecuniarily interested therein, who shall make affidavit of their belief, with specifications of their reasons therefor, that the company is in an unsound condition. Whenever the Commissioner deems it prudent for the protection of policyholders in this State he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose, any foreign insurance company applying for admission or already admitted to do business in this State, and such company shall pay the proper charges incurred in this examination, including the expenses of the Commissioner or his deputy and the expenses and compensation of his assistants employed therein. The refusal of any insurer to submit to examination, or the refusal or failure of an insurer to pay the expenses of examination upon presentation of a bill therefor by the Commissioner, shall be grounds for the revocation or refusal of a license. The Commissioner is authorized to make public any such revocation or refusal of license as he may determine and to give his reasons therefor. The Commissioner shall promptly institute a civil action to recover the expenses of examination against any insurer which refuses or fails to pay. For these purposes the Commissioner or his deputy or persons making the examination shall have free access to all the books and papers of the insurance company that relate to its business, and to the books and papers kept by any of its agents, or to the books and papers of any affiliated or subsidiary corporations or partnerships that affect the affairs or financial condition of said company and may summon, administer oaths to, and examine as witnesses, the directors, officers, agents, and trustees of any such company, and any other person, affiliate or subsidiary in relation to its affairs, transactions, and condition. (1899, c. 54, s. 13; Rev., s. 4692; C.S., s. 6275; 1945, c. 383.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Cited in In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

§ 58-16.1. Examination dispensed with under certain circumstances.

Before ordering or making the examination provided for in G.S. 58-16 of any foreign or alien company, the Commissioner shall first inquire of the insurance department of the state or country (if there be any such department therein), in which is located the principal office of such company, as to the financial and business standing and solvency of such company. If, upon such inquiry, it shall appear that such company is of good financial and business standing, and is solvent, and it be certified, in writing, attested by the seal (if any) of the insurance department of the state or country wherein is located the principal office of such company, that it has been examined by the insurance department of such state or country in the manner prescribed by the laws thereof, and was by such examination found to be in sound condition, that there is no reason to doubt its solvency, and that it is still permitted, under the laws of such state or country, to do business therein, then in the discretion of the Commissioner, further examination may be dispensed with, and the information so obtained, and such certificate so furnished, may be accepted as sufficient evidence of the solvency of such company. (1945, c. 383.)

§ 58-16.2. Results of examination not to be made public until company is given opportunity to be heard; exception.

Pending, during and after the examination of any domestic, foreign or alien insurance company neither the Commissioner nor his representative or representatives shall make public or allow to be made public the financial statement, findings or report of examination, or any report affecting the status or standing of the company examined until the company has either accepted and approved the final report of examination or has been afforded a reasonable opportunity to be heard thereon and to answer or rebut any statements or findings therein. Such hearing, if requested, shall be informal and private.

If within 30 days after the final report of examination has been submitted to it, the company examined has neither notified the Commissioner of its acceptance and approval of the report nor requested to be heard thereon, the report shall thereupon be filed as a public document and shall be open to public inspection.

The provisions of this section shall not, however, prohibit the Commissioner from taking any action provided for, or from exercising any power conferred by, any other provision of this Chapter to suspend or revoke the license of any insurance company. (1945, c. 383.)

CASE NOTES

Cited in In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

§ 58-17. Oath required for compliance with law.

Before issuing license to any insurance company to transact the business of insurance in this State, the Commissioner of Insurance shall require, in every case, in addition to the other requirements provided for by law, that the company file with him the affidavit of its president or other chief officer that it has not violated any of the provisions of this Chapter for the space of 12 months last past, and that it accepts the terms and obligations of this Chapter as a part of the consideration of the license. (1899, c. 54, s. 110; 1901, c. 391, s. 8; Rev., s. 4693; C.S., s. 6276.)

§ 58-18. Investigation of charges.

Upon his own motion or upon complaint being filed by a citizen of this State that a company authorized to do business in the State has violated any of the provisions of this Chapter, the Commissioner shall investigate the matter, and, if necessary, examine, under oath, by himself or his accredited representatives the president and such other officer or agents of such companies as may be deemed proper; also all books, records, and papers of the same. In case the Commissioner shall find upon substantial evidence that any complaint against a company is justified, said company, in addition to such penalties as are imposed for violation of any of the provisions of this Chapter, shall be liable for the expenses of the investigation, and the Commissioner shall promptly present said company with a statement of such expenses. If the company refuses or neglects to pay, the Commissioner is authorized to bring a civil action for the collection of these expenses. (1899, c. 54, s. 111; 1903, c. 438, s. 11; Rev., s. 4694; C.S., s. 6277; 1921, c. 136, s. 4; 1925, c. 275, s. 6; 1945, c. 383.)

§§ 58-19, 58-20: Repealed by Session Laws 1945, c. 383.

§ 58-21. Annual statements to be filed with Commissioner.

Every insurance company shall file in the office of the Commissioner of Insurance, on or before the first day of March in each year, in form and detail as the Commissioner of Insurance prescribes, a statement showing the business standing and financial condition of such company, association, or order on the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the Commissioner of Insurance or some officer authorized by law to administer oaths. The Commissioner of Insurance shall, in December of each year, furnish to each of the insurance companies authorized to do business in the State two or more blanks adapted for their annual statements. Provided, the Commissioner may, for good and sufficient cause shown by an applicant company, extend the filing date of such annual statement for such company, for a reasonable period of time, not to exceed 30 days. (1899, c. 54, ss. 72, 73, 83, 90, 97; 1901, c. 706, s. 2; 1903, c. 438, s. 9; Rev., s. 4698; C.S., s. 6280; 1945, c. 383; 1957, c. 407.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-21.1. Annual statements by professional liability insurers.

(a) Every insurance company authorized to write professional liability insurance in the State shall file in the office of the Commissioner of Insurance, on or before the first day of February in each year, in form and detail as the Commissioner of Insurance prescribes, a statement showing the items set forth hereinafter, as of the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the Commissioner of Insurance or some officer authorized by law to administer oaths. The Commissioner of Insurance shall, in December of each year, furnish to each of the insurance companies authorized to write professional liability insurance in the State forms for the annual statements: Provided that the Commissioner may, for good and sufficient cause shown by an applicant company, extend the filing date of such annual statement for such company, for a reasonable period of time, not to exceed 30 days.

PROFESSIONAL LIABILITY INSURERS: ANNUAL STATEMENT

(1) Number of claims pending at beginning of year;
(2) Number of claims pending at end of year;
(3) Number of claims settled paid:
    a. Highest award
    b. Lowest award
    c. Average award;
(4) Number of claims closed no payment;
(5) Number of claims to court in which award paid;
(6) Number of claims out of court in which award paid;
(7) Average amount per claim set up in reserve;
(8) Total premium collection;

(9) Total expenses less reserve expenses; and
(10) Total reserve expenses.
(b) The information contained within the reports as required by this section is to be used for internal statistical purposes only. Therefore, such information shall be privileged and not be disseminated to the general public however the statistics obtained therefrom should be available to the public. (1975, 2nd Sess., c. 977, s. 6.)

Editor's Note. — Session Laws 1975, 2nd Sess., c. 977, s. 7, contains a severability clause.

§ 58-21.2. Reporting of products liability claims, premiums, and other information.

(a) Every insurance company providing products liability insurance or excess insurance above self-insurance to one or more manufacturers, sellers, or distributors in this State shall file with the Commissioner not later than the first day of June in each year, a report containing the following information for the one-year period ending December 31st of the previous year; provided, however, that information for the period preceding June 30, 1979, need not be reported:
(1) The total amount of earned premiums received during the year from insureds, resident or located in North Carolina, that are attributable to products liability insurance;
(2) The total number of policies of insureds, resident or located in North Carolina, for which the insurance company provided products liability insurance;
(3) The total number of insureds, resident or located in North Carolina, whose products liability insurance coverage the insurance company canceled or refused to renew and the reasons therefor;
(4) The total number of products liability claims filed during the one-year period, broken down by the type of claims;
(5) The total amount of reserves for the claims in subdivision (4) of this subsection that remained outstanding at the end of the one-year period;
(6) The total amount paid in settlement or discharge of the claims in subdivision (4) of this subsection for each type of claims;
(7) The total amount of outstanding reserves for claims filed in years prior to the one-year period; and
(8) The total amount of reserves for incurred but not reported losses.
The report shall be in the format established by the Commissioner.
(b) The information contained in the reports required by this section is to be used for internal statistical purposes only. (1979, c. 979, s. 1.)

Editor's Note. — Session Laws 1979, c. 979, s. 2, provides: "The Legislative Research Commission is authorized to study the products liability laws of this State, examine the effects of any 1979 General Assembly changes in the laws, and study the recommendations of the Task Force on Product Liability of the United States Department of Commerce and the availability of product liability insurance in North Carolina."

Session Laws 1979, c. 979, s. 3, provides: "The Commission may report the results of its study to the 1981 General Assembly."

§ 58-22. Punishment for making false statement.

If any insurance company in its annual or other statement required by law shall wilfully misstate the facts, the insurance company and the person making oath to or subscribing the same shall severally be punished by a fine of not less than five hundred ($500.00) nor more than one thousand dollars ($1,000). (1899, c. 54, s. 97; Rev., s. 3493; C.S., s. 6281.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§§ 58-23, 58-24: Repealed by Session Laws 1945, c. 383.

§ 58-25. Record of business kept by companies and agents; Commissioner may inspect.

All companies, agents, or brokers doing any kind of insurance business in this State must make and keep a full and correct record of the business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal. Information from these records must be furnished to the Commissioner of Insurance on demand, and the original books of records shall be open to the inspection of the Commissioner when demanded. (1899, c. 54, s. 108; 1903, c. 438, s. 11; Rev., s. 4696; C.S., s. 6284; 1945, c. 383.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-25.1. Commissioner may require special reports.

The Commissioner may also address to any authorized insurer or its officers any inquiry in relation to its transactions or condition or any matter connected therewith. Every corporation or person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be verified, if required by the Commissioner, by such individual, or by such officer or officers of a corporation, as he shall designate. (1945, c. 383.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-26. Commissioner may require records, reports, etc., for agencies, agents and others.

(a) The Commissioner is empowered to make and promulgate reasonable rules and regulations governing the recording and reporting of insurance business transactions by insurance agencies, agents, brokers and producers of record, any of which agencies, agents, brokers or producers of record are defined by G.S. 58-39.4 and are licensed in this State or are transacting insurance business in this State to the end that such records and reports will accurately and separately reflect the insurance business transactions of such agency, agent, broker or producer of record in this State. Information from records required to be kept pursuant to the provisions of this section must be furnished the Commissioner on demand and the original records required to be kept pursuant to the provisions of this section shall be open to the inspection for the Commissioner or any other authorized employee described in G.S. 58-7.3 when demanded.

(b) Every insurance agency as defined by G.S. 58-39.4(a) transacting insurance business in this State shall at all times have appointed some person employed or associated with such agency who shall have the responsibility of seeing that such records and reports as are required pursuant to the provisions of this section are kept and maintained.

(c) Any person subject to the provisions of subsection (a) of this section who violates the provisions of this section or the rules and regulations prescribed by the Commissioner pursuant to the provisions of this section may after notice and hearing: for the first offense have his license or licenses (in case license be issued for more than one company in such person's case) suspended or revoked for not less than one month nor more than six months and for the second offense shall have his license or licenses (in case license be issued from more than one company in his case) suspended or revoked for the period of one year and such person shall not thereafter be licensed for one year from the date said revocation or suspension first became effective.

(d) For the purpose of enforcing the provisions of this section the Commissioner or any other authorized employee described in G.S. 58-7.3 is authorized and empowered to examine persons, administer oaths and require production of papers and records relative to this section. (1971, c. 948, s. 1.)

§ 58-27. Books and papers required to be exhibited.

It is the duty of any person having in his possession or control any books, accounts, or papers of any company licensed under this Chapter, to exhibit the same to the Commissioner of Insurance or to any deputy, actuary, accountant, or persons acting with or for the Commissioner of Insurance. Any person who shall refuse, on demand, to exhibit the books, accounts, or papers, as above provided, or who shall knowingly or willfully make any false statement in regard to the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1899, c. 54, s. 76; Rev., ss. 3494, 4697; 1907, c. 1000, s. 3; C.S., s. 6286; 1945, c. 383.)

§ 58-27.1. Insurance advisory board; organization and powers.

(a) There shall be in the Insurance Department an insurance advisory board which shall consist of seven members. The Commissioner shall be a member of the board and its chairman and executive head. The remaining six members shall be appointed by the Governor and any of them may be removed from office

by the Governor whenever, in his judgment, the public interest may require. Of the six members appointed, three shall have had experience of such a nature as to make them familiar with the purposes and practices of the insurance business. Three members shall be appointed for two years and three for four years, and thereafter all appointments shall be for a term of four years and until a successor has been appointed; and in case of a vacancy for any reason, the Governor shall appoint a member to fill the unexpired term of office. The members of the insurance advisory board shall receive no salary but shall be paid for their services seven dollars ($7.00) per diem and their expenses. The board shall meet in regular session at least once each three months on call of the chairman. Special meetings may be had at any time upon call of the Commissioner, or at the request of any two members of the board. The board may adjourn its meetings from day to day or until a day certain until all its business has been transacted. The Commissioner shall keep a record of all proceedings of the board, which records shall be open to public inspection.

(b) The insurance advisory board shall have power to consider and, by a majority vote of its members present, to make recommendations to the Commissioner upon any matter which may be submitted to the board.

(c) The insurance advisory board shall, within three months of the ratification of this subsection promulgate rules and regulations to provide for the holding of public hearings before the Commissioner of Insurance, or any person employed by the Insurance Department authorized by the Commissioner to act in his stead, on such proposals, to revise an existing rating schedule the effect of which is to increase or decrease the charge for insurance or to set up a new rating schedule, as are subject to the approval of the Commissioner and as, in the judgment of the board, are of such nature and importance as to justify and require a public hearing. The board shall have authority to determine by such rules and regulations the circumstances under which such public hearings shall be held and the Commissioner of Insurance shall hold public hearings in accordance with such rules and regulations. From time to time the board may revise and change its promulgated rules and regulations in such manner as, in its judgment, the public interest may require. (1945, c. 383; 1949, c. 1079, s. 1.)

Legal Periodicals. — For comment on subsection (c), see 27 N.C.L. Rev. 460.

State Government Reorganization. — The insurance advisory board was transferred to the Department of Insurance by § 143A-76, enacted by Session Laws 1971, c. 864.

CASE NOTES

Subsection (c) contemplates the holding of a public hearing before an order can be entered making a material change in insurance premium rates. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976).

Both the public and the insurance companies, acting through the Rating Bureau are entitled to a prompt hearing of and determination of each proposal by the Bureau for a substantial change in the rates of premium charged. Such hearings must be held as required by subsection (c). State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976).

Section 58-27.2(a) and the rules and regulations made by the Insurance Advisory Board, pursuant to the authority granted by subsection (c), require the Commissioner of Insurance in acting upon a rate filing to hold a public hearing on such proposal after notice in accordance with the rules and regulations. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 30 N.C. App. 549, 228 S.E.2d 264 (1976), rev'd on other grounds, 292 N.C. 471, 234 S.E.2d 720 (1977).

Hearings Notwithstanding Administrative Procedure Act. — The rules adopted by the Insurance Advisory Board, pursuant to subsection (c), concerning hearings to be held by the Commissioner or his authorized representative, remain presently in effect, notwithstanding the Administrative Procedure Act. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

Procedural Due Process Provided by Former § 58-131.1 along with This Section

and § 58-27.2. — When the deemer provision of former § 58-131.1 was construed in pari materia with the statutes calling for a public hearing, i.e., this section and § 58-27.2, it functioned in conjunction with such requirements to provide procedural due process in rate adjustment proceedings. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977).

Temporary Approval under Former § 58-131.1. — Where the deemer provision of former § 58-131.1 was triggered by failure of the Commissioner to validly approve or disapprove a proposed rate adjustment, it operated only as a temporary approval pending valid action by the Commissioner as contemplated by subsection (c) of this section and § 58-27.2(a). Thus the Bureau was lawfully entitled to place the proposed rates into effect, prospectively, under the deemer provision until such time as a valid final order was entered by the Commissioner, either in a proceeding or in a subsequent filing. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977).

Since the "deemer" provision of former § 58-131.1 operated in conjunction with the hearing provisions, it could not stand alone as a final resolution of the proposal. Final resolution came only after a valid approval or disapproval by the Commissioner. Where the deemer provision was triggerd by failure of the Commissioner to validly approve or disapprove a proposed rate adjustment, it operated only as a temporary approval pending valid action by the Commissioner as contemplated by subsection (c) of this section and § 58-27.2(a). Thus, the Bureau was lawfully entitled to place the proposed rates into effect, prospectively, under the deemer provision until such time as a valid final order was entered by the Commissioner, either in a proceeding or in a subsequent filing. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. N.C. 471, 234 S.E.2d 720 (1977).

As to inapplicability of former §§ 143-317 and 143-318, relating to rules of evidence in administrative proceedings, to a public hearing before the Commissioner on proposals for a general revision of insurance rates submitted by a statutory ratemaking bureau such as the Rate Office, see In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 29 N.C. App. 237, 224 S.E.2d 223 (1976); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 292 N.C. 1, 231 S.E.2d 867 (1977).

§ 58-27.2. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice.

(a) Whenever any statutory or licensed insurance rating organization or any insurance company making its own rate filings makes any proposal to revise an existing rating schedule, the effect of which is to increase or decrease the charge for insurance, or to set up a new rating schedule, and such rating schedules are subject to the approval of the Commissioner, such organization or company shall file its proposed change and supporting data with the Commissioner who shall thereafter, before acting upon any such proposal, order a public hearing thereon, if such hearing is required by the rules and regulations adopted by the insurance advisory board and then in accordance therewith, and fix a time and place for such hearing not earlier than 20 days thereafter. The organization or the company making such proposal shall, not more than 10 days prior to the time of such public hearing, cause to be published in a daily newspaper or newspapers published in North Carolina, and in accordance with the rules and regulations of the insurance advisory board, a notice, in the form and content approved by the Commissioner, setting forth the nature and effect of such proposal and the time and place of the public hearing to be held.

(b) The provisions of this section shall be applicable to all rating organizations operating in North Carolina and all companies making independent filings under the provisions of Chapters 58 and 97 of the General Statutes of North Carolina, and shall be in addition to any requirements otherwise made specifically applicable to said organizations and companies. (1949, c. 1079, s. 1; 1977, c. 828, ss. 4, 5.)

CASE NOTES

Hearings and Notice Required. — Subsection (a) and the rules and regulations made by the Insurance Advisory Board, pursuant to the authority granted by § 58-27.1(c), require the Commissioner of Insurance in acting upon a rate filing to hold a public hearing on such proposal after notice in accordance with the rules and regulations. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 30 N.C. App. 549, 228 S.E.2d 264 (1976), rev'd on other grounds, 292 N.C. 471, 234 S.E.2d 720 (1977).

Whatever the legal effect of a "waiver" by the Fire Insurance Rating Bureau of the "deemer" provisions of former § 58-131.1 was, it was clear that neither the Rating Bureau nor the Insurance Commissioner could lawfully dispense with the public hearing in cases in which a public hearing was mandated by subsection (a). State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 30 N.C. App. 549, 228 S.E.2d 264 (1976), rev'd on other grounds, 292 N.C. 471, 234 S.E.2d 720 (1977).

Approval or disapproval of proposed rate adjustment necessarily contemplated action by the Commissioner, and a public hearing under subsection (a) was required prior to such action upon a proposed material rate change. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

To affirm an order denying rate increases when there was no opportunity for notice and hearing subjects both the public and the insurance carriers to danger of arbitrary action by the Commissioner. State ex rel. Commissioner of Ins. v. Compensation Rating & Inspection Bureau, 28 N.C. App. 409, 221 S.E.2d 96 (1976).

Neither a Rating Bureau nor the Insurance Commissioner may lawfully dispense with the public hearing in cases in which public hearing is mandated by this section. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 29 N.C. App. 237, 224 S.E.2d 223, aff'd, 291 N.C. 55, 229 S.E.2d 268 (1976).

The busy schedule of the Commissioner does not justify failure to comply with the mandate of this section to hold a public hearing. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 29 N.C. App. 237, 224 S.E.2d 223, aff'd, 291 N.C. 55, 229 S.E.2d 268 (1976).

The Commissioner of Insurance has no authority to disapprove proposed rates without conducting a public hearing. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 29 N.C. App. 182, 223 S.E.2d 512 (1976).

Withdrawal of Obsolete Filing. — When, because of delay in setting the hearing, the data upon which a filing was made becomes obsolete and orderly procedure may call for the withdrawal of the old filing and the making of a new one based upon more recently available information, the Rating Bureau may, in its discretion, withdraw a filing if this is done prior to the setting of a public hearing thereon. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 29 N.C. App. 237, 224 S.E.2d 223, aff'd, 291 N.C. 55, 229 S.E.2d 268 (1976).

As to controlling effect of hearing provisions of this section over former § 58-131.1, see State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 29 N.C. App. 237, 224 S.E.2d 223, aff'd, 291 N.C. 55, 229 S.E.2d 268 (1976); State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 30 N.C. App. 549, 228 S.E.2d 264 (1976), rev'd on other grounds, 292 N.C. 471, 234 S.E.2d 720 (1977).

Temporary Approval under Former § 58-131.1. — Where the deemer provision of former § 58-131.1 was triggered by failure of the Commissioner to validly approve or disapprove a proposed rate adjustment, it operated only as a temporary approval pending valid action by the Commissioner as contemplated by § 58-27.1(c) and subsection (a) of this section. Thus the Bureau was lawfully entitled to place the proposed rates into effect, prospectively, under the deemer provision until such time as a valid final order was entered by the Commissioner, either in a proceeding or in a subsequent filing. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977).

Since the "deemer" provision of former § 58-131.1 operated in conjunction with the hearing provisions, it could not stand alone as a final resolution of the proposal. Final resolution came only after a valid approval or disapproval by the Commissioner. Where the deemer provision was triggered by a failure of the Commissioner to validly approve or disapprove a proposed rate adjustment, it operated only as a temporary approval pending valid action by the Commissioner as contemplated by § 58-27.1(c) and subsection (a). Thus, the Bureau was lawfully entitled to place the proposed rates into effect, prospectively, under the deemer provision until such time as a valid final order was entered by the Commissioner, either in a proceeding or in a subsequent filing. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

Procedural Due Process Provided by Former § 58-131.1 along with This Section and § 58-27.1. — When the deemer provision of former § 58-131.1 was construed in pari materia with the statutes calling for a public hearing, i.e., § 58-27.1 and this section, it functioned in conjunction with such requirements to provide procedural due process in rate adjustment proceedings. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977).

ARTICLE 3.

General Regulations for Insurance.

§ 58-28. State law governs insurance contracts.

All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof. (1899, c. 54, s. 2; 1901, c. 705, s. 1; Rev., s. 4806; C.S., s. 6287.)

Legal Periodicals. — For note on validity of statutes localizing insurance contracts, see 13 N.C.L. Rev. 213.

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For comment, "Insurance Contract and Policy in General as it Relates to North Carolina," see 3 N.C. Cent. L.J. 259 (1972).

CASE NOTES

This section is constitutional. Williams v. Mutual Reserve Fund Life Ass'n, 145 N.C. 128, 28 S.E. 802 (1907).

Regulation of insurance is a function of the states rather than the federal government. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

And Is Constitutional. — The insurance business is charged with a public interest, and its regulation is constitutional. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Applications Taken within State. — Policies of insurance issued by a foreign company, the applications for which are taken in this State, are to be construed in accordance with the laws of this State, even though the insurance company may under its charter be allowed privileges which are contrary to statutes of this State. Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917), appeal dismissed, 249 U.S. 583, 39 S. Ct. 287, 63 L. Ed. 787 (1919). See also, Horton v. Life Ins. Co., 122 N.C. 498, 29 S.E. 944 (1898); Cordell v. Brotherhood of Locomotive Firemen, 208 N.C. 632, 182 S.E. 141 (1935).

A contract of insurance, based upon the application of insured made while residing in this State, must be construed in accordance with the laws of this State rather than the laws in force at the time of the inception of the contract in the state in which the insurer is incorporated. Pace v. New York Life Ins. Co., 219 N.C. 451, 14 S.E.2d 411 (1941).

Applications Taken out of State. — When neither party was a resident of the State at the time of the contract of insurance and the application was taken out of State the rule of lex loci contractu will apply. Keesler v. Mutual Benefit Life Ins. Co., 177 N.C. 394, 99 S.E. 97 (1919).

Where insurance policies were applied for, countersigned and delivered in New Jersey, they would be governed by the law of New Jersey as regards interpretation and effect, and this section would not operate to make them North Carolina contracts merely because the insured property, a tractor, was property in this State, and because of driver's coverage under the omnibus clauses of the policies. Turner v. Liberty Mut. Ins. Co., 105 F. Supp. 723 (M.D.N.C. 1952).

Effect of Stipulation Making Policy a Foreign Contract. — A provision in a contract of insurance that "This contract shall be

governed by, subject to, and construed only according to the laws of the State of New York, the home office of said association" is void, insofar as the courts of this State are concerned. Blackwell v. Life Ass'n, 141 N.C. 117, 53 S.E. 833 (1906). See Cordell v. Brotherhood of Locomotive Firemen, 208 N.C. 632, 182 S.E. 141 (1935).

Laws in Force Become Part of Insurance Contract. — Laws in force at the time of executing a policy of insurance are binding on the insurer and become a part of the insurance contract. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

North Carolina Choice-of-Law Rules Control. — The provision of this section that all contracts of insurance on lives in North Carolina shall be subject to the law of North Carolina seems to mean the whole law of North Carolina, including choice-of-law rules. Lowe's N. Wilkesboro Hdwe., Inc. v. Fidelity Mut. Life Ins. Co., 206 F. Supp. 427 (M.D.N.C. 1962), aff'd, 319 F.2d 469 (4th Cir. 1963).

Applied in Fountain & Herrington, Inc. v. Mutual Life Ins. Co., 55 F.2d 120 (4th Cir. 1932); Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937); Petty v. Pacific Mut. Life Ins. Co., 212 N.C. 157, 193 S.E. 228 (1937); Rossman v. New York Life Ins. Co., 19 N.C. App. 651, 199 S.E.2d 681 (1973).

§ 58-29. No insurance contracts except under this Chapter.

It is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this State, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this Chapter. (1899, c. 54, s. 2; Rev., s. 4807; C.S., s. 6288.)

Legal Periodicals. — For comment, "Insurance Contract and Policy in General as it Relates to North Carolina," see 3 N.C. Cent. L.J. 259 (1972).

CASE NOTES

Recovery by Insured Where Contract Void as to Insurer. — The statute does not impose on the insured the duty of showing the authority of the company or its agent, as the statute is for the protection of the policyholder, and a recovery can be had by the insured although as to the insurer the contract may be void. Gazzam v. German Union Fire Ins. Co., 155 N.C. 330, 71 S.E. 434 (1911).

When a statute or valid regulation in restraint only of the company's action is made for protection of the policyholder, a recovery may ordinarily be had, though the contract is in breach of the regulation. Blount v. Royal Fraternal Ass'n, 163 N.C. 167, 79 S.E. 299 (1913); Robinson v. Security Life & Annuity Co., 163 N.C. 415, 79 S.E. 681 (1913); Morgan v. Royal Fraternal Ass'n, 170 N.C. 75, 86 S.E. 975 (1915).

Resident Process Agent Held Not Required. — The issuance of one or more policies of fire insurance by a corporation created and existing under the laws of another state, not by or through any agent, did not constitute "doing business" in the State of North Carolina, so as to require a resident process agent. Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Applied in Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937); Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 45 S.E.2d 45 (1947).

Cited in Charleston & W. Carolina Ry. v. Robert G. Lassiter & Co., 207 N.C. 408, 177 S.E. 9 (1934); Petty v. Pacific Mut. Life Ins. Co., 212 N.C. 157, 193 S.E. 228 (1937).

§ 58-30. Statements in application not warranties.

All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy. (1901, c. 705, s. 2; Rev., s. 4808; C.S., s. 6289.)

Legal Periodicals. — For note, "Life Insurance Applications: Opinion Answers or Material Misrepresentations," see 49 N.C.L. Rev. 560 (1971).

CASE NOTES

I. In General.
II. Particular Representations.

I. IN GENERAL.

The purpose of this section is to prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts. Cottingham v. Maryland Motor Car Ins. Co., 168 N.C. 259, 84 S.E. 274 (1915); Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957), aff'd, 253 F.2d 299 (4th Cir. 1958).

Applicability of Section to Fraternal Benefit Associations and Fraternal Orders. — Fraternal benefit associations fall within the provision of this section as to representations, but fraternal orders as defined in § 58-264 do not. Gay v. Woodmen of the World, 179 N.C. 210, 102 S.E. 195 (1920).

What Representations Are Material. — In an application for a policy of life insurance every fact stated will be deemed material which would materially influence the judgment of the insurance company, either in accepting the risk or in fixing the premium rate. Bryant v. Metropolitan Life Ins. Co., 147 N.C. 181, 60 S.E. 983 (1908); Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913); Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957), aff'd, 253 F.2d 299 (4th Cir. 1958).

The materiality of the representation depends on whether it was such as would naturally and reasonably have influenced the insurance company with respect to the contract or risk. Carroll v. Carolina Cas. Ins. Co., 227 N.C. 456, 458, 42 S.E.2d 607 (1947); Walker v. Philadelphia Life Ins. Co., 127 F. Supp. 26 (E.D.N.C. 1954); Old Colony Ins. Co. v. Garvey, 253 F.2d 299 (4th Cir. 1958).

Written Questions and Answers Relating to Health Deemed Material as Matter of Law. — In an application for a policy of life insurance, written questions relating to health and written answers thereto are deemed material as a matter of law. Tedder v. Union Fid. Life Ins. Co., 436 F. Supp. 847 (E.D.N.C. 1977).

A representation in an application for a policy of life insurance is deemed material if the knowledge or ignorance of it would naturally influence the judgment of insurer in making the contract, and written questions relating to health and their answers in an application are deemed material as a matter of law. Tolbert v. Mutual Benefit Life Ins. Co., 236 N.C. 416, 72 S.E.2d 915 (1952).

A statement in an application for reinstatement of an insurance policy that applicant, in the year previous, had not had any injury, sickness, or ailment of any kind, and had not required the services of a physician, being a statement of fact within the knowledge of applicant, is a material representation as a matter of law. Petty v. Pacific Mut. Life Ins. Co., 212 N.C. 157, 193 S.E. 228 (1937).

Where Company and Agents Were Unaware of the Truth. — Where application declares that the statements the applicant makes are true and there is no evidence that the company or its agents were aware of any facts to the contrary, all of the misrepresentations made as to the prior attendance of physicians, diseases, surgical operations, and the like are deemed material. Alexander v. Metropolitan Life Ins. Co., 150 N.C. 536, 64 S.E. 432 (1909); Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N.C. 534, 90 S.E. 574 (1916).

But treatment for a mere temporary indisposition may well be regarded as immaterial where an applicant fully discloses medical treatment for a serious ailment administered at or about the same time. Jeffress v. New York Life Ins. Co., 74 F.2d 874 (4th Cir. 1935).

Relationship Between Insured and Beneficiary Immaterial. — The false representation of the relationship between insured and beneficiary is, as a matter of law, immaterial. Howell v. American Nat'l Ins. Co., 189 N.C. 212, 126 S.E. 603 (1925).

Answers as to Other Applications Material where Offered as Inducement. — Answers made in response to questions in the application as to applications for other insurance, where the applicant declares that they are true and offers them as an inducement to the issuance of the policy, are deemed material as a matter of law. Fountain & Herrington, Inc. v. Mutual Life Ins. Co., 55 F.2d 120 (4th Cir. 1932).

Verbal Answers Made to Agent by Applicant for Fire Policy Not Material as Matter of Law. — There is nothing in the law of this State, or anywhere else, which requires that the rule with respect to the effect to be given to written answers to written questions in an application for a life insurance policy which is attached to and made a part of the policy be applied to verbal answers made by an applicant for a fire policy to an agent asking questions for the purpose of obtaining information upon which to describe the insured property in the

policy. To hold that such answers are to be deemed material as a matter of law would be to give them the status of warranties in contravention of this section. Old Colony Ins. Co. v. Garvey, 253 F.2d 299 (4th Cir. 1958).

Misrepresentation Need Not Contribute to Loss. — It is not necessary, to defeat recovery, that a material misrepresentation by the applicant must contribute in some way to the loss for which indemnity is claimed. Bryant v. Metropolitan Life Ins. Co., 147 N.C. 181, 60 S.E. 983 (1908).

As Materiality Is Judged in Terms of Effect on Insurer's Decision. — The materiality of the misrepresentation is judged in terms of its effect upon the insurer's decision to underwrite the risk and therefore, the actual cause of death does not have to be related to the health matters misrepresented. Tedder v. Union Fid. Life Ins. Co., 436 F. Supp. 847 (E.D.N.C. 1977).

Policy Avoided by False Material Representations. — A material representation shall avoid the policy if it is also false and is calculated to influence the company, if without notice of its falsity, in making the contract at all, in estimating the degree and character of the risk, or in fixing the premiums. Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913).

Misrepresentations admitted, of which the court will take judicial notice, must be deemed material as a matter of law; and their making is sufficient ground for canceling of the policy, whatever may be proved in extenuation of the conduct of insured in making them. Jeffress v. New York Life Ins. Co., 74 F.2d 874 (4th Cir. 1935).

It is well settled that a material representation which is false will constitute sufficient ground upon which to avoid the policy. Tolbert v. Mutual Benefit Life Ins. Co., 236 N.C. 416, 72 S.E.2d 915 (1952).

Answers to questions in application for life insurance were material, and being also false, the contract of insurance was vitiated and there could be no recovery. Walker v. Philadelphia Life Ins. Co., 127 F. Supp. 26 (E.D.N.C. 1954).

An insurer's duty under an insurance contract may be avoided by a showing that the insured made representations in his insurance application which were material and false. Willetts v. Integon Life Ins. Corp., 45 N.C. App. 424, 263 S.E.2d 300, cert. denied, 300 N.C. 562, 270 S.E.2d 116 (1980).

Even If Misrepresentations Were Unintentional. — The company is entitled to have the policy canceled on bringing suit within the proper time, especially where, even if the misrepresentations are not intentional, the policy, when delivered, plainly discloses the untruthfulness of the representations. Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N.C. 534, 90 S.E. 574 (1916).

The North Carolina law is that a fraudulent or material misrepresentation in the application for insurance, even though innocently made, will prevent recovery on the policy. Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957), aff'd, 253 F.2d 299 (4th Cir. 1958).

Misrepresentations Need Not Be Fraudulent to Prevent Recovery. — Where representations were material to the issuance of an insurance certificate, the certificate was void, notwithstanding the evidence tended to show that the representations, although false, were not fraudulent. Inman v. Sovereign Camp, W.O.W., 211 N.C. 179, 189 S.E. 496 (1937).

Fraud is not essential under this section, since as a general rule recovery will not be allowed if the statements made and accepted as inducements to the contract of insurance are false and material. Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937).

An instruction of the court which tended to leave the impression that it was not only necessary that insurer show that representations were false and material but also that they were fraudulently made with intent to deceive would be held prejudicial. Tolbert v. Mutual Benefit Life Ins. Co., 236 N.C. 416, 72 S.E.2d 915 (1952).

Clearly a representation which is material and false will prevent recovery, even though not fraudulent. Walker v. Philadelphia Life Ins. Co., 127 F. Supp. 26 (E.D.N.C. 1954).

If a representation is material and false, it is not necessary for avoidance of the policy that such misrepresentation be intentional. Tedder v. Union Fid. Life Ins. Co., 436 F. Supp. 847 (E.D.N.C. 1977).

But if the insurance company knew that the representations made by the insured were false, it cannot set the policy aside on the grounds that they were material or fraudulent. Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913).

An insurance company cannot avoid liability on a life insurance policy on the basis of facts known to it at the time the policy went into effect. Willetts v. Integon Life Ins. Corp., 45 N.C. App. 424, 263 S.E.2d 300 (1980), cert. denied, 300 N.C. 562, 270 S.E.2d 116 (1980).

Imputation of Agents' Knowledge to Insurer. — Where, in an application for a double indemnity life insurance policy which was completed for the insured by defendant insurer's agent, only a charge of speeding 60 mph in a 45 mph zone was listed in answer to a question as to whether insured had been charged with any motor vehicle moving violations or had had his license revoked within the past three years, but insured discussed with the

agent the possibility that a charge against him for driving under the influence might have occurred within the past three years and was told by the agent that he should not worry about whether the charge was within three years because insurer would obtain a copy of insured's driving record and would notify insured if there was a problem, the agent had notice of insured's conviction within the past three years for driving under the influence which further inquiry would have revealed; such notice was imputed to defendant insurer and precluded defendant from avoiding the policy on the ground that such conviction was not listed in the application, notwithstanding the application contained a provision that knowledge of an agent did not constitute knowledge of the insurer. Willetts v. Integon Life Ins. Corp., 45 N.C. App. 424, 263 S.E.2d 300, cert. denied, 300 N.C. 562, 270 S.E.2d 116 (1980).

Burden on Insurer to Prove Misrepresentation. — By offering in evidence the policy of insurance and the insurer's admission of its execution and delivery and of the death of the insured, the beneficiaries made out a prima facie case, and the burden was then upon the insurer to rebut it by proof of the alleged misrepresentation. And though the beneficiaries, in anticipation of the defense, elected to offer testimony as to misrepresentations, this did not change the rule as to the burden of proof. Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937).

Evidence of Misrepresentations Admissible in Action on Policy. — After a contract of life insurance has become effective, its terms may not be contradicted so as to affect its continued validity; but it may be shown that the delivery of the policy was made upon false representations in the application therefor as to the health of the insured and as to his not having been subjected to contagious diseases for a prior period of one year, and the like, for such matters bear upon the question as to whether the policy had ever taken effect as a contract of insurance. Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913).

A representation by insured that he had never consulted a physician or been in a hospital was material, and testimony of physicians that insured was not in sound health at the date of the delivery of the policy was competent on the issue of fraud. Potts v. Life Ins. Co., 206 N.C. 257, 174 S.E. 123 (1934).

Identification of Insured Vehicle. — A vehicle covered by a policy of liability insurance may be identified as between the parties not only by the motor and serial numbers entered on the policy, but also by descriptive insignia resorted to in the policy, or, in case of an ambiguous description, by evidence aliunde, and this without resort to the equitable doctrine of reformation for mutual mistake or fraud. Ratliff v. Virginia Sur. Co., 232 N.C. 166, 59 S.E.2d 609 (1950).

Questions for Jury. — Although it has occasionally been held that the materiality of the misrepresentation is a question of fact for the jury, these cases are exceptional and usually involve a dispute as to whether the insured actually had a disease or infirmity at the time of the application or the question of whether the insured's opinion as to his good health was truthful, at least to the insured's knowledge, at the time he applied. Tedder v. Union Fid. Life Ins. Co., 436 F. Supp. 847 (E.D.N.C. 1977).

Whether a misrepresentation is made with fraudulent intent by insured, or whether it is material, so that insurer would not have issued the policy had it known the truth, are ordinarily questions for the jury. Harrison v. Metropolitan Life Ins. Co., 207 N.C. 487, 177 S.E. 423 (1934).

Where the evidence tended to show that in her application for hospital insurance plaintiff inadvertently misrepresented that she did not have hernia, and that subsequent to the issuance of the policy she was hospitalized for appendicitis, a charge to the effect that the misrepresentation would bar recovery if the hernia in any way contributed to the hospitalization or materially affected the acceptance of the risk by insurer, so that the insurer would not have written the policy in the form it was issued if the existence of the hernia had been known, was without error, as the question of materiality of the misrepresentation was for the jury upon the evidence. Carroll v. Carolina Cas. Ins. Co., 227 N.C. 456, 42 S.E.2d 607 (1947), discussed in 26 N.C.L. Rev. 78.

Where the insured had hernia at the time of his application, and, without specific question as to this, stated he was in sound physical and mental condition, with "no exceptions," and there was evidence tending to show that the hernia did not affect the soundness of his health, it was for the jury to determine whether his representation was false and material. Hines v. New England Cas. Co., 172 N.C. 225, 90 S.E. 131 (1916).

Effect of "Binding Slip." — Where an insurance company has given a "binding slip" to an applicant for insurance, it only protects the applicant against the contingency of his sickness intervening its date and the delivery of the policy, if the applicant for insurance is accepted, and as such slip does not insure of itself, it does not affect the right of the insurer to avail itself of all defenses it may have, under the policy, after its delivery, to avoid payment thereof by reason of material misrepresentation made in the application for it. Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913).

Cited in Jones v. Home Sec. Life Ins. Co., 254 N.C. 407, 119 S.E.2d 215 (1961).

II. PARTICULAR REPRESENTATIONS.

Failure of insured to disclose treatment by a physician within five years prior to the application was held not a suppression of a material fact in light of the evidence, and was not adequate cause for cancellation of the policy. Anthony v. Teachers Protective Union, 206 N.C. 7, 173 S.E. 6 (1934).

Where insured stated she was not pregnant and died of childbirth in less than nine months, her statement did not preclude recovery, in view of the evidence that insurer issued its policy on the life of the insured when it knew she was 33 years of age, had been married about a year, and that ordinarily pregnancy might be expected, and it required an additional premium on that account. Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937).

Incurable Disease Unknown to Insured. — Where the evidence showed that insured was suffering with an incurable disease, but that he was ignorant of this fact, and that he had been assured by a physician, whom he had consulted, that there was nothing the matter with him at the date of application, there was no evidence from which the jury could have found that the statement made by the applicant in the application was fraudulent, and this section was applicable. Missouri State Life Ins. Co. v. Hardin, 208 N.C. 22, 179 S.E. 2 (1935).

Failure to Disclose Mild Bout of Malaria. — Under this section, a failure to disclose the fact that insured had had, at some time previous to her application, one-half degree of fever due to a mild form of malaria from which she had entirely recovered, taken in connection with the further fact that she was at the time of the application in sound health and otherwise insurable, was held not material. Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937).

Unoccupancy of Insured House. — Evidence was held insufficient to show that knowledge of the unoccupancy of insured house would have influenced the company naturally and materially on the question of risk. Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957), aff'd, 253 F.2d 299 (4th Cir. 1958).

§ 58-30.1. Additional or coinsurance clause.

No insurance company or agent licensed to do business in this State may issue any policy or contract of insurance covering property in this State which shall contain any clause or provision requiring the insured to take or maintain a larger amount of insurance than that expressed in such policy, nor in any way provide that the insured shall be liable as a coinsurer with the company issuing the policy for any part of the loss or damage to the property described in such policy, and any such clause or provision shall be null and void, and of no effect: Provided, the coinsurance clause or provision may be written in or attached to a policy or policies issued when there is printed or stamped on the filing face of such policy or on the form containing such clause the words "coinsurance contract," and the Commissioner may, in his discretion, determine the location of the words "coinsurance contract" and the size of the type to be used. If there be a difference in the rate for the insurance with and without the coinsurance clause, the rates for each shall be furnished the insured upon request. (1915, c. 109, s. 5; C.S., s. 6441; 1925, c. 70, s. 4; 1945, c. 377; 1947, c. 721.)

Cross References. — As to standard policy and permissible variations, see § 58-177.

§ 58-30.2. Group plans other than life, annuity or accident and health.

No policy of insurance other than life, annuity or accident and health may be written in North Carolina on a group plan which insures a group of individuals under a master policy at rates lower than those charged for individual policies covering similar risks. The master policy and certificates, if any, shall be first approved by the Commissioner and the rate, premiums or other essential information shall be shown on the certificate. (1945, c. 377.)

CASE NOTES

Cited in First Nat'l Bank v. Nationwide Ins. Co., 303 N.C. 203, 278 S.E.2d 507 (1981).

§ 58-30.3. Discriminatory practices prohibited.

No insurer shall after September 1, 1975, base any standard or rating plan for private passenger automobiles or motorcycles, in whole or in part, directly or indirectly, upon the age or sex of the persons insured. (1975, c. 666, s. 1.)

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

Purpose of This Section and § 58-30.4. — This section and § 58-30.4 were designed to eliminate primary classifications utilizing sex or age as a criterion and to give safe drivers a premium reduction to be offset by increasing the premiums to be paid by inexperienced drivers and those drivers with motor vehicle offenses or chargeable accidents on their records. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

The primary purpose of this section and § 58-30.4 was to abolish age and sex as criteria for classifying motor vehicle insurance, both automobile and motorcycle. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

The new classification plan required by § 58-30.4 was intended to put into effect this section, ending classifications based on age or sex. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979), aff'd in part and rev'd in part, 300 N.C. 381, 269 S.E.2d 547 (1980).

Both this section and § 58-30.4 apply to private passenger automobiles and motorcycles. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 477, 227 S.E.2d 621 (1976), aff'd, 294 N.C. 60, 241 S.E.2d 324 (1978).

Motorcycles Not Removed from Plans Applicable to Motor Vehicles. — The General Assembly did not intend, by enacting this section and § 58-30.4, to remove motorcycles from the primary and subclassification plans applicable to motor vehicles generally. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

A new filing was mandated by this section and § 58-30.4, and a review of the 1970 filing could serve no present purpose. The request of the former Automobile Rate Office to be allowed to withdraw the 1970 filing should have been granted. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 477, 227 S.E.2d 621 (1976), aff'd, 294 N.C. 60, 241 S.E.2d 324 (1978).

Cited in State ex rel. Commissioner of Ins. v. Motors Ins. Corp., 294 N.C. 360, 241 S.E.2d 332 (1978).

§ 58-30.4. Revised classifications and rates.

The North Carolina Rate Bureau shall promulgate a revised basic classification plan and a revised subclassification plan for coverages on private passenger (nonfleet) motor vehicles in this State affected by the provisions of G.S. 58-30.3. Said revised basic classification plan will provide for the following four basic classifications to wit: (i) pleasure use only; (ii) pleasure use except for driving to and from work; (iii) business use; and (iv) farm use. The North Carolina Rate Bureau shall promulgate a revised subclassification plan which appropriately reflects the statistical driving experience and exposure of insureds in each of the four basic classifications provided for above, except that no subclassification shall be promulgated based, in whole or in part, directly or indirectly, upon the age or sex of the person insured. Such revised subclassification plan may provide for premium surcharges for insureds having

less than two years' driving experience as licensed drivers, and shall provide for premium surcharges for drivers having a driving record consisting of a record of a chargeable accident or accidents, or having a driving record consisting of a conviction or convictions for a moving traffic violation or violations, or any combination thereof. The subclassification plan shall provide that in policies insuring more than one motor vehicle and insured, driving record points for chargeable accidents and moving traffic violations shall be apportioned among and assigned to the motor vehicles so insured. The classification plans and subclassification plans so promulgated by the Bureau shall be subject to the filing, hearing, disapproval, review and appeal procedures before the Commissioner and the courts as provided for rates and classification plans in G.S. 58-124.20, 58-124.21, and 58-124.22. (1975, c. 666, s. 1; 1977, c. 828, s. 9; 1979, c. 824, s. 7; 1981, c. 916, s. 3a.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the fifth sentence. Session Laws 1981, c. 916, s. 4, provides: "The provisions of this act shall apply only to policies that are issued or renewed on or after the respective effective dates of this Act."

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Purpose of This Section and § 58-30.3. — This section and § 58-30.3 were designed to eliminate primary classifications utilizing sex or age as a criterion and to give safe drivers a premium reduction to be offset by increasing the premiums to be paid by inexperienced drivers and those drivers with motor vehicle offenses or chargeable accidents on their records. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

The primary purpose of this section and § 58-30.3 was to abolish age and sex as criteria for classifying motor vehicle insurance, both automobile and motorcycle. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

The new classification plan required by this section was intended to put into effect § 58-30.3, ending classifications based on age or sex. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979), aff'd in part and rev'd in part, 300 N.C. 381, 269 S.E.2d 547 (1980).

Both § 58-30.3 and this section apply to private passenger automobiles and motorcycles. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 477, 227 S.E.2d 621 (1976), aff'd, 294 N.C. 60, 241 S.E.2d 324 (1978).

Motorcycles Not Removed from Plans Applicable to Motor Vehicles. — The General Assembly did not intend, by enacting this section and § 58-30.3, to remove motorcycles from the primary and subclassification plans applicable to motor vehicles generally. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

The legislature intended to classify and subclassify motorcycles in the same manner as automobiles for insurance ratemaking purposes. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

The word "basic" in the phrase "four basic classifications" is used to distinguish the four primary classifications from the surcharge subclassifications. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

Territories are not "classifications," and their use in a filing is therefore not prohibited by this section, which concerns revised classifications and rates. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

This section provides for a reclassification, not a reduction or an increase, overall, in rates. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

A new filing was mandated by § 58-30.3 and this section, and a review of the 1970 filing could serve no present purpose. The request of the former Automobile Rate Office to be allowed to withdraw the 1970 filing should have been granted. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin.

Office, 30 N.C. App. 477, 227 S.E.2d 621 (1976), aff'd, 294 N.C. 60, 241 S.E.2d 324 (1978).

Cited in State ex rel. Commissioner of Ins. v. Motors Ins. Corp., 294 N.C. 360, 241 S.E.2d 332 (1978); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 295 S.E.2d 922 (1979).

§ 58-31. Stipulations as to jurisdiction and limitation of actions.

No company or order, domestic or foreign, authorized to do business in this State under this Chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff takes a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section are void. (1899, c. 54, ss. 23, 106; 1901, c. 391, s. 8; Rev., s. 4809; C.S., s. 6290.)

Legal Periodicals. — For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

CASE NOTES

Section Repealed to Extent of Conflict with Contractual Limitation in Standard Form of Fire Insurance Policy. — This section was repealed by c. 378, Session Laws of 1945 (§ 58-176) insofar as it is in conflict with the contractual limitation in standard fire insurance policy form that suit on the policy be instituted within one year of the inception of loss. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Validity of Limitation Not in Conflict with Statute. — A stipulation in a policy as to time of bringing action is a contractual limitation, and has been held by the Supreme Court to be valid when it does not conflict with any provision of the statute. Parker v. Insurance Co., 143 N.C. 339, 55 S.E. 717 (1906). See also Muse v. London Assurance Corp., 108 N.C. 240, 13 S.E. 94 (1891); Dibbrell v. Georgia Home Ins. Co., 110 N.C. 193, 14 S.E. 783 (1892).

Provision Requiring Joinder of Person Allegedly Responsible for Damage Held Void. — Provision of an automobile liability policy which required the insured, in an action against the insurer, to join as a party defendant the person or organization allegedly responsible for the damage to the insured, was held void as a violation of this section, where the party defendant was a nonresident uninsured motorist and not amenable to the jurisdiction of this State. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

The standard policy is not regulated by the statute of limitations, and the disabilities which stop the running of the statute have no effect upon it. Hence, the imprisonment of the insured will not give him the right to recover when he has delayed his action for more than a year. This rule applies likewise to minors. Holly v. London Assurance Co., 170 N.C. 4, 86 S.E. 694 (1915).

Stipulations in accident insurance policies that proceedings shall not be begun until 90 days after proof of loss do not contravene this section, when the policy also states that the insured may bring his action within 12 months after the accident, this being construed to mean that he will have 12 months after the cause of action accrues. Heilig v. Aetna Life Ins. Co., 152 N.C. 358, 67 S.E. 927 (1910).

Waiver of Stipulation of Standard Policy. — As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement. Dibbrell v. Georgia Home Ins. Co., 110 N.C. 193, 14 S.E. 783 (1892).

Contracts of indemnity against loss or surety bonds for the faithful performance of a building contract are regarded in the nature of contracts of insurance and any conflicting restrictions in such contracts as to the time of bringing an action to recover damages for breach thereof are void. Guilford Lumber Mfg. Co. v. Johnson, 177 N.C. 44, 97 S.E. 732 (1919).

Provisions of the constitution and bylaws of a fraternal insurance order, that suits shall not be brought or maintained for any

cause or claim arising out of the benefit certificate of a member unless within one year from the time the right of action accrues, are valid. Faulk v. Fraternal Mystic Circle, 171 N.C. 301, 88 S.E. 431 (1916).

Presumption as to Entry of Nonsuit. — Where a nonsuit is entered and it does not appear on record when the nonsuit was entered, it will be presumed that it was within six months prior to the date on which action was commenced. Parker v. Insurance Co., 143 N.C. 339, 55 S.E. 717 (1906).

Limitation in Surety Bond Must Be Pleaded. — A limitation in a surety bond as to the time in which an action may be maintained against the surety thereon, after notice of default, is contractual, and affects the remedy, and it is necessary that the surety plead it in the action for it to be available as a defense. Ideal Brick Co. v. Gentry, 191 N.C. 636, 132 S.E. 800 (1926).

For history of this section, see Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Applied in F & D Co. v. Aetna Ins. Co., 53 N.C. App. 92, 280 S.E.2d 34 (1981); F & D Co. v. Aetna Ins. Co., — N.C. —, 287 S.E.2d 867 (1982).

Cited in Lowe v. United States Mut. Accident Ass'n, 115 N.C. 18, 20 S.E. 169 (1894); Gerringer v. North Carolina Home Ins. Co., 133 N.C. 407, 45 S.E. 773 (1903); Modlin v. Atlantic Fire Ins. Co., 151 N.C. 35, 65 S.E. 605 (1909).

§ 58-31.1. Proof of loss forms required to be furnished.

When any company under any insurance policy requires a written proof of loss after notice of such loss has been given by the insured or beneficiary, the company or its representative shall furnish a blank to be used for that purpose. If such forms are not so furnished within 15 days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss, upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made. (1945, c. 377.)

CASE NOTES

Waiver of Policy Provision Requiring Proof of Loss. — The insurer waived policy provision requiring proof of loss to be furnished within 60 days, where (1) The insured went to the insurer's agent, who had sold him the policy, and notified him of the loss; (2) The insured notified the insurer in writing of his loss; and (3) The insurer failed to furnish proof of loss forms to the insured. McElrath v. State Capitol Ins. Co., 13 N.C. App. 211, 184 S.E.2d 912 (1971), cert. denied, 280 N.C. 722, 186 S.E.2d 924 (1972).

Applied in Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545 (1973).

Cited in Northern Assurance Co. of Am. v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965).

§ 58-31.2. No presumption as to loss under burglary or theft policy.

In any action for recovery under a burglary or theft insurance policy, as that term is defined in G.S. 58-72(7), there shall be no presumptions that the alleged loss was caused by theft or by mysterious disappearance. (1979, 2nd Sess., c. 1327, s. 1.)

§ 58-32. Insurance as security for a loan by the company.

Where an insurance company, as a condition for a loan by such company, of money upon mortgage or other security, requires that the borrower insure either his life or that of another, or his property, or the title to his property, with the company, and assign or cause to be assigned to it a policy of insurance as security for the loan, and agree to pay premiums thereon during the continuance of the loan, whether the premium is paid annually, semiannually, quarterly, or monthly, such premiums shall not be considered as interest on such

loans, nor will any loan be rendered usurious by reason of any such requirements, where the rate of interest charged for the loan does not exceed the legal rate and where the premiums charged for the insurance do not exceed the premiums charged to other persons for similar policies who do not obtain loans. (1915, c. 8; 1917, c. 61; C.S., s. 6291.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Insurance Companies Not Exempted from Usury Laws. — This section does not exempt insurance companies from the provisions of §§ 24-1 and 24-2, relating to usury; the purport and effect of the section is merely to allow insurance companies to require as a condition precedent to the loan of money that the borrower take out a policy of insurance and assign same as security for the loan. If this section did provide that insurance companies should be exempt from §§ 24-1 and 24-2, it would be void as in violation of former Art. I, § 7, of the State Constitution (see now N. C. Const., Art. I, § 32). Cowan v. Security Life & Trust Co., 211 N.C. 18, 188 S.E. 812 (1936).

A 10-year endowment policy came within the provisions of this section, when such endowment policy provided that the face amount thereof would be paid to the beneficiary if the insured died during the 10-year period while the policy was in force. Cowan v. Security Life & Trust Co., 211 N.C. 18, 188 S.E. 812 (1936).

Stated in Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co., 271 N.C. 662, 157 S.E.2d 352 (1967).

§ 58-33. Companies must do business in own name; emblems, insignias, etc.

Every insurance company must conduct its business in the State in, and the policies and contracts of insurance issued by it shall be headed or entitled only by, its proper or corporate name. There shall not appear on the face of the policy or on its filing back anything that would indicate that it is the obligation of any other than the company or companies responsible for the payment of losses under the policy, though it will be permissible to stamp or print on the bottom of the filing back, the name or names of the department or general agency issuing the same, and the group of companies with which the company is financially affiliated. The use of any emblem, insignia, or anything other than the true and proper corporate name of such company shall be permitted only with the approval of the Commissioner. (1899, c. 54, s. 18; Rev., s. 4811; C.S., s. 6292; 1945, c. 377; 1951, c. 781, s. 10.)

Legal Periodicals. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-33.1. Must not pay death benefits in services.

No insurance company now doing business in this State or that may hereafter be authorized to do business in this State issuing contracts providing benefits in the event of death shall issue any contract providing for the payment of benefits in merchandise or service to be rendered to such policyholder or his beneficiary. (1945, c. 377.)

§ 58-34. Publication of assets and liabilities; penalty for failure.

When any company publishes its assets, it must in the same connection and with equal conspicuousness publish its liabilities computed on the basis allowed for its annual statements; and any publications purporting to show its capital must exhibit only the amount of such capital as has been actually paid in cash. Any company or agent thereof violating the provision of this section shall be punished by a fine of not less than fifty ($50.00) nor more than two hundred dollars ($200.00). (1899, c. 54, ss. 18, 96; Rev., ss. 3492, 4812; C.S., s. 6293.)

§ 58-34.1. Publication of financial information.

Notwithstanding any other provision of the laws of this State an insurer may, subject to requirements set forth by regulation promulgated by the Commissioner, publish financial statements or information based on financial statements prepared on a basis which is in accordance with requirements of a competent authority and which differs from the basis of the statements which have been filed with the Insurance Commissioner. Such differing financial statements or information based on financial statements shall not be made the basis for the application of provisions of any laws of this State not relating solely to the publication of financial information unless such provisions specifically so require. (1973, c. 1130.)

§ 58-35. Unearned premium reserves.

Every insurance company other than life and real estate title insurance shall maintain unearned premium reserves equal to the unearned portions of the gross premiums charged on unexpired or unterminated risks and policies, provided, that excluding commissions thereon, unmatured installment premiums on such risks and policies may be treated as admitted assets or allowed as deductions from liabilities in computing the necessary reserves therefor, subject to regulations issued by the Commissioner. No deductions may be made from the gross premiums in force except for original premiums canceled on risks terminated or reduced before expiration, or except for premiums paid or credited for risks reinsured with other solvent assuming insurers. Premiums charged for bulk or portfolio reinsurance assumed from other insurers shall be included as premiums in force on the basis of the original premiums and the original terms of the policies of the ceding insurer. Reinsurance ceded to such an assuming insurer may be deducted on the basis of original premiums and original terms except in the case of excess loss or catastrophe reinsurance which may be deducted only on the basis of actual reinsurance premiums and actual reinsurance terms. The Commissioner of Insurance may accept the valuation made by the company upon such evidence of its correctness as the Commissioner may require.

If in the opinion of the Commissioner the above method does not produce an adequate reserve he may require the company to calculate its unearned premium reserve upon the monthly pro rata fractional basis, or, if necessary, on each respective risk from the date of the issuance of the policy, and in case of premiums covering indefinite terms he may prescribe special regulations. (1899, c. 54, s. 67; 1901, c. 391, s. 5; Rev., s. 4704; 1907, c. 1000, s. 4; C.S., s. 6294; 1945, c. 377; 1947, c. 721.)

Legal Periodicals. — For comment on the 1947 amendment, see 25 N.C.L. Rev. 440.

CASE NOTES

Constitutionality. — This section in no way impinges on the Constitution. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N.C. 69, 185 S.E. 449 (1936).

Unearned premiums are a liability of the company. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N.C. 69, 185 S.E. 449 (1936).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-35.1. Loss reserves of fire and marine insurance companies.

In any determination of the financial condition of any fire or marine or fire and marine insurance company authorized to do business in this State, such company shall be charged, in addition to its unearned premium liability as prescribed in G.S. 58-35, with a liability for loss reserves in an amount equal to the aggregate of the estimated amounts payable on all outstanding claims reported to it which arose out of any contract of insurance or reinsurance made by it, and in addition thereto an amount fairly estimated as necessary to provide for unreported losses incurred on or prior to the date of such determination, and including, both as to reported and unreported claims, an amount estimated as necessary to provide for the expense of adjusting such claims, and there shall be deducted, in determining such liability for loss reserves, the amount of reinsurance recoverable by such company, in respect to such claims, from assuming insurers. (1945, c. 377.)

§ 58-35.2. Loss and loss expense reserves of casualty insurance and surety companies.

(a) In determining the financial condition of any casualty insurance or surety company and in any financial statement or report of any such company, there shall be included in the liabilities of such company loss reserves and loss expense reserves at least equal to the amounts required under the provisions of this section, and the amount of such reserves shall be diminished by allowance or credit for reinsurance recoverable from assuming insurers. The date as of which such determination, statement or report is made is hereinafter referred to as the date of determination.

(b) For all outstanding losses, other than those incurred under policies of workmen's compensation, employer's liability or personal injury liability insurance, such loss reserves shall include the following:

(1) The aggregate estimated amounts due or to become due on account of all losses and claims incurred but not paid, including the estimated liability on any notice received by the company of the occurrence of any event which may result in a loss.

(2) The aggregate amounts of liability for all losses incurred but on which no notice has been received, estimated in accordance with the company's prior experience, if any, otherwise in accordance with the experience of similar companies under similar contracts of insurance. The estimated liabilities for such losses under all its bonds, policies or contracts of, or covering any of the risks of, fidelity insurance, shall be not less than ten percent (10%) of the net premiums in force thereon, and the estimated liabilities for all such losses under all its surety contracts shall be not less than five percent (5%) of the net premium in force thereon.

In any loss reserves computed in accordance with rules or regulations prescribed by the Commissioner under the provisions of subsections (g) or (h) there shall be included, for liability upon all losses incurred but on which no notice

has been received, an amount not less than that indicated by the company's experience.

(c) The reserves for outstanding losses and loss expenses under policies of personal injury liability insurance and under policies of employer's liability insurance, except as provided in subsections (g) and (h), shall be computed as follows:

(1) For all liability suits being defended under policies written:

a. Ten years or more prior to the date of determination, one thousand five hundred dollars ($1,500) for each suit.

b. Five or more and less than 10 years prior to the date of determination, one thousand dollars ($1,000) for each suit.

c. Three or more and less than five years prior to the date of determination, eight hundred fifty dollars ($850.00) for each suit. In any event the total loss and loss expense reserves for all such liability policies written more than three years prior to the date of determination shall be not less than the aggregate of the estimated unpaid losses and loss expenses under such policies computed on an individual case basis.

(2) For all such liability policies written during the three years immediately preceding the date of determination, such reserves shall be the sum of the reserves for each such year, which shall be sixty percent (60%) of the earned premiums on liability policies written during such year less all loss and loss expense payments made under such policies written in such year. In any event such reserves for each of such three years shall be not less than the aggregate of the estimated unpaid losses and loss expense for claims incurred under liability policies written in the corresponding year computed on an individual case basis.

(d) The reserves for outstanding losses and loss expenses under policies of workmen's compensation insurance, except as provided in subsections (g) and (h), shall be computed as follows:

(1) For all such compensation policies written more than three years prior to the date of determination, such reserves shall be the present values, at three and one-half percent (3½%) interest per annum, of the determined and estimated future loss and loss expense payments under such policies computed on an individual case basis.

(2) For all such compensation policies written during the three years immediately preceding the date of determination, such reserve shall be the sum of the reserves for each such year, which shall be sixty-five percent (65%) of the earned premiums on such compensation policies written during such year less all loss and loss expense payments made under such policies written in such year. In any event such reserves for each of such three years shall be not less than the present values at three and one-half percent (3½%) interest per annum, of the determined and estimated unpaid losses and loss expenses in connection with claims incurred under compensation policies written in the corresponding year computed on an individual basis.

(e) The earned premiums referred to in this section shall be computed as follows: Determine the gross premiums charged on all such policies written or assumed, including all determined excess and additional premiums thereon; then deduct return premiums thereon other than premiums returned to policyholders as dividends, and deduct premiums for reinsurance ceded thereon to assuming insurers, and from such net premiums deduct the unearned premiums on such policies in force. The policy year basis as used in this section means the year in which a policy is written and all premiums, losses and loss expenses relating to policies written in such year shall be credited or charged to such year.

The terms "loss payments" and "loss expense payments" as used in this section shall be determined by including all payments to claimants under such policies, payments for medical and surgical attendance, legal expenses, salaries and expenses of investigators, adjusters and field men, apportionable salaries and expenses of the home office and branch offices and all other payments made by such insurer on account of claims under such policies, whether such payments shall be allocated to specific claims or unallocated. Loss and loss expense payments shall be reduced by the amount of reinsurance recovered therefor from any assuming insurer.

(f) All unallocated payments of liability loss expenses on policies referred to in subsection (c), made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies shall be distributed by policy years as follows: Thirty-five percent (35%) shall be charged to that year, forty percent (40%) to the preceding year, ten percent (10%) to the second year preceding, ten percent (10%) to the third year preceding and five percent (5%) to the fourth year preceding. Such payments made in each of the first four calendar years in which an insurer issued liability policies shall be distributed by policy years as follows: In the first calendar year one hundred percent (100%) shall be charged to that year, in the second calendar year fifty percent (50%) to that year and fifty percent (50%) to the preceding year, in the third calendar year forty percent (40%) to that year and forty percent (40%) to the preceding year and twenty percent (20%) to the second year preceding, and in the fourth calendar year thirty-five percent (35%) to that year and forty percent (40%) to the preceding year and fifteen percent (15%) to the second year preceding and ten percent (10%) to the third year preceding. A schedule showing such distribution shall be included in the annual statement.

All unallocated payments of compensation loss expenses on policies referred to in subsection (d), made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed by policy years as follows: Forty percent (40%) shall be charged to that year, forty-five percent (45%) to the preceding year, ten percent (10%) to the second year preceding and five percent (5%) to the third year preceding. Such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed by policy years as follows: In the first calendar year one hundred percent (100%) shall be charged to that year, in the second calendar year fifty percent (50%) to that year and fifty percent (50%) to the preceding year, in the third calendar year forty-five percent (45%) to that year, and forty-five percent (45%) to the preceding year and ten percent (10%) to the second year preceding. A schedule showing such distribution shall be included in the annual statement.

(g) Whenever in the judgment of the Commissioner the loss and loss expense reserves of any casualty or surety company doing business in this State calculated in accordance with the foregoing provisions are inadequate, he may, in his discretion, modify the formulas hereinbefore set forth or prescribe any other basis which will produce adequate reserves. Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the Commissioner may prescribe.

(h) For the purpose of determining loss reserves every casualty insurance and every surety company doing business in this State shall keep a complete and itemized record showing all losses and claims on which it has received notice, including all notices received by it of the occurrence of any event which may result in a loss. (1945, c. 377.)

CASE NOTES

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-36. Corporation or association maintaining office in State required to qualify and secure license.

Any corporation or voluntary association, other than an association of companies, the members of which are licensed in this State, issuing contracts of insurance and maintaining a principal, branch, or other office within this State, whether soliciting business in this State or in foreign states, shall qualify under the insurance laws of this State applicable to the type of insurance written by such corporation or association and secure license from the Commissioner of Insurance as provided under this Chapter on insurance, as amended, and the officers and agents of any such corporation or association maintaining offices within this State and failing to qualify and secure license as herein provided shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1937, c. 39.)

§ 58-37. Revocation of license of foreign company; publication of notice.

If the Commissioner of Insurance is of the opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, or, if a life insurance company, that its actual funds, exclusive of its capital, are less than its liabilities; or that it has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination or to perform any legal obligation in relation thereto, he shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notification thereof to be published in one or more newspapers published in this State; and no new business may thereafter be done by it or its agents in this State while such default or disability continues, or until its authority to do business is restored by the Commissioner. (1899, c. 54, s. 14; 1901, c. 176, s. 1; Rev., s. 4701; C.S., s. 6295.)

§ 58-38. Revocation of license of domestic company; injunction and receiver.

If, upon examination, the Commissioner of Insurance is of the opinion that any domestic insurance company is insolvent, or has exceeded its powers, or failed to comply with any provision of law, or that its condition is such as to render its further proceeding hazardous to the public or to its policyholders, he shall revoke its license, and, if he deems it necessary, shall apply to a judge of the superior court to issue an injunction restraining it in whole or in part from further proceeding with its business. The judge may issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify the injunction or make it permanent, and may make all orders and judgments needful in the matter, and may appoint agents or a receiver to take possession of the property and effects of the company and to settle its affairs, subject to such rules and orders as the court from time to time prescribes. (1899, c. 54, s. 14; Rev., s. 4702; C.S., s. 6296.)

CASE NOTES

Commissioner Has No Statutory Power to Issue Restraining Orders or Injunctions. — The statutes creating the Department of Insurance and prescribing the powers and duties of the Commissioner do not purport to grant him the power of issuing restraining orders and injunctions. Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

But May Apply to Courts for Such. — In administering the laws relative to the insurance industry, the Commissioner, if he deems it necessary, may apply to the courts for restraining orders and injunctions under the provisions of this section. Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

§ 58-39. Revocation, suspension and refusal to renew license.

The license of any insurer, including fraternal orders and societies, may in the discretion of the Commissioner be suspended or revoked or its renewal refused,

(1) Whenever it fails or refuses to comply with any law, order or regulation applicable to it;

(2) Whenever its condition is unsound, or its assets above its liabilities, exclusive of capital, are less than the amount of its capital or required minimum surplus;

(3) Whenever it has published or made to the Department or to the public any false statement or report;

(4) Whenever it refuses to submit to any examination authorized by law;

(5) Whenever it is found to make a practice of unduly engaging in litigation, or delaying the investigation of claims or the adjustment or payment of valid claims or whenever it fails to acknowledge a claim within 60 days after receiving written notice thereof, provided, such notice contains sufficient information for the insurance company to identify the specific insurance coverage involved. Acknowledgment of the claim shall be made to the claimant or his legal representative advising that the claim is being investigated; or shall be a payment of the claim; or shall be a bona fide written offer of settlement; or shall be a written denial of the claim.

Any such suspension, revocation or refusal to renew a license may also be made applicable to the license of an agent who is a party to such default or improper practice. (1899, c. 54, ss. 66, 75, 112; 1901, c. 391, s. 5; Rev., ss. 4703, 4705; C.S., s. 6297; 1947, c. 721; 1963, c. 1234.))

§ 58-39.1. Limitation of risk.

Except as otherwise provided in this Chapter, no insurer doing business in this State shall expose itself to any loss on any one risk in an amount exceeding ten percent (10%) of its surplus to policyholders. Any risk or portion of any risk which shall have been reinsured shall be deducted in determining the limitation of risk prescribed in this section. This section shall not apply to life insurance or to the insurance of marine risks, or marine protection and indemnity risks, or workmen's compensation or employer's liability risks, or to certificates of title or guaranties of title or policies of title insurance. For the purpose of determining the limitation of risk under any provision of this Chapter, "surplus to policyholders" shall

(1) Be deemed to include any voluntary reserves, or any part thereof, which are not required by or pursuant to law, and

(2) Be determined from the last sworn statement of such insurer on file with the Commissioner pursuant to law, or by the last report on

examination filed by the Commissioner, whichever is more recent at the time of assumption of such risk.

In applying the limitation of risk under any provision of this Chapter to alien insurers, such provision shall be deemed to refer to the exposure to risk and to the surplus to policyholders of the United States branch of such alien insurer. (1945, c. 377.)

§ 58-39.2. Limitation of liability assumed.

(a) No company transacting fidelity or surety business in this State shall expose itself to any loss on any one fidelity or surety risk or hazard in an amount exceeding ten per centum (10%) of its policyholders' surplus, unless it shall be protected in excess of that amount by:

(1) Reinsurance in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof; or

(2) The cosuretyship of such a company similarly authorized; or

(3) By deposit with it in pledge or conveyance to it in trust for its protection of property; or

(4) By conveyance or mortgage for its protection; or

(5) In case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such company; except by decree or order of a court of competent jurisdiction;

(b) Provided:

(1) That such company may execute what are known as transportation or warehousing bonds for United States internal revenue taxes to an amount equal to fifty per centum (50%) of its policyholders' surplus;

(2) That, when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject matter in controversy or estate not subject to the supervision or control of the surety is not in excess of such limitation; and

(3) That, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section.

(c) No such company shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per centum (10%) of the policyholders' surplus of such surety, unless it shall be protected in excess of that amount by credits in accordance with subdivisions (1), (2), (3) or (4) of subsection (a) of this section: Provided, nothing in this section shall be construed to make invalid any contract entered into by such company with another person, firm, corporation or municipal corporation, notwithstanding any provisions of this section. (1911, c. 28; C.S., s. 6382; 1931, c. 285; 1945, c. 377.)

CASE NOTES

As to joint-control agreements between fiduciaries and their sureties, see Pierce v. Pierce, 197 N.C. 348, 148 S.E. 438 (1929); State ex rel. Leonard v. York, 202 N.C. 704, 163 S.E. 878 (1932).

§ 58-39.3. Reinsurance, when permitted; effect on reserves.

(a) Every insurer authorized to do an insurance business in this State, hereinafter called the "ceding insurer" may, subject to the limitations of this Chapter, reinsure its risks and policy liabilities in any other solvent insurer, hereinafter called the "assuming insurer," with the effects herein prescribed; but no prohibition or limitation herein contained shall invalidate any such contract of reinsurance as between the parties thereto. The Commissioner shall have authority to make investigations and call for information relating to all contracts of reinsurance and when in his judgment such reinsurance contracts are not satisfactory he may disallow credit therefor as an admitted asset or as a deduction from loss and unearned premium reserve.

(b) For the purpose of determining the financial condition of a ceding insurer, it shall, in addition to any credit allowed against its loss reserves, receive credit for such reinsurance calculated in the following manner:

(1) In the case of reinsurance of the whole or any part of any risk other than as specified in subdivision (2) following, the ceding insurer shall receive credit for such reinsurance by way of deduction from its unearned premium liability calculated in accordance with the provisions of G.S. 58-35.

(2) In the case of reinsurance of the whole or any part of any life insurance or annuity or noncancellable disability risk, the ceding insurer shall receive credit, by way of deduction from its reserve liability, in an amount not exceeding the amount of the reserve on the reinsured portion of such risk which the ceding insurer would have maintained if such portion had not been reinsured.

Nothing contained in this section shall be deemed to permit the ceding insurer to receive through the cession of the whole or any part of any risk or risks any advantage whereby its unearned premium reserve, or the net amount of its valuation reserves, as the case may be, is reduced below the required amount thereof by the provisions of this Chapter.

(c) For the purpose of determining the financial condition of any assuming insurer, such insurer shall be charged with an amount in its unearned premium liability equal to the amount of the deduction specified in subdivision (1) of subsection (b), and in its valuation reserve liability with an amount at least equal to the amount which it would be required to maintain in accordance with the provisions of this Chapter if it were the direct insurer of such assumed risks on the basis specified in the reinsurance agreement.

(d) The Commissioner may revoke or suspend the license of any company violating the provisions of this section. (1945, c. 377.)

§ 58-39.4. Definitions.

(a) An insurance agency is hereby defined to be any person, partnership, or corporation designated in writing by any insurance company lawfully licensed to do business in this State, to act as its agent, with authority to solicit, negotiate, and effect contracts of insurance on behalf of the insurance company through duly licensed agents of such company, and to collect the premiums thereon, or to do any of such acts.

(b) An insurance broker is hereby defined to be an individual who being a licensed agent, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act as agent.

(c) A general agent is hereby defined to be an individual designated in writing by an insurance company lawfully licensed to do business in this State to act for it as agent or manager and with additional authority to appoint, designate, or supervise local agents within a specified territory.

(d) A special agent is hereby defined to be an individual other than an officer, manager, or general agent of the insurer, employed by an insurer or general agent to work with and assist agents in soliciting, negotiating, and effectuating insurance in such insurer or in the insurers represented by the general agent.

(e) A life insurance agent is hereby defined to be a person engaged in the business of selling any or all types of insurance offered by life insurance companies, including life, annuities, health, accident and hospital insurance.

(f) A credit life insurance agent is hereby defined to be a person engaged in selling any or all of the following types of insurance or collateral security for a loan in connection with which such insurance is written:

(1) Credit term life;

(2) Credit accident and health; and

(3) Hospital insurance.

(g) An accident and health insurance agent is hereby defined to be a person engaged in the business of selling accident and health insurance and hospital insurance as defined in G.S. 58-72(3).

(h) A hospital or medical care agent is hereby defined to be a person representing a hospital or medical service association selling prepaid hospital or medical care service.

(i) A fire and casualty insurance agent is hereby defined to be a person engaged in the business of selling any type of insurance offered by a fire and casualty company.

(j) A credit insurance agent is hereby defined to be a person engaged in the business of selling credit insurance as defined in G.S. 58-72(17) not including credit life, credit accident and health or hospital insurance.

(k) A physical damage insurance agent is hereby defined to be a person engaged in the business of selling physical damage insurance on a motor vehicle.

(l) A title insurance agent is hereby defined to be a person engaged in the business of selling title insurance.

(m) An insurance adjuster is hereby defined to be any individual, who for salary, fee, commission, or other compensation of any nature, as an independent contractor, or as an employee of an independent contractor or as an employee of an insurer or as an adjuster for any insured investigates or reports to his principal relative to claims arising under insurance contracts other than life or annuity. It shall be unlawful and cause for revocation of license for a licensed insurance adjuster to engage in the practice of law.

(n) An attorney-at-law who adjusts insurance losses from time to time incidental to the practice of his profession, an adjuster of marine losses, or a special agent who adjusts for companies for which he is licensed as agent is not deemed to be an "adjuster" for the purposes of this Chapter.

(o) In this Chapter, unless the context otherwise requires, a motor vehicle damage appraiser is hereby defined to be an individual who for salary, fee, commission, or other compensation of any nature or as an independent contractor or as an employee of an independent contractor regularly investigates or advises relative to the nature and amount of damage to motor vehicles located in this State or the amount of money deemed necessary to effect repairs thereto and is not

(1) An adjuster licensed to adjust insurance claims in this State;
(2) An agent for an insurance company who is not required by law to be licensed as an adjuster;
(3) An attorney-at-law who is not required by law to be licensed as an adjuster; and
(4) A person who incident to his regular employment in the business of actually repairing defective or damaged motor vehicles investigates and advises relative to the nature and amount of motor vehicle damage or the amount of money deemed necessary to effect repairs thereto.

(p) Nothing in the above definitions shall be construed to prohibit any individual from applying for and upon passing any required examination from receiving license under any or all of the above definitions or classifications.

(q) A regular salaried officer or employee of a licensed mutual or reciprocal insurer who travels for his insurer in this State shall not be deemed an insurance agent if

(1) He has other duties than soliciting insurance,
(2) Any policies of insurance written by him are signed by a licensed insurance agent who is a bona fide resident of this State, and
(3) He receives no commission or other compensation directly dependent upon the amount of business obtained.

(r) Nothing in this section shall be construed to in any way prevent or restrict any insurance agent, general agent, or adjuster from continuing to engage in the business of selling the same kind and type of insurance as authorized by the license now held by him on or after April 1, 1957, except as provided in G.S. 58-41.1(b).

(s) A producer of record is hereby defined to be an individual who is licensed as a fire and casualty insurance agent and as a resident insurance broker under the insurance laws of this State and who is designated by an assigned-risk applicant as the producer of record on an assigned-risk application. (1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 1; 1957, c. 299; 1965, c. 1047; 1971, c. 757, s. 2; c. 926, s. 1.)

Legal Periodicals. — For discussion of changes made by the 1947 act in the laws relating to insurance agents, brokers and adjusters, see 25 N.C.L. Rev. 441.

CASE NOTES

Insurance Broker as Agent of Insured. — An insurance broker is primarily the agent of the person who first employs him; hence, he is the agent of the insured as to all matters within the scope of his employment, and the acts or knowledge of such broker or agent will be binding on, or imputed to, the insured and not to the company. Williams v. Canal Ins. Co., 21 N.C. App. 658, 205 S.E.2d 331 (1974).

Cited in Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965); State v. Moose, 36 N.C. App. 202, 243 S.E.2d 425 (1978).

§§ 58-39.5, 58-39.6: Repealed by Session Laws 1951, c. 105, s. 1.

§ 58-40. Agents and others must procure license.

(a) Every agent of any insurance company authorized to do business in this State shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office, showing that the company for which he is agent is licensed to do business in this State and that he has been appointed an agent of such company as defined in G.S. 58-39.4 and is duly authorized to act for such company within the scope of the agency designated on such license.

(b) Every insurance adjuster shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that he is duly authorized to act as an adjuster.

(c) Every motor vehicle damage appraiser shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that he is duly authorized to act as a motor vehicle damage appraiser.

(d) Every such agent, motor vehicle damage appraiser, or adjuster, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit insurance or with whom he deals as an adjuster or motor vehicle damage appraiser. (1899, c. 54, s. 81; 1901, c. 391, s. 7; 1903, c. 438, s. 8; c. 774; Rev., s. 4706; 1915, c. 109, s. 7; c. 166, s. 1; C.S., s. 6298; 1951, c. 105, s. 1; 1953, c. 1043, s. 2; 1971, c. 757, s. 3.)

Cross References. — As to punishment for violating this section, see § 58-47. As to review and evaluation of the programs and functions authorized under this section, see § 143-34.26.

CASE NOTES

This section is applicable to all agents, including an organizer of a fraternal insurance order operating in North Carolina. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

Validity of Contract When Agent Not Licensed. — Where a foreign insurance company, authorized to do business in this State under our laws, issues its policy on property situated within the State, but through an agency in another state which is unauthorized to write it here, because of not having obtained the license required by law, the policy is nevertheless valid as to the right of action of the insured thereon. T.T. Hay & Bro. v. Union Fire Ins. Co., 167 N.C. 82, 83 S.E. 241 (1914).

Cited in Charleston & W. Carolina Ry. v. Robert G. Lassiter & Co., 207 N.C. 408, 177 S.E. 9 (1934); Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

§ 58-40.01. Companies writing automobile insurance to notify Commissioner upon termination of relationship with agent.

Whenever any insurance company writing automobile insurance shall cancel its relationship with a licensed North Carolina agent or whenever the relationship between the agent and the company is in any way terminated, the company shall notify the Commissioner of Insurance. The notification to the Commissioner shall state the number of policies written through the agent, as well as the number of automobiles covered by said policies, and shall further state whether or not the termination was at the instance of the company or of the agent. If the termination was at the instance of the company, then the notification shall further state the specific reason for the termination. (1973, c. 1083.)

§ 58-40.1. Insurance brokers must procure license.

Every insurance broker shall be required to obtain annually from the Commissioner a license under the seal of his office, showing that he is authorized to procure insurance through duly authorized agents of insurers for which he is not authorized to act as agent. Such license shall be issued to cover only those kinds of insurance authorized by his agent's license. Every such broker shall, on demand, exhibit his license to any representative of the Insurance Department or to any person from whom he shall solicit insurance. (1947, c. 922.)

§ 58-40.2. Bond required of brokers.

(a) Every applicant for a resident broker's license or for the renewal thereof shall file with the application and shall thereafter maintain in force while so licensed a bond in favor of the State of North Carolina for the use of aggrieved parties, executed by an authorized corporate surety approved by the Commissioner, in the amount of five thousand dollars ($5,000). The bond may be continuous in form, and total aggregate liability on the bond may be limited to the payment of ten thousand dollars ($10,000). The bond shall be conditioned on the accounting by the broker (i) to any person requesting the broker to obtain insurance for moneys or premiums collected in connection therewith, (ii) to any licensed insurer or agent who provides coverage for such person with respect to any such moneys or premiums, and (iii) to any association of insurers under any plan or plans for the placement of insurance under the laws of North Carolina which afforded coverage for such person with respect to any such moneys or premiums.

(b) Any such bond shall remain in force until the surety is released from liability by the Commissioner, or until the bond is canceled by the surety. Without prejudice to any liability accrued prior to such cancellation, the surety may cancel the bond upon 30 days' advance notice in writing filed with the Commissioner. (1947, c. 922; 1951, c. 781, s. 6; 1971, c. 950; 1977, c. 868.)

Legal Periodicals. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-40.3. Broker's authority and commissions.

(a) A broker, as such, is not an agent or other representative of an insurer, and does not have power, by his own act, to bind an insurer for which he is not agent upon any risk or with reference to any insurance contract.

(b) An insurer or agent shall have the right to pay to a broker licensed under this Chapter, and such broker shall have the right to receive from the insurer or agent, the customary commissions upon insurance placed in the insurer by the broker. (1947, c. 922.)

CASE NOTES

Broker as Agent of Insured. — An insurance broker is primarily the agent of the person who first employs him; hence he is the agent of the insured as to all matters within the scope of his employment, and the acts or knowledge of such broker or agent will be binding on, or imputed to, the insured and not the company. Williams v. Canal Ins. Co., 21 N.C. App. 658, 205 S.E.2d 331 (1974).

§ 58-40.4. Salaried officers not required to be licensed.

A regular salaried officer or employee of an insurer authorized to do business in this State shall not be deemed to be an insurance agent where his only activity in the solicitation of insurance is confined to the rendering of assistance to or on behalf of a licensed insurance agent; provided that such salaried officer or employee devotes substantially all of this time to activities other than the solicitation of applications for insurance or annuity contracts and receives no commission or other compensation directly dependent upon the amount of insurance obtained. (1953, c. 1043, s. 3.)

§ 58-40.5. Exceptions to requirements for licensing.

Nothing contained in Article 3 of Chapter 58 shall be construed as prohibiting the purchase of insurance by, or requiring the licensing of, a person who arranges the purchase of insurance to cover property in which he or his employer has an insurable interest, provided such insurance is issued through an agent duly licensed under this Article. (1953, c. 1043, s. 4.)

CASE NOTES

What Constitutes Insurable Interest. — As a general rule, anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708, cert. denied, 282 N.C. 153, 191 S.E.2d 759 (1972).

§ 58-40.6. Motor vehicle damage appraiser's qualifications.

An individual desiring to be licensed as a motor vehicle damage appraiser must apply to the Commissioner for issuance of said license on forms prescribed by the Commissioner. Before issuing a license, the Commissioner shall satisfy himself that such license if issued shall serve the public interest and that the individual applying for the license as a motor vehicle damage appraiser:

(1) Be 21 years of age or over;
(2) Be a bona fide resident of and actually reside in this State except as provided in G.S. 58-51.2;
(3) Be a trustworthy person;
(4) Has not willfully violated any of the insurance laws of this State;
(5) Has had special education, training or experience of sufficient duration and extent reasonably to satisfy the Commissioner that he possess the competence necessary to fulfill the responsibilities of a motor vehicle damage appraiser; and
(6) Has advanced the fees provided in G.S. 105-228.7. (1971, c. 757, s. 4.)

§ 58-41. Agent's and adjuster's qualifications.

Before a license is issued to an insurance agent, general agent, or insurance adjuster in this State, the agent, general agent, or adjuster shall apply for license on forms to be prescribed by the Commissioner. In all cases where application is made for the license mentioned herein by an insurance agent or general agent, the company for which the agent or general agent desires to act shall also apply for the license on forms to be prescribed by the Commissioner. Upon the filing of an application of an insurance adjuster there shall also be an application, as above prescribed, by the insurance company for which that adjuster proposes to adjust in the event that the adjuster is to be an employee of that company. Upon the filing of an application of an adjuster who is to work as an employee of any person, firm, or corporation other than an insurance company, then the employer shall make an application on form prescribed by the Commissioner. Before he issues a license to such agent, general agent, or insurance adjuster, the Commissioner shall satisfy himself that such license, if issued, shall serve the public interest and that the person applying for the license as an agent, general agent, or insurance adjuster:

(1) Be 18 years of age or over;
(2) Meet residence requirements as follows:
    a. For insurance adjusters: be a bona fide resident of and actually reside in this State except as provided in G.S. 58-51.2.

b. For agents and general agents: be a bona fide resident of and actually reside in this State for a period of 12 months next preceding the date when he applies for license, except as provided in G.S. 58-43: Provided, however, that the said 12-month waiting period shall not apply if the applicant for license files a good and sufficient bond of one thousand dollars ($1,000) with the Commissioner of Insurance, which bond shall be subject to forfeiture upon a finding by the Commissioner of Insurance that the licensed person or agent has moved his domicile or residence from this State within the period of the year for which license was issued; provided, however, that no such agent shall be required to file more than one bond under this section, irrespective of the number of licenses issued to him or the number of companies he may represent. Upon such forfeiture, the Commissioner of Insurance shall pay said penal amount of such bond to the board of education of the county where the agent resided. The provisions of this paragraph shall also be applicable to the agents of hospitals and medical and/or dental service corporations operating under Chapter 57 of the General Statutes, as amended. In lieu of the requirements of this paragraph that all agents shall file the bond herein prescribed, all insurance companies licensed to write accident, health or hospitalization insurance in this State may file a blanket bond covering such of their agents who are duly authorized to sell accident, health or hospitalization insurance.

(3) Successfully pass an examination as required under G.S. 58-41.1;

(4) Be a trustworthy person;

(5) Has not willfully violated any of the insurance laws of this State;

(6) Has had special education, training or experience of sufficient duration and extent reasonably to satisfy the Commissioner that he possesses the competence necessary to fulfill the responsibilities of an agent, general agent or adjuster: Provided, that upon the expiration of any license of an agent, general agent, or insurance adjuster, the Commissioner of Insurance may grant a license to such agent, general agent, or insurance adjuster for a period not exceeding 12 months, upon an application of the company desiring to license such agent, or general agent, or upon the application of the employer of such insurance adjuster, and without any application from the agent, general agent, or insurance adjuster, upon such forms and in accordance with such rules as may be determined by the Commissioner of Insurance and upon the payment by either the insurance company or the agent, general agent, or insurance adjuster of the proper fees.

No license may be issued to any agent whose premium writings represented by the premiums on contracts of insurance signed, countersigned, issued or sold by him or the agency employing him for the general public during the preceding year shall not exceed those on insurance signed, countersigned, issued or sold by the agency covering his own property or life and the property or lives of members of his immediate family, his employer, his employees, and stockholders or employees of his employer. This limitation shall not apply to agents originally licensed and duly qualified prior to April 1, 1945.

In addition to the bond requirements of paragraph b of subdivision (2) of this section, all agents licensed to sell accident, health or hospitalization insurance in this State or certificates or service plans of a medical and/or dental service corporation shall be required to file with the Commissioner of Insurance a bond in the amount of five hundred dollars ($500.00), which shall be subject to forfeiture in whole or in part upon a finding made by the Commissioner of Insurance that such agent has wilfully misrepresented the terms of an accident, health or hospitalization insurance policy, or service plan or certificate

of a medical and/or dental service corporation, offered for sale; provided, however, that no such agent shall be required to file more than one bond under this section, irrespective of the number of licenses issued to him or the number of companies he may represent. Upon such forfeiture being made final by the Commissioner of Insurance or his authorized deputy, the forfeiture shall be paid to the board of education of the county of the agent's residence. (1913, c. 79, s. 1; 1915, c. 109, ss. 6, 7; c. 166, s. 7; C.S., s. 6299; 1931, c. 185; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 5; 1955, c. 850, ss. 1, 4; 1957, c. 96; 1961, c. 1149; 1971, c. 1231, s. 1.)

CASE NOTES

An insurance agent is within the Employment Security Law, Chapter 96. Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939).

Cited in Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

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Title Insurance Agent. — The provisions of this section, which operate to prohibit the licensing of an insurance agent whose total premium writings for the preceding year for the general public do not exceed those on insurance sold, issued or countersigned on his own life or property or that of his employer apply to an agent for a title insurance company who issues policies of mortgage title insurance which insure the security interest of a lending institution which, directly or indirectly, employs the agent or exercises substantial dominance and control over such agent in his work. See opinion of Attorney General to the Honorable Edwin S. Lanier, Commissioner of Insurance, 40 N.C.A.G. 321 (1969).

§ 58-41.1. Examinations for license.

(a) Each applicant for license as agent, general agent or adjuster shall, prior to the issuance of any such license, personally take and pass to the satisfaction of the Commissioner an examination in writing given by the Commissioner as a test of his qualifications and competence; but this requirement shall not apply to:

(1) Applicants for license under G.S. 58-41.2 and as agents for companies or associations specified in G.S. 58-131.9;

(2) Applicants who have, within the three-year period next preceding the date of application, not including time spent in military service of the United States during war, been licensed in this State in the same capacity and to engage in the same kinds of insurance for which they were previously licensed;

(3) Applicants for an agent's, general agent's or adjuster's license covering the same kinds of insurance as authorized by the license then held by them except as provided in subsection (b) of this section;

(4) Applicants for license to write ocean marine insurance whenever the Commissioner deems the applicant to be qualified by past experience to deal in such insurance;

(5) Applicants (who are bona fide residents and actually residing in this State) for an agent's, general agent's, or adjuster's license covering the same kinds of insurance as authorized by the license or certificate granted him upon the successful passing of a written examination given by the insurance department of another state, or by the American College of Life Underwriters, Life Underwriters Training Council, American Institute of Property and Liability Underwriters,

Institute of Insurance of America, or any insurance institute conducted at a recognized college or university in the State of North Carolina and meeting the standards as approved by the Commissioner of Insurance;

(6) Applicants for license as credit life insurance agents, credit accident and health insurance agents and credit insurance agents as defined in subdivision (17) of G.S. 58-72.

(b) The Commissioner may require any licensed agent, general agent or adjuster to take and successfully pass an examination in writing, testing his competence and qualifications as a condition to the continuance or renewal of his license, if the licensee has been guilty of any violation of any provision of this Chapter. If a person fails to pass such an examination, the Commissioner shall revoke all licenses issued in his name and no license shall be issued until such person has successfully passed an examination as provided in this Chapter.

(c) Each examination shall be as the Commissioner prescribes, shall be of sufficient scope to test the applicants' knowledge of:

(1) The terms and provisions of the policies or contracts of insurance he proposes to effect; or

(2) The types of claims or losses he proposes to adjust; and

(3) The duties and responsibilities of such a license; and

(4) The current laws of this State applicable to such a license.

(d) The answers of the applicant to any such examination shall be written by the applicant under the Commissioner's supervision. The Commissioner shall give examinations at such times and places within this State as he deems necessary reasonably to serve the convenience of both the Commissioner and applicants. The Commissioner shall require a waiting period of at least 30 days' duration before giving a new examination to an applicant who has failed to pass a previous similar examination.

(e) The Commissioner shall collect in advance the examination fee provided in G.S. 105-228.7. The Commissioner shall make or cause to be made available to all applicants, for a reasonable fee to offset the costs of production, materials that he deems necessary for the applicants' proper preparation for such exams. The Commissioner is hereby empowered to contract directly with publishers and other suppliers for the production of such preparatory materials, and contracts so let by the Commissioner shall not be subject to Article 3, Chapter 143 of the General Statutes.

(f) Upon the filing of the application for the license as insurance adjuster and the advance payment of the examination fee referred to above and upon the filing with the Commissioner of a certificate signed by the employer of the applicant certifying that the applicant is a person of good character and is employed by the signer of a certificate and will operate as a student or learner under the instruction and general supervision of a licensed insurance adjuster, and that the employer will be responsible for the adjustment acts of the learner during the learning period, the Commissioner may issue to the applicant a learner's permit authorizing the applicant to act as an insurance adjuster for a learning period of 90 days without a requirement of any other or additional license; provided that not more than one learner permit shall ever be issued to one individual. (1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 6; 1969, c. 1206; 1971, c. 926, s. 2; 1979, 2nd Sess., c. 1320, ss. 1, 2.)

Editor's Note. — Section 58-131.9, referred to in this section, was repealed by Session Laws 1977, c. 828. See now § 58-131.60.

§ 58-41.2. Limited licenses.

(a) The Commissioner shall issue limited licenses to persons requesting to be licensed:

(1) As agents for any type of insurance to persons who continue to represent an insurance company solely for the purpose of servicing unexpired contracts of insurance.

(2) As travel insurance agents to employees of common carriers of persons or to individuals or employees of persons engaged in selling transportation on such common carriers.

(b) Travel insurance agents are restricted to the sale of insurance to individuals entitled to transportation on a common carrier, as follows:

(1) Transportation ticket policies of accident insurance.

(2) Baggage insurance on the personal effects of such individuals while in transit. (1947, c. 922; 1953, c. 1043, s. 7.)

§ 58-41.3. Temporary license.

(a) The Commissioner may issue an agent's, general agent's or broker's temporary license in the following circumstances:

(1) To applicants for licensing as agent of a life insurer pending the passing of the examination provided for in G.S. 58-41.1;

(2) To the personal representative of a deceased licensed agent, general agent or broker, or to his surviving spouse or to some other proper person in case the personal representative or surviving spouse does not apply or is not qualified therefor;

(3) To an employee, legal guardian or spouse of a licensed agent, general agent or broker becoming disabled because of sickness, insanity or injury, or to some other proper person;

(4) To an employee, spouse or other proper person as designated by a licensed agent who is called into the armed services.

(b) An individual to be eligible for any such temporary license must be qualified as for a permanent license except as to experience, training or the taking of the examination.

(c) The fee paid to the Commissioner for issuance of a temporary license as specified in G.S. 105-228.7 shall be credited toward the fee required for a permanent license which is issued to replace the temporary license prior to the expiration of such temporary license.

(d) No such temporary license shall be effective for more than 90 days in any 12-month period and shall automatically terminate upon such licensee's failing the examination required in G.S. 58-41.1. The Commissioner may refuse so to license again any person who has previously held a temporary license.

(e) An individual requesting a temporary license on account of death or disability of an agent, general agent or broker shall not be so licensed for any insurer as to which such agent, general agent or broker was not licensed at the time of death or commencement of disability. (1947, c. 922; 1953, c. 1043, s. 8.)

§ 58-41.4. Employment in agency.

No person shall be issued an agent's license to enter the employment of any agency or person, which agency or person is at that time found by the Commissioner of Insurance to be in violation of any of the insurance laws of this State, or which has been in any manner disqualified under the laws of this State to engage in the insurance business. (1953, c. 1043, s. 9.)

§ 58-41.5. Licensing of persons other than individuals as life insurance agents.

(a) A person other than an individual may be licensed as a life insurance agent as defined in G.S. 58-39.4(e). In such event, each individual who is to act for the person shall be named in the application for license and shall qualify as an individual licensee.

(b) A license shall not be issued to a person other than an individual unless it maintains a place of business in this State.

(c) The licensee shall promptly notify the Commissioner of all changes among the individuals named in its application. (1981, c. 845.)

§ 58-42. Revocation of license.

When the Commissioner is satisfied that any insurance agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker or nonresident broker licensed by this State has willfully violated any of the insurance laws of this State or regulation of the Commissioner, or has willfully overinsured property or has willfully misrepresented any policy of insurance, or has dealt unjustly with or willfully deceived any person in regard to any insurance policies, or has exercised coercion in obtaining an application for or in selling insurance, or, on demand, has failed or refused to pay over or deliver to the company which he represents, or has represented, any money or property in his hands belonging to the company, or has become in any way disqualified according to any of the provisions necessary for obtaining or holding such license as set out in this Chapter, or has obtained or attempted to obtain any license through willful misrepresentation or fraud, the Commissioner may immediately suspend his license or licenses and shall forthwith give to such licensee 10 days' notice of the charge or charges and of a hearing thereon, and if the Commissioner finds there has been any of the violations hereinbefore set forth, he shall specifically set out such finding and shall revoke the license of such agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker or nonresident broker and his license for all the companies which he represents in this State. Such agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker, or nonresident broker shall have the right to have such revocation reviewed as provided in G.S. 58-9.3. For the purposes of investigation under this section the Commissioner shall have all the power conferred upon him by G.S. 58-44.4. (1913, c. 79, ss. 2, 3; 1915, c. 166, s. 7; C.S., s. 6300; 1929, c. 301, s. 1; 1943, c. 434; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1971, c. 757, s. 5.)

Cross References. — As to insurance agents and brokers wrongfully converting money being guilty of larceny, see § 14-96.

CASE NOTES

Applicability of Former § 143-318. — Former § 143-318, relating to evidence in administrative proceedings, in light of former § 143-317(3), was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the Insurance Law. Such hearings involve the essential elements of a court trial, and the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with the applicable rules of evidence. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Motions for Continuance and Bill of Particulars Addressed to Commissioner's

Discretion. — In a hearing before the Commissioner of Insurance in proceedings for the revocation of an agent's license, where the agent was given more than the 10-day statutory notice, motions for a continuance and for a bill of particulars were addressed to the sound discretion of the Commissioner, and the denial of the motions would not be disturbed in the absence of ã showing of abuse. Elmore v. Lanier, 270 N.C. 674, 155 S.E.2d 114 (1967).

Quoted in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

Cited in In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

§ 58-42.1. "Twisting" with respect to insurance policies defined; penalties.

Any insurer, or any agent of any insurer, who shall engage in twisting, as defined in this section, shall be subject to the provisions of G.S. 58-37 and 58-38 or G.S. 58-44.4 and 58-44.6. As used in this section "twisting" shall mean the willful, material misrepresentation of an insurance contract, whereby an insured is deceived and induced to cancel or terminate insurance in force to such insured's detriment. (1961, c. 823.)

§ 58-43. Nonresident agents forbidden; exception.

No nonresident of the State shall be licensed as an agent to do business in the State except as a special agent or organizer, and except as an agent licensed to sell life insurance and annuities only, and then only when he reports his business as North Carolina business to some general or district agent of his company in the State, or having territory within the State. No such nonresident shall be licensed to represent a life insurance company in this State unless he is licensed to represent the same company in his home state and meets the licensing requirements of this Chapter. (1899, c. 54, s. 108; 1903, c. 438, s. 11; Rev., s. 4707; C.S., s. 6301; 1945, c. 458; 1947, c. 922; 1955, c. 850, s. 2.)

§ 58-43.1. Reciprocity for agents.

Notwithstanding the provisions of G.S. 58-41, 58-43, 58-44, 58-44.1, or 58-44.2, to the extent that other states that provide for the licensing and regulation of and payment of commissions to insurance agents or brokers waive restrictions on the basis of reciprocity with respect to North Carolina insurance agents holding nonresident licenses as insurance agents or brokers in such states, all such restrictions on nonresident insurance agents or brokers from such states holding North Carolina nonresident licenses shall be and hereby are waived. (1981, c. 773.)

§ 58-44. Resident agents required.

All business done in this State by insurance companies doing the business of insurance as defined in G.S. 58-72, shall be transacted by their regularly authorized agents residing in this State, or through applications of such agents; and all policies issued by insurance companies doing the business of insurance as defined in subdivisions (3) through (22), inclusive, of G.S. 58-72, must be countersigned by such agents; provided, however, that this section shall not apply to bid bonds issued by any such company in connection with any public or private building or construction project. It shall be unlawful for any salaried officer, manager or other representative of any such company to transact for his company any of the business of a licensed agent unless he himself shall be a bona fide resident licensed agent. (1899, c. 54, ss. 107, 108; 1903, c. 438, s. 11; Rev., s. 4810; 1911, c. 196, s. 5; 1913, c. 140, s. 3; C.S., s. 6302; 1921, c. 136, s. 3; 1925, c. 70, s. 1; 1945, c. 458; 1957, c. 548; 1959, c. 1013.)

CASE NOTES

Cited in Charleston & W. Carolina Ry. v. Robert G. Lassiter & Co., 207 N.C. 408, 177 S.E. 9 (1934).

§ 58-44.1. Agents not to pay commissions to nonresidents or unlicensed persons.

No licensed agent of any insurer shall pay directly or indirectly, any commission or brokerage or other valuable consideration on account of any policy of insurance on any risk in this State to any person not licensed in this State to act as agent for the same kind of insurance, provided however that with respect to the kinds of insurance as defined in subdivisions (3) through (22), inclusive, of G.S. 58-72 an agent may pay to a licensed nonresident broker not exceeding fifty per centum (50%) of the regular commissions allowed upon the issuance of such policies. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C.S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458; 1947, c. 922.)

§ 58-44.2. Licensing nonresident brokers.

The Commissioner may license a nonresident as an insurance broker to represent companies doing the business of insurance as defined in subdivisions (3) through (22), inclusive, of G.S. 58-72, upon application made in the form prescribed by the Commissioner, and upon such applicant's filing an affidavit setting forth that he has not after January 1, 1955, and will not during the period of the license solicit, directly or indirectly in this State, nor will he place any insurance on any risk located in this State except through licensed agents of companies licensed to do business in this State, that he is a bona fide broker, and proposes to hold himself out as such, and that neither he nor any member of the agency or corporation is an employee or active officer of an insurance company. The fee for such license shall be as fixed in the Revenue Act. For any violation of the terms on which such license is issued the Commissioner may revoke the same. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C.S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458; 1955, c. 902.)

§ 58-44.3. Discrimination forbidden.

No company doing the business of insurance as defined in subdivisions (3) through (22), inclusive, of G.S. 58-72, nor its agents, shall make any discrimination in favor of any person, and all provisions of this Chapter prohibiting discrimination by companies doing the business of insurance as defined in subdivisions (1) and (2) of G.S. 58-72, shall equally apply to the companies referred to herein and to their agents. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C.S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458.)

CASE NOTES

The prohibition against discrimination in rates is directed to insurers, agents, brokers and other representatives of insurers. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

The sanctions provided by statutes for violations of the antirebate provisions are directed to the insurers, agents, brokers or other representatives, and the statutes do not declare that contracts in violation of the antirebate provision are void. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

§ 58-44.4. Revocation of license for violation; power of Commissioner.

When the Commissioner has information of a violation of any of the provisions of G.S. 58-44, 58-44.1, 58-44.2, 58-44.3, and 58-169, he shall immediately investigate or cause to be investigated such violation, and if any such insurance company has violated any of said provisions he may immediately revoke its license for not less than three nor more than six months for a first offense, and for each offense thereafter for not less than one year. If a licensed insurance agent violates or causes to be violated any of the provisions of said sections, he may for the first offense have his license revoked for all companies for which he has been licensed for not less than three nor more than six months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and he shall not thereafter be licensed for any company for one year from the date of the revocation. For the purpose of enforcing the provisions of said sections the Commissioner is authorized and empowered to examine persons, administer oaths, and require production of papers and records. A failure or refusal on the part of any such insurance company, licensed to do business in this State, or representative thereof, to appear before the Commissioner when requested to do so, or to produce records and papers, or answer under oath, subjects such company, or representative, to the penalties of this section. (1903, c. 488, ss. 3, 4; Rev., s. 4767; C.S., s. 6431; 1945, c. 458.)

CASE NOTES

Applicability of Former § 143-318. — Former § 143-318, relating to evidence in administrative proceedings, in light of former § 143-317(3), was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the insurance law. Such hearings involve the essential elements of a court trial, and the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with the applicable rules of evidence. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-44.4A. Notice and hearing prior to revocation of license, etc.

In all cases where a license may be suspended or revoked by the Commissioner of Insurance pursuant to the provisions of this Chapter, such suspension or revocation of such license shall not be ordered until after notice and opportunity to be heard has been given such licensee. (1971, c. 1080, s. 1.)

§ 58-44.5. Rebates prohibited.

No insurer or employee thereof, and no broker or agent shall knowingly charge, demand or receive a premium for any policy of insurance except in accordance with the applicable filing approved by the Commissioner of Insurance. No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit, or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified

in the policy of insurance. No insured named in a policy of insurance, nor any employee of such insured shall knowingly receive or accept, directly or indirectly, any such rebate, discount, abatement or reduction of premium, or any special favor or advantage or valuable consideration or inducement. Nothing herein contained shall be construed as prohibiting the payment of commissions or other compensation to duly licensed agents and brokers, nor as prohibiting any participating insurer from distributing to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits. As used in this section the word "insurance" includes suretyship and the word "policy" includes bond. (1943, c. 170; 1951, c. 781, s. 2.)

Legal Periodicals. — For brief comment on this section, see 29 N.C.L. Rev. 398.

CASE NOTES

The prohibition against discrimination in rates is directed to insurers, agents, brokers and other representatives of insurers. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

The sanctions provided by statutes for violations of the antirebate provisions are directed to the insurers, agents, brokers or other representatives. The statutes do not declare that contracts in violation of the antirebate provision are void. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

Stated in Goforth v. Avemco Life Ins. Co., 368 F.2d 25 (4th Cir. 1966).

§ 58-44.6. Imposition of civil penalty.

Whenever any person, agent, adjuster, firm, corporation or company, subject to the provisions of Chapter 57 of the General Statutes, as amended, and the provisions of Chapter 58 of the General Statutes, as amended, shall do or commit any act or shall fail to comply with any requirements prohibited or required by said Chapters, by virtue of which any license is subject to suspension or revocation, the Commissioner of Insurance, in addition to or in lieu of any other official action that may be taken by him, may, in his discretion, inflict a civil penalty in an amount to be fixed by said Commissioner of Insurance not in excess of twenty-five thousand dollars ($25,000), and if said civil penalty is not paid within 10 days from the date of the finding and order inflicting said penalty, then said Commissioner of Insurance may revoke any license of such person, agent, adjuster, firm, corporation or company subject to the provisions of said Chapters. The Commissioner of Insurance before imposing any penalty or revoking any license shall conduct a hearing and shall make all necessary findings of fact in regard to the matter under inquiry. In giving notices, conducting hearings and producing evidence, as well as examining records, the Commissioner of Insurance shall have all the power and authority and shall follow the procedures conferred and given in G.S. 58-54.6. Any person, agent, adjuster, firm, corporation or company subject to said Chapters, whose rights are affected by the findings and order of the Commissioner of Insurance, shall have the right to appeal to the Superior Court of Wake County, and upon such appeal the record shall be certified to the Superior Court of Wake County, and the procedure and authority contained in G.S. 58-9.3 shall be followed and shall govern. The commencement of proceedings, as herein authorized, shall not operate as a stay of the Commissioner's order or decision, unless so ordered by the court. (1955, c. 850, s. 11.)

CASE NOTES

Constitutionality. — The attempted grant to the Commissioner of Insurance of judicial power to impose a penalty upon an insurance agent for a violation of the insurance laws, varying in the Commissioner's discretion from a nominal sum to $25,000.00, violates the State Constitution, there being no reasonable necessity for conferring such judicial power upon the Commissioner. State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

The Commissioner of Insurance is a real party in interest and is entitled to bring an action in the superior court to enforce the collection of a civil penalty imposed pursuant to this section. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35, rev'd on other grounds, 274 N.C. 486, 164 S.E.2d 161 (1968).

Penalty to Be Paid Over to State Treasurer. — By clear implication of §§ 58-62 and 58-63, the amount of any monetary civil penalty imposed and collected as authorized by this section should be paid over to the State Treasurer. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35, rev'd on other grounds, 274 N.C. 486, 164 S.E.2d 161 (1968).

§ 58-44.7. Rebate of premiums on credit life and credit accident and health insurance; retention of funds by agent.

It shall be unlawful for any insurance carrier or officer or agent of an insurance company writing credit life and credit accident and health insurance, as defined in G.S. 58-195.2 and 58-254.8, or combination credit life, accident and health, hospitalization and disability insurance in connection with loans, to permit any agent or representative of such company to retain any portion of funds received for the payment of losses incurred, or to be incurred, under such policies of insurance issued by such company, or to pay, allow, permit, give or offer to pay, allow, permit or give, directly, or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium, to any loan agency, insurance agency or broker, or to any creditor of the debtor on whose account the insurance was issued, or to any person, firm or corporation which received a commission or fee in connection with the issuance of such insurance: Provided, that this section shall not prohibit the payment of commissions to a licensed insurance agent or agency on the sale of a policy of credit life and credit accident and health insurance, or combination credit life, accident and health, hospitalization and disability insurance in connection with loans.

It shall be unlawful for any broker, agent, agency or insured named in any such policy, or for any loan agency or broker, or any agent, officer or employee of any loan agency or broker to receive or accept, directly or indirectly, any such rebate, discount, abatement, credit or reduction of the premium as set out in this section. (1955, c. 1341, s. 1.)

CASE NOTES

A bank could not have legally made a refund of money which had gone, even through its hands, to an insurance company as premiums on credit life insurance. It is unlawful for an insurance company writing credit life insurance in connection with a loan to permit any agent to pay any rebate or to refund any premiums without the consent of the policyholders. Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co., 271 N.C. 662, 157 S.E.2d 352 (1967).

§ 58-44.8. Agents prohibited from representing unauthorized companies.

No licensed agent of any insurer shall solicit anywhere in the boundaries of the State of North Carolina, or receive or transmit an application or premium of insurance, for a company not authorized to do business in the State, except as provided in G.S. 58-53.1. (1957, c. 547.)

§ 58-45. Agents personally liable, when.

Any agent representing an insurer is personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for any company not authorized to do business in the State. A person or citizen of the State who fills up or signs any open policy, certificate, blank or coupon of, or furnished by, an unlicensed company, agent, or broker, the effect of which is to bind any insurance in an unlicensed company on property in this State, is the agent of such company, and personally liable for all licenses and taxes due on account of such transaction. (1899, c. 54, s. 70; 1903, c. 438, s. 7; Rev., s. 4813; C.S., s. 6303; 1947, c. 922.)

§ 58-46. Payment of premium to agent valid; obtaining by fraud a crime.

Any agent or broker who acts for a person other than himself negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker knowingly procuring by fraudulent representations payment, or the obligation for the payment, of a premium of insurance, shall be punished by a fine of not less than one hundred ($100.00) nor more than five hundred dollars ($500.00), or be imprisoned for not more than one year. (1899, c. 54, s. 69; Rev., ss. 3486, 4814; C.S., s. 6304; 1947, c. 922.)

CASE NOTES

Payment to Agent or Broker as Payment to Company. — Payment of the initial premium on a policy of life insurance to one who is a soliciting agent or broker of the company constitutes payment to the company by virtue of this section. Creech v. Sun Life Assurance Co., 224 N.C. 144, 29 S.E.2d 348 (1944).

For case declining to impute payment to agent to insurer where policy required receipt, see Mills v. New York Life Ins. Co., 209 N.C. 296, 183 S.E. 289 (1936), decided prior to 1947 amendment.

Insurer Held Liable for Broker's Failure to Deliver Funds. — Where insurer credited the amount of the unearned premiums to its broker's account, and broker in turn credited the amount to the account of the broker who procured the employer's application for the insurance, the insurer was liable to the employer for the amount of the unearned premium not actually paid to the employer by the broker. Hughes v. Lewis, 203 N.C. 775, 166 S.E. 909 (1932).

§ 58-47. Representing unlicensed company prohibited; penalty.

If any person shall unlawfully solicit, negotiate for, collect or transmit a premium for a contract of insurance or act in any way in the negotiation or transaction of any unlawful insurance with an insurance company not licensed to do an insurance business in North Carolina, he shall be guilty of a misdemeanor and upon conviction shall pay a fine of not less than two hundred

dollars ($200.00) nor more than five hundred dollars ($500.00) or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (1899, c. 54, s. 94; Rev., s. 3484; 1907, c. 1000, s. 8; C.S., s. 6305; 1945, c. 458.)

CASE NOTES

The purpose of this section is to protect people from harmful imposition in contracts of insurance, and the evil which the statute is designed to prevent is as threatening in the case of a bogus as a real company, perhaps more so. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911), decided prior to 1945 amendment.

For case holding agents of fraternal insurance orders punishable under this section, see State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911), decided prior to 1945 amendment. As to fraternal orders, see now § 58-263 et seq.

Cited in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-48. Agent failing to exhibit license.

If any agent representing an insurer or any broker shall, on demand of any person from whom he shall solicit insurance, fail to exhibit a certificate from the Commissioner of Insurance bearing the seal of his office, and dated within one year from such demand, he shall be fined five dollars ($5.00) or imprisoned 10 days for each offense. (1899, c. 54, s. 81; Rev., s. 3485; C.S., s. 6306; 1947, c. 922.)

CASE NOTES

Commissioner Cannot Require Prosecution or Punishment. — The Commissioner of Insurance has no authority to require the solicitor to institute or prosecute a criminal action, nor to require a judge to punish the defendant upon conviction. Elmore v. Lanier, 270 N.C. 674, 155 S.E.2d 114 (1967).

§ 58-49. False statements in applications for insurance.

If any agent, examining physician, applicant, or other person shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for insurance, or shall make any such statement for the purpose of obtaining any fee, commission, money or benefit from any company engaged in the business of insurance in this State, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or imprisonment in the county jail for not less than 30 days nor more than one year, or by both fine and imprisonment, at the discretion of the court. The provisions of this section shall be applicable to contracts and certificates issued pursuant to Chapters 57 and 58 of the General Statutes. (1899, c. 54, s. 60; Rev., s. 3487; C.S., s. 6307; 1945, c. 458; 1947, c. 922; 1965, c. 911.)

§ 58-50. Agents signing certain blank policies.

No agent shall sign any blank contract or policy of insurance, and any agent guilty of violating this section shall, upon conviction, be fined for each offense not less than one hundred dollars ($100.00) nor more than two hundred dollars ($200.00); provided, however, that transportation ticket policies of accident

insurance and baggage insurance policies may be countersigned in blank for issuance only through coin-operated machines, subject to regulations prescribed by the Commissioner. (1899, c. 54, ss. 108, 109; Rev., s. 3488; 1911, c. 196, s. 6; C.S., s. 6308; 1945, c. 458; 1947, c. 922.)

§ 58-51. Adjuster acting for unauthorized company.

If any person shall act as adjuster on a contract made otherwise than as authorized by the laws of this State, or by any insurance company or other person not regularly licensed to do business in this State, or shall adjust or aid in the adjustment, either directly or indirectly, of a claim arising under a contract of insurance not authorized by the laws of the State, he shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00), or imprisoned not less than six months nor more than two years, or both, in the discretion of the court. (1899, c. 54, s. 114; Rev., s. 3482; C.S., s. 6309; 1945, c. 458; 1949, c. 958, s. 1; 1951, c. 105, s. 1.)

§ 58-51.1. Agent may adjust.

On behalf and on request of an insurer for which he is licensed, any agent may from time to time act as an adjuster and investigate and report upon claims without being required to be licensed as an adjuster, provided: In no event may any agent or agents adjust any losses in any amount where his remuneration for the sale of insurance is in any way dependent upon the adjustment of such losses. (1947, c. 922; 1951, c. 781, s. 7.)

Legal Periodicals. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-51.2. Nonresident adjusters and motor vehicle damage appraisers.

(a) The Commissioner may license a nonresident as an insurance adjuster upon his compliance with all the requirements of this Chapter applicable to resident adjusters. No license shall be required of an adjuster licensed as such in another state for the adjustment in this State of a single loss, or of losses arising out of a catastrophe common to all such losses: Provided such adjuster notifies the Commissioner of Insurance in writing prior to the adjusting of such loss or losses. The Commissioner of Insurance may permit an experienced adjuster, who regularly adjusts in another state and who is licensed in such other state (if such state requires a license), to act as adjuster in this State without a North Carolina license, for emergency insurance adjustment work, for a period of not exceeding 30 days, done for an employer who is an insurance adjuster licensed by the State of North Carolina or who is a regular employer of one or more insurance adjusters licensed by the State of North Carolina; provided that the employer shall furnish to the Commissioner a notice in writing immediately upon the beginning of any such "emergency insurance adjustment work."

(b) The Commissioner may license a nonresident as a motor vehicle damage appraiser upon his compliance with all the requirements of this Chapter applicable to resident motor vehicle damage appraisers and may permit an experienced motor vehicle damage appraiser who regularly appraises in another state (if such state requires a license) to act as a motor vehicle damage appraiser in this State without a North Carolina license for emergency motor vehicle damage appraisal work for a period not exceeding 30 days done for an employer who is

(1) An insurance adjuster licensed by the State of North Carolina,
(2) A motor vehicle damage appraiser licensed by the State of North Carolina,
(3) A regular employer of one or more insurance adjusters licensed by the State of North Carolina, or
(4) A regular employer of one or more motor vehicle damage appraisers licensed by the State of North Carolina;

Provided that the employer shall furnish to the Commissioner a notice in writing immediately upon the beginning of any such emergency appraisal work. (1947, c. 922; 1951, c. 105, s. 1; 1957, c. 360; 1971, c. 757, s. 6.)

§ 58-51.3. Companies and agents to transact business through licensed agents.

No insurance company, nor any agent of any insurance company, shall on behalf of such company or agent knowingly permit any person not licensed as an insurance agent as provided by law, to solicit insurance, negotiate for, collect or transmit a premium for a new contract of insurance or to act in any way in the negotiation for any contract or policy of insurance; provided, no license shall be required of the following:

(1) Persons designated by the insurance company or the insured to collect or deduct and transmit premiums or other charges for life, accident and/or health and/or hospitalization insurance, or to perform such acts as may be required for providing coverage for additional persons who are eligible under the terms of a master contract.
(2) Of an agency office employee acting within the confines of the agent's office, under the direction and supervision of the duly licensed agent and within the scope of such agent's license, in the acceptance of request for insurance and payment of premiums and the performance of clerical, stenographic, and similar office duties.
(3) Of those persons described as a regular salaried officer or employee of an insurer or reciprocal as defined in this Article. (1949, c. 1120; 1953, c. 1043, s. 10.)

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 461.

§ 58-51.4. Lending institutions.

Nothing in this act shall prohibit or prevent lending institutions or their officers or employees from acting as insurance agents as heretofore. (1953, c. 1043, s. 11.)

Editor's Note. — The words "this act" in the section evidently refer to Chapter 1043 of the 1953 Session Laws, which also amended or added §§ 58-39.4, 58-40, 58-40.4, 58-40.5, 58-41 to 58-41.4, 58-51.3.

§ 58-52. Agent, adjuster, etc., acting without a license or violating insurance law.

If any person shall assume to act either as principal, agent, broker, adjuster or motor vehicle damage appraiser without license as is required by law or pretending to be a principal, agent, broker, adjuster or licensed motor vehicle damage appraiser, shall solicit, examine or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, investigate or advise relative to the

nature and amount of damages to motor vehicles or the amount necessary to effect repairs thereto, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making or executing any contract of insurance of any kind otherwise than the law permits, or as principal or agent shall violate any provision of law contained in this Chapter, the punishment for which is not elsewhere provided for, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (1899, c. 54, s. 115; Rev., s. 3490; C.S., s. 6310; 1945, c. 458; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1971, c. 757, s. 7.)

§ 58-52.1. Process against nonresident licensees.

(a) Each licensed nonresident agent, adjuster, motor vehicle damage appraiser, or broker shall by the act of acquiring such license thereby be deemed to appoint the Commissioner as his attorney to receive service of legal process issued against the agent, adjuster, motor vehicle damage appraiser, or broker in this State upon causes of action arising within this State.

(b) The appointment shall be irrevocable for as long as there could be any cause of action against the agent, adjuster, motor vehicle damage appraiser, or broker arising out of his insurance transactions in this State.

(c) Duplicate copies of such legal process against such agent, adjuster, motor vehicle damage appraiser, or broker shall be served upon the Commissioner either by a person competent to serve a summons, or through registered mail. At the time of such service the plaintiff shall pay to the Commissioner a fee of one dollar ($1.00), taxable as costs in the action to defray the expense of such service.

(d) Upon receiving such service, the Commissioner shall forthwith send one of the copies of the process, by registered mail with return receipt requested, to the defendant agent, adjuster, motor vehicle damage appraiser, or broker at his last address of record with the Commissioner.

(e) The Commissioner shall keep a record of the day and hour of service upon him of all such legal process. No proceedings shall be had against the defendant agent, adjuster, motor vehicle damage appraiser, or broker, and such defendant shall not be required to appear, plead or answer until the expiration of 40 days after the date of service upon the Commissioner. (1947, c. 922; 1971, c. 757, s. 8.)

§ 58-53. Informer to receive half of penalty.

The person, if other than the Commissioner of Insurance or his deputy, upon whose complaint a conviction is had for violation of the law, prohibiting insurance in or by companies not authorized to do business in the State, or for soliciting, examining, inspecting any risk, or receiving, collecting, or transmitting any premium, or adjusting or aiding in the adjustment of a loss, under a contract made otherwise than as authorized by the laws of this State, is entitled to one half of the penalty recovered therefor. (1899, c. 54, s. 93; Rev., s. 4831; C.S., s. 6311; 1945, c. 377.)

§ 58-53.1. Citizens authorized to procure policies in unlicensed foreign companies.

(a) What Applicant Must Show. — The Commissioner, upon the annual payment of a fee of twenty dollars ($20.00), may issue licenses to citizens of this State, subject to revocation at any time, permitting the person named therein to procure policies of insurance on risks in this State in foreign or alien insur-

ance companies not authorized to transact business in the State. Before the person named in such a license may procure any insurance in such companies or on any risks in this State, he must execute and file with the Commissioner an affidavit that he is unable to procure in companies admitted to do business in the State the amount of insurance necessary to protect such risk, and may only procure insurance under such license after he has procured insurance in companies admitted to do business in this State to the full amount which those companies are willing to write on the risk. If the person licensed under the provisions of this section procures insurance on risks of others in such nonadmitted companies he shall stamp or print in not less than 10 point regular type and in contrasting color upon the filing face and the first page of each policy so issued the words "This company is not licensed to do business in North Carolina."

(b) Account and Report. — Each person so licensed must keep a separate account of the business done under the license, a certified copy of which account he shall forthwith file with the Commissioner, showing the exact amount of such insurance placed by any person, firm or corporation, the gross premium charged thereon, the companies in which the same is placed, the date and terms of the policies, and also a report in the same detail of all such policies canceled and the gross return premium thereon.

(c) Bond Filed. — Before receiving such license the applicant therefor shall execute and deliver to the Commissioner a bond in the penal sum of one thousand dollars ($1,000), with such sureties as the Commissioner may approve, with a condition that the licensee will faithfully comply with all the requirements of G.S. 58-53.1, 58-53.2 and 58-53.3, and will file with the Commissioner in January of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross returned premiums on such insurance canceled under such license during the year ending on the thirty-first day of December next preceding, and at the time of filing such statement will pay into the treasury of the State a sum equal to five per centum (5%) of such gross premiums, less return premiums, so reported, or pay such tax at the time of taking out and delivering such policy or policies.

(d) Exemption. — A nuclear insured shall be exempt from the requirements of this and other sections of Article 3, and nothing contained in Article 3 shall be interpreted as prohibiting a nuclear insured from procuring policies of insurance on risks on its own nuclear electric generating plants and other facilities at such plants in this State in foreign or alien insurance companies not authorized to transact business in this State. (1899, c. 54, ss. 68, 95; 1903, c. 438, s. 7; c. 680; Rev., ss. 4715, 4769; C.S., s. 6425; 1945, c. 378; 1961, c. 1150, s. 1; 1971, c. 510, s. 2.)

CASE NOTES

Cited in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

§ 58-53.2. Punishment for failure to file affidavit and statements.

If any person licensed to procure insurance in an unauthorized foreign or alien company shall procure, or act in any manner in the procurement or negotiation of, insurance in any unauthorized foreign or alien company, and shall neglect to make and file the affidavit and statements required by the preceding section [G.S. 58-53.1], he shall forfeit his license and be punished by a fine of not less than one hundred ($100.00) nor more than five hundred

dollars ($500.00), or by imprisonment for not more than one year, or by both. (1899, c. 54, ss. 68, 95; Rev., ss. 3483, 4769; C.S., s. 6426; 1945, c. 378.)

CASE NOTES

Cited in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-53.3. Tax deducted from premium; reports filed.

When any person procures insurance on any risk located in this State with an insurance company not licensed to do business in this State, it shall be the duty of such person to deduct from the premium charged on the policy or policies issued for such insurance five per centum (5%) of the premium and remit the same to the Commissioner of Insurance of the State, at the same time reporting to the Commissioner of Insurance the name of the company or companies issuing the policy or policies, the location of the risks insured, and the premium charged. The Commissioner of Insurance shall pay the said amounts to the Treasurer of the State. If such report is not made on or before the thirtieth days of July and January of each year for the business done prior to July 1 and January 1 preceding, there shall be added to the amount of taxes thereon the sum of one per centum (1%) on the first day of each month thereafter. (1915, c. 109, s. 8; C.S., s. 6427; 1945, c. 378; 1961, c. 1150, s. 2.)

CASE NOTES

Defendant insurance agency "procured" errors and omissions insurance written by an insurer not licensed to do business in North Carolina for various insurance agents in this State and was therefore liable for the premium tax imposed by this section, where defendant's performance in its dealings with unlicensed insurer involved action; action is an element of procurement. State ex rel. Ingram v. North Carolina Farm Bureau Ins. Agency, Inc., 50 N.C. App. 510, 274 S.E.2d 497, modified and aff'd, 303 N.C. 287, 278 S.E.2d 248 (1981).

Stated in State ex rel. Ingram v. North Carolina Farm Bureau Ins. Agency, Inc., 303 N.C. 287, 278 S.E.2d 248 (1981).

§ 58-54. Forms to be approved by Commissioner of Insurance.

It is unlawful for any insurance company doing business in this State to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by the Commissioner of Insurance of North Carolina, and copies filed in the Insurance Department. (1907, c. 879; 1913, c. 139; C.S., s. 6312; 1945, c. 377.)

CASE NOTES

Validity of Unapproved Policy. — The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company. It does not say a policy shall be void unless approved by the Commissioner, but that it shall be unlawful for the company to issue such policy. Blount v. Royal Fraternal Ass'n, 163 N.C. 167, 79 S.E. 299 (1913).

ARTICLE 3A.

Unfair Trade Practices.

§ 58-54.1. Declaration of purpose.

The purpose of this Article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (1949, c. 1112.)

Legal periodicals. — For brief discussion of this Article, see 27 N.C.L. Rev. 461.

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

The purpose of this Article is not to make these sections the exclusive North Carolina remedy for unfair trade practices in the insurance industry. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977).

Federal Anti-Trust Law. — This Article was enacted to regulate trade practices in the insurance business in accordance with directives from federal anti-trust law. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

This Article does not so comprehensively regulate unfair trade practices in the business of insurance in North Carolina as to preclude subjecting the acts complained of to the Sherman Anti-Trust Act, 15 U.S.C.A. § 1 et seq. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977).

Recovery under § 75-1.1. — Plaintiff can recover damages under § 75-1.1 even though unfair methods of competition perpetrated by persons engaged in the business of insurance are regulated by the insurance statutes which do not provide for civil damage actions. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977).

Unfair and deceptive acts and practices in the insurance industry are not regulated exclusively by this article and may constitute the basis of recovery under § 75-1.1. Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980).

No Rate Setting Authority. — This Article generally, and § 58-54.3 specifically, contain no authority to issue orders setting premium rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.2. Definitions.

When used in this Article:

(1) "Commissioner" shall mean the Commissioner of Insurance of this State.

(2) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters. (1949, c. 1112.)

§ 58-54.3. Unfair methods of competition or unfair and deceptive acts or practices prohibited.

No person shall engage in this State in any trade practice which is defined in this Article as or determined pursuant to this Article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. (1949, c. 1112.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Nothing in this section grants authority to the Commissioner of Insurance to take any action whatsoever. It merely prohibits unfair methods of competition or unfair or deceptive acts or practices in the insurance industry, which are exhaustively defined in § 58-54.4. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Limited Remedial Powers. — Moreover, §§ 58-54.5, 58-54.6 and 58-54.7, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by G.S. 58-54.3 . . .," grant no remedial power to the Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Charging of Excessive Rates Not within Prohibition of This Section. — Nothing in § 58-54.4 declares the charging of excessive rates to be an act or practice within the prohibition of this section. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

No Rate Setting Authority. — Clearly this Article generally, and this section specifically, contain no authority to issue orders setting premium rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined.

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts. — Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) False Information and Advertising Generally. — Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation. — Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written

statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Boycott, Coercion and Intimidation. — Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(5) False Financial Statements. — Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Stock Operations and Insurance Company Advisory Board Contracts. — Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or any insurance company advisory board contracts or other contracts of any kind promising returns and profit as an inducement to insurance.

(7) Unfair Discrimination.

a. Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

b. Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates.

a. Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

b. Nothing in subdivision (7) or paragraph a of subdivision (8) of this section shall be construed as including within the definition of discrimination or rebates any of the following practices:

1. In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided, that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;
2. In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense;
3. Readjustment of the rate of premium for a group insurance policy based on the loss or expense experienced thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

c. No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance. Nothing herein contained shall be construed as prohibiting the payment of commissions or other compensation to regularly appointed and licensed agents and to brokers duly licensed by this State; nor as prohibiting any participating insurer from distributing to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits.

(9) Advertising of Health, Accident or Hospitalization Insurance. — In all advertising of policies, certificates or service plans of health, accident or hospitalization insurance, except those providing group coverage, where details of benefits provided by a particular policy, certificate or plan are set forth in any advertising material, such advertising material shall contain reference to the major exceptions or major clauses limiting or voiding liability contained in the policy, certificate or plan so advertised. The references to such exceptions or clauses shall be printed in a type no smaller than that used to set forth the benefits of the policy, certificate or plan. In all advertising of such policies, certificates or plans which contain a cancellation provision or a provision that the policies, certificates or plans may be renewed at the option of the company or medical service corporation only, such advertising material shall contain clear and definite reference to the fact that the policies, certificates or plans are cancellable or that the same may be renewed at the option of the company only.

(10) Soliciting, etc., Unauthorized Insurance Contracts in Other States. — Soliciting, advertising or entering into insurance contracts in foreign states and any other jurisdiction in which such domestic insurer is not licensed in accordance with the laws of such state or jurisdiction, except as provided in G.S. 58-54.27.

(11) Certain Business Practices in Connection with First-Party Claims. — In connection with first-party claims, committing or performing with

such frequency as to indicate a general business practice any of the following:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

e. Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

g. Compelling [the] insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured;

h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

j. Making claims payments to insureds or beneficiaries not accompanied by [a] statement setting forth the coverage under which the payments are being made;

k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

l. Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, of [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;

m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and

n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement. (1949, c. 1112; 1955, c. 850, s. 3; 1967, c. 935, s. 2; 1975, c. 668.)

Editor's Note. — Session Laws 1955, c. 850, which added subdivision (9), provides in s. 12 that the amendment shall be applicable to hospital and medical service corporations under Chapter 57 to the same extent as to insurers under this Chapter.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

The prohibition against discrimination in rates is directed to insurers, agents, brokers and other representatives of insurers. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

The sanctions provided by statutes for violations of the antirebate provisions are directed to the insurers, agents, brokers or other representatives. The statutes do not declare that contracts in violation of the antirebate provision are void. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

Nothing in this section declares the charging of excessive rates to be an act or practice within the prohibition of § 58-54.2. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Applied in Smith v. King, 52 N.C. App. 158, 277 S.E.2d 875 (1981).

§ 58-54.5. Power of Commissioner.

The Commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this State in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by G.S. 58-54.3 of this Article. (1949, c. 1112.)

CASE NOTES

Limited Remedial Power. — Sections 58-54.6 and 58-54.7 and this section, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 . . .," grant no remedial power to the Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.6. Hearings, witnesses, appearances, production of books and service of process.

(a) Whenever the Commissioner shall have reason to believe that any such person has been engaged or is engaging in this State in any unfair method of competition or any unfair or deceptive act or practice defined in G.S. 58-54.4, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of the hearing thereon to be held at the time and place fixed in the notice, which shall not be less than 10 days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the Commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the Commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) Nothing contained in this Article shall require the observance at any such hearing of formal rules of pleading or evidence.

(d) The Commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The Commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic

record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the Commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the Superior Court of Wake County, on application of the Commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(e) Statements of charges, notices, orders, and other processes of the Commissioner under this Article may be served by anyone duly authorized by the Commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement, notice, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same. (1949, c. 1112.)

CASE NOTES

Limited Remedial Power. — Sections 58-54.5 and 58-54.7 and this section, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 . . .," grant no remedial power to the Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Stated in State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-54.7. Cease and desist orders and modifications thereof.

(a) If, after such hearing, the Commissioner shall determine that the method of competition or the act or practice in question is defined in G.S. 58-54.4 and that the person complained of has engaged in such method of competition, act or practice in violation of this Article, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act or practice.

(b) Until the expiration of the time allowed under G.S. 58-54.8(a) of this Article for filing a petition for review (by appeal) if no such petition has been duly filed within such time or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the superior court, as hereinafter provided, the Commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the Commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require. (1949, c. 1112.)

CASE NOTES

Limited Remedial Power. — Sections 58-54.5 and 58-54.6 and this section, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 . . .," grant no remedial power to the Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.8. Judicial review of cease and desist orders.

(a) Any person required by an order of the Commissioner under G.S. 58-54.7 to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice defined in G.S. 58-54.4 may obtain a review of such order by filing in the Superior Court of Wake County, within 30 days from the date of the service of such order, a written petition praying that the order of the Commissioner be set aside. A copy of such petition shall be forthwith served upon the Commissioner, and thereupon the Commissioner forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the Commissioner, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the Commissioner, in whole or in part. The findings of the Commissioner as to the facts, if supported by substantial evidence, shall be conclusive.

(b) To the extent that the order of the Commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner, the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which, if supported by substantial evidence shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(c) A cease and desist order issued by the Commissioner under G.S. 58-54.7 shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the Commissioner may thereafter modify or set aside his order to the extent provided in G.S. 58-54.7(b); or

(2) Upon the final decision of the court if the court directs that the order of the Commissioner be affirmed or the petition for review dismissed.

(d) No order of the Commissioner under this Article or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this State. (1949, c. 1112.)

§ 58-54.9. Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.

(a) Whenever the Commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this State in any method of competition or in any act or practice in the conduct of such business which is not defined in G.S. 58-54.4, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than 10 days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in G.S. 58-54.6. The Commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this Article and if such method of competition, act or practice has not been discontinued, the Commissioner may, through the Attorney General of this State, at any time after 10 days after the service of such report cause a petition to be filed in the superior court of this State of the county wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite. To the extent that the order of the Commissioner is affirmed, the court shall thereupon issue its order commanding obedience to the terms of such order of the Commissioner.

(c) A transcript of the proceedings before the Commissioner including all evidence taken and the report and findings shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner, the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the Commissioner with respect thereto is to the interest of the public and that the findings of the Commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice. (1949, c. 1112.)

§ 58-54.10. Judicial review by intervenor.

If the report of the Commissioner does not charge a violation of this Article, then any intervenor in the proceedings may within 10 days after the service of such report, cause a notice of appeal to be filed in the Superior Court of Wake County for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or

practice which it finds, notwithstanding such report of the Commissioner, constitutes a violation of this Article. (1949, c. 1112.)

§ 58-54.11. Penalty.

Any person who willfully violates a cease and desist order of the Commissioner under G.S. 58-54.7, after it has become final, and while such order is in effect, shall forfeit and pay to the Commissioner for the use of the public schools of the county or counties in which the act or acts complained of occurred a sum to be determined by the Commissioner not to exceed one thousand dollars ($1,000) for each violation, which if not paid may be recovered in a civil action instituted in the name of the Commissioner in a court of competent jurisdiction in Wake County. (1949, c. 1112.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-54.12. Provisions of Article additional to existing law.

The powers vested in the Commissioner by this Article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive. (1949, c. 1112.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Applied in Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977).

§ 58-54.13. Immunity from prosecution.

If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must nonetheless comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this State. Any such individual may execute, acknowledge and file in the office of the Commissioner a statement expressly waiving such immunity or privilege in respect to any

transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced. (1949, c. 1112.)

Article 3B.

Unauthorized Insurers False Advertising Process Act.

§ 58-54.14. Purpose; construction.

(a) The purpose of this Article is to subject to the jurisdiction of the Commissioner of Insurance and to the jurisdiction of the courts of this State, insurers not authorized to transact business in this State which place in or send into this State any false advertising designed to induce residents of this State to purchase insurance from insurers not authorized to transact business in this State. The General Assembly declares it is in the interest of the citizens of this State who purchase insurance from insurers which solicit insurance business in this State in the manner set forth in the preceding sentence that such insurers be subject to the provisions of this Article. In furtherance of such interest, the General Assembly in this Article provides a method of substituted service of process upon such insurers and declares in so doing, it exercises its power to protect its residents and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, 1st Session, section 340, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states; the authority provided herein to be in addition to any existing powers of this State.

(b) The provisions of this Article shall be liberally construed. (1965, c. 910.)

§ 58-54.15. Definitions.

As used in this Article:

(1) "Residents" shall mean and include person, partnership or corporation, domestic, alien or foreign.

(2) "Unfair Trade Practice Act" shall mean Article 3A of this Chapter. (1965, c. 910.)

§ 58-54.16. Unlawful advertising; notice to unauthorized insurer and domiciliary insurance supervisory official.

No unauthorized foreign or alien insurer shall make, issue, circulate or cause to be made, issued or circulated, to residents of this State any estimate, illustration, circular, pamphlet, or letter, or cause to be made in any newspaper, magazine or other publication or over any radio or television station, any announcement or statement to such residents misrepresenting its financial condition or the terms of any contracts issued or to be issued or the benefits or advantages promised thereby, or the dividends or share of the surplus to be received thereon in violation of the Unfair Trade Practice Act, and whenever the Commissioner shall have reason to believe that any such insurer is engaging in such unlawful advertising, it shall be his duty to give notice of such fact by registered mail to such insurer and to the insurance

supervisory official of the domiciliary state of such insurer. For the purpose of this section, the domiciliary state of an alien insurer shall be deemed to be the state of entry or the state of the principal office in the United States. (1965, c. 910.)

§ 58-54.17. Action by Commissioner under Unfair Trade Practice Act.

If after 30 days following the giving of the notice mentioned in G.S. 58-54.16 such insurer has failed to cease making, issuing, or circulating such false misrepresentations or causing the same to be made, issued or circulated in this State, and if the Commissioner has reason to believe that a proceeding by him in respect to such matters would be to the interest of the public, and that such insurer is issuing or delivering contracts of insurance to residents of this State or collecting premiums on such contracts or doing any of the acts enumerated in G.S. 58-54.18, he shall take action against such insurer under the Unfair Trade Practice Act. (1965, c. 910.)

§ 58-54.18. Acts appointing Commissioner as attorney for service of statement of charges, notices and process; manner of service; limitation on entry of order or judgment.

(a) Any of the following acts in this State, effected by mail or otherwise, by any such unauthorized foreign or alien insurer:

(1) The issuance or delivery of contracts of insurance to residents of this State,
(2) The solicitation of applications for such contracts,
(3) The collection of premiums, membership fees, assessments or other considerations for such contracts, or
(4) Any other transaction of insurance business,

Is equivalent to and shall constitute an appointment by such insurer of the Commissioner of Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all statements of charges, notices and lawful process in any proceeding instituted in respect to the misrepresentations set forth in G.S. 58-54.16 hereof under the provisions of the Unfair Trade Practice Act, or in any action, suit or proceeding for the recovery of any penalty therein provided, and any such act shall be signification of its agreement that such service of statement of charges, notices or process is of the same legal force and validity as personal service of such statement of charges, notices or process in this State, upon such insurer.

(b) Service of a statement of charges and notices under said Unfair Trade Practice Act shall be made by any deputy or employee of the Insurance Department delivering to and leaving with the Commissioner or some person in apparent charge of his office, two copies thereof. Service of process issued by any court in any action, suit or proceeding to collect any penalty under said act provided, shall be made by delivering and leaving with the Commissioner, or some person in apparent charge of his office, two copies thereof. The Commissioner shall forthwith cause to be mailed by registered mail one of the copies of such statement of charges, notices or process to the defendant at its last known principal place of business, and shall keep a record of all statements, charges, notices and process so served. Such service of statement of charges, notices or process shall be sufficient provided they shall have been so mailed and the defendant's receipt or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and

the name and address of the person to whom the letter is addressed, and the affidavit of the person mailing such letter showing a compliance herewith are filed with the Commissioner in the case of any statement of charges or notices, or with the clerk of the court in which such action is pending in the case of any process, on or before the date the defendant is required to appear or within such further time as may be allowed.

(c) Service of statement of charges, notices and process in any such proceeding, action or suit shall in addition to the manner provided in subsection (b) of this section be valid if served upon any person within this State who on behalf of such insurer is

(1) Soliciting insurance, or

(2) Making, issuing or delivering any contract of insurance, or

(3) Collecting or receiving in this State any premium for insurance;

And a copy of such statement of charges, notices or process is sent within 10 days thereafter by registered mail by or on behalf of the Commissioner to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter, the name and address of the person to whom the letter is addressed, and the affidavit of the person mailing the same showing a compliance herewith, are filed with the Commissioner in the case of any statement of charges or notices, or with the clerk of the court in which such action is pending in the case of any process, on or before the date the defendant is required to appear or within such further time as the court may allow.

(d) No cease or desist order or default judgment under this section shall be entered until the expiration of 30 days from the date of the filing of the affidavit of compliance.

(e) Service of process and notice under the provisions of this Article shall be in addition to all other methods of service provided by law, and nothing in this Article shall limit or prohibit the right to serve any statement of charges, notices or process upon any insurer in any other manner now or hereafter permitted by law. (1965, c. 910.)

§ 58-54.19. Short title.

This Article may be cited as the Unauthorized Insurers False Advertising Process Act. (1965, c. 910.)

Article 3C.

Unauthorized Insurers.

§ 58-54.20. Purpose of Article.

It is the purpose of this Article to abate and prevent the practices of unauthorized insurers within the State of North Carolina, and to provide methods for effectively enforcing the laws of this State against such practices. The General Assembly finds that there is within this State a substantial amount of insurance business being transacted by insurers who have not complied with the laws of this State and have not been authorized by the Commissioner of Insurance to do business. These practices by unauthorized insurers are deemed to be harmful and contrary to public welfare of the citizens of this State. The difficulties which arise from the acts and practices of unauthorized insurers is compounded by the fact that such companies are licensed in foreign jurisdictions and conduct a long-range business without having personal representatives or agents in proximity to insureds. The

General Assembly further declares that it is a subject of vital public interest to the State that unlicensed and unauthorized companies have been and are now engaged in soliciting by way of direct mail and other advertising media, insurance risks within this State, and that such companies enjoy the many benefits and privileges provided by the State as well as the protection afforded to citizens under exercise of the police powers of the State, without themselves being subject to the laws designed to protect the insurance consuming public. The provisions of this Article are in addition to all other statutory provisions of Chapter 58 relating to unauthorized insurers and do not replace, alter, modify or repeal such existing provisions. (1967, c. 909, s. 1.)

§ 58-54.21. Transacting business without certificate of authority prohibited; exceptions.

Except as hereinafter provided, it shall be unlawful for any company to enter into a contract of insurance as an insurer or to transact insurance business in this State as set forth in G.S. 58-54.22 of this Article, without a certificate of authority issued by the Commissioner of Insurance. This section shall not apply to the following acts or transactions:

(1) The procuring of a policy of insurance upon a risk within this State where the applicant is unable to procure coverage in the open market with admitted companies and is otherwise in compliance with G.S. 58-53.1;

(2) Contracts of reinsurance;

(3) Transactions in this State involving a policy lawfully solicited, written and delivered outside of this State covering only subjects of insurance not resident, located or expressly to be performed in this State at the time of issuance, and which transactions are subsequent to the issuance of such policy;

(4) Transactions in this State involving group or blanket insurance and group annuities where the master policy of such group insurance was lawfully issued and delivered in a state where the company was authorized to transact business;

(5) Transactions in this State involving all policies of insurance issued prior to July 1, 1967;

(6) The procuring of contracts of insurance issued to an "industrial insured" as hereinafter defined, or to a nuclear insured.

For the purposes of this section, an "industrial insured" is an insured (i) who procures the insurance of any risk or risks by use of the services of a full-time employee acting as an insurance manager or buyer, (ii) whose aggregate annual premiums for insurance on all risks total at least twenty-five thousand dollars ($25,000), and (iii) who has at least 25 full-time employees: Provided, nothing herein shall relieve such industrial insured from complying with the provisions of G.S. 58-53.1. (1967, c. 909, s. 1; 1971, c. 510, s. 3.)

§ 58-54.22. Acts or transactions deemed to constitute transacting insurance business in this State.

The following acts, if performed in this State, shall be included among those deemed to constitute transacting insurance business in this State:

(1) a. Maintaining any agency or office where any acts in furtherance of an insurance business are transacted, including, but not limited to the execution of contracts of insurance with citizens of this or any other state;

b. Maintaining files or records of contracts of insurance; or

c. Receiving payments of premiums for contracts of insurance.

(2) Likewise, any of the following acts in this State, whether effected by mail or otherwise by an unauthorized insurer, is included among those deemed to constitute transacting insurance business in this State:

a. The issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein;

b. The soliciting of applications for contracts of insurance through the use of the United States mail or any other media, method or device;

c. The collections of premiums, membership fees, assessments or other considerations for such contracts; or

d. The transaction of any matters prior to or subsequent to the execution of such contracts in contemplation thereof or arising out of them.

Any company violating any of the provisions of this section, by doing any of the foregoing acts or transactions while not authorized to do business within this State, shall be subject to penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense; such penalty shall be payable to the Commissioner of Insurance, who shall in turn forward the same to the county or counties wherein the violation or violations occur, for the use of the public schools of such county or counties: Provided, that each day in which a violation occurs shall constitute a separate offense. The Attorney General of the State of North Carolina at the request of and upon information from the Commissioner of Insurance shall initiate a civil action in behalf of the Commissioner in any county of the State wherein a violation under this section occurs to recover the penalty provided. Service of process upon the unauthorized insurer shall be had as is provided in G.S. 58-54.25. (1967, c. 909, s. 1.)

§ 58-54.23. Validity of acts or contracts of unauthorized company shall not impair obligation of contract as to the company; maintenance of suits; right to defend.

The failure of a company to obtain a certificate of authority shall not impair the validity of any acts or contracts of the company. Any person or insured holding contracts of insurance of an unauthorized insurer may bring an action in the courts of this State under the provisions of G.S. 58-153.1, known as the "Unauthorized Insurers Process Act," for the enforcement of any rights pursuant to the contract of insurance. The failure of the insurance company to obtain a certificate of authority shall not prevent such company from defending any action at law or suit in equity in any court of this State so long as the said company fully complies with the provisions of G.S. 58-153.1(c), but no company transacting insurance business in this State without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State to enforce any right, claim or demand arising out of the transaction of such business until such company shall have obtained a certificate of authority. Nor shall an action at law or in equity be maintained in any court of this State by any successor or assignee of such company on any such right, claim or demand originally held by such company until a certificate of authority shall have been obtained by the company or by a company which has acquired all or substantially all of its assets. Nothing in this section shall be construed to abrogate the conditions of admission into this State nor to impair the authority of the Commissioner of Insurance with respect to the issuance of certificates of authority. The Commissioner of Insurance in considering the issuance of a certificate of authority shall take into consideration the acts or

transactions which an unauthorized company has engaged in in this State prior to its application for a certificate of authority. (1967, c. 909, s. 1.)

§ 58-54.24. Commissioner empowered to enjoin unauthorized companies.

Whenever the Commissioner of Insurance, from evidence satisfactory to him, has reasonable grounds for believing that any foreign or alien company is violating or is about to violate the provisions of G.S. 58-54.21, the Commissioner may through the Attorney General of this State cause a complaint to be filed in the Superior Court of Wake County to enjoin and restrain such company from continuing such violations or engaging therein, or doing any act in furtherance thereof. The court shall have jurisdiction of the proceedings and shall have the power to make and enter an appropriate order or judgment granting preliminary or final injunctive relief as in its discretion is proper: Provided, however, that the company alleged to be in violation shall have been served with process as is provided hereinafter. (1967, c. 909, s. 1.)

§ 58-54.25. Service of process on Secretary of State as agent for unauthorized company.

(a) Any act of entering into a contract of insurance as an insurer or transacting insurance business in this State, as set forth in G.S. 58-54.22 by an unauthorized, foreign or alien company, shall be equivalent to and shall constitute an appointment by such company of the Secretary of State to be its true and lawful attorney upon whom may be served all lawful process in any action or proceeding against it arising out of a violation of G.S. 58-54.21, and any of said acts shall be a signification of its agreement that any such process against it, which is so served, shall be of the same legal force and validity as if in fact served upon the company.

(b) Service of process on the Secretary of State shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, notice or demand. Service shall be deemed complete when the Secretary of State is so served. The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered mail, with return receipt requested, to such insurer at its last known principal place of business as shown on the process, notice or demand served on the Secretary of State. The Commissioner of Insurance and the Attorney General shall see that such address is included on the process, notice or demand which is served upon the Secretary of State. A copy of the complaint or order of the clerk extending the time for filing the complaint must be mailed to the insurer with the copy of the summons. When a copy of the complaint is not mailed with the summons, the Secretary of State shall mail a copy of the complaint when it is served on him in the same manner as the copy of summons is required to be mailed.

(c) Upon the return to the Secretary of State of the requested return receipt showing delivery and acceptance of such registered mail, or upon the return of such registered mail showing refusal thereof by such foreign or alien insurer, the Secretary of State shall note thereon the date of such return to him and shall attach either the return receipt or such refused mail including the envelope, as the case may be, to the copy of the process, notice or demand theretofore retained by him and shall mail the same to the clerk of the court in which such action or proceeding is pending and in respect of which such process, notice or demand was issued. Such mailing, in addition to the return by the sheriff, shall constitute the due return required by law. The clerk of the court shall thereupon file the same as a paper in such action or proceeding.

(d) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. The refusal of any such foreign or alien insurer to accept delivery of the registered mail provided for in subsection (b) of this section or the refusal to sign the return receipt shall not affect the validity of such service; and any foreign or alien insurer refusing to accept delivery of such registered mail shall be charged with knowledge of the contents of any process, notice or demand contained therein.

(e) Whenever service of process is made upon the Secretary of State as herein provided the defendant foreign or alien insurer shall have 30 days from the date when the defendant receives or refuses to accept the registered mail containing the copy of the complaint sent as in this section provided in which to appear and answer the complaint in the action or proceeding so instituted. Entries on the defendant's return receipt or the refused registered mail shall be sufficient evidence of such date. If the date of acceptance or refusal to accept the registered mail cannot be determined from the entries on the return receipt or from notations of the postal authorities on the envelope, then the date when the defendant accepted or refused to accept the registered mail shall be deemed to be the date that the return receipt or the registered mail was received back by the Secretary of State.

(f) The court in any action or proceeding in which service is made in the manner provided in the above paragraph may, in its discretion, order such postponement as may be necessary to afford such company reasonable opportunity to defend such action or proceeding.

(g) The Secretary of State shall keep a summarized record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(h) Nothing herein contained shall limit or affect the right to serve any process, notice or demand to be served upon an insurer in any other manner now or hereafter permitted by law.

(i) No judgment by default shall be entered in any such action or proceeding until the expiration of 30 days from the date of the filing of the affidavit of compliance. (1967, c. 909, s. 1.)

§ 58-54.25:1: Repealed by Session Laws 1971, c. 1204.

Article 3D.

Unauthorized Insurance by Domestic Companies.

§ 58-54.26. Purpose of Article.

It is the purpose of this Article to effectively control and regulate the activities of domestic insurance companies so as to prevent them from engaging in and transacting insurance business in states and jurisdictions in which they are not authorized to do a business of insurance. The General Assembly recognizes that insofar as domestic companies of this State engage in transacting insurance business in states and jurisdictions in which they are not authorized to do business that such activity subjects the domestic companies of this State to the penalties for such unlawful activities in other states and jurisdictions, and that such activities tend to substantially impair the effectiveness of the domestic companies in this State. The General Assembly also recognizes that the practices of unauthorized insurers could be largely corrected if each state would effectively regulate the activities of its domestic companies. The provisions of this Article are in addition to all other statutory provisions designed to control the activities of domestic companies and nothing

herein shall be construed to amend, modify or repeal the provisions of existing laws. (1967, c. 935, s. 1.)

§ 58-54.27. Domestic insurers prohibited from transacting business in foreign states without authorization; exceptions.

Except as hereinafter provided, no domestic insurer organized under the laws of this State shall transact or attempt to transact or solicit business in any manner or accept risks in any jurisdiction in which such insurer is not licensed in accordance with the laws of such jurisdiction. There is excepted from the terms of this section the following acts and transactions:

(1) Contracts entered into by a domestic company insuring a risk within a foreign state or jurisdiction, where the law of the foreign state or jurisdiction permits an unauthorized insurer to so contract;
(2) Contracts entered into where the prospective insured is personally present in the state in which the insurer is authorized to transact business when he signs the application;
(3) Contracts of reinsurance between a licensed insurer of the foreign state or jurisdiction and a domestic company;
(4) The issuance of certificates under a lawfully transacted group life or group disability policy, where the master policy was entered into in a state in which the insurer was then authorized to transact business;
(5) The renewal or continuance in force, with or without modification, of contracts otherwise lawful and which were not originally executed in violation of this section. (1967, c. 935, s. 1.)

§ 58-54.28. Domestic insurers; advertising; exceptions.

No domestic insurer shall knowingly solicit or advertise its insurance business in a state or jurisdiction in which it is not licensed as an authorized insurer. Provided, however, that this section shall not prohibit a domestic insurer from advertising through publications, radio or television if such advertising is not expressly directed toward the residents or subjects of insurance in a foreign state or other jurisdiction. Nor shall this section apply to trade journals or directories. (1967, c. 935, s. 1.)

§ 58-54.29. Penalties provided for unauthorized acts.

Whenever any domestic insurer shall knowingly engage in the practice of soliciting, advertising or making contracts for insurance in states or jurisdictions in which it is not licensed, the North Carolina Commissioner of Insurance shall be authorized, as hereinafter provided, to issue an order requiring such company to cease and desist from engaging in such activities and, for the purposes of this section, the acts prohibited by G.S. 58-54.28 and the foregoing sections, are declared to be an unfair trade practice within the meaning of G.S. 58-54.4 and 58-54.9. Provided, whenever the Commissioner shall have reason to believe that any domestic company has been engaged or is engaging in the practice of knowingly soliciting, advertising or writing contracts of insurance on risks within a state or jurisdiction in which it is not licensed, he shall proceed to serve such company with notice of hearing and the hearing shall in all respects conform with the hearing procedure set forth in G.S. 58-54.6. Any action taken by the Commissioner of Insurance after such hearing shall be in compliance with G.S. 58-54.7, and any company aggrieved by an order of the Commissioner shall be entitled to that judicial review as is provided in G.S. 58-54.8. (1967, c. 935, s. 1.)

Article 4.

Insurance Premium Financing.

§ 58-55. Definitions.

When used in this Article:

(1) An insurance premium finance company is hereby defined to be:

a. Any person engaged, in whole or in part, in the business of entering into insurance premium finance agreements with insureds; or

b. Any person engaged, in whole or in part, in the business of acquiring insurance premium finance agreements from other insurance premium finance companies.

(2) "Insurance premium finance agreement" means a promissory note or other written agreement by which an insured promises or agrees to pay to, or to the order of, an insurance premium finance company the amount advanced or to be advanced under the agreement to an insurer or to an insurance agent, in payment of premiums on an insurance contract, together with a service charge as authorized and limited by this Article. (1963, c. 1118.)

Editor's Note. — Former Article 4, "Deposit of Securities," consisting of §§ 58-55 to 58-61, was transferred to §§ 58-188.1 to 58-188.7 by Session Laws 1945, c. 384.

CASE NOTES

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-56. License required; fees.

(a) No person except an authorized insurer shall engage in the business of an insurance premium finance company without obtaining a license from the Commissioner, as provided in this Article.

(b) Application for license required under this Article shall be in writing, and in the form prescribed by the Commissioner.

(c) When an applicant has more than one office, separate applications for license shall be made for each such office.

(d) At the time of filing an application for a license, the applicant shall pay to the Commissioner the license fee. Upon original application or upon application subsequent to denial of application, or revocation, suspension or surrender of a license, an examination fee may be required.

(e) There shall be two types of licenses issued to an insurance premium finance company:

(1) An "A" type license shall be issued to insurance premium finance companies whose business of insurance premium financing is limited to the financing of insurance premiums of one insurance agent or agency and whose primary function is to finance only the insurance premium of such agent or agency. The license fee for an "A" type license shall be two hundred dollars ($200.00) for each license year or part thereof.

(2) A "B" type license shall be issued to an insurance premium finance company whose business of insurance premium financing is not limited to the financing of insurance premiums of one insurance agent or agency and whose primary function is to finance the insurance premiums of more than one insurance agent or agency. The license fee

for a "B" type license shall be nine hundred fifty dollars ($950.00) for each license year or part thereof.

A branch office license may be issued for either an "A" type or "B" type license. The fee for the branch office license shall be fifty dollars ($50.00) for each license year or part thereof. The examination fee when required by this section shall be one hundred dollars ($100.00) per application. (1963, c. 1118; 1967, c. 1232, s. 1.)

Cross References. — As to exemption of insurance premium finance companies licensed under this Article from the license tax on loan agencies or brokers, see § 105-88 (b).

CASE NOTES

Fees Intended to Pay Expenses of Supervision. — The fees exacted of insurance premium financiers by this section and of persons engaged in business under the Consumers Finance Act by § 53-167 are intended to pay the necessary expenses of licensing, regulating, and supervising the business. Although any surplus collected under this section reverts to the general treasury of the State under § 58-61.1, this is merely an incidental budgetary provision. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-56.1. Exceptions to license requirements.

(a) Any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks, trust companies, installment paper dealers, auto finance companies, savings and loan associations, cooperative credit unions, agricultural credit corporations or associations, organized under the laws of North Carolina or any person, firm or corporation subject to the provisions of the North Carolina Consumer Finance Act and the North Carolina Motor Vehicle Dealers and Manufacturers Licensing Law, Article 12, Chapter 20, of the General Statutes of North Carolina are exempt from the provisions of this Article.

(b) An insurance company duly licensed in this State may make an installment payment charge as set forth in the rate filings and approved by the Commissioner and are thereby exempt from the provisions of this Article.

(c) A fire and casualty insurance agent or an insurance broker duly licensed in this State who extends credit to and only to his own policyholders may charge and collect finance charges or other fees at a periodic (monthly) rate as provided in G.S. 24-11(a), after said amount has been outstanding for 30 days, and is hereby exempt from the provisions of this Article. Notwithstanding the exceptions set forth in subsections (a), (b) and (c) of this section, when any person, firm, or corporation shall exercise a power of attorney taken in connection with the financing of an insurance premium, such person, firm or corporation shall comply with the requirements of G.S. 58-60, as if it were an insurance premium financing company. (1963, c. 1118; 1967, c. 942, s. 1; 1971, c. 1186, ss. 1, 2.)

Legal Periodicals. — For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

CASE NOTES

Those Subject to This Article Not Intended to Be Subject to Consumer Finance Act. — Had the legislature intended to subject to the provisions of the Consumer Finance Act those who make loans solely to finance insurance premiums, surely it would not have enacted this Article in the first instance, since it exempts from its provisions those subject to the Consumer Finance Act. The legislature did not deem it necessary for both the Commissioner of Banks and the Commissioner of Insurance to supervise an insurance premium financing company. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

Agent May Impose Finance Charge. — Section 24-11 and this section authorize an insurance agent who extends customer credit on an open account to impose a finance charge on his own customers in an amount not to exceed an aggregate annual rate of 18 percent. Hyde Ins. Agency, Inc. v. Noland, 30 N.C. App. 503, 227 S.E.2d 169 (1976).

Providing Notice Is Given at Time Credit Is Extended. — The creditor could collect a finance charge on an open insurance account under the provisions of § 24-11(a) provided the person to whom the credit was extended had been notified by the creditor when the credit was extended of all the details and circumstances pertaining to the imposition of finance charges. Hyde Ins. Agency, Inc. v. Noland, 30 N.C. App. 503, 227 S.E.2d 169 (1976).

It was the intention of the legislature to authorize the imposition of finance charges on an open insurance account, even though there had not been any prior express agreement between the parties regarding such charges. Such charges could not be imposed unless the debtor was given proper notice that the creditor intended to impose such finance charges. Hyde Ins. Agency, Inc. v. Noland, 30 N.C. App. 503, 227 S.E.2d 169 (1976).

§ 58-56.2. Issuance or refusal of license; bond; duration of license; renewal; one office per license; display of license; notice of change of location.

(a) Within 60 days after the filing of an application for a license accompanied by payment of the fees for license and examination, the Commissioner shall issue the license or may refuse to issue the license and so advise the applicant. The applicant shall submit with such application any and all information which the Commissioner may require to assist him in determining the financial condition, business integrity, method of operation and protection to the public offered by the person filing such application. The Commissioner may require a bond not to exceed twenty-five thousand dollars ($25,000) on applications and any renewal thereof. Such license to engage in business in accordance with the provisions of this Article at the location specified in the application shall be executed in duplicate by the Commissioner and he shall transmit one copy to the applicant and retain a copy on file.

(b) If the Commissioner refuses to issue a license, he shall notify the applicant of the denial, return to the applicant the sum paid as a license fee, but retain the examination fee to cover the cost of examining the applicant.

(c) Each license issued hereunder shall remain in full force and effect until the last day of June unless earlier surrendered, suspended, or revoked pursuant to this Article, and may be renewed for the ensuing license year upon the filing of an application and conforming with G.S. 58-56, but subject to all of the provisions of this Article. If an application for a renewal of a license is filed with the Commissioner before July 1 of any year, the license sought to be renewed shall be continued in full force and effect either until the issuance by the Commissioner of the renewal license applied for or until five days after the Commissioner refuses to issue such renewal license under the provisions of this Article.

(d) Only one office may be maintained under each license, but more than one license may be issued to the same licensee pursuant to this Article.

(e) Such license shall state the name and address of the licensee and shall at all times be prominently displayed in the office of the licensee and shall not be transferable or assignable.

(f) Before any licensee changes any office of his to another location, he shall give written notice thereof to the Commissioner. (1963, c. 1118; 1965, c. 1039.)

§ 58-56.3. Grounds for refusal, suspension or revocation of licenses; surrender of licenses; reinstatement.

(a) The Commissioner may forthwith deny, suspend, revoke, or refuse to renew or continue any license hereunder if he shall find that:

(1) The licensee has failed to pay the annual license fee or any sum of money lawfully demanded under authority of any section of this Article or has violated or failed to comply with any demand, ruling, provision or requirement of the Commissioner lawfully made pursuant to or within the authority of this Article.

(2) Any fact or condition exists which, if it had been known to exist at the time of the original application, would have caused the original license to have been refused.

(b) The Commissioner may revoke or suspend only the particular license with respect to which grounds for revocation or suspension may occur or exist; or if he shall find that such grounds for revocation or suspension are of general application to all offices, or to more than one office, operated by such licensee, he shall revoke or suspend all of the licenses issued to such licensee or such number of licenses as such grounds apply to, as the case may be.

(1) Any licensee may surrender any license by delivering to the Commissioner written notice that he thereby surrenders such license, but such surrender shall not affect such licensee's civil or criminal liability for acts committed prior to such surrender.

(2) No revocation or suspension or surrender of any license shall impair or affect the obligation of any insured under any lawful insurance premium finance agreement previously acquired or held by the licensee.

(3) Every license issued hereunder shall remain in force and effect until the same shall have been surrendered, revoked, suspended, or expires in accordance with the provisions of this Article; but the Commissioner shall have authority to reinstate suspended licenses or to issue new licenses to a licensee whose license or licenses shall have been revoked, if no fact or condition then exists which clearly would have warranted the Commissioner in refusing originally to issue such license under this Article. (1963, c. 1118.)

§ 58-57. Investigations; hearings.

For the purpose of conducting investigations and holding hearings on insurance premium finance companies, the Commissioner shall have the same authority as that vested in him by G.S. 58-9.2 and 58-44.6. (1963, c. 1118.)

§ 58-57.1. Licensee's books and records; reports; refusing to exhibit records; making false statements.

(a) The licensee shall keep and use in his business such books, accounts, and records as will enable the Commissioner to determine whether such licensee is complying with the provisions of this Article and with the rules and regulations lawfully made by the Commissioner hereunder. Every licensee shall preserve such books, accounts, and records, including cards used in a card

system, if any, for at least three years after making the final entry in respect to any insurance premium finance agreement recorded therein; provided, however, the preservation of photographic reproductions thereof or records in photographic form shall constitute compliance with this requirement. The Commissioner may require of licensees under oath and in the form prescribed by him regular or special reports as he may deem necessary to the proper supervision of licensees under this Article.

(b) Any person who shall refuse, on demand, to exhibit to the Commissioner of Insurance or to any deputy, or person acting with or for the Commissioner, the books, accounts or records as above provided, or who shall knowingly or willfully make any false statement in regard to the same shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1963, c. 1118.)

§ 58-57.2. Excessive insurance premium finance charges; penalty.

The knowingly taking, receiving, reserving, [or] charging a greater insurance premium finance charge than that authorized in this Article shall be held and adjudged a forfeiture of the entire insurance premium finance charge which the insurance premium finance agreement carries with it, or which has been agreed to be paid thereon; and if a greater insurance premium finance charge has been paid, the person paying the same or his legal representative may recover from the insurance premium finance company twice the entire amount of the insurance premium finance thus paid if action therefor is brought within two years from the time of such payment. (1963, c. 1118.)

§ 58-57.3. Rebates and inducements prohibited; assignment of insurance premium finance agreements.

(a) No insurance premium finance company, and no employee of such a company shall pay, allow, or offer to pay or allow in any manner whatsoever to an insurance agent or any employee of an insurance agent, or to any other person, or as an inducement to the financing of an insurance policy with the insurance premium finance company or after any such policy has been financed, any rebate whatsoever, either from the service charge for financing specified in the insurance premium finance agreement or otherwise, or shall give or offer to give any valuable consideration or inducement of any kind directly or indirectly, other than an article of merchandise not exceeding one dollar ($1.00) in value which shall have thereon the advertisement of the insurance premium finance company; but an insurance premium finance company may purchase or otherwise acquire an insurance premium finance agreement provided that it conforms to this Article in all respects, from another insurance premium finance company with recourse against the insurance premium finance company on such terms and conditions as may be mutually agreed upon and such terms and conditions shall be subject to the approval of the Commissioner.

(b) No filing of the assignment or notice thereof to the insured shall be necessary to the validity of the written assignment of an insurance premium finance agreement as against creditors or subsequent purchases, pledges, or encumbrancers of the assignor. (1963, c. 1118.)

§ 58-58. Filing and approval of forms and service charges.

(a) No insurance premium finance agreement form or related form shall be used in this State unless it has been filed with and written approval given by the Commissioner.

(b) In addition each insurance premium finance company shall file with the Commissioner the service charge rate plan to be used in insurance premium financing including all modifications of service charges to be paid by the insured or others under the insurance premium finance agreement. Such filings shall not be used in this State until written approval has been given by the Commissioner. (1963, c. 1118.)

§ 58-58.1. Form, contents and execution of insurance premium finance agreements.

(a) An insurance premium finance agreement shall be in writing, dated, signed by the insured, and the printed portion thereof shall be in at least eight point type. It shall contain the entire agreement of the parties with respect to the insurance contract, the premiums for which are advanced or to be advanced under it, and:

(1) At its top, the words "INSURANCE PREMIUM FINANCE AGREEMENT" or similar wording in at least 10 point bold type; and the insurance premium finance company license number shall also appear, and:

(2) A notice in at least eight point bold type, reading as follows: "NOTICE":

a. Do not sign this agreement before you read it.

b. You are entitled to a copy of this agreement.

c. Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the service charge.

(b) An insurance premium finance agreement shall:

(1) Contain the name and place of business of the insurance agent negotiating the related insurance contract, the name and residence or the place of business of the insured as specified by him, the name and place of business of the insurance premium finance company to which installments or other payments are to be made, a description of the insurance contract, the premiums for which are advanced or to be advanced under the agreement, and the amount of the premiums for such insurance contract; and

(2) Set forth the following items:

a. The total amount of the premiums;

b. The amount of the down payment;

c. The principal balance, which is the difference between items a and b;

d. The amount of the service charge;

e. The balance, which is the sum of items c and d, payable by the insured, the number of installments required, the amount of each installment expressed in dollars and the due date or period thereof.

(c) The items need not be stated in the sequence or order set forth above, inapplicable items may be omitted; additional items may be included to explain the computations made in determining the amount to be paid by the insured.

(d) No insurance premium finance agreement shall be signed by an insured when it contains any blank space to be filled in after it has been signed; however, if the insurance contract, the premiums for which are advanced or to

be advanced under the agreement, has not been issued at the time of its signature by the insured and it so provides, the name of the authorized insurer by whom such insurance contract is issued and the policy number and the due date of the first installment may be left blank and later inserted in the original of the agreement after it has been signed by the insured. (1963, c. 1118.)

CASE NOTES

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-59. Limitations on service charges; computation; minimum charges.

(a) An insurance premium finance company shall not directly or indirectly except as otherwise provided by law, impose, take, receive from, reserve, contract for, or charge an insured greater service charges than are permitted by this Article. No insurance premium finance company shall be permitted to charge or finance any membership fees, dues, registration fees, or any other charges except the service charges provided for in this Article for financing insurance premiums on policies of insurance lawfully placed in this State.

(b) An insurance premium finance company may, in an insurance premium finance agreement, contract for, charge, receive, and collect a service charge for financing the premiums under the agreement computed as provided in subsection (c).

(c) The service charge provided for in this section shall be computed on the principal balance of the insurance premium finance agreement from the inception date of the insurance contract, the premiums for which are advanced or to be advanced under the agreement unless otherwise provided under rules and regulations prescribed by the Commissioner, to and including the date when the final installment of the insurance premium finance agreement is payable, at a rate not exceeding twelve dollars ($12.00) per one hundred dollars ($100.00) per annum; plus a nonrefundable origination fee which shall not exceed fifteen dollars ($15.00) per premium finance agreement.

(d) The provisions of subsection (c) apply if the premiums under only one insurance contract are advanced or are to be advanced under an insurance premium finance agreement; if premiums under more than one insurance contract are advanced or are to be advanced under an insurance premium finance agreement, the service charge shall be computed from the inception date of such insurance contracts, or from due date of such premiums; however, not more than one minimum service charge shall apply to each insurance premium finance agreement.

(e) No insurance agent or insurance premium finance company shall induce an insured to become obligated under more than one insurance premium finance agreement for the purpose of or with the effect of obtaining service charges in excess of those authorized by this Article.

(f) A premium service agreement may provide for the payment by the insured of a delinquency and collection charge on each installment in default for a period of not less than five days in an amount of one dollar ($1.00) or a maximum of five percent (5%) of such installment, whichever is greater, provided that only one such delinquency and collection charge may be collected on any such installment regardless of the period during which it remains in default. (1963, c. 1118; 1967, c. 824; 1979, 2nd Sess., c. 1083, ss. 1, 2; 1981, c. 394, s. 1.)

Effect of Amendments. — The 1981 amendment, ratified May 14, 1981, and effective 30 days after ratification, substituted "fifteen dollars ($15.00)" for "ten dollars ($10.00)" near the end of subsection (c).

§ 58-59.1. Prohibited provisions in insurance premium finance agreements.

No insurance premium finance agreement shall contain any provisions by which:

(1) In the absence of default of the insured, the insurance premium finance company holding the agreement may, arbitrarily and without reasonable cause, accelerate the maturity of any part or all of the amount owing thereunder;

(2) A power of attorney is given to confess judgment in this State; or

(3) The insured relieves the insurance agent or the insurance premium finance company holding the agreement from liability for any legal rights or remedies which the insured may otherwise have against him. (1963, c. 1118.)

§ 58-59.2. Delivery of copy of insurance premium finance agreement to insured.

Before the due date of the first installment payable under an insurance premium finance agreement, the insurance premium finance company holding the agreement or the insurance agent shall deliver to the insured, or mail to him at his address as shown in the agreement, a copy of the agreement. (1963, c. 1118.)

§ 58-59.3. Payments by insured without notice of assignment of agreement.

Unless the insured has notice of actual or intended assignment of the insurance premium finance agreement, payment thereunder by him to the last known holder of the agreement shall be binding upon all subsequent holders or assignees. (1963, c. 1118.)

§ 58-59.4. Statement of account; release on payment in full.

(a) At any time after its execution, but not later than one year after the last payment thereunder, an insurance premium finance company holding an insurance premium finance agreement shall, upon written request of the insured, give or mail to him a written statement of the dates and amounts of payments and the total amount, if any, unpaid thereunder.

(b) After the payment of all sums for which an insured is obligated under an insurance premium finance agreement, and upon his written demand, the insurance premium finance company holding the agreement shall deliver, or mail to the insured at his last known address, such one or more good and sufficient instruments as may be necessary to acknowledge payment in full and to release all interest in or rights to the insurance contracts, the premiums for which were advanced or are to be advanced under the agreement. (1963, c. 1118.)

§ 58-59.5. Credit upon anticipation of payments.

(a) Notwithstanding the provisions of any insurance premium finance agreement to the contrary, any insured may pay it in full at any time before the maturity of the final installment of the balance thereof; and, if he does so and the agreement included an amount for service charge, he shall receive and be entitled to receive for such anticipation a refund credit thereon.

(b) The amount of any such refund credit shall represent at least as great proportion of the service charge, if any, as the sum of the periodic balances after the month in which prepayment is made bears to the sum of all periodic balances under the schedule of installments in the agreement. Where the amount of the refund credit for anticipation of payment is less than one dollar ($1.00), no refund need be made. (1963, c. 1118; 1981, c. 394, s. 2.)

Effect of Amendments. — The 1981 amendment, ratified May 14, 1981, and effective 30 days after ratification, deleted the former third sentence, providing the refund credit when the earned for minimum service charge amounted to less than twelve dollars, and the former fourth sentence, defining "earned service charge," in subsection (b).

§ 58-60. Procedure for cancellation of insurance contract upon default; return of unearned premiums; collection of cash surrender value.

When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions:

(1) Not less than 10 days' written notice be mailed to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. A notice thereof shall also be mailed to the insurance agent.

(2) After expiration of such period, the insurance premium finance company shall mail the insurer a request for cancellation, including a copy of the power of attorney, and shall mail a copy of the request for cancellation to the insured at his last known address as shown on the insurance premium finance agreement.

(3) Upon receipt of a copy of such request for cancellation notice by the insurer or insurers, the insurance contract shall be cancelled with the same force and effect as if the aforesaid request for cancellation had been submitted by the insured himself, without requiring the return of the insurance contract or contracts.

(4) All statutory, regulatory, and contractual restrictions providing that the insured may not cancel his insurance contract unless he or the insured first satisfies such restrictions by giving a prescribed notice to a governmental agency, the insurance carrier, an individual, or a person designated to receive such notice for said governmental agency, insurance carrier, or individual shall apply where cancellation is effected under the provisions of this section.

(5) Whenever an insurance contract is cancelled in accordance with this section, the insurer shall promptly return whatever gross unearned premiums are due under the contract to the insurance premium finance company effecting the cancellation for the benefit of the insured or insureds. Whenever the return premium is in excess of the

amount due the insurance premium finance company by the insured under the agreement, such excess shall be remitted promptly to the order of the insured, subject to the minimum service charge provided for in this Article.

(6) The provisions of this section relating to request for cancellation by the insurance premium finance company of an insurance contract and the return by an insurer of unearned premiums to the insurance premium finance company, also, apply to the surrender by the insurance premium finance company of an insurance contract providing life insurance and the payment by the insurer of the cash value of the contract to the insurance premium finance company, except that the insurer may require the surrender of the insurance contract. (1963, c. 1118; 1967, c. 825; 1969, c. 941.)

CASE NOTES

Authority to Cancel Policy and Collect Unearned Premium as Security. — The authority given by a borrower to an insurance premium finance company to cancel the policy and collect the unearned premium upon the borrower's default is security analogous to a chattel mortgage or a conditional sale. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

The burden is upon the insurance company to show that all statutory requirements have been complied with, including the 10 days' written notice by the premium finance company to the insured, together with said notice to the insurance agent, prior to the premium finance company requesting cancellation of the policy. Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968).

The burden of proving cancellation by the insured or his agent is on the insurance company. Ingram v. Nationwide Mut. Ins. Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969).

To avoid liability to a third-party beneficiary of an assigned risk automobile insurance policy, the insurer must allege and prove cancellation and termination of the policy in accordance with the applicable statutes. Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Redress of Insurance Company Where Finance Company Wrongfully Requests Cancellation. — If the premium finance company misleads the insurance company wrongfully by requesting cancellation of the policy, the insurance company can seek redress from the premium finance company. Ingram v. Nationwide Mut. Ins. Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969).

Applied in Graves v. ABC Roofing Co., 55 N.C. App. 252, 284 S.E.2d 718 (1981).

Stated in Hayes v. Hartford Accident & Indem. Co., 274 N.C. 73, 161 S.E.2d 552 (1968).

§ 58-61. Violations; penalties.

Any person who shall engage in the business referred to in this Article without first receiving a license, or who shall fail to secure a renewal of his license upon the expiration of the license year, or shall engage in the business herein referred to after the license has been suspended or revoked as herein provided, or who shall fail or refuse to furnish the information required of the Commissioner, or who shall willfully and knowingly enter false information on an insurance premium finance agreement, or who shall fail to observe the rules and regulations made by the Commissioner pursuant to this Article, shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or be imprisoned, or both, at the discretion of the court. (1963, c. 1118; 1965, c. 1040.)

§ 58-61.1. Disposition of fees.

All fees collected hereunder shall be credited to the account of the Insurance Commissioner for the specific purpose of providing the personnel, equipment and supplies necessary to enforce this Article, but the Director of the Budget shall have the right to budget the revenues received in accordance with the requirements of the Commissioner for the purposes herein required, and at the end of the fiscal year, if any sum whatever shall remain to the credit of the Commissioner, derived from the sources herein referred to, the same shall revert to the general treasury of the State to be appropriated as other funds. (1963, c. 1118.)

CASE NOTES

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

ARTICLE 4A.

Insurance Business through Credit Cards Prohibited.

§ 58-61.2. Solicitation, negotiation or payment of premiums on insurance policies through credit card facilities prohibited; exceptions.

Except as otherwise provided herein, no authorized insurer and no representative of such insurer or insurance broker shall employ or avail itself of the facilities of any person, firm or corporation engaged in the credit card business to solicit or negotiate any contract of insurance upon any life or risk within the State of North Carolina, or accept the payment of premiums upon a policy of insurance, insuring any life or risk in the State of North Carolina, through the use of any credit card facility. Except as otherwise provided herein, no person, firm or corporation engaged in the business of extending credit through a credit card system shall, on behalf of any insurer, its representative or any insurance broker, utilize his or its credit card facilities to solicit for, negotiate contracts of insurance or accept the payment of premiums upon any contract of insurance from credit card holders or prospective credit card holders who reside in this State. The solicitation for and the negotiation of policies of insurance prohibited by this section shall include, but shall not be limited to, the transmittal of applications for insurance, premium rate schedules, circulars, letters or sales literature pertaining to insurance to credit card holders or prospective credit card holders who reside in this State. Credit card business as used in this section shall mean the business of extending credit to persons who are holders of credit cards issued by the credit card facility or organization entitling the holder to pay charges for purchases or other transactions through the use of credit card facilities.

Nothing in this Article shall prohibit an authorized insurer, the representative of such insurer, or an insurance broker from accepting payment of an insurance premium through a credit card facility provided and operated by a banking corporation principally domiciled in this State and doing business under the laws of the State of North Carolina or the United States. No such bank shall be prohibited from making such credit card facility available for this limited purpose, provided, that all records relating to the payment of insurance premiums through such credit card facility are maintained within the State of North Carolina.

Nothing in this Article shall prohibit an authorized insurer, the representative of such insurer, or an insurance broker from notifying its or his customers or prospective customers through means other than credit card facilities of the availability of credit card facilities for the payment of insurance premiums.

Nothing in this Article shall prohibit any authorized insurer qualified to do business in the State of North Carolina pursuant to the provisions of this Chapter, and any representative of such insurer or insurance broker, from employing or availing itself of the facilities of any person, firm or corporation engaged in the business of extending credit through a credit card system for the limited purposes of soliciting for or negotiating any contract of travel accident insurance upon any life or risk within the State of North Carolina arising from travel, including but not limited to airline flight insurance, or accepting the payment of premiums thereon, through the use of any credit card facility. Nor shall anything in this Article prohibit any person, firm or corporation engaged in the business of extending credit through a credit card system on behalf of any insurer, its representative or any insurance broker, from utilizing his or its credit card facilities for the limited purposes of soliciting for or negotiating contracts of travel accident insurance, including but not limited to airline flight insurance, or accepting the payment of premiums thereon, from credit card holders or prospective credit card holders who reside in this State. (1967, c. 1245; 1979, c. 528.)

OPINIONS OF ATTORNEY GENERAL

The 1979 amendment to this section permits insurance premiums to be charged to a credit card facility respecting travel accident insurance as to both public and private modes of transportation. See opinion of Attorney General to Joseph E. Johnson, Representative, 15th District, 49 N.C.A.G. 116 (1980).

Article 5.

License Fees and Taxes.

§ 58-62. Commissioner to report and pay monthly.

On or before the tenth day of each month the Commissioner of Insurance shall furnish to the Auditor a statement in detail of the taxes and license fees received by him during the previous month, and shall pay to the Treasurer the amount in full of such taxes and fees. The Auditor may examine the accounts of the Commissioner of Insurance and check them up with said statement. (1899, c. 54, s. 82; 1901, c. 391, s. 7; 1905, c. 430, s. 4; Rev., s. 4714; C. S., s. 6317.)

CASE NOTES

Payment of Penalty Imposed by § 58-44.6 to State Treasurer. — By clear implication of this section and § 58-63, the amount of any monetary civil penalty imposed and collected as authorized by § 58-44.6 should be paid over to the State Treasurer. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35, rev'd on other grounds, 274 N.C. 486, 164 S.E.2d 161 (1968).

§ 58-63. Schedule of fees and charges.

The Commissioner of Insurance shall collect and pay into the State treasury fees and charges as follows:

(1) For filing and examining statement preliminary to admission, twenty dollars ($20.00); for filing and auditing annual statement, ten dollars ($10.00); for filing any other papers required by law, one dollar ($1.00); for each certificate of examination, condition, or qualification of company or association, two dollars ($2.00); for each seal when required, one dollar ($1.00); for filing charter and other papers of a fraternal order, preliminary to admission, twenty-five dollars ($25.00).

(2) Repealed by Session Laws 1977, c. 376, s. 2.

(3) The Commissioner shall receive for copy of any record or paper in his office fifty cents (50¢) per copy sheet and one dollar ($1.00) for certifying same, or any fact or data from the records of his office; for examination of any foreign company, not less than forty dollars ($40.00) per diem and all expenses or the fees as prescribed by the Examination Committee of the National Association of Insurance Commissioners, and for examining any domestic company, actual expenses incurred; for the examination and approval of charters of companies, five dollars ($5.00). Notwithstanding the provisions of G.S. 138-6, the Commissioner of Insurance is authorized to pay examiners an amount in lieu of traveling expenses equal to the rate charged to and collected from the companies, associations or orders. For the investigation of tax returns and the collection of any delinquent taxes disclosed by such investigation, the Commissioner may, in lieu of the above per diem charge, assess against any such delinquent company the expense of the investigation and collection of such delinquent tax, a reasonable percentage of such delinquent tax, not to exceed ten per centum (10%) of such delinquency, and in addition thereto.

(4) He shall collect all other fees and charges due and payable into the State treasury by any company, association, order, or individual under his Department. (1899, c. 54, ss. 50, 68, 80, 81, 82, 87, 90, 92; 1901, c. 391, s. 7, c. 706, s. 2; 1903, c. 438, ss. 7, 8, c. 536, s. 4, cc. 680, 774; 1905, c. 588, s. 68; Rev., s. 4715; 1913, c. 140, s. 1; 1919, c. 186, s. 6; C.S., s. 6318; 1921, c. 218; 1935, c. 334; 1939, c. 158, s. 208; 1945, c. 386; 1947, c. 721; 1957, cc. 133, 1047; 1959, c. 911; 1963, c. 692; 1977, c. 376, s. 2; c. 802, s. 50.)

CASE NOTES

Payment of Penalty Imposed by § 58-44.6 to State Treasurer. — By clear implication of this section and § 58-62, the amount of any monetary civil penalty imposed and collected as authorized by § 58-44.6 should be paid over to the State Treasurer. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35, rev'd on other grounds, 274 N.C. 486, 164 S.E.2d 161 (1968).

§ 58-64: Repealed by Session Laws 1945, c. 386.

§ 58-65. Licensing of underwriters reinsurance agencies.

An underwriters agency, composed of two or more companies, proposing to do a reinsurance business only in the State may be licensed without a separate license for each company, upon filing with the Commissioner of Insurance a statement of each company, the amount proposed to be assumed by them, and such other information as he may call for, showing that the companies are solvent and propose to conduct the business in a way that would be safe and fair to the citizens of the State. (1919, c. 186, s. 6; C. S., s. 6318.)

§ 58-66. Licenses run from July 1; pro rata payment.

The license required of insurance companies shall continue for the next ensuing 12 months after July 1 of each year, unless revoked as provided in this Chapter; but the Commissioner of Insurance may, when the annual license tax exceeds twenty-five dollars ($25.00), receive from applicants after July 1 so much of the license fee required by law as may be due pro rata for the remainder of the year, beginning with the first day of the current month. Application for renewal of the company license must be submitted on or before the first day of March on a form to be supplied by the Commissioner of Insurance. Upon satisfying himself that the company has met all requirements of law and appears to be financially solvent he shall forward renewal license to the company. Any company which does not qualify for renewal license before July 1 shall cease to do business in the State of North Carolina as of July 1, unless license is sooner revoked by the Commissioner.

Before issuing any license for the year, beginning July 1, 1955, the Commissioner shall collect, in addition to the annual license fee, a pro rata fee for the three months of April, May and June, 1955, collection of which fee shall extend licenses expiring April 1, 1955, until July 1, 1955, if accepted by the Commissioner of Insurance.

Nothing contained in this section shall be interpreted as applying to licenses issued to individual representatives of insurance companies, as listed in G.S. 105-228.7, which licenses shall run from April 1 of each year. (1899, c. 54, s. 78; Rev., s. 4718; C. S., s. 6321; 1955, c. 179, s. 1.)

CASE NOTES

Cited in National Home Life Assurance Co. v. Ingram, 21 N.C. App. 591, 205 S.E.2d 313 (1974).

§ 58-67. Statements of gross receipts filed and tax paid.

Every general agent shall, within the first 30 days of January and July of each year, make a full and correct statement, under oath of himself and of the president, secretary, or some officer at the home or head office of the company in this country, of the amount of the gross receipts derived from the insurance business under this Chapter obtained from residents of this State, or on property located therein during the preceding six months, and shall, within the first 15 days of February and August of each year, pay to the Commissioner of Insurance the tax imposed upon such gross receipts. (1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; Rev., s. 4719; C.S., s. 6322.)

§ 58-68. Policyholders to furnish information.

To enable the Commissioner of Insurance the better to enforce the payment of the taxes imposed by this Chapter and by G.S. 105-121 every corporation, firm, or individual doing business in the State shall, upon demand of the Commissioner, furnish to him, upon blanks to be provided by him, a statement of the amount of all insurance held by them, giving the name of the company, number, and amount of policies and the premiums paid on each, and such other information as the Commissioner calls for, or shall file an affidavit with the Commissioner that all their insurance is placed in companies licensed to do business in this State. (1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; Rev., s. 4720; C.S., s. 6323.)

Editor's Note. — Section 105-121, referred to in this section, has been repealed.

SUBCHAPTER II. INSURANCE COMPANIES.

ARTICLE 6.

General Domestic Companies.

§ 58-69. Application of this Chapter and general laws.

The general provisions of law relative to the powers, duties, and liabilities of corporations apply to all incorporated domestic insurance companies where pertinent and not in conflict with other provisions of law relative to such companies or with their charters. All insurance companies of this State shall be governed by this Chapter, notwithstanding anything in their special charters to the contrary, provided notice of the acceptance of this Chapter is filed with the Commissioner of Insurance. (1899, c. 54, s. 19; Rev., s. 4721; C.S., s. 6324.)

§ 58-70. Extension of existing charters.

Domestic insurance companies incorporated by special acts, whose charters are subject to limitation of time, shall, after the limitation expires, and upon filing statement and paying the taxes and fees required for an amendment of the charter, continue to be bodies corporate, subject to all general laws applicable to such companies. (1899, c. 54, s. 20; Rev., s. 4722; C.S., s. 6325.)

§ 58-71. Certificate required before issuing policies.

No domestic insurance company may issue policies until upon examination of the Commissioner of Insurance, his deputy or examiner, it is found to have complied with the laws of the State, and until it has obtained from the Commissioner of Insurance a certificate setting forth that fact and authorizing it to issue policies. The issuing of policies in violation of this section renders the company liable to the forfeiture prescribed by law, but such policies are binding upon the company. (1899, c. 54, ss. 21, 99; 1903, c. 438, s. 10; Rev., s. 4723; C.S., s. 6326.)

§ 58-72. Kinds of insurance authorized.

The kinds of insurance which may be authorized in this State, subject to the other provisions of this Chapter, are set forth in the following paragraphs. Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits resulting therefrom; but no kind of insurance shall be deemed to include life insurance or insurance against legal liability for personal injury or death unless specified herein. In addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions of this Chapter, any insurer authorized to do business in this State may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this State. Each of the following paragraphs indicates the scope of the kind of insurance business specified therein:

(1) "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured, including industrial sick benefit; and optional modes of settlement of proceeds.

(2) "Annuities," meaning all agreement to make periodical payments, whether in fixed or variable dollar amounts, or both, where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of subdivision (1).

(3) "Accident and health insurance," meaning

a. Insurance against death or personal injury by accident or by any specified kind or kinds of accident and insurance against sickness, ailment or bodily injury except as specified in paragraph b following; and

b. Noncancellable disability insurance, meaning insurance against disability resulting from sickness, ailment or bodily injury (but not including insurance solely against accidental injury), under any contract which does not give the insurer the option to cancel or otherwise terminate the contract at or after one year from its effective date or renewal date.

(4) "Fire insurance," meaning insurance against loss of or damage to any property resulting from fire, including loss or damage incident to the extinguishment of a fire or to the salvaging of property in connection therewith.

(5) "Miscellaneous property insurance," meaning loss of or damage to property resulting from

a. Lightning, smoke or smudge, windstorm, tornado, cyclone, earthquake, volcanic eruption, rain, hail, frost and freeze, weather or climatic conditions, excess or deficiency of moisture, flood, the rising of the waters of the ocean or its tributaries, or

b. Insects, or blights, or from disease of such property other than animals, or

c. Electrical disturbance causing or concomitant with a fire or an explosion in public service or public utility property, or

d. Bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, any order of a civil authority made to prevent the spread of a conflagration, epidemic or catastrophe, vandalism or malicious mischief, strike or lockout, or explosion; but not including any kind of insurance specified in subdivision (9), except insurance against loss or damage to property resulting from

1. Explosion of pressure vessels (except steam boilers of more than 15 pounds pressure) in buildings designed and used solely for residential purposes by not more than four families,
2. Explosion of any kind originating outside of the insured building or outside of the building containing the property insured,
3. Explosion of pressure vessels which do not contain steam or which are not operated with steam coils or steam jackets,
4. Electrical disturbance causing or concomitant with an explosion in public service or public utility property.

(6) "Water damage insurance," meaning insurance against loss or damage by water or other fluid or substance to any property resulting from the breakage or leakage of sprinklers, pumps or other apparatus erected for extinguishing fires or of water pipes or other conduits or containers, or resulting from casual water entering through leaks or openings in buildings or by seepage through building walls, but not including loss or damage resulting from flood or the rising of the waters of the ocean or its tributaries; and including insurance against accidental injury of such sprinklers, pumps, fire apparatus, conduits or containers.

(7) "Burglary and theft insurance," meaning

a. Insurance against loss of or damage to any property resulting from burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation or wrongful conversion, disposal or concealment by any person or persons, or from any attempt at any of the foregoing, and

b. Insurance against loss of or damage to moneys, coins, bullion, securities, notes, drafts, acceptances or any other valuable papers or documents, resulting from any cause, except while in the custody or possession of and being transported by any carrier for hire or in the mail.

(8) "Glass insurance," meaning insurance against loss of or damage to glass and its appurtenances resulting from any cause.

(9) "Boiler and machinery insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the explosion of or injury to

a. Any boiler, heater or other fired pressure vessel;
b. Any unfired pressure vessel;
c. Pipes or containers connected with any of said boilers or vessels;
d. Any engine, turbine, compressor, pump or wheel;
e. Any apparatus generating, transmitting or using electricity;
f. Any other machinery or apparatus connected with or operated by any of the previously named boilers, vessels or machines;

and including the incidental power to make inspections of and to issue certificates of inspection upon, any such boilers, apparatus, and machinery, whether insured or otherwise.

(10) "Elevator insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the ownership, maintenance or use of elevators, except loss or damage by fire.

(11) "Animal insurance," meaning insurance against loss of or damage to any domesticated or wild animal resulting from any cause.

(12) "Collision insurance," meaning insurance against loss of or damage to any property of the insured resulting from collision of any other object with such property, but not including collision to or by elevators or to or by vessels, craft, piers or other instrumentalities of ocean or inland navigation.

(13) "Personal injury liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, and including an obligation of the insurer to pay medical, hospital, surgical and funeral benefits and in the case of automobile liability insurance including also disability and death benefits to injured persons, irrespective of legal liability of the insured, arising out of the death or injury of any person, or arising out of injury to the economic interests of any person as a result of negligence in rendering expert, fiduciary or professional service, but not including any kind of insurance specified in subdivision (15).

(14) "Property damage liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, arising out of the loss or destruction of, or damage to, the property of any other person, but not including any kind of insurance specified in subdivision (13) or (15).

(15) "Workers' compensation and employer's liability insurance," meaning insurance against the legal liability, whether imposed by common law or by statute or assumed by contract, of any employer for the death or disablement of, or injury to, his or its employee.

(16) "Fidelity and surety insurance," meaning

a. Guaranteeing the fidelity of persons holding positions of public or private trust;

b. Becoming surety on, or guaranteeing the performance of, any lawful contract except the following:

1. A contract of indebtedness secured by title to, or mortgage upon, or interest in, real or personal property;

2. Any insurance contract except reinsurance;

c. Becoming surety on, or guaranteeing the performance of, bonds and undertakings required or permitted in all judicial proceedings or otherwise by law allowed, including surety bonds accepted by states and municipal authorities in lieu of deposits as security for the performance of insurance contracts;

d. Guaranteeing contracts of indebtedness secured by any title to, or interest in, real property, only to the extent required for the purpose of refunding, extending, refinancing, liquidating or salvaging obligations heretofore lawfully made and guaranteed;

e. Indemnifying banks, bankers, brokers, financial or moneyed corporations or associations against loss resulting from any cause of bills of exchange, notes, bonds, securities, evidences of debts, deeds, mortgages, warehouse receipts, or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, including any loss while the same are being transported in armored motor vehicles, or by messenger, but not including any other risks of transportation or navigation; also against loss or damage to such an insured's premises, or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

(17) "Credit insurance," meaning indemnifying merchants or other persons extending credit against loss or damage resulting from the nonpayment of debts owed to them; and including the incidental power to acquire and dispose of debts so insured, and to collect any debts owed to such insurer or to any person so insured by him including without limiting the foregoing, mortgage guaranty insurance which is insurance against financial loss by reason of the nonpayment of principal, interest and other sums agreed to be paid under the terms of any note or bond, or other evidence of indebtedness secured by a security interest, mortgage, deed of trust, or other instrument constituting a lien or charge on real estate, or on such personal property as the Commissioner may from time to time approve.

(18) "Title insurance," meaning insuring the owners of real property and chattels real and other persons lawfully interested therein against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property, including the power to procure and furnish information relative thereto, and such other incidental powers as are specifically granted in this Chapter.

(19) "Motor vehicle and aircraft insurance," meaning insurance against loss of or damage resulting from any cause to motor vehicles or aircraft and their equipment, and against legal liability of the insured for loss or damage to the property of another resulting from the ownership, maintenance or use of motor vehicles or aircraft and against loss, damage or expense incident to a claim of such liability.

(20) "Marine insurance," meaning insurance against any and all kinds of loss or damage to:

a. Vessels, craft, aircraft, cars, automobiles and vehicles of every kind, as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit, or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marine builder's risks and all personal property floater risks, and

b. Person or to property in connection with or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance (but not including life insurance or surety bonds nor insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance or use of automobiles), and

c. Precious stones, jewels, jewelry, gold, silver and other precious metals, whether used in business or trade or otherwise and whether the same be in course of transportation or otherwise, and

d. Bridges, tunnels and other instrumentalities of transportation and communication (excluding buildings, their furniture and furnishings, fixed contents and supplies held in storage) unless fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion are the only hazards to be covered; piers,

wharves, docks and slips, excluding the risks of fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion; other aids to navigation and transportation, including dry docks and marine railways against all risks.

(21) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

(22) "Miscellaneous insurance," meaning insurance against any other casualty authorized by the charter of the company, not included in subdivisions (1) to (21) inclusive of this section, which is a proper subject of insurance. No corporation so formed may transact any other business than that specified in its charter and articles of association. (1899, c. 54, ss. 24, 26; 1903, c. 438, s. 1; Rev., s. 4726; 1911, c. 111, s. 1; C.S., s. 6327; 1945, c. 386; 1947, c. 721; 1953, c. 992; 1967, c. 624, s. 1; 1969, c. 616, s. 1; 1979, c. 714, s. 2.)

CASE NOTES

Quoted in Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

§ 58-73. Manner of creating such corporations.

The procedure for organizing such corporations is as follows: The proposed incorporators, not less than 10 in number, a majority of whom must be residents of the State, shall subscribe articles of association setting forth their intention to form a corporation; its proposed name, which must not so closely resemble the name of an existing corporation doing business under the laws of this State as to be likely to mislead the public, and must be approved by the Commissioner of Insurance; the class of insurance it proposes to transact and on what business plan or principle; the place of its location within the State, and if on the stock plan, the amount of its capital stock. The words "insurance company," "insurance association," or "insurance society" or "life" or "casualty" or "indemnity" must be a part of the title of any such corporation, and also the word "mutual," if it is organized upon the mutual principle. The certificate of incorporation must be subscribed and sworn to by the incorporators before an officer authorized to take acknowledgment of deeds, who shall forthwith certify the certificate of incorporation, as so made out and signed, to the Commissioner of Insurance of the State at his office in the City of Raleigh. The Commissioner of Insurance shall examine the certificate, and if he approves of it and finds that the requirements of the law have been complied with, shall certify such facts, by certificate on such articles, to the Secretary of State. Upon the filing in the office of the Secretary of State of the certificate of incorporation and attached certificates, and the payment of a charter fee in the amount required for private corporations, and the same fees to the Secretary of State, the Secretary of State shall cause the certificate and accompanying certificates to be recorded in his office, and shall issue a certificate in the following form:

Be it known that, whereas (here the names of the subscribers to the articles of association shall be inserted) have associated themselves with the intention of forming a corporation under the name of (here the name of the corporation

shall be inserted), for the purpose (here the purpose declared in the articles of association shall be inserted), with a capital (or with a permanent fund) of (here the amount of capital or permanent fund fixed in the articles of association shall be inserted), and have complied with the provisions of the statute of this State in such case made and provided, as appears from the following certified articles of association: (Here copy articles of association and accompanying certificates). Now, therefore, I (here the name of the Secretary shall be inserted), Secretary of State, hereby certify that (here the names of the subscribers to the articles of association shall be inserted), their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of (here the name of the corporation shall be inserted), with such articles of association, and have all the powers, rights, and privileges and are subject to the duties, liabilities, and restrictions which by law appertain thereto.

Witness my official signature hereunto subscribed, and the seal of the State of North Carolina hereunto affixed, this the . . . . . day of . . . . . ., in the year . . . . . (in these blanks the day, month, and year of execution of this certificate shall be inserted; and in the case of purely mutual companies, so much as relates to capital stock shall be omitted).

The Secretary of State shall sign the certificate and cause the seal of the State to be affixed to it, and such certificate of incorporation and certificate of the Secretary of State has the effect of a special charter and is conclusive evidence of the organization and establishment of the corporation. The Secretary of State shall also cause a record of his certificate to be made, and a certified copy of this record may be given in evidence with the same effect as the original certificate. (1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3; Rev., s. 4727; C.S., s. 6328; 1957, c. 98.)

§ 58-74. First meeting; organization; license.

The first meeting for the purpose of organization under such charter shall be called by a notice signed by one or more of the subscribers to the certificate of incorporation, stating the time, place, and purpose of the meeting; and at least seven days before the appointed time a copy of this notice shall be given to each subscriber, left at his usual place of business or residence, or duly mailed to his post-office address, unless the signers waive notice in writing. Whoever gives the notice must make affidavit thereof, which affidavit shall include a copy of the notice and be entered upon the records of the corporation. At the first meeting, or any adjournment thereof, an organization shall be effected by the choice of a temporary clerk, who shall be sworn; by the adoption of bylaws; and by the election of directors and such other officers as the bylaws require; but at this meeting no person may be elected director who has not signed the certificate of incorporation. The temporary clerk shall record the proceedings until the election and qualification of the secretary. The directors so chosen shall elect a president, secretary, and other officers which under the bylaws they are so authorized to choose. The president, secretary, and a majority of the directors shall forthwith make, sign, and swear to a certificate setting forth a copy of the certificate of incorporation, with the names of the subscribers thereto, the date of the first meeting and of any adjournments thereof, and shall submit such certificate and the records of the corporation to the Commissioner of Insurance, who shall examine the same, and who may require such other evidence as he deems necessary. If upon his examination the Commissioner of Insurance approves of the bylaws and finds that the requirements of the law have been complied with, he shall issue a license to the company to do business in the State, as is provided for in this Chapter. (1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3; Rev., s. 4728; C.S., s. 6329.)

§ 58-75. Bylaws; classification and election of directors.

A domestic company may adopt bylaws for the conduct of its business not repugnant to law or its charter, and therein provide for the division of its board of directors into two, three, or four classes, and the election thereof at its annual meetings so that the members of one class only shall retire and their successors be chosen each year. Vacancies in any such class may be filled by election by the board for the unexpired term. (1899, c. 54, s. 22; Rev., s. 4724; C.S., s. 6330.)

§ 58-76: Repealed by Session Laws 1945, c. 386.

§ 58-77. Amount of capital and/or surplus required; impairment of capital or surplus.

The amount of capital and/or surplus requisite to the formation and organization of companies under the provisions of this Chapter shall be as follows:

(1) Stock Life Insurance Companies.

a. A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do the business of life insurance, only when it shall have paid-in capital of at least six hundred thousand dollars ($600,000) and a paid-in initial surplus of at least nine hundred thousand dollars ($900,000), and it may in addition do the kind of business specified in subdivision (2) of G.S. 58-72 (annuities), without having additional capital or surplus. Every such company shall at all times thereafter maintain a minimum capital of not less than six hundred thousand dollars ($600,000) and a minimum surplus of at least one hundred fifty thousand dollars ($150,000). Provided that, any such corporation may do either or both of the kinds of insurance authorized for stock, accident and health insurance companies, as set out in paragraphs a and b of subdivision (3) of G.S. 58-72 (accidental death or personal injury, and noncancelable disability), where its charter so permits, and when and so long as it meets and maintains a minimum capital and surplus equal to the sum of the minimum capital and surplus requirements of this subdivision (1)a and the minimum capital and surplus requirements of subdivision (2)a and/or (2)b hereof as applicable.

b. If the Commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do the business of life insurance, or the writing of annuities or both, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit the organization of a stock corporation to do on such restricted plan either or both kinds of business specified in subdivisions (1) and (2) of G.S. 58-72 (life insurance and annuities), with the minimum paid-in capital and a minimum paid-in initial surplus in an amount to be prescribed by him, but in no event to be less than a paid-in capital of four hundred thousand dollars ($400,000) and a paid-in surplus of six hundred thousand dollars ($600,000). Every such company shall at all times thereafter maintain such prescribed minimum capital, or four hundred thousand dollars ($400,000), whichever is greater and a minimum surplus of at least one hundred thousand dollars ($100,000).

(2) Stock Accident and Health Insurance Companies.

a. A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do only the kind of insurance specified in subdivision (3)a of G.S. 58-72 (accidental death or personal injury), when it shall have a paid-in capital of not less than four hundred thousand dollars ($400,000), and a paid-in initial surplus of at least six hundred thousand dollars ($600,000). Every such company shall at all times thereafter maintain a minimum capital of not less than four hundred thousand dollars ($400,000) and a minimum surplus of at least one hundred thousand dollars ($100,000).

b. Any company organized under the provisions of paragraph a of this subdivision may, by the provisions of its original charter or any amendment thereto, acquire the power to do the kind of business specified in paragraph b of subdivision (3) of G.S. 58-72 (noncancelable disability insurance), if it has a paid-in capital of at least six hundred thousand dollars ($600,000) and a paid-in initial surplus of at least nine hundred thousand dollars ($900,000). Every such company shall at all times maintain a minimum capital of not less than six hundred thousand dollars ($600,000) and a minimum surplus of at least one hundred fifty thousand dollars ($150,000).

(3) Stock Fire and Marine Companies. — A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72 only when it shall have a paid-in capital of not less than eight hundred thousand dollars ($800,000) and a paid-in initial surplus of not less than one million two hundred thousand dollars ($1,200,000). Every such company shall at all times thereafter maintain a minimum capital of not less than eight hundred thousand dollars ($800,000) and a minimum surplus of at least two hundred thousand dollars ($200,000). Provided that, any such corporation may do all the kinds of insurance authorized for casualty, fidelity and surety companies, as set out in subdivision (4) hereof where its charter so permits, and when and so long as it meets and thereafter maintains a minimum capital and surplus equal to the sum of the minimum capital and surplus requirements of this subdivision (3) and the minimum capital and surplus requirements of subdivision (4) hereof.

(4) Stock Casualty and Fidelity and Surety Companies.

a. A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21) and (22) of G.S. 58-72 only when it shall have a paid-in capital of not less than one million dollars ($1,000,000) and a paid-in initial surplus of not less than one million five hundred thousand dollars ($1,500,000). Every such company shall at all times thereafter maintain a minimum capital of not less than one million dollars ($1,000,000) and a minimum surplus of at least two hundred fifty thousand dollars ($250,000).

b. If the Commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do one or more of such kinds of insurance, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit such corporation to be organized and licensed to write the lines set out

in subsection a above with a paid-in capital of not less than six hundred thousand dollars ($600,000) and a paid-in initial surplus of not less than nine hundred thousand dollars ($900,000). Every such company shall hereafter maintain a minimum capital of not less than six hundred thousand dollars ($600,000) and a minimum surplus of at least one hundred fifty thousand dollars ($150,000). Provided that, any such casualty, fidelity and surety corporation may do all the kinds of insurance authorized for fire and marine companies, as set out in subdivision (3) hereof where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in said section, and maintains the same.

(5) Mutual Fire and Marine Companies.

a. Limited assessment companies. — A limited assessment mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more kinds of insurance specified in subdivisions (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72 only when it has no less than five hundred thousand dollars ($500,000) of insurance in not fewer than 500 separate risks subscribed with a paid-in initial surplus of at least three hundred thousand dollars ($300,000), which surplus shall at all times be maintained. The assessment liability of a policyholder of a company organized in accordance with the provisions of this paragraph shall not be limited to less than five annual premiums provided, such limited assessment company may reduce the assessment liability of its policyholders from five annual premiums as set out herein to one additional annual premium when the free surplus of such company amounts to not less than three hundred thousand dollars ($300,000), which surplus shall at all times be maintained.

b. Assessable mutual companies. — An assessable mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (4), (5) and (6) of G.S. 58-72 (fire, miscellaneous property and water damage), with an unlimited assessment liability of its policyholders only when it shall have not less than five hundred thousand dollars ($500,000) of insurance in not fewer than 500 separate risks subscribed with a paid-in initial surplus equal to twice the amount of the maximum net retained liability under the largest policy of insurance issued by such company; but not less than sixty thousand dollars ($60,000) which surplus shall at all times be maintained. Provided such company, when its charter so permits, in addition may be licensed to do one or more of the kinds of insurance specified in subdivisions (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72, with an unlimited assessment liability of its policyholders, when its free surplus amounts to not less than sixty thousand dollars ($60,000), which surplus shall at all times be maintained.

c. Nonassessable mutual companies. — A nonassessable mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72 and may be authorized to issue policies under the terms of which a policyholder is not liable for any assessments in addition to the premium set out in the policy only when it shall have not less than five hundred thousand dollars ($500,000) of insurance in not fewer than 500 separate risks

subscribed with a paid-in initial surplus of not less than eight hundred thousand dollars ($800,000), which surplus shall at all times be maintained.

d. Town or county mutual insurance companies. — A town or county mutual insurance company with unlimited assessment liability may be organized in the manner prescribed in this Chapter and licensed to do the kinds of insurance specified in subdivision (4) of G.S. 58-72 (fire) only when it shall have not less than fifty thousand dollars ($50,000) of insurance in not fewer than 50 separate risks subscribed with a paid-in initial surplus of not less than fifteen thousand dollars ($15,000), which surplus shall at all times be maintained. A town or county mutual insurance company may, in addition to writing the business specified in subdivision (4) of G.S. 58-72 (fire insurance), cover in the same policy the hazards usually insured against under an extended coverage endorsement when such company has and at all times maintains in addition to the surplus hereinbefore required, an additional surplus of not less than twenty-five thousand dollars ($25,000) or not less than an amount equivalent to one percent (1%) of the total amount of net retained insurance in force, whichever is the larger sum: Provided, that such company may not operate in more than three adjacent counties in this State.

(6) Mutual Life, Accident and Health Insurance Companies. — A nonassessable mutual insurance company may be organized in the manner prescribed in this Chapter, and licensed to do only one or more of the kinds of insurance specified in subdivisions (1), (2) and (3) of G.S. 58-72 (life, annuities, and accident and health) when it has complied with the requirements of this Chapter and with those hereinafter set forth in paragraphs a to d of this subdivision, inclusive, whichever shall be applicable.

a. If organized to do only the kinds of insurance specified in subdivisions (1) and (2) of G.S. 58-72 (life insurance and annuities), such company shall have not less than 500 bona fide applications for life insurance in an aggregate amount not less than five hundred thousand dollars ($500,000), and shall have received from each such applicant in cash the full amount of one annual premium on the policy applied for by him, in an aggregate amount at least equal to ten thousand dollars ($10,000), and shall in addition have a paid-in initial surplus of two hundred thousand dollars ($200,000), and shall have and maintain at all times a minimum surplus of one hundred thousand dollars ($100,000).

b. If organized to do only the kind of insurance specified in paragraph a of subdivision (3) of G.S. 58-72 (accidental death and personal injury), such company shall have not less than 250 bona fide applications for such insurance, and shall have received from each such applicant in cash the full amount of one annual premium on the policy applied for by him in an aggregate amount of at least ten thousand dollars ($10,000), and shall have a paid-in initial surplus of two hundred thousand dollars ($200,000) and shall have and maintain at all times a minimum surplus of one hundred thousand dollars ($100,000).

c. If organized to do the kinds of insurance specified in subdivision (1) and in paragraph a of subdivision (3) of G.S. 58-72 (life insurance and accidental death and injury), such company shall have complied with the provisions of both paragraphs a and b hereof.

d. If organized to do the kind of insurance specified in paragraph b of subdivision (3) of G.S. 58-72 (noncancelable disability insurance),

in addition to the kind or kinds of insurance designated in any one of the foregoing paragraphs of this subdivision, such company shall have a paid-in initial surplus of at least five hundred thousand dollars ($500,000) and shall maintain a minimum surplus of at least three hundred thousand dollars ($300,000).

(7) Organization of Mutual Casualty, Fidelity and Surety Companies.

a. Nonassessable, mutual companies. — A mutual insurance company with no assessment liability provided for its policyholders may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21) and (22) of G.S. 58-72 when it has a minimum paid-in initial surplus of one million dollars ($1,000,000) and not less than five hundred thousand dollars ($500,000) in insurance subscribed in not less than 500 separate risks. The surplus of such company shall at all times be maintained at or above the amount required hereinabove for organization of such company.

b. Assessable mutual companies. — A mutual insurance company with assessment liability provided for its policyholders may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21) and (22) of G.S. 58-72 when it has a minimum paid-in initial surplus of four hundred thousand dollars ($400,000) and not less than five hundred thousand dollars ($500,000) of insurance subscribed in not less than 500 separate risks. Such company shall at all times maintain a surplus in an amount not less than four hundred thousand dollars ($400,000). The assessment liability of a policyholder of such company shall not be limited to less than one annual premium.

(8) Organization of Mutual Multiple Line Companies.

a. Assessable mutual companies. — A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of paragraph a of subdivision (5) hereof (limited assessment mutual fire and marine companies), and paragraph b of subdivision (7) hereof (assessable mutual casualty, fidelity and surety companies), where its charter so permits when and if it meets the combined minimum requirements of said paragraphs. The assessment liability of policyholders of such a company shall not be limited to less than one annual premium within any one policy year.

b. Nonassessable mutual companies. — A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of paragraph c of subdivision (5) hereof (nonassessable mutual fire and marine companies), and paragraph a of subdivision (7) hereof (nonassessable mutual casualty, fidelity and surety companies), where its charter so permits when and if it meets the combined minimum requirements of said paragraphs. The policyholders of such a company shall not be subject to any assessment liability.

(9) Time for Compliance. — Any domestic, foreign or alien company licensed to do business in North Carolina prior to July 1, 1979, shall be permitted to continue to do the same kinds of business which it was authorized to do on such date without being required to increase its capital and/or surplus, provided however, such insurers shall increase the capital and surplus requirements to the amounts set forth in this

section G.S. 58-77 on or before July 1, 1983, but the requirements of this section as to capital and surplus shall apply to such companies as a prerequisite to writing additional lines of business, and to such companies as a prerequisite to commencing business if unlicensed prior to July 1, 1979.

(10) Impairment of Capital and/or Surplus. — Whenever the Commissioner finds from a financial statement made by any such company, or from a report of examination of any such company, that its admitted assets are less than the aggregate amount of its liabilities and its outstanding capital stock and/or required minimum surplus, he shall determine the amount of such impairment of capital and/or surplus and issue an order in writing requiring the company to eliminate the impairment within such period of not more than 90 days as he shall designate. The Commissioner may, by order served upon the company, prohibit the company from issuing any new policies while such impairment exists. If at the expiration of the designated period the company has not satisfied the Commissioner that the impairment has been eliminated, an order for the rehabilitation or liquidation of the company may be entered as provided in Article 17A, Chapter 58 of the General Statutes of North Carolina. (1899, c. 54, s. 26; 1903, c. 438, s. 4; Rev., s. 4729; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; C.S., s. 6332; 1929, c. 284, s. 1; 1945, c. 386; 1947, c. 721; 1963, c. 943; 1965, c. 947; 1967, c. 300; 1971, c. 536; 1973, c. 686; 1979, c. 421, s. 1.)

CASE NOTES

Cited in American Equitable Assurance Co. v. Gold, 249 N.C. 461, 106 S.E.2d 875 (1959).

§ 58-78. Capital stock fully paid in cash.

The capital stock shall be paid in cash within 12 months from the date of the charter or certificate of organization, and no certificate of full shares and no policies may be issued until the whole capital is paid in. A majority of the directors shall certify on oath that the money has been paid by the stockholders for their respective shares and is held as the capital of the company invested or to be invested as required by G.S. 58-77. (1899, c. 54, s. 27; Rev., s. 4730; C. S., s. 6333; 1945, c. 386.)

§ 58-79. Investments; life.

(a) Investments Specified. — Every domestic stock and mutual life insurance company must have and continually keep to the extent of an amount equal to its entire reserves, as hereinafter defined, an entire capital, if any, and minimum required surplus, invested in:

(1) Coin or currency of the United States of America, on hand or on deposit in a national or state bank or trust company or invested in the shares of any building and loan or savings and loan association, or invested in the shares of any federal savings and loan association.

(2) Interest-bearing bonds, notes, certificates of indebtedness, bills or other direct interest-bearing obligations of the United States of America or of the Dominion of Canada or other interest-bearing obligations fully guaranteed both as to principal and interest by the United States of America, or by the Dominion of Canada.

(3) Interest-bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or of any province of the Dominion of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America.

(4) Interest-bearing bonds of any commission, authority or political subdivision having legal authority to issue the same of any state, District of Columbia, territory or possession of the United States of America or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America.

(5) Federal farm loan bonds issued by federal land banks organized under the provisions of the act of Congress known as the Federal Farm Loan Act. Any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended. Interest-bearing bonds, notes or other interest-bearing obligations of any solvent corporation organized under the laws of the United States of America or of the Dominion of Canada, or under the laws of any state, District of Columbia, territory or possession of the United States of America, or obligations issued, assumed or guaranteed by the International Bank for Reconstruction and Development, Asian Development Bank and Inter-American Development Bank. Equipment trust obligations or certificates or other secured instruments evidencing an interest in (i) transportation equipment; and (ii) industrial and utility equipment and related buildings and other construction whether or not affixed to land, and related leases, easements, uses, rights-of-way and any other appurtenances thereto; all of which items listed in parts (i) and (ii) of this sentence are and will be wholly or in part within the United States of America and a right to receive determined portions of rental, purchases or other fixed obligatory payments for the use or purchase of such items.

(6) Dividend-paying stocks or shares of any corporation created or existing under the laws of the United States of America or of any state, District of Columbia, territory or possession of the United States of America; notwithstanding any provisions in this section to the contrary no company may invest more than twenty percent (20%) of its total admitted assets in common stocks; and further provided, that no company may invest more than three percent (3%) of its admitted assets in the stock or shares of any one corporation, and provided further, except as the Commissioner shall permit, that such investment in any one corporation not engaged solely in the business of insurance shall not result in the acquisition of more than twenty percent (20%) of the outstanding voting stock or shares of such corporation. The restrictions in this section do not apply to shares of building and loan or savings and loan associations or federal savings and loan associations.

(7) Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple or improved leasehold real estate in the District of Columbia or in any state, territory or possession of the United States of America, to an amount not exceeding seventy-five percent (75%) of the fair market value of such fee simple or improved leasehold real estate; provided that such loans may exceed seventy-five percent (75%) of the fair market value of such fee simple or improved leasehold real estate to the extent that an admitted mortgage guaranty insurer, as defined in G.S. 58-72(17), has insured or guaranteed or made a commitment to insure or guarantee the amount by which such loan is

in excess of seventy-five percent (75%) of the fair market value; provided, further, that, in no event shall any such loan exceed ninety-five percent (95%) of the fair market value of the property. No loan may be made on leasehold real estate unless the lease has at least 30 years to run before its termination and the loan matures at least 20 years before expiration of the lease. Whenever such loans are made upon fee simple, or improved leasehold real estate which is improved by a building or buildings, the said improvements shall be insured against loss by fire, and the fire insurance policies shall contain a standard mortgage clause and shall be delivered to the mortgagee as additional security for the said loan.

Loans secured by first mortgages which the Federal Housing Administrator has insured or has made a commitment to insure, or invested in mortgage notes or bonds so insured, and neither the limitations of this section nor any other law of this State requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured mortgage loans.

Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple real estate in connection with which the Veterans Administration of the United States has guaranteed, or has made a commitment to guarantee, a portion of the loan pursuant to the Servicemen's Readjustment Act of 1944, and amendments thereto, provided the amount of any such loan, less the portion thereof guaranteed by said Veterans Administration, shall not exceed seventy-five percent (75%) of the fair market value of such real estate.

In all investments made upon mortgages, the evidence of the debt, if any, shall accompany the mortgage or deed of trust.

(8) Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premiums paid, if any, shall be amortized over the period between date of acquisition and earliest redemption date or charged off at any time prior to redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

(9) Collateral loans secured by pledge of any security named in subdivisions (1), (2), (3), (4), (5), (6), (7) and (8) of this subsection; provided that the current market value of such pledged securities shall be at all times during the continuance of such loans at least twenty-five percent (25%) more than the unpaid balance of the amount loaned on them.

(10) Loans upon the policies of the company; provided that the total indebtedness against any policy shall not be greater than the loan value of such policy.

(11) No domestic company may directly or indirectly acquire or hold real property except as follows:

a. Such land and buildings thereon in which it has its principal office and such real estate as shall be requisite for the convenient transaction of its own business; the amount invested in such real property shall not exceed ten per centum (10%) of the investing company's admitted assets, but the Commissioner may grant permission to the company to invest in real property for such purpose in such increased amount as he may deem proper upon a hearing held before him.

b. Property mortgaged to it in good faith as security for loans previously contracted for money due.

c. Property conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

d. Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it under paragraphs b and c of this subdivision and subject to the prior written approval of the Commissioner.

e. 1. Real estate acquired for the purpose of leasing the same to any person, firm, or corporation, or real estate already leased under the following conditions:

I. A. Where there has already been erected on said property a building or other improvements satisfactory to the purchaser, or

B. Where the lessee shall at its own cost erect thereon, free of liens, a building or other improvements satisfactory to the lessor, or

C. Where the lessor under the terms and conditions of a lease executed and entered into simultaneously with the purchase of the property agrees to erect a building or other improvements on said property;

II. That the said improvements shall remain on the said property during the period of the lease, and in cases where the said improvements are put upon said property at the cost of the lessee the said improvements at the termination of the lease shall vest, free of liens, in the owner of the real estate;

III. That during the term of the lease the tenant shall keep and maintain the said improvements in good repair. Real estate acquired pursuant to the provisions of this subparagraph (a)(11)e1 shall not be treated as an admitted asset unless and until the improvements herein required shall have been constructed and the lease agreement entered into in accordance with the terms of this subparagraph, nor shall real estate acquired pursuant to this subparagraph (a)(11)e1 be treated as an admitted asset in an amount exceeding the amount actually invested reduced each year by at least two percent (2%) of the investment allocable to the improvements on such real estate. The total investments of any company under this subparagraph (a)(11)e1 shall not exceed ten percent (10%) of its assets, nor more than fifty percent (50%) of its capital and surplus whichever is less.

2. Subject to approval of the Commissioner, real estate for recreation, hospitalization, convalescent and retirement purposes of its employees. Such investment under this subparagraph (a)(11)e2 shall not exceed five percent (5%) of the company's surplus.

3. Subject to the approval of the Commissioner, real estate for public or private housing developments. Such investment under this subparagraph (a)(11)e3 shall be subject to and not exceed the limitation provided for in the last sentence of subparagraph (a)(11)e1 III hereof.

4. No investment shall be made by any company pursuant to this paragraph e which will cause such company's investment in all real property owned or held by it directly or indirectly to exceed fifteen percent (15%) of its assets.

f. It is unlawful for any such incorporated company to purchase or hold real estate in any other case or for any other purpose; provided, however, notwithstanding any express or implied prohibitions, and in addition to other investments permitted by this section, any incorporated company may invest up to six percent (6%) of its assets in real estate for the production of income. Real estate acquired under paragraph (a)(11)a and subparagraph (a)(11)e2 of this section which has ceased to be used or to be necessary for the purposes stated therein shall be sold within five years thereafter, unless the company procures a certificate from the Commissioner that the interest of the company will materially suffer by a forced sale of such real estate in which event the time for the sale may be extended to such a time as the Commissioner may direct in the certificate. Any real estate acquired under paragraphs b, c, and d of this subdivision (11) shall be sold within five years after the company has acquired title thereto; provided, that the Commissioner may in his discretion extend the five-year period as provided hereinabove. Any real estate acquired under subparagraph (a)(11)e1 of this section shall within five years after the termination or expiration of such lease be sold or released for an additional term pursuant to the provisions of subparagraph (a)(11)e1; provided, that the Commissioner may in his discretion extend the five-year period as provided hereinabove. Nothing contained herein prevents any insurance company from improving or conveying its real estate, notwithstanding the lapse of five years without having procured such certificate from the Commissioner.

(12) Electronic and mechanical machines constituting a data processing and accounting system if the cost of such system is at least twenty-five thousand dollars ($25,000), but not more than two percent (2%) of its admitted assets, which cost shall be amortized in full over a period not to exceed 10 calendar years.

(13) Interest, rents or other fixed income due and accrued on any of the investments named in subdivisions (1), (2), (3), (4), (5), (7), (8), (9), (10) and (11) of this subsection pursuant to regulations promulgated by the Commissioner.

(14) Notwithstanding any expressed or implied prohibitions, a company may, after the date of the enactment of this subdivision, invest in investments which do not otherwise qualify under any other provision of this subsection; provided, however, that the investments authorized by this subdivision shall not exceed the lesser of (i) five percent (5%) of its admitted assets or (ii) the amount by which total admitted assets exceed total liabilities (except capital) plus six hundred thousand dollars ($600,000) as shown on its last annual statement preceding the date of the acquisition of such investment as filed with the Commissioner of Insurance.

(15) To the extent necessary to satisfy the investment requirements as to reserves and entire capital, if any, and minimum required surplus, no company shall make any investment in or loan on any of the securities mentioned in this section, which are in default as to principal or interest or as to which the dividend on the last preceding dividend date has been passed.

(b) General Provisions. —

(1) The entire reserves of a domestic life insurance company, as used in this section, shall be the sum of:

Net present value of all outstanding policies in force (less reinsurance); reserves for accidental death benefits and total and permanent disability benefits (less reinsurance); present value of supplementary contracts and including dividends left with the company to accumulate at interest; liability on policies canceled and not included in "net reserve" upon which a surrender value may be demanded, and policy claims and losses outstanding, less amount of net uncollected and deferred premiums.

(2) No investment or loan, except loans made on the company's own policies, shall be made by any domestic insurer unless the same be authorized or approved by the board of directors, or by a committee appointed by the board and charged with the duty of supervising or making such investment or loan. The minutes of any such committee shall be recorded and a report shall be submitted to the board of directors.

(3) No life insurance company doing business in this State shall make any loan to any director or officer of such insurer, either directly or indirectly; nor shall such insurer make any loan to any other corporation or business unit in which such officer or director is substantially interested; nor shall any such director or officer accept any such loan directly or indirectly.

No director or officer of any such insurance company doing business in this State shall receive any money or valuable thing either directly or indirectly, or through any substantial interest in any other corporation or business unit, for negotiating, procuring, recommending or aiding in any purchase or sale of property or loan from such insurer nor be pecuniarily interested either as principal, coprincipal, agent or beneficiary, in any such purchase, sale or loan, nor shall any financial obligation of any such director or officer be guaranteed by such insurer.

Nothing contained in this section shall be construed as prohibiting a director or officer of any such insurance company or fraternal benefit society from receiving the usual salary, compensation or emoluments for services rendered in the ordinary course of his duties as a director or officer, if such salary, compensation or emoluments be authorized by vote of the board of directors of such insurer, or prevent any life insurance company in connection with the relocation of the place of employment of an officer, including any relocation in connection with the initial employment of such officer, from (i) making (or such officer from accepting therefrom) a mortgage loan to such officer on real property owned by such officer which is to serve as such officer's residence or (ii) acquiring (or such officer from selling thereto), at not more than the fair market value thereof, the residence of such officer, nor as prohibiting the payment to a director or officer of any such insurer who is a licensed attorney-at-law of a fee or fees in connection with loans made by any such insurer if and when such fees are paid by the borrower and do not constitute a charge against any such insurer; and, provided, that nothing herein contained shall prevent a life insurance corporation from making a loan upon a policy held therein by the borrower not in excess of the net value thereof.

A substantial interest in any corporation or business unit is defined to mean an interest equivalent to ownership or control by a director or officer or the aggregate ownership or control by all directors and officers of the same insurance or surety company or fraternal benefit

society, of ten per centum (10%) or more of the stock of such corporation or business unit.

(4) When any of the investments mentioned in this section and held by any domestic insurer are of doubtful value, or without ascertainable value on a public exchange, unless the company by placing some of them upon the market and obtaining a bona fide offer therefor shall so establish a value, the Commissioner shall have the authority to cause the same to be appraised and such appraisement shall be taken to be the true value thereof. In such case, the appraisement shall be made by two disinterested and competent persons, one to be appointed by the Commissioner and one to be appointed by the company; in the event these two fail to agree, they shall appoint a third disinterested and competent person and the estimate of the value of such investment as arrived at by these three shall be taken to be the true value thereof.

(5) When any of the investments mentioned in this section shall default in the payment of interest or dividends after having been purchased by the company, such investments shall thereafter be carried at their respective market values or at valuations fixed in accordance with regulations promulgated by the Commissioner.

(6) The investments made by domestic companies on and after March 6, 1945, shall be in accordance with the provisions of this section, and any investments made prior to March 6, 1945, shall be made to conform to the requirements of this Article by not later than three years after March 6, 1945, but the Commissioner may, on application by the company extend the time for such conformance for each period or periods as he may deem proper on the showing made, if he is satisfied that such company will suffer materially by the forced sale of any securities or property not conforming; and the Commissioner shall grant a hearing to the company upon request.

(7) Notwithstanding any provision of this Chapter to the contrary, domestic insurance companies may be authorized by their charter to own, maintain and operate radio and television stations; provided, no such company may make any investment in the ownership, maintenance and operation of such stations in an amount greater than fifty percent (50%) of the excess of its surplus over the minimum surplus required for the organization of such company.

(c) Other Investments; Investments Unlawfully Acquired. — After satisfying the requirements hereinbefore set forth any funds of any domestic company in excess of its entire capital, if any, and minimum required surplus and reserves as defined in subdivision (b)(1) of this section shall be invested in such other securities or in any such safe manner as may be approved by the Commissioner.

Whenever it appears by examination as authorized by law that an insurance company organized under the laws of this State has acquired any investments in violation of the law in force at the date of such acquisition it is the duty of the Commissioner to disallow the amount of such investments, if wholly ineligible, or the amount of the value thereof in excess of any limitation prescribed in the law and to deduct such amount as a nonadmitted asset of such company. In any determination of the financial condition of any such company such amount shall be deducted as a nonadmitted asset of such company.

(d) Investments of Foreign and Alien Companies. —

(1) The Commissioner may refuse a new or renewal license to any foreign company if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this section upon like domestic companies wherever authorized to do the same kind or kinds of insurance business.

(2) No alien company shall be authorized to do business in this State unless its general State deposits and its trusteed assets comply in substance with the requirements and limitations of this section applicable to like domestic companies wherever authorized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

a. Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien company was organized or by any province or other major political subdivision thereof and not in default as to principal or interest in an amount not exceeding the minimum capital required of a domestic stock company wherever authorized to do the same kind or kinds of insurance business.

b. Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof or other political subdivisions, and such securities of corporations of the Dominion of Canada as may be approved by the Commissioner which are not in default as to principal or interest not exceeding ten percent (10%) of the total admitted assets of the United States branch of such company. (1899, c. 54, s. 27; Rev., s. 4731; 1907, cc. 798, 998; 1911, c. 32; 1913, c. 200; C.S., s. 6334; 1923, c. 73; 1925, c. 187; 1945, c. 386; 1947, c. 721; 1951, c. 284; c. 781, s. 8; 1955, c. 178, s. 1; 1959, c. 286; 1961, cc. 263, 378; 1967, c. 842; 1969, c. 1199; 1971, c. 386, s. 1; 1973, c. 239, s. 5; 1979, c. 777; 1981, c. 306; c. 760, ss. 1-5.)

Cross References. — As to authority to invest in bonds guaranteed by the United States, see § 53-44. As to authority to invest in bonds or notes secured by mortgages insured by the Federal Housing Administrator, see § 53-45. See also § 53-60 as to investments in federal farm loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

Effect of Amendments. — The first 1981 amendment, in the third paragraph of subdivision (3) of subsection (b) inserted the language beginning "or prevent any life insurance company in connection with the relocation" and ending "residence of such officer."

The second 1981 amendment rewrote the last sentence of subdivision (5) of subsection (a), making it applicable to industrial and utility equipment and related buildings and other construction, related leases, easements, uses, rights-of-way and any other appurtenances, as well as to transportation equipment, substituted "twenty percent (20%)" for "ten percent (10%)" near the beginning of the first sentence of subdivision (6) of subsection (a), substituted "ten percent (10%)" for "six percent (6%)" in subdivision (11) e1 III of subsection (a), substituted "fifteen percent (15%)" for "ten percent (10%)" in subdivision (11) e4 of subsection (a) and added the proviso to the first sentence of subdivision (11)f of subsection (a).

Legal Periodicals. — For brief comment on the second 1951 amendment, see 29 N.C.L. Rev. 398.

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Cited in Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

§ 58-79.1. Investments; fire, casualty and miscellaneous.

(a) Minimum Capital Investments. — Before investing any of its funds in any other classes of securities or types of investments, every domestic stock insurance company other than a life insurance company or a fraternal benefit association, shall to the extent of an amount equal in value to the minimum capital required by law for a domestic stock corporation authorized to transact the same kinds of insurance, invest its funds only in securities of the classes described in this section and which are not in default as to principal or interest. Every domestic mutual insurance company, other than a life insurance company, before investing any of its funds in any other classes of securities or types of investment, shall invest its funds only in such securities to the extent of an amount equal in value to the minimum assets or surplus required of such company by the laws of North Carolina. Investments equal in value to such an amount and of the kind or kinds hereinafter prescribed in this section shall at all times be maintained free and clear from any lien or pledge other than as impressed upon a deposit with any government within the United States or upon trusteed assets held in trust for the security of all its policyholders and creditors. Minimum capital investments of such an insurer shall consist of the following classes of securities and not less than sixty percent (60%) of the total amount of the required minimum capital investments shall consist of the classes specified in subdivisions (1) and (2) following:

(1) Bonds, or other evidences of indebtedness of the United States of America or of any of its agencies when such obligations are guaranteed as to principal and interest by the United States of America.

(2) Bonds, or stocks or other evidences of indebtedness which are direct obligations of the State of North Carolina or of any county, district or municipality thereof.

(3) Bonds, or other evidences of indebtedness which are direct obligations of any state of the United States.

(4) Mortgage loans or deeds of trust as specified in paragraphs a or c of subdivision (6) of subsection (c) on property located in this State.

(5) Ground rents as specified in subdivision (7) of subsection (c).

(6) Obligations issued, assumed or guaranteed by the International Bank for Reconstruction and Development, Asian Development Bank and Inter-American Development Bank.

(b) Reserve Investments Required.

(1) After satisfying requirements for minimum capital investments specified in subsection (a), any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, may invest its funds in, or otherwise acquire, or loan upon, only the classes of reserve investments as specified in subsection (c), unless it shall at all times have and maintain cash and such reserve investments (including its minimum capital investments), free from any lien or pledge, which, when valued in accordance with the provisions of this section, shall be at least equal in amount to fifty per centum (50%) of the aggregate amount of its unearned premium and loss reserves as shown by its last sworn statement, annual or quarterly on file with the Commissioner. The term "lien or pledge" as used in this subsection shall not include any deposit of securities or cash with any government, nor trusteed assets, held in trust for the benefit or protection of all or any class of the policyholders, or policyholders and creditors, of such insurer.

(2) No securities or other investments shall be eligible for purchase or acquisition under this section unless they are interest bearing or income paying, but defaults in interest or income occurring

subsequent to such purchase or acquisition shall not affect the allowance thereof as an admitted asset at the market value thereof unless otherwise specifically provided in this section.

(3) Nothing contained in this subsection shall prohibit the acquisition by an insurer of other securities of property if distributed to it as a dividend or if acquired by it pursuant to a lawful plan of reorganization, or if acquired by it pursuant to a lawful and bona fide agreement of bulk reinsurance or consolidation.

(4) Any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, which has investments fully complying with the requirements of subdivision (1) of this subsection may acquire investments eligible under the provisions of subsection (d). Any such insurer whose investments do not fully comply with such requirements may, during a period of 10 years from March 6, 1945, acquire such additional kinds of securities if acquired in substitution for other securities heretofore lawfully acquired by it and if such substitution results in a net reduction in the aggregate amount of the insurer's investments in securities not eligible under subsection (c).

(c) Classes of Reserve Investments. — The reserve investments of every domestic stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, shall consist of the following:

(1) Bonds or other evidences of indebtedness, not in default as to principal or interest, which are valid and legally authorized obligations issued, assumed or guaranteed by the United States of America or by any state thereof or by any territory or possession of the United States or by the District of Columbia, or by any county, city, town, village, municipality or district therein or by any political subdivision thereof or by any civil division or public instrumentality of one or more of the foregoing, if by statutory or other legal requirements applicable thereto, such obligations are payable, as to both principal and interest, from taxes levied or by such law required to be levied upon all taxable property or all taxable income within the jurisdiction of such governmental unit or from adequate special revenues pledged or otherwise appropriated or by such law required to be provided for the purpose of such payment, but not including any obligations payable solely out of special assessments on properties benefited by local improvements.

(2) Obligations, other than those eligible for investment under subdivision (6), issued, assumed, or guaranteed by any solvent institution created or existing under the laws of the United States or of any state, district or territory thereof, which are not in default as to principal or interest, and which are qualified under any of the following paragraphs:

a. Obligations which are secured by adequate collateral security and bear fixed interest and if during each of any three, including the last two, of the five fiscal years next preceding the date of acquisition by such insurer, the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges, as hereinafter defined, shall have been not less than one and one-quarter times the total of its fixed charges for such year, or obligations which, at the date of acquisition by such insurer, are adequately secured and have investment qualities and characteristics wherein the speculative elements are not predominant. In determining the adequacy of collateral security, not more than one third of the total value of such required collateral shall consist of stock other than stock meeting the requirements of subsection (c).

b. Fixed interest-bearing obligations, other than those described in paragraph a if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times its average annual fixed charges applicable to such period and if during the last year of such period such net earnings shall have been not less than one and one-half times its fixed charges for such year.

c. Adjustment, income or other contingent interest obligations if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges and its average annual maximum contingent interest applicable to such period and if during each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges and maximum contingent interest for such year.

Within the meaning of this section the term "obligation" shall include bonds, debentures, notes or other evidences of indebtedness; the term "institution" shall include a corporation, a joint stock association and a business trust. The term "net earnings available for fixed charges" shall mean net income after deducting operating and maintenance expenses, taxes other than federal and State income taxes, depreciation and depletion, but excluding extraordinary nonrecurring items of income or expense appearing in the regular financial statements of the issuing, assuming or guaranteeing institutions. The term "fixed charges" shall include interest on funded and unfunded debt amortization of debt discount, and rentals for leased properties. If net earnings are determined in reliance upon consolidated earnings statements of parent and subsidiary institutions, such net earnings shall be determined after provision for income taxes of subsidiaries and after proper allowance for minority stock interest, if any; and the required coverage of fixed charges shall be computed on a basis including fixed charges and preferred dividends of subsidiaries other than those payable by such subsidiaries to the parent corporation or to any other of such subsidiaries, except that if the minority common stock interest in the subsidiary corporation is substantial, the fixed charges and preferred dividends may be apportioned in accordance with regulations prescribed by the Commissioner.

In applying the earnings tests under this section to any issuing, assuming or guaranteeing institution, whether or not in legal existence during the whole of such five years next preceding the date of investment by such insurer, which has at any time or times during such five-year period acquired the assets of any other institution or institutions by purchase, merger, consolidation or otherwise, substantially as an entirety, or has been reorganized pursuant to the bankruptcy law, the earnings of such other predecessor or constituent institutions, or of the institution so reorganized, available for interest and dividends for such portion of such period as shall have preceded such acquisition, or such reorganization may be included in the earnings of such issuing, assuming or guaranteeing institution for such portion of such period as may be determined in accordance with adjusted or pro forma consolidated earnings statements covering such portion of such period and giving effect to all stocks or shares

outstanding and all fixed charges existing, immediately after such acquisition, or such reorganization.

(3) Preferred or guaranteed stocks or shares of any solvent institution, created or existing under the laws of the United States or of any state, district or territory thereof, if all of the prior obligations, and prior preferred stocks, if any, of such institution at the date of acquisition by such insurer are eligible as investments under this section; and if qualified under paragraph a or paragraph b following:

a. Preferred stocks or shares shall be deemed qualified if both of the following requirements are met:

1. The net earnings of such institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges, if any, its average annual maximum contingent interest if any, and its average annual preferred dividend requirements applicable to such period; and

2. During each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges, contingent interest and preferred dividend requirements for such year. The term "preferred dividend requirements" chall be deemed to mean cumulative or noncumulative dividends whether paid or not.

b. Guaranteed stocks or shares shall be deemed qualified if the assuming or guaranteeing institution meets the requirements of paragraph b of subdivision (2) of subsection (c) construed so as to include as a fixed charge the amount of guaranteed dividends of such issue or the rental covering the guarantee of such dividends.

(4) a. Certificates, notes or other obligations issued by trustees or receivers of any institution created or existing under the laws of the United States or of any state, district or territory thereof, which, or the assets of which, are being administered under the direction of any court having jurisdiction, if such obligation is adequately secured as to principal and interest.

b. Equipment trust obligations or certificates which are adequately secured or other adequately secured instruments evidencing an interest in transportation equipment wholly or in part within the United States and a right to receive determined portions of rental, purchase or other fixed obligatory payments for the use or purchase of such transportation equipment.

(5) Bank and banker's acceptances and other bills of exchange of the kind of maturities made eligible, pursuant to law, for purchase in the open market by federal reserve banks.

(6) a. Bonds or evidences of indebtedness other than those described in subdivision (2) of subsection (c) which are secured by first mortgages or deeds of trust upon unencumbered fee simple or improved leasehold real property located in the United States. Real property shall not be deemed to be encumbered within the meaning of this section, by reason of the existence of instruments reserving mineral, oil or timber rights, rights-of-way, sewer rights, rights in walls, nor by reason of any liens for taxes or assessments not yet due, nor by reason of building restrictions or other restrictive covenants, nor when such real property is subject to lease under which rents or profits are reserved to the owner, if in any event the security for such loan is a first lien upon such real property and if there is no condition or right of reentry or

forfeiture, under which such lien can be cut off, subordinated or otherwise disturbed. No such mortgage loan or loans made or acquired by any insurer on any one property shall, at the time of investment by the insurer, exceed two thirds of the value of the real property securing the same. No such mortgage loan or loans shall be made or acquired by an insurer except after an appraisal made by an appraiser for the purpose of such investment. No such mortgage loan made or acquired by an insurer which is a participation or a part of a series or issue secured by the same mortgage or deed of trust shall be a lawful investment under this paragraph unless the entire series or issue which is secured by the same mortgage or deed of trust is held by such insurer or unless the insurer holds a senior participation in such mortgage or deed of trust giving it substantially the rights of a first mortgagee. Except as otherwise provided in this section, no domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, shall invest in or loan upon the security of any one property more than twenty-five thousand dollars ($25,000) or more than two per centum (2%) of its total admitted assets, whichever is the greater. In no event shall the total investments of any such insurer in the kinds permitted under this subdivision exceed forty per centum (40%) of its total admitted assets.

b. Purchase money mortgages or like securities received by it upon the sale or exchange of real property acquired pursuant to subdivision (8) of this subsection (c).

c. Bonds or notes secured by mortgage or trust deed guaranteed or insured by the Federal Housing Administration under the terms of an act of Congress of the United States of June 27, 1934, entitled the "National Housing Act," as heretofore or hereafter amended.

(7) Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premium paid, if any, shall be amortized over the period between date of acquisition and redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

(8) Real estate only if acquired or used for the following purposes in the following manner:

a. The land and the building thereon in which it has its principal office or offices.

b. Such as shall be requisite for its convenient accommodation in the transaction of its business.

c. Such as shall have been acquired in satisfaction of loans, mortgages, liens, judgments, decrees or other debts previously owing to such insurer in the course of its business or in connection with the default in payment of a loan insured under any mortgage guaranty policy of credit insurance.

d. Such as shall have been acquired in part payment of the consideration on the sale of real property owned by it, if each such transaction shall have effected a net reduction in the company's investment in real property.

e. Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it pursuant to the provisions of paragraph c or d of this subdivision (8).

All real property acquired pursuant to paragraphs a and b of this subdivision shall be disposed of within five years after it shall have ceased to be necessary for the convenient accommodation of such insurer in the transaction of its business, and all real property acquired pursuant to paragraphs c, d and e of this subdivision shall be disposed of within five years after the date of acquisition, unless in either case the Commissioner shall certify that the interests of the insurer will suffer materially by the forced sale thereof, in which event the time for disposal of such real property may be extended for such time as the Commissioner shall prescribe in such certificate. No real property shall be acquired by any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, pursuant to paragraphs a, b, d or e of this subdivision (8), except with the approval of the Commissioner.

(9) a. Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, may invest in, or otherwise acquire or loan upon, bonds, notes or other evidences of indebtedness which are valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof and which are not in default as to principal or interest; but the aggregate amount of such investments which are held at any time by any such insurer, together with all Canadian investments held by it pursuant to the following paragraph b shall not exceed ten percent (10%) of its total admitted assets, except where a greater amount is permitted pursuant to the following paragraph b, in which case the provisions of this subdivision shall not be applicable.

b. Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, which is authorized to do business in a foreign country or possession of the United States or which has outstanding insurance or reinsurance contracts on risks located in a foreign country or possession of the United States, may invest in, or otherwise acquire or loan upon securities and investments in such foreign country or possession which are substantially of the same kinds, classes and investment grades as those eligible for investment under the foregoing subdivisions of this subsection; but the aggregate amount of such investments in a foreign country or a possession of the United States and of cash in the currency of such country or possession which is at any time held by such insurer shall not, except as provided in the next preceding paragraph a, exceed one and one-half times the amount of its reserves and other obligations under such contracts or the amount which such insurer is required by law to invest in such country or possession, whichever shall be greater.

(10) Stock and debentures, or either, of any housing company organized under the public housing law of this State, to the extent and upon such conditions as may be authorized by the Commissioner, provided all of the stock of such housing company has been or is to be originally issued to one or more insurance companies.

(d) Residue and Surplus Fund Investments. — After satisfying the requirements for minimum capital investments, any domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, which has accumulated and maintains reserve investments as required in subsection (b), may invest any portion of the remainder of its funds in, or otherwise acquire or loan upon, any of the classes of investments eligible under subsection (c) and any stock or shares, bonds or obligations, including

voting trust certificates, certificates of deposit, interim receipts, and other similar instruments representing stock or shares, bonds or obligations eligible hereunder, or in investments in loans made by banks or trust companies secured by the assignment of cash surrender values of at least equal amount, in life insurance policies issued by life insurance companies licensed to do business in the State of North Carolina, except the following prohibited investments:

(1) Obligations, stock or other securities of any corporation, association or other business unit which is insolvent at the time of such acquisition or loan, except securities eligible for investment under subsection (c).

(2) Any mortgage or deed of trust, or any real property or any interest therein, which does not come within the class of investments specified in subdivisions (6) and (7) of subsection (c).

(3) Any capital stock of the investing insurer.

(4) Stocks, bonds or other securities issued by any corporation, if a majority of the outstanding stock of such corporation, or a majority of the stock having voting powers of such corporation is, or will be after such acquisition, directly or indirectly owned by such insurer or by or through one or more of its officers or directors holding the same, for the benefit of such insurer or of its stockholders, or owned by a parent corporation or subsidiary of such insurer, parent corporation or subsidiary thereof, or owned by any combination of the insurer, its parent corporation, its subsidiaries or its stockholders. Nothing contained in this subdivision shall be deemed to prevent any investment in the stock, bonds or other securities of a corporation organized exclusively to hold and operate real estate acquired by such insurer in accordance with and subject to the provisions of subsection (c), nor an investment in the stock of another insurance corporation nor an investment in stocks, bonds or other securities of any corporation which is engaged exclusively in a kind of business properly incidental to the insurance business of such insurer, including an investment in securities of any corporation engaged in the financing of insurance premiums, or in such incidental business and the business of holding and operating real estate.

(5) Stocks, bonds or other securities issued by a corporation, other than an insurance corporation, having more than twenty per centum (20%) of its assets invested in insurance company stocks directly or indirectly, including proportionate equities or interest in insurance company stocks held through any intermediate subsidiary or subsidiaries of such issuing corporation.

(6) Stocks, bonds or other securities issued by a corporation, other than an insurance corporation, if a majority of the stock having voting powers of such issuing corporation is owned directly or indirectly by or for the benefit of one or more officers or directors of such insurer.

(7) Foreign investments, meaning stocks or shares, bonds or obligations of any person or governmental or business unit of or in a foreign country or any subdivision thereof, except such as conform substantially with the limitations imposed by this subsection upon like domestic investments; but the aggregate amount of foreign investments held by such insurer under this subdivision of subsection (d) and under subdivision (9) of subsection (c) shall not exceed ten per centum (10%) of its total admitted assets or one and one-half times the amount of its reserves and other obligations under such contracts or the amount necessary to enable it to establish and carry on an insurance business in such foreign country, directly or through a subsidiary corporation, whichever shall be greater.

(8) Any investment which is found by the Commissioner to be against public policy or designed to evade any prohibition of this section. Nothing contained herein shall be deemed to prohibit any such insurer from accepting securities, otherwise ineligible, which may be distributed pursuant to any plan of reorganization or dissolution.

(e) Limitation of Investments. — Except as more specifically provided in this section, no domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, shall have more than ten percent (10%) of its total admitted assets invested in, or loaned upon the securities of any one institution; but this restriction shall not apply to the classes of governmental obligations (including those eligible under paragraph c, subdivision (6) of subsection (c)) eligible for minimum capital investments of such insurer nor to investments in stocks of other insurance companies. No domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association shall hereafter acquire any real property of the kind or kinds specified in paragraphs a and b of subdivision (8) of subsection (c), if the value of such real property, together with the value of all such real property then held by it, exceeds ten per centum (10%) of its total admitted assets except as more specifically provided in this section.

(f) Disposal or Reduction of Investments Unlawfully Acquired. — Every domestic stock and mutual insurance company, other than a life insurance company or fraternal benefit association, shall dispose of any investments acquired in violation of the law in force at the date of such acquisition, and in any determination of the financial condition of any such insurer, the amount of the value of such investments, if wholly ineligible, or the amount of the value thereof in excess of any limitation prescribed in this section, shall be deducted as an unadmitted asset of such insurer.

(g) Investments of Foreign and Alien Insurers.

(1) The Commissioner may refuse a new or renewal license to any foreign insurer, if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this section upon like domestic insurers hereafter organized to do the same kind or kinds of insurance business. The Commissioner may recognize like securities of the home state of a foreign insurer as minimum capital investments in lieu of the securities specified in subdivisions (2) and (4) of subsection (a).

(2) No alien insurer shall be authorized to do business in this State unless its general State deposits and its trusteed assets comply in substance with the requirements and limitations of this section applicable to like domestic insurers hereafter organized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

a. Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien insurer was organized or by any province or other major political subdivision thereof and not in default as to principal or interest, may be recognized as reserve investments under subsection (c) in an amount not exceeding the minimum capital required of a domestic stock insurer hereafter organized to do the same kind or kinds of insurance business.

b. Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof which are not in default as to principal or interest may be included in the trusteed assets of such alien insurer in an amount not exceeding ten percent (10%) of the total admitted assets of the United States branch of such insurer.

(h) Valuation of Investments.

(1) The investments of every stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, authorized to do business in this State, except securities subject to amortization and except as otherwise provided in this section, shall be valued, in the discretion of the Commissioner, at their market value, or at their appraised value, or at prices determined by him as representing their fair market value. If the Commissioner finds that in view of the character of investments of any such insurer authorized to do business in this State it would be prudent for such insurer to establish a special reserve for possible losses or fluctuations in the values of its investments, he may require such insurer to establish such reserve, reasonable in amount, and may require that such reserve be maintained and reported in any statement or report of the financial condition of such insurer. The Commissioner may, in connection with any examination or required financial statement of an authorized insurer require such insurer to furnish him a complete financial statement and audited report of the financial condition of any corporation of which the securities are owned wholly or partly by such insurer and may cause an examination to be made of any subsidiary or affiliate of such insurer.

(2) The stock of an insurance company shall be valued at its book value as shown by its last annual statement or the last report on examination, whichever is more recent. The book value of a share of common stock of an insurance company shall be ascertained by dividing (i) the amount of its capital and surplus less the value of all of its preferred stock, if any, outstanding, by (ii) the number of shares of its common stock issued and outstanding. Notwithstanding the foregoing provisions, an insurer may, at its option, value its holdings of stock in a subsidiary insurance company in an amount not less than acquisition cost if such acquisition cost is less than the value determined as hereinbefore provided.

(3) Real estate acquired by foreclosure or by deed in lieu thereof, or in connection with the default in payment of a loan insured under any mortgage guaranty policy of credit insurance, in the absence of a recent appraisal deemed by the Commissioner to be reliable, shall not be valued at an amount greater than the unpaid principal of the defaulted loan at the date of such foreclosure or deed, together with any taxes and expenses paid or incurred by such insurer at such time in connection with such acquisition (but not including any uncollected interest on such loan); and the cost of additions or improvements thereafter made by such insurer and any amount or amounts thereafter paid by such insurer on any assessments levied for improvements in connection with the property; provided, that the value of any property conveyed to any mortgage guaranty insurance company in satisfaction of debts or guarantees previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees or mortgages obtained or made for such debts or guaranties, or acquired upon tender of the named insured, whether such property be held by it directly or indirectly, together with the value of all such real property then held by it shall not exceed thirty percent (30%) of its total admitted assets; provided, however, that the Commissioner of Insurance shall have authority from time to time by regulation to fix a lesser percentage of admitted assets than provided by this statute, and when so fixed, the property so held by such company, directly or indirectly, shall not exceed such percentage of its admitted assets.

(4) Purchase money mortgages shall be valued in an amount not exceeding the acquisition cost of such real property or ninety percent (90%) of the value of such real property, whichever is less.

(5) The stock of a subsidiary of an insurer shall be valued on the basis of the value of only such of the assets of such subsidiary as would constitute lawful investments for the insurer if acquired or held directly by the insurer.

(i) Interest, Dividends and Rent. — In any determination of the financial condition of every stock and mutual insurance company, domestic or foreign, other than a life insurance company or a fraternal benefit association, authorized to do business in this State, amounts due to such insurer may be allowed as an admitted asset of such insurer as follows:

(1) Interest due or accrued on any bond or evidence of indebtedness qualifying as an admitted asset which is not in default and which is not valued on a basis including accrued interest.

(2) Declared and unpaid dividends on stocks and shares unless such amount has otherwise been allowed as an admitted asset.

(3) Interest due or accrued upon a collateral loan in an amount not to exceed one year's interest thereon.

(4) Interest due or accrued on deposits in solvent banks and trust companies, and interest due or accrued on other admitted assets if such interest is in the judgment of the Commissioner a collectible asset.

(5) Interest due or accrued on any real estate mortgage loan which is an admitted asset, in amount not exceeding in any event the amount, if any, obtained by subtracting the amount of the principal remaining unpaid from the value of the property less delinquent taxes thereon; but if any interest on such loan is in default more than 18 months, or if any interest on such loan is in default and any taxes or any installment thereof on such property are and have been due and unpaid for more than 18 months, no allowance shall be made for any interest on such loan.

(6) Rent due or accrued on real property if such rent is not in arrears for more than three months.

(j) Application of G.S. 58-79, Subdivision (b)(3). — The provisions of subdivision (b)(3) of G.S. 58-79 shall apply to all insurance companies doing business in this State. (1945, c. 386; 1955, c. 178, s. 2; 1967, c. 624, ss. 2-4; 1971, c. 386, s. 2.)

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There is no requirement in this section that insurance companies invest in risk-free ventures; rather, the statute provides that insurance companies may engage in a variety of investments. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Investment in the common stock of a subsidiary represents the ownership of real property. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Investment in Wholly Owned Subsidiary Not Admitted Asset. — Where petitioner's investment in wholly owned subsidiary would enable the petitioner to convert unadmitted assets into admitted assets, and in so doing evade the real property limitation provided by the law for insurance company, under these circumstances it would not be in the public interest to consider the company's investment in its wholly owned subsidiary as an admitted asset. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Reserve Investment Can Consist of Real Estate. — Subsection (c)(8) provides that a company's reserve investment can consist of real estate, but only if used for the company's principal office or for its convenient accommodation in the transaction of its business. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Subsection (d)(4) allows a company to invest in the stock of its wholly owned subsidiary, subject to the provisions of subsection (c). In re Hardware Mut Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Value of Property May Not Exceed 10% of Admitted Assets. — Under subsection (e), a company cannot even acquire real property for the purposes stated in subsection (c)(8)a and b if the value of the acquired property, together with all the real property held by the company, exceeds 10% of its total admitted assets. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-79.2. Establishment of separate accounts by life insurance companies.

(a) When used in this section, "variable contract" shall mean any individual or group contract issued by an insurance company providing for life insurance or annuity benefits or contractual payments or values which vary so as to reflect investment results of any segregated portfolio of investments or of a designated separate account or accounts in which amounts received or retained in connection with any of such contracts have been placed.

(b) Any domestic life insurance company may, pursuant to resolution of its board of directors, establish one or more separate accounts and may allocate to such account or accounts amounts received or retained in connection with variable contracts (including without limitation proceeds applied under optional modes of settlement or under dividend options) to provide for life insurance or annuities (and benefits incidental thereto) payable in fixed or variable amounts or both.

(c) In addition to the amounts allocated under subsection (b), such company may allocate from its general accounts to such separate account or accounts additional amounts, which may include an initial allocation to establish such account; provided, that the aggregate amount so allocated shall not exceed one per centum (1%) of its admitted assets as of the preceding December 31, or one million dollars ($1,000,000), whichever is less, and, provided further, that such company shall be entitled to withdraw at any time, in whole or in part, its participation in any separate account to which funds have been allocated as provided in this subsection (c), and to receive, upon withdrawal, its proportionate share of the value of the assets of the separate account at the time of withdrawal.

(d) Except as hereinafter provided, the amounts allocated to any separate account and accumulations thereon may be invested and reinvested without regard to any requirements or limitations prescribed by the laws of this State governing the investments of life insurance companies; provided, that to the extent that the company's reserve liability with regard to (i) benefits guaranteed as to amount and duration, and (ii) funds guaranteed as to principal amount or stated rate of interest is maintained in any separate account, a portion of the assets of such separate account at least equal to such reserve liability shall be, except as the Commissioner may otherwise approve, invested in accordance with the laws of this State governing the investments of life insurance companies. The investments in such separate account or accounts shall not be taken into account in applying the investment limitations applicable to other investments of the company.

(e) With respect to seventy-five percent (75%) of the market value of the total assets in a separate account no company shall purchase or otherwise acquire the securities of any issuer, other than securities issued or guaranteed as to principal or interest by the United States, if immediately after such purchase or acquisition the market value of such investment, together with prior investments of such separate account in such security taken at market,

would exceed ten percent (10%) of the market value of the assets of said separate account; provided, however, that the Commissioner may waive such limitation if, in his opinion, such waiver will not render the operation of such separate account hazardous to the public or the policyholders in this State.

(f) Unless otherwise permitted by law or approved by the Commissioner, no company shall purchase or otherwise acquire for its separate accounts the voting securities of any issuer if as a result of such acquisition the insurance company and its separate accounts, in the aggregate, will own in excess of ten percent (10%) of the total issued and outstanding voting securities of such issuer provided that the foregoing shall not apply with respect to securities held in separate accounts, the voting rights in which are exercisable only in accordance with instructions from persons having interests in such accounts.

(g) The limitations provided in subsections (e) and (f) above shall not apply to the investment with respect to a separate account in the securities of an investment company registered under the Investment Company Act of 1940, provided that the investments of such investment company comply in substance with subsections (e) and (f) hereof.

(h) The income, if any, and gains and losses, realized or unrealized, from assets allocated to each account shall be credited to or charged against the account without regard to other income, gains or losses of the company.

(i) Unless otherwise approved by the Commissioner, assets allocated to a separate account shall be valued at their market value on the date of valuation, or if there is no readily available market, then as provided under the terms of the contract or the rules or other written agreement applicable to such separate account; provided, that unless otherwise approved by the Commissioner that portion of the assets of such separate account equal to the company's reserve liability with regard to the guaranteed benefits and funds referred to in subsection (d) hereof, if any, shall be valued in accordance with the rules otherwise applicable to the company's assets. The reserve liability for variable contracts shall be determined in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees.

(j) If and to the extent so provided under the applicable contracts, that portion of the assets of any such separate account equal to the reserves and other contract liabilities with respect to such account shall not be chargeable with liabilities arising out of any other business the company may conduct.

(k) The life insurance company shall have the power and the company's charter shall be deemed amended to authorize such company to do all things necessary under any applicable state or federal law in order that variable contracts may be lawfully sold or offered for sale. To the extent such company deems it necessary to comply with any applicable federal or state laws, such company, with respect to any separate account, including without limitation any separate account which is a management investment company or a unit investment trust, may provide, for persons having an interest therein, appropriate voting and other rights and special procedures for the conduct of the business of such account, including without limitation special rights and procedures relating to investment policy, investment advisory services, selection of independent public accountants, and the selection of a committee, the members of which need not be otherwise affiliated with such company, to manage the business of such account. This provision shall not affect existing laws pertaining to the voting rights of the life insurance company's policyholders.

(l) Amounts allocated to a separate account in the exercise of the power granted by this section shall be owned by the company, and the company shall not be, or hold itself out to be, a trustee with respect to such amounts.

(m) The company shall not, in connection with the allocation of investments or expenses, or in any other respect, discriminate unfairly between separate

accounts or between separate and other accounts, but this provision shall not require the company to follow uniform investment policies for its accounts.

(n) No sale, exchange or other transfer of assets may be made by a company between any of its separate accounts or between any other investment account and one or more of its separate accounts unless, in case of a transfer into a separate account, such transfer is made solely to establish the account or to support the operation of the contracts with respect to the separate account to which the transfer is made, and unless such transfer, whether into or from a separate account, is made (i) by a transfer of cash, or (ii) by a transfer of securities having a readily determinable market value, provided that such transfer of securities is approved by the Commissioner. The Commissioner may approve other transfers among such accounts if, in his opinion, such transfers would not be inequitable.

(o) Any contract providing benefits payable in variable amounts delivered or issued for delivery in this State shall contain a statement of the essential features of the procedure to be followed by the company in determining the dollar amount of such variable benefits. Any such contract under which the benefits vary to reflect investment experience, including a group contract and any certificate in evidence of variable benefits issued thereunder, shall state that such dollar amount will so vary and shall contain on its first page a statement to the effect that the benefits thereunder are on a variable basis.

(p) Any variable annuity contract providing benefits payable in variable amounts issued under this section may include as an incidental benefit provision for payment on death during the deferred period of an amount not in excess of the greater of the sum of the premiums or stipulated payments paid under the contract or the value of the contract at time of death; such contracts will be deemed not to be contracts of life insurance and therefore not subject to the provisions of the insurance law governing life insurance contracts. Provision for any other benefit on death during the deferred period will be subject to such insurance provisions.

(q) No domestic life insurance company and no other life insurance company shall deliver or issue for delivery within this State any contracts under this section unless it is licensed or organized to do a life insurance or annuity business in this State, and the Commissioner of Insurance is satisfied that its financial condition and its methods of operation in connection with the issuance of such contracts will not render its operation hazardous to the public or its policyholders in this State. In determining the qualification of a company requesting authority to deliver such contracts within this State, the Commissioner of Insurance shall consider, among other things:

(1) The history and financial condition of the company;

(2) The character, responsibility and general fitness of the officers and directors of the company; and

(3) The law and regulations under which the company is authorized in the state of domicile to issue variable annuity contracts. The state of entry of an alien company shall be deemed its place of domicile for this purpose.

If the company is a subsidiary of an admitted life insurance company, or affiliated with such company through common management or ownership, it may be deemed by the Commissioner to have met the provisions of this subsection if either it or the parent or affiliated company meets the requirements hereof.

(r) The Commissioner of Insurance shall have sole and exclusive authority to regulate the issuance by life insurance companies and the sale of such contracts and to issue such reasonable rules and regulations as may be necessary to carry out the purposes and provisions of this section, and such contracts and the life insurance companies which issue them shall not be subject to the Securities Law of North Carolina nor to the jurisdiction of the Secretary of State thereunder.

(s) Except for G.S. 58-201.3 and 58-207 in the case of a variable annuity contract and G.S. 58-201.2, 58-207, and 58-211(1) in the case of a variable life insurance policy and except as otherwise provided in this section, all pertinent provisions of the insurance laws of this State shall apply to separate accounts and contracts issued in connection therewith. Any individual variable life insurance contract, delivered or issued for delivery within this State, shall contain reinstatement and nonforfeiture provisions appropriate to such a contract. Any group variable life insurance contract, delivered or issued for delivery within this State, shall contain grace provisions appropriate to such a contract. Any individual variable annuity contract, delivered or issued for delivery within this State, shall contain reinstatement provisions appropriate to such a contract. (1965, c. 166; 1969, c. 616, s. 2; 1971, c. 831, s. 2; 1973, c. 490; 1979, c. 409, s. 10.)

§ 58-80. Valuation of bonds and other evidences of debt; discretion of Commissioner of Insurance.

All bonds or other evidences of debt having a fixed term and rate held by any life insurance company, assessment life association, or fraternal beneficiary association authorized to do business in this State may, if amply secured and not in default as to principal and interest, be valued as follows: if purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity, and so as to yield in the meantime the effective rate of interest at which the purchase was made: Provided, that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase; and provided further, that the Commissioner of Insurance shall have full discretion in determining the method of calculating values according to the foregoing rule. (1921, c. 220; C.S., s. 6334(a).)

§ 58-81. Authority to increase or reduce capital stock.

The Commissioner of Insurance shall, upon application, examine the proceedings of domestic companies to increase or reduce their capital stock, and when found conformable to law shall issue certificates of authority to such companies to transact business upon such increased or reduced capital: Provided, that in no event shall the said capital stock be reduced to an amount less than that required upon organization of such company in G.S. 58-77. He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company unless the same are secured by competent collateral. (1899, c. 54, s. 15; Rev., s. 4732; C.S., s. 6335; 1945, c. 386.)

§ 58-82. Assessment of shares; revocation of license.

When the net assets of a company organized under this Article do not amount to more than the amount required in G.S. 58-77 for its original capital, it may make good its capital to the original amount by assessment of its stock. Shares on which such an assessment is not paid within 60 days after demand shall be forfeitable and may be canceled by vote of the directors and new shares issued to make up the deficiency. If such company does not, within three months after notice from the Commissioner of Insurance to that effect, make good its capital or reduce the same, as allowed by this Article, its authority to transact new business of insurance shall be revoked by the Commissioner. (1899, c. 54, s. 28; 1903, c. 438, s. 4; Rev., s. 4733; C.S., s. 6336; 1945, c. 386.)

§ 58-83. Increase of capital stock.

Any company organized under the provisions of this Chapter may issue pro rata to its stockholders certificates of any portion of its actual net surplus over and above the minimum required by law it deems fit to divide, which shall be considered an increase of its capital to the amount of such certificates. The company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates therefor when paid for in full. In whichever method the increase is made, the company shall, within 30 days after the issue of such certificates, submit to the Commissioner of Insurance a certificate setting forth the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the Commissioner of Insurance finds that the facts conform to the law, he shall endorse his approval thereof; and upon filing such certificate so endorsed with the Secretary of State, and the payment of a fee of five dollars ($5.00) for filing the same, the company may transact business upon the capital as increased, and the Commissioner of Insurance shall issue his certificate to that effect. (1899, c. 54, s. 29; Rev., s. 4734; C.S., s. 6337; 1945, c. 386.)

§ 58-84. Reduction of capital stock.

When the capital stock of a company organized under this Article is impaired, the company may, upon a vote of the majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum sum required by law, but no part of its assets and property shall be distributed to its stockholders. Within 10 days after such meeting the company must submit to the Commissioner of Insurance a certificate setting forth the proceedings thereof and the amount of the reduction and the assets and liabilities of the company, signed and sworn to by its president, secretary, and a majority of its directors. The Commissioner of Insurance shall examine the facts in the case, and if they conform to law, and in his judgment the proposed reduction may be made without prejudice to the public, he shall endorse his approval upon the certificate. Upon filing the certificate so endorsed with the Secretary of State and paying a filing fee of five dollars ($5.00), the company may transact business upon the basis of the reduced capital as though it were original capital, and its charter shall be deemed to be amended to conform thereto, and the Commissioner of Insurance shall issue his certificate to that effect. The company may, by a majority vote of its directors, after the reduction, require the return of the original certificates of stock held by each stockholder in exchange for new certificates it may issue in lieu thereof for such number of shares as each stockholder is entitled to in the proportion that the reduced capital bears to the original capital. (1899, c. 54, s. 30; Rev., s. 4735; C.S., s. 6338.)

§ 58-85. Dividends not payable when capital stock impaired; liability of stockholders for unlawful dividends.

No dividend shall be paid by any company incorporated in this State when its capital stock is impaired, or when such payment would have the effect of impairing its capital stock; and any dividend so paid subjects the stockholders receiving it to a joint and several liability to the creditors of said company to the extent of the dividend so paid. (1899, c. 54, s. 31; 1903, c. 536, s. 3; Rev., s. 4736; C.S., s. 6339; 1945, c. 386.)

§ 58-85.1. Payment of dividends impairing financial soundness of company or detrimental to policyholders.

Each domestic insurance company in North Carolina shall be restricted by the Commissioner from the payment of any dividends to its stockholders whenever the Commissioner determines from examination of such company's financial condition that the payment of future dividends would impair the financial soundness of the company or be detrimental to its policyholders, and such restrictions shall continue in force until such future date when the Commissioner may specifically permit the payment of dividends to stockholders by the company through a written authorization. Nothing contained in this section and no action taken by the Commissioner shall in any way restrict the liability of stockholders under the preceding section [G.S. 58-85]. (1945, c. 386.)

§ 58-86. Loans insufficiently secured.

Whenever it appears by examination, as authorized by law, that an insurance company, organized under the laws of this State, holds, as collateral security for the payment of any loan, any stock, bond, or security of whatever description, which has not a cash market value of at least twenty-five per centum (25%) more than the amount of such loan, the Commissioner of Insurance may require the reduction of the loan or an increase of the collateral security, so that the security shall be at least twenty-five per centum (25%) in excess of the amount loaned. If the company fail to comply with this requirement within 10 days after receiving written notice thereof from the Commissioner, it is the duty of the Commissioner to disallow the loan and to deduct the amount thereof from the assets of the company. If it appears, upon examination, that any such insurance company holds, as security for any loan, a mortgage upon real estate which is not a first lien, or that the value of the real estate is less than fifty per centum (50%) in excess of the loan which it is mortgaged to secure, the Commissioner of Insurance may disallow the loan and deduct the amount thereof from the assets of the company holding it, after having given the company at least 20 days' notice, in writing, to change or conform the loan to the requirements of this section. (1903, c. 536, ss. 6, 7, 8; Rev., s. 4737; C.S., s. 6340.)

§ 58-86.1. Certain officers debarred from commissions.

No officer or other person whose duty it is to determine the character of the risk, and upon whose decision the application shall be accepted or rejected by an insurance company, shall receive as any part of his compensation a commission upon the premiums, but his compensation shall be a fixed salary and such share in the net profits as the directors may determine. Nor shall such officer or person be an employee of any officer or agent of the company. (1899, c. 54, s. 32; 1903, c. 438, s. 4; Rev., s. 4738; C.S., s. 6347; 1945, c. 386.)

Editor's Note. — This section was transferred from § 58-93.

§ 58-86.2. Restrictions on purchase and sale of equity securities of domestic companies.

(a) Statement of Ownership of Equity Securities. — Every person who is directly or indirectly the beneficial owner of more than ten percent (10%) of any class of any equity security of a domestic stock insurance company or who is a director or an officer of such company shall file in the office of the Commissioner on or before the first day of June, 1966, or within 10 days after he becomes such beneficial owner, director or officer, a statement, in such form as the Commissioner may prescribe, of the amount of all equity securities of such company of which he is the beneficial owner, and within 10 days after the close of each calendar month thereafter if there has been a change in such ownership during such month, shall file in the office of the Commissioner a statement, in such form as the Commissioner may prescribe, indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

(b) Profit Made from Sale of Equity Security Held Less than Six Months. — For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to such company, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such company within a period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the company, irrespective of any intention on the part of such beneficial owner, director or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the company, or by the owner of any equity security of the company in the name and in behalf of the company, if the company shall fail or refuse to bring such suit within 60 days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This section shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the equity security involved, or any transaction or transactions which the Commissioner by rules and regulations may exempt as not comprehended within the purpose of this section.

(c) Delivery of Security Sold. — It shall be unlawful for any such beneficial owner, director or officer, directly or indirectly, to sell any equity security of such company if the person selling the security or his principal (i) does not own the security sold, or (ii) if owning the security, does not deliver it against such sale within 20 days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this section if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense.

(d) Sales by Dealers. — The provisions of subsection (b) shall not apply to any purchase and sale, or sale and purchase, and the provisions of subsection (c) shall not apply to any sale, of an equity security of a domestic stock insurance company not then or theretofore held by him in an investment account, by a dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market (otherwise than on an exchange as defined in the Securities Exchange Act of 1934) for such security. The Commissioner may, by such rules and regulations as he deems necessary or appropriate in the public interest, define and prescribe terms and conditions with respect to securities held in an investment

account and transactions made in the ordinary course of business and incident to the establishment or maintenance of a primary or secondary market.

(e) Arbitrage Transactions. — The provisions of subsections (a), (b) and (c) of this section shall not apply to foreign or domestic arbitrage transactions unless made in contravention of such rules and regulations as the Commissioner may adopt in order to carry out the purposes of this section.

(f) "Equity Security" Defined. — The term "equity security" when used in this section means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commissioner shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as he may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(g) Exemptions from Requirements of Section. — The provisions of subsections (a), (b) and (c) hereof shall not apply to equity securities of a domestic stock insurance company if

(1) Such securities shall be registered, or shall be required to be registered, pursuant to section 12 of the Securities Exchange Act of 1934, as amended, or if

(2) Such domestic stock insurance company shall not have any class of its equity securities held of record by 100 or more persons on the last business day of the year next preceding the year in which equity securities of the company would be subject to the provisions of subsections (a), (b) and (c) hereof except for the provisions of this subdivision (2).

(h) Rules and Regulations of Commissioner. — The Commissioner shall have the power to make such rules and regulations as may be necessary for the execution of the functions vested in him by subsections (a) through (g) hereof, and may for such purpose classify domestic stock insurance companies, securities, and other persons or matters within his jurisdiction. No provision of subsections (a), (b) and (c) hereof imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commissioner, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

(i) Severability. — If any part or provision of this section or the application thereof to any person or circumstance be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this section or the application thereof to other persons or circumstances. (1965, c. 127, s. 2.)

Article 6A.

Exchange of Stock.

§ 58-86.3. Exchange of securities.

Any domestic insurance company with capital stock (hereinafter referred to as "domestic company") may adopt a plan of exchange providing for the exchange by its shareholders of their stock in the domestic company for (i) shares of stock issued by any other domestic stock insurance company or other domestic stock corporation organized or reorganized under the laws of this State — such other corporation being hereinafter referred to as the "acquiring

corporation"; (ii) other securities issued by the acquiring corporation; (iii) cash; (iv) other consideration; (v) any combination of such stock, such other securities, cash or other consideration. For the purpose of this Article, a "domestic company" or "domestic stock insurance company" shall mean a business corporation or a stock insurance company, respectively, organized and existing under the laws of the State of North Carolina. (1967, c. 938).

CASE NOTES

Propriety of Insurance Company Having Holding Company Structure. — By enacting this Article the General Assembly has recognized, and in so doing has established as the public policy of this State, that it is entirely proper for a domestic insurance company and its stockholders to enjoy the benefits of a corporate reorganization so as to bring their company under a holding company structure, provided the protective procedures prescribed in the Article are followed. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

§ 58-86.4. Procedure for exchange.

Subject to the provisions of G.S. 58-86.3, any domestic company may adopt a plan of exchange with any acquiring corporation providing for the exchange of the outstanding stock of the domestic company for shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof in the following manner:

(1) Approval of the Boards of Directors. — The boards of directors of the domestic company and of the acquiring corporation by resolutions shall adopt a plan of exchange which shall set forth the terms and conditions of the exchange and the mode of carrying the same into effect and such other provisions with respect to the exchange as may be deemed necessary or desirable.

(2) Approval of Commissioner of Insurance. — The domestic company and the acquiring corporation shall submit to the Commissioner of Insurance three copies of the plan of exchange certified by an officer of each as having been adopted in accordance with subdivision (1) of this section. Such copies of the plan of exchange shall be accompanied by (i) financial statements of the domestic company and the acquiring corporation for the last preceding fiscal year, (ii) pro forma financial statements of each corporation based on the assumption that the plan of exchange was effective as proposed at the end of the last preceding fiscal year of the domestic company, (iii) an estimate of expenses already incurred and of expenses expected to be incurred in connection with the proposed plan of exchange, (iv) a written statement which sets forth for each corporation the identity of officers and directors of the domestic company and of the acquiring corporation, and (v) any other information which the Commissioner may require with respect to such plan.

No director, officer, member or subscriber of the domestic company or of the acquiring corporation, except as is expressly provided by the plan filed with the Commissioner of Insurance, shall receive any fee, commission, other compensations or valuable considerations whatever, for in any manner aiding, promoting, or assisting in the promotion of the plan of exchange.

The Commissioner of Insurance shall hold a public hearing upon the terms, conditions and provisions of the proposed plan of exchange to determine if the proposed plan of exchange is reasonable, fair and in the public interest. At such hearing the shareholders and the

policyholders of the domestic company and the shareholders of the acquiring corporation and also the policyholders of the acquiring corporation, if it is an insurance company, and any other interested parties shall have the right to appear and to become parties to the proceedings.

Such hearing shall be commenced not less than 30 days after the date on which the plan of exchange is presented to the Commissioner. The hearing shall be held at such place, date and time as the Commissioner shall specify. Notice of the hearing shall be published in a newspaper of general circulation in the city or cities wherein are located the registered office of the domestic company and of the acquiring corporation once a week for two successive weeks, the last publication of such notice to be not more than two weeks prior to the hearing date. Written notice of the hearing shall be mailed at least 10 days prior to the hearing by the domestic company and by the acquiring corporation to all of their respective shareholders. All expenses of publication shall be borne by the domestic company or the acquiring corporation or both, as shall be specified in the plan of exchange, and the Commissioner may charge the domestic company or the acquiring corporation, or both, with such of the costs of the hearing as he may deem reasonable.

The Commissioner shall issue a written order approving the plan of exchange as delivered to him by the domestic company and the acquiring corporation and such modification therein as the board of directors of each such corporation shall approve, if he finds (i) that the plan, including all such modification, if effected, will not tend adversely to affect the financial stability or management of the domestic company or the general capacity or intention to continue the safe and prudent transaction of the insurance business of the domestic company, or of the acquiring corporation, if it is a domestic insurance company; (ii) that the interests of the policyholders and shareholders of the domestic company, and, if the acquiring corporation is a domestic insurance company, the policyholders of the acquiring corporation are protected; (iii) that the terms and conditions of the plan of exchange and the proposed issuance and exchange are fair and reasonable; and (iv) that the plan of exchange is consistent with the law and will not conflict with the public interest. If the Commissioner fails to approve the plan, he shall state his reasons for such failure in his order made on such hearing.

Any order issued by the Commissioner hereunder shall be subject to court review in accordance with the provisions of G.S. 58-9.3.

(3) Approval of Shareholders. — The plan of exchange as approved by the Commissioner of Insurance shall then be submitted to a vote of the shareholders of the domestic company at an annual or special meeting of the shareholders. Notice of the submission of the plan to the shareholders shall be included in the notice of such annual or special meeting. The plan shall be approved by the shareholders of the domestic company upon receiving the affirmative votes representing at least two thirds of the outstanding capital stock of the domestic company or such larger proportion as may be specified in the plan of exchange. Notwithstanding shareholder adoption of the plan of exchange and at any time prior to the filing of the certificate setting forth the plan of exchange pursuant to G.S. 58-86.5, the plan of exchange may be abandoned pursuant to a provision for such abandonment, if any, contained in the plan of exchange.

(4) Objection. — Any shareholder of the domestic company may, by following the procedure set forth in G.S. 55-113(b) object to the plan

of exchange and become entitled, if the plan becomes effective, to be paid by the domestic company or the acquiring corporation the fair value of his shares in the domestic company. Such payment and the amount thereof shall be determined in accordance with the provisions of G.S. 55-113(d), (e), (f), (g) and (h). (1967, c. 938.)

CASE NOTES

Notice and Hearing Required. — Because there may be circumstances in which a corporate reorganization might work to the detriment of the domestic insurance company or its shareholders or policyholders, this section provides that the corporate reorganization can be accomplished only after notice is given to all shareholders and to the public of a public hearing which the Commissioner of Insurance is directed to hold. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Commissioner Must Act in Good Faith. — A clearly implied condition upon the powers conferred upon the Commissioner by this section is that he will exercise them in good faith. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

And Not Arbitrarily. — The powers conferred upon the Commissioner of Insurance by this section are not so broad as to permit him arbitrarily to refuse to make findings favorable to petitioners when all of the evidence supports such findings and there is no competent evidence to the contrary. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

The Commissioner of Insurance abused the powers granted to him by the General Assembly when he arbitrarily and capriciously denied a domestic insurance company's plan to reorganize under a holding company structure where all of the competent evidence showed it was clearly entitled to reorganization. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Relief from Commissioner's Arbitrary Action. — If the Commissioner acts arbitrarily, petitioners are not left helpless, nor are the courts powerless to grant them adequate relief. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Issuance of Mandatory Injunction Requiring Commissioner to Act Upheld. — The trial court did not exceed its power and authority by issuing its mandatory injunction requiring the Commissioner of Insurance to approve a domestic insurance corporation's plan to reorganize under a holding company structure where the Commissioner acted arbitrarily and capriciously when he disapproved the plan. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

§ 58-86.5. Filing plan of exchange.

Not earlier than 31 days after the date of the meeting of shareholders of the domestic company at which the plan of exchange was approved by such shareholders, a certificate setting forth (i) the plan of exchange and (ii) the vote by which such plan was adopted by the shareholders of the domestic company, or (iii) that the plan of exchange has been abandoned, shall be signed on behalf of the domestic company by its president or a vice-president and also by its secretary or an assistant secretary and shall then be presented in triplicate to the Commissioner of Insurance. If the certificate indicates that the plan of exchange has been approved by the domestic company's shareholders as required by G.S. 58-86.4(3) and that the facts otherwise conform to the law, he shall endorse his approval on the certificate and the same shall then be filed as provided in G.S. 55-4. Upon the filing of such certificate, the plan of exchange and the issuance and exchange provided for therein shall become effective, unless a later date and time is specified in the plan of exchange, in which event the plan of exchange and issuance and exchange provided for therein shall become effective upon such later date and time. (1967, c. 938).

§ 58-86.6. Effect of exchange.

Upon the plan of exchange becoming effective, the exchange provided for therein shall be deemed to have been consummated, each shareholder of the domestic company shall cease to be a shareholder of such company and the ownership of all shares of the issued and outstanding stock of the domestic company shall vest in the acquiring corporation automatically without any physical transfer or deposit of certificates representing such shares.

Certificates representing shares of the domestic company prior to the plan of exchange becoming effective shall, after the plan of exchange becomes effective, represent (i) shares of the issued and outstanding capital stock or other securities issued by the acquiring corporation, and (ii) the right, if any, to receive such cash or other consideration upon such terms as shall be specified in the plan of exchange: Provided, that the plan of exchange (i) shall specify that all certificates representing shares of stock of the domestic company may, after the plan of exchange becomes effective, be exchanged for shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof upon such terms as shall be specified in the plan of exchange, and (ii) may require that all certificates representing shares of stock of the domestic company shall, after the plan of exchange becomes effective, represent only the right to receive shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof upon such terms as shall be specified in the plan of exchange. (1967, c. 938.)

§ 58-86.7. Authorized insurance business and regulatory authority.

(a) Nothing contained in this Article shall be construed to authorize any insurance company to engage in any kind or kinds of insurance business not authorized by its articles of incorporation, or to authorize any acquiring corporation which is not an insurance company to engage directly in the business of insurance. Subsequent to the effective date of the plan of exchange, the Commissioner having regard to the findings stated in subdivision (2) of G.S. 58-86.4, shall have the authority to require that the affairs of the domestic company be conducted in such manner as to assure the continuing safe conduct and transaction of the domestic company's business of insurance.

(b) If at any time the Commissioner finds, after due notice and opportunity to be heard as provided by G.S. 58-9.2, that the business and affairs of the acquiring corporation are of such nature or are conducted in such manner as to endanger the continued solvency of any domestic insurance company, to be harmful to any domestic insurance company, or to impair the rights of any policyholder, he shall issue such written order or orders as he deems appropriate to assure that the business and affairs of the acquiring corporation are of such nature and are conducted in such manner as to no longer endanger the solvency of any domestic insurance company, to be harmful to any domestic insurance company, or to impair the rights of any policyholder, including an order requiring the acquiring corporation to divest itself of the stock of the domestic company.

(c) The Commissioner may examine, at such time or times as he may deem appropriate, the financial and business affairs of the acquiring corporation, and in connection with any such examination or examinations the acquiring corporation shall make available its books, records and accounts, and the Commissioner may require from the acquiring corporation and its officers, directors and employees the submission of such written or oral statements as the Commissioner may deem necessary or advisable. The cost of the examination shall be borne by the acquiring corporation at the same rate as is provided for under G.S. 58-63(3).

(d) Any acquiring corporation which owns or controls any domestic insurance company shall be subject to all proxy solicitation and insider trading regulations promulgated from time to time by the Commissioner of Insurance pursuant to statutory authority.

(e) It shall be unlawful for any domestic insurance company which has exercised the privileges allowed by this Article, except upon written approval by the Commissioner and subject to the provisions of G.S. 58-79,

(1) To invest any of its funds in the capital stock, bonds, debentures, or other obligations of any acquiring corporation of which it is a subsidiary, or of any other subsidiary of any such acquiring corporation;

(2) To accept the capital stock, bonds, debentures, or other obligations of any acquiring corporation of which it is a subsidiary or any other subsidiary of any such acquiring corporation, as collateral security for advances made to any person or company;

(3) To purchase securities, other assets or obligations under repurchase agreement from any acquiring corporation of which it is a subsidiary or any other subsidiary of any such acquiring corporation; and

(4) To make any loan, discount or extension of credit to any acquiring corporation of which it is a subsidiary or to any other subsidiary of any such acquiring corporation. (1967, c. 938.)

§ 58-86.8. Powers of Commissioner not affected.

Nothing in this Article shall affect the power of the Commissioner to regulate, supervise and control insurance companies to the extent of and as provided by this Chapter. (1967, c. 938.)

§ 58-86.9. Application of Article to other domestic corporations.

Any such domestic corporation, other than a domestic insurance company, which shall acquire the majority of the voting capital stock of any domestic insurance company shall be subject to the regulations contained in this Article; provided, however, that the provisions of this Article shall not apply to any domestic corporation which has acquired a domestic insurance company or companies prior to June 27, 1967. (1967, c. 938.)

Article 7.

Guaranty Fund for Domestic Companies.

§ 58-87. Guaranty fund established.

Any insurance company formed as provided in the preceding Article [Article 6], or now existing by virtue of any of the laws of North Carolina, may establish a guaranty fund of not less than twenty-five thousand dollars ($25,000) nor more than two hundred thousand dollars ($200,000), in the following manner: The company may receive from any person, firm, or corporation, money, bonds, or other securities, in such amount as may be agreed upon, for the purpose of providing a guaranty fund, to be used as hereinafter provided, for payment of the claims of policyholders. Upon the receipt of such bonds, money, or other securities by an insurance company, it shall issue its certificate, in writing, authenticated as required by law for certificates of stock, stating the amount, terms, and conditions of repayment of such money or the return of such bonds or other securities, the name of the payee or depositor, and the certificate shall

also state upon its face that it is issued under the provisions of this section. The money, bonds, or other securities, when so paid to or deposited with such insurance company, become a part of the guaranty fund of the company, and are liable for all the claims of policyholders after the general assets of the company have been exhausted. This guaranty fund is not liable for the claims or debts due to stockholders or the general creditors of such insurance company. No insurance company shall create a guaranty fund, as provided in this Article, except upon the approval of a majority of its stockholders authorized at any regular or special meeting called for the purpose. (1909, c. 922, s. 1; C.S., s. 6341.)

§ 58-88. Separate accounts; application of fund.

Every insurance company which establishes a guaranty fund under the provisions of this Article must keep a separate account of the same on its books, together with a full and true list of any securities held therefor. The money and securities belonging to the guaranty fund must be invested in the same manner as is now provided by law for the investment of other assets of insurance companies; but any bond or other securities received by any such insurance company as a part of its guaranty fund may be deposited with the Commissioner of Insurance, as is now allowed by law, subject to the further provisions of this Article. An insurance company receiving said money or securities as a part of its guaranty fund, as herein provided, may pay to the person, firm, or corporation from whom the same is received an annual dividend of not more than eight percent (8%) on the amount of said money or securities. The guaranty fund herein provided for shall be applied to the payment of claims of policyholders only when the insurance company has exhausted its cash on hand and the invested assets, exclusive of uncollected premium; and when the guarantee is in any way impaired the directors may make good the whole or any part of such impairment, by assessment upon the contingent funds of the company at the date of such impairment, if any are available. (1909, c. 922, s. 1; C.S., s. 6342; 1945, c. 386.)

§ 58-89. Reduction or retirement of fund.

The guaranty fund shall be retired when the permanent fund of the company equals two per centum (2%) of the amount insured upon all policies in force; and such guaranty fund may be reduced or retired by vote of the directors of the company and the assent of the Commissioner of Insurance, if the net assets of the company above the reinsurance reserve and all other claims and obligations, exclusive of the guaranty fund, for two years immediately preceding and including the date of its last annual statement, are not less than twenty-five per centum (25%) of the fund. Due notice of this proposed action on the part of the directors of the company must be mailed to each director of the company not less than 30 days before the meeting when such action may be taken, and must also be advertised in two newspapers of general circulation, to be approved by the Commissioner of Insurance, not less than twice a week for a period of not less than four weeks before the meeting. No insurance company with a guaranty fund, as hereinbefore provided, which has ceased to do new business, may return or retire any part of the guaranty fund or divide to its stockholders any part of its general assets, except incomes from its investments, until it shall have performed, reinsured, or canceled its policy obligations. (1909, c. 922, s. 1; C.S., s. 6343.)

§ 58-90. Insolvency; return of fund.

In the event of insolvency or voluntary liquidation of any such insurance company, the amount of the guaranty fund shall be returned to the persons, firms, or corporations, their heirs, executors, administrators, successors, or assigns, from which the same was received, in full or pro rata, as the case may be, before any amount shall be paid from the assets of said company to its stockholders. The intention of this section is that the liability of the company for the repayment or the return of its guaranty fund, as evidenced by its certificates therefor, as hereinbefore provided, shall be preferred in the distribution of its assets to the stockholders and general creditors of the company, other than its policy obligations. (1909, c. 922, s. 1; C.S., s. 6344.)

§ 58-91. Conversion to guaranty fund.

Any insurance company now doing business as a domestic insurance company under the laws of this State which has received any money or securities to be held as a guaranty capital, guaranty surplus, or guaranty fund, may convert the same into a guaranty fund, as hereinbefore provided, by mutual agreement between the board of directors of the insurance company and the parties from whom the money or securities have been received, subject, however, to the approval of the Commissioner of Insurance, and thereupon certificates shall be issued therefor, as hereinbefore provided, and the same shall thereafter be held subject to the rights and liabilities provided in this Article. (1909, c. 922, s. 2; C.S., s. 6345.)

Article 8.

Mutual Insurance Companies.

§ 58-92. Mutual insurance companies organized; requisites for doing business.

No policy may be issued by a mutual company until the president and the secretary of the company have certified under oath that every subscription for insurance in the list presented to the Commissioner for approval is genuine, and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within 30 days after the granting of a license to the company by the Commissioner to issue policies. (1899, c. 54, ss. 25, 32, 34; 1901, c. 391, s. 3; 1903, c. 438, s. 4; Rev., s. 4738; 1911, c. 93; C.S., s. 6346; 1945, c. 386.)

§ 58-92.1. Manner of amending charter.

(a) A domestic mutual insurance company may hereafter amend its charter in the following manner only:

(1) A meeting of the board of directors shall be called in accordance with the bylaws, specifying the amendment to be voted upon at such meeting;

(2) If at such meeting two thirds of the directors present vote in favor of the proposed amendment, then the president and secretary shall under oath make a certificate to this effect, which certificate shall set forth the call for such meeting, the service of such call upon all directors, and the minutes of the meeting relating to the adoption of the proposed amendment;

(3) Said officers shall cause said certificate to be published once a week for two consecutive weeks in a newspaper in Raleigh and in the county where the company's principal office is located, or posted at the courthouse door if no newspaper be published within the county. Said printed or posted notices shall be in such form and of such size as the Commissioner may approve, and in addition to setting forth in full the certificate required in subdivision (2) shall state that application for amending the company's charter in the manner specified has been proposed by the board of directors, and shall also state the time set for a meeting of policyholders thereby called to be held at the principal office of the company to take action on the proposed amendment. A true copy of such notice shall be filed with the Commissioner, and also with that official who performs the functions of Commissioner of Insurance in each state where the company is licensed to do business. Such publication and filing of notices shall be completed at least 30 days prior to the date set therein for the meeting of policyholders and due proof thereof shall be filed with the Commissioner at least 15 days prior to the date of such meeting. If the meeting at which the proposed amendment is to be considered is a special meeting, rather than a regular annual meeting of policyholders, such special meeting can be called only after the Commissioner has given his approval in writing, and the published notice shall show the fact of such approval;

(4) If at such policyholders' meeting two thirds of those voting in person or by proxy shall vote in favor of any proposed amendment, the president and secretary shall make a certificate under oath setting forth such fact together with the full text of the amendment thus approved. Said certificate shall, within 30 days after such meeting, be submitted to the Commissioner for his approval as conforming to the requirements of law, and it shall be the duty of the Commissioner to act upon all proposed amendments within 10 days after the filing of such certificate with him.

(b) All charter amendments heretofore issued upon application of the board of directors of any domestic mutual insurance company are hereby validated, if otherwise legally adopted. (1943, c. 170; 1947, c. 721.)

Legal Periodicals. — For comment on this section, see 25 N.C.L. Rev. 441.

§ 58-93: Transferred to G.S. 58-86.1 by Session Laws 1945, c. 386.

Editor's Note. — This section was repealed, but a part of it was rewritten and transferred to § 58-86.1 by Session Laws 1945, c. 386.

§ 58-94. Policyholders are members of mutual companies.

Every person insured by a mutual insurance company is a member while his policy is in force, entitled to one vote for each policy he holds, and must be notified of the time and place of holding its meetings by a written notice or by an imprint upon the back of each policy, receipt, or certificate of renewal, as follows:

> The insured is hereby notified that by virtue of this policy he is a member of the . . . . . insurance company, and that the annual meetings of the company are held at its home office on the . . . . . day of . . . . . ., in each year, at . . . . . o'clock.

The blanks shall be duly filled in print and are a sufficient notice. A corporation which becomes a member of such company may authorize any person to represent it, and this representative has all the rights of an individual member. A person holding property in trust may insure it in such company, and as trustee assume the liability and be entitled to the rights of a member, but is not personally liable upon the contract of insurance. Members may vote by proxies, dated and executed within three months, and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person as proxy or otherwise may cast more than 20 votes. (1899, c. 54, s. 33; Rev., s. 4739; C.S., s. 6348; 1945, c. 386; 1947, c. 721.)

CASE NOTES

This section is an enabling statute to protect a trustee from liability. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

Policyholders in a mutual fire insurance company are not liable for its debts beyond the contingent liability fixed in the policy. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935). See §§ 58-97.1 to 58-97.3.

As to county boards of education as policyholders, see Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

§ 58-95. Directors in mutual companies.

Every mutual insurance company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and hold office for one year or for such term as the bylaws provide and until their successors are qualified. The directors need not be residents of this State or members of the company. In companies with a guaranty capital, one half of the directors shall be chosen by and from the stockholders. (1899, c. 54, s. 33; Rev., s. 4739; C.S., s. 6349; 1945, c. 386; 1971, c. 751.)

§ 58-96. Mutual companies with a guaranty capital.

A mutual insurance company formed as provided in this Chapter, in lieu of the contributed surplus required for the organization of mutual companies under the provisions of G.S. 58-77, or a mutual insurance company now existing, may establish a guaranty capital or surplus of not less than twenty-five thousand dollars ($25,000), divided into shares of one hundred dollars ($100.00) each, which shall be invested in the same manner as is provided in this Subchapter for the investment of the capital stock of insurance companies. The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to an annual dividend of not more than ten per centum (10%) on their respective shares and, in the discretion of the board of directors of a company, said dividend may be increased in any year to not more than fifteen per centum (15%), if the net profits or unused premiums left after all expenses, losses, and liabilities then incurred, together with the reserve as provided for, are sufficient to pay the same. The guaranty capital or surplus shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies are subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policyholders in purely mutual companies. This guaranty capital or surplus may be reduced or retired by vote of the policyholders of the company and the assent of the Commissioner of

Insurance, if the net assets of the company above its reserve and all other claims and obligations, exclusive of guaranty capital or surplus, for two years immediately preceding and including the date of its last annual statement, is not less than twenty-five per centum (25%) of the guaranty capital or surplus. Due notice of such proposed action on the part of the company must be mailed to each policyholder of the company not less than 30 days before the meeting when the action may be taken, and must also be advertised in two papers of general circulation, approved by the Commissioner of Insurance, not less than three times a week for a period of not less than four weeks before such meeting. No insurance company with a guaranty capital or surplus, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital or surplus, except income from investments, until it has performed or canceled its policy obligations. (1899, c. 54, s. 34; Rev., s. 4740; 1911, c. 196, s. 3; C.S., s. 6350; 1945, c. 386; 1971, c. 752; 1981, c. 723.)

Effect of Amendments. — The 1981 amendment deleted "nor more than one million dollars ($1,000,000)" following "($25,000)" in the first sentence and inserted in the second sentence "and, in the discretion of the board of directors of a company, said dividend may be increased in any year to not more than fifteen percentum (15%)."

OPINIONS OF ATTORNEY GENERAL

Income from guaranty fund investments does not accrue solely to benefit of guaranty fund shareholders. See opinion of Attorney General to Ron Raxter, Staff Attorney, Dep't of Insurance, 49 N.C.A.G. 207 (1980).

§ 58-97. Dividends to policyholders.

Any participating or dividend-paying company, stock or mutual, other than life, may declare and pay a dividend to policyholders from its surplus which shall include only its surplus in excess of any required minimum surplus. No such dividend shall be paid unless fair and equitable and for the best interest of the company and its policyholders. In declaring any dividend to its policyholders, any such company may make reasonable classifications of policies expiring during a fixed period, upon the basis of each general kind of insurance covered by such policies and by territorial divisions of the location of risks by states, except that in fixing the amount of dividends to be paid on each general kind of insurance, which dividends shall be uniform in rate and applicable to the majority of risks within such general kind of insurance, exceptions may be made as to any class or classes of risk and a different rate or amount of dividends paid on such class or classes if the conditions applicable to such class or classes differ substantially from the condition applicable to the kind of insurance as a whole. Every such company shall have an equal rate of dividend for the same term on all policies insuring risks in the same classification. The payment of dividends to policyholders shall not be contingent upon the maintenance or renewal of the policy. All dividends shall be paid to the policyholder unless a written assignment thereof be executed. Neither the payment of dividends nor the rate thereof may be guaranteed by any company, or its agent, prior to the declaration of the dividend by the board of directors of such company. The holders of policies of insurance issued by a company in compliance with the orders of any public official, bureau or committee, in conformity with any statutory requirement or voluntary arrangement, for the issuance of insurance to risks not otherwise acceptable to the company, may be established as a separate class of risks. (1899, c. 54, s. 35; Rev., s. 4741; C.S., s. 6351; 1935, c. 89; 1945, c. 386; 1947, c. 721; 1955, c. 645.)

CASE NOTES

For case upholding contract between county board of education and mutual fire insurance corporations, see Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

Cited in Paramore v. Farmers' Mut. Fire Ins. Ass'n, 207 N.C. 300, 176 S.E. 585 (1934).

§ 58-97.1. Contingent liability of policyholders.

Every insurance company shall in its bylaws and policies prescribe the contingent liability, if any, of its members for the payment of losses, reserves and expenses not provided for by its assets, which contingent liability shall be in accordance with the provisions of G.S. 58-77. Each member is liable for the payment of his proportionate share of any assessments made by the company in accordance with the law, his contract and the bylaws of the company on account of losses incurred while he was a member, if he is notified of such assessment within one year after the expiration of his policy. When any reduction is made in the contingent liability of members, it shall apply proportionately to all policies in force. (1945, c. 386.)

CASE NOTES

For case upholding contract between county board of education and mutual fire insurance corporations, see Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

§ 58-97.2. Contingent liability printed on policy.

Every insurance company licensed to do business in this State shall print upon the filing face of its policies in clear and explicit language the full contingent liability of its members. (1945, c. 386.)

§ 58-97.3. Nonassessable policies; foreign or alien companies.

No foreign or alien insurance company shall be licensed to issue in this State nonassessable policies unless it has a free surplus equal in amount to that required of a domestic insurance company, writing the same kind or kinds of insurance, and in addition thereto has fully complied with the requirements of the government under which it was organized; and no foreign or alien insurance company may be licensed to do business in this State to issue assessable policies if it issues nonassessable policies in any other state or country unless all policies shall state that any assessment shall be for the exclusive benefit of holders of policies which provide for such contingent liability and the holders of policies subject to assessment shall not be liable to assessment in an amount greater in proportion to the total deficiency than the ratio that the deficiency attributable to the assessable business bears to the total deficiency. (1945, c. 386.)

§ 58-98. Waiver of forfeiture in policies assigned or pledged; notice of assignment; payment of assessment or premium by assignee or mortgagee.

When any policy of insurance is issued by any mutual insurance company or association other than life, organized under the laws of this State and such

policy is assigned or pledged as collateral security for the payment of a debt, such company or association, by its president and secretary or other managing officers, may insert in such policy so assigned or pledged, or attach thereto as a rider thereon, a provision or provisions to be approved by the Commissioner of Insurance, whereby any or all conditions of the policy which work a suspension or forfeiture and especially the provisions of the statute which limits such corporation to insure only property of its members, may be waived in such case for the benefit of the assignee or mortgagee. In case any such company or association shall consent to such assignment of any policy or policies, or the proceeds thereof, it may nevertheless at any time thereafter, by its president and secretary or such other officer as may be authorized by the board of directors, cancel such policy by giving the assignee or mortgagee not less than 10 days' notice in writing: Provided, however, a longer period may be agreed upon by the company or association and such assignee or mortgagee. And the president and secretary of such company or association, with the approval of the Commissioner of Insurance, may agree with the assignee or mortgagee upon an assessment or premium to be paid to the insurer in case the insured shall not pay the same, which shall not be less than such a rate or sum of money as may be produced by the average assessments or premiums made or charged by like company or association during a period of five years next preceding the year of such agreement and assignment. When an assignment is made as herein provided the policy or policies so assigned or pledged, subject to the conditions herein, shall remain in full force and effect for the benefit of the assignee or mortgagee, notwithstanding the title or ownership of the assured to the property insured, or to any interest therein, shall be in any manner changed, transferred or encumbered. (Ex. Sess., 1920, c. 79; C.S. s. 6351(a); 1945, c. 386.)

§ 58-99. Guaranty against assessments prohibited.

If any director, officer, or agent of a mutual insurance company, either officially or privately, shall give a guarantee to a policyholder thereof against an assessment to which such policyholder would otherwise be liable, he shall be punished by a fine not exceeding one hundred dollars ($100.00) for each offense. (1899, c. 54, s. 100; Rev., s. 3496; C.S., s. 6352; 1945, c. 386.)

CASE NOTES

Cited in Paramore v. Farmers' Mut. Fire Ins. Ass'n, 207 N.C. 300, 176 S.E. 585 (1934).

§ 58-100. Manner of making assessments; rights and liabilities of policyholders.

When a mutual insurance company is not possessed of cash funds above its reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities. The company shall cause to be recorded in a book kept for that purpose the order for the assessment, together with a statement which must set forth the condition of the company at the date of the order, the amount of its cash assets and deposits, notes, or other contingent funds liable to the assessment, the amount the assessment calls for, and the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the order before any part of the assessment is collected, and any

person liable to the assessment may inspect and take a copy of the same. When, by reason of depreciation or loss of its funds or otherwise, the cash assets of such company, after providing for its other debts, are less than the required premium reserve upon its policies, it must make good the deficiency by assessment in the manner above provided. If the directors are of the opinion that the company is liable to become insolvent they may, instead of such assessment, make two assessments, the first determining what each policyholder must equitably pay or receive in case of withdrawal from the company and having his policy canceled; the second, what further sum each must pay in order to reinsure the unexpired term of his policy at the same rate as the whole was insured at first. Each policyholder must pay or receive according to the first assessment, and his policy shall be cancelled unless he pays the sum further determined by the second assessment, in which case his policy continues in force; but in neither case may a policyholder receive or have credited to him more than he would have received on having his policy canceled by a vote of the directors under the bylaws. (1899, c. 54, ss. 36, 37; Rev., s. 4742; C.S., s. 6353; 1945, c. 386.)

CASE NOTES

Waiver of Forfeiture. — Failure to pay assessments, in accordance with the terms of a contract of insurance, works a forfeiture of the policy, but the insurance company may by acts of unequivocal character waive such forfeiture. Perry v. Farmers Mut. Life Ins. Co., 132 N.C. 283, 43 S.E. 837 (1903).

An acceptance of an overdue assessment by a fire insurance company, after the property is burned, the company having notice thereof, is a waiver of the forfeiture of the policy. Perry v. Farmers Mut. Life Ins. Co., 132 N.C. 283, 43 S.E. 837 (1903).

Where mutual fire insurance company relies on failure to pay assessment in order to defeat recovery on policy, it must show that the assessment was legally made in conformity with the provisions of this section; hence, where it failed to so show and plaintiff insurer testified that she did not get notice of the assessment or of the cancellation of the policy, peremptory instructions against insurer on the affirmative defense were without error. Abernethy v. Mecklenburg Farmers' Mut. Fire Ins. Co., 213 N.C. 23, 195 S.E. 30 (1938).

Right of Insured to Withdraw. — Where the members of mutual insurance companies have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. Perry v. Farmers Mut. Fire Ass'n, 139 N.C. 374, 51 S.E. 1025 (1905).

No claim on Amount Paid to Another Policyholder. — The right of each policyholder in the defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policyholder. Perry v. Farmers Mut. Fire Ass'n, 139 N.C. 374, 51 S.E. 1025 (1905).

§§ 58-101, 58-102: Repealed by Session Laws 1945, c. 386.

Article 9.

Conversion of Stock Corporations into Mutual Corporations.

§ 58-103. Domestic stock life insurance corporations authorized to convert into mutual corporations; procedure.

Any domestic stock life insurance corporation may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock: Provided, however, that such plan (i) shall have been adopted by a vote of a majority of the directors of such corporation; (ii)

shall have been approved by a vote of the holders of two thirds of the stock outstanding at the time of issuing the call for a meeting for that purpose; (iii) shall have been submitted to the Commissioner of Insurance and shall have been approved by him in writing, and (iv) shall have been approved by a majority vote of the policyholders (including, for the purpose of this Article, the employer or the president, secretary or other executive officer of any corporation or association to which a master group policy has been issued, but excluding the holders of certificates or policies issued under or in connection with a master group policy) voting at said meeting, called for that purpose, at which meeting only such policyholders whose insurance shall then be in force and shall have been in force for at least one year prior to such a meeting shall be entitled to vote; notice of such a meeting shall be given by mailing such notice, postage prepaid, from the home office of such corporation at least 30 days prior to such meeting to such policyholders at their last known post-office addresses: Provided, that personal delivery of such written notice to any policyholder may be in lieu of mailing the same; and such meeting shall be otherwise provided for and conducted in such a manner as shall be provided in such plan: Provided, however, that policyholders may vote in person, by proxy, or by mail; that all such votes shall be cast by ballot, and a representative of the Commissioner of Insurance shall supervise and direct the methods and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the said representative and to the corporation the results thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the Commissioner of Insurance; that all necessary expenses incurred by the Commissioner of Insurance or his representative shall be paid by the corporation as certified to by said Commissioner. Every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the Commissioner: Provided, that neither such plan, nor any payment thereunder, nor any payment not fixed by such plan, shall be approved by the Commissioner, if the making of such payment shall reduce the assets of the corporation to an amount less than the entire liabilities of the corporation, including therein the net values of its outstanding contracts according to the standard adopted by the Commissioner of Insurance, and also all other funds, contingent reserves and surplus which the corporation is required by order or direction of the Commissioner of Insurance to maintain, save so much of the surplus as shall have been appropriated or paid under such plan. (1937, c. 231, s. 1.)

Legal Periodicals. — For discussion of the act from which this Article is codified, see 15 N.C.L. Rev. 359.

§ 58-104. Stock acquired to be turned over to voting trust until all stock acquired; dividends repaid to corporation for beneficiaries.

If a domestic stock life insurance corporation shall determine to become a mutual life insurance corporation it may, in carrying out any plan to that end under the provisions of G.S. 58-103, acquire any shares of its own stock by gift, bequest or purchase. And until all such shares are acquired, any shares so acquired shall be acquired in trust for the policyholders of the corporation as

hereinafter provided, and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees, and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote until all of the capital stock of such corporation is acquired, when the entire capital stock shall be retired and canceled; and thereupon, unless sooner incorporated as such, the corporation shall be and become a mutual life insurance corporation without capital stock. Said trustees shall be appointed and vacancies shall be filled as provided in the plan adopted under G.S. 58-103. Said trustees shall file with the corporation and with the Commissioner of Insurance a verified acceptance of their appointments and declaration that they will faithfully discharge their duties as such trustees. After the payment of such dividends to stockholders or former stockholders as may have been provided in the plan adopted under G.S. 58-103, all dividends and other sums received by said trustees on said shares of stock so acquired, after paying the necessary expenses of executing said trust, shall be immediately repaid to said corporation for the benefit of all who are or may become policyholders of said corporation and entitled to participate in the profits thereof, and shall be added to and become a part of the surplus earned by said corporation, and be apportionable accordingly as a part of said surplus among said policyholders. (1937, c. 231, s. 2.)

Article 10

Assessment Companies.

§ 58-105. Copies of charter and bylaws filed.

Every corporation, society, or organization of this or any other state or country, transacting business under this department upon the cooperative or assessment plan, must file with the Commissioner of Insurance, before beginning to do business in this State, a copy of its charter or articles of association, and the bylaws, rules, or regulations referred to in its policies or certificates and made a part of such contract. Bylaws or regulations not so filed with the Commissioner of Insurance will not avoid or affect any policy or certificate issued by such company or association. (1899, c. 54, s. 86; Rev., s. 4790; C.S., s. 6356.)

Cross References. — As to mutual insurance companies generally, see §§ 58-92 to 58-100. As to fraternal orders and societies, see § 58-263 et seq.

§ 58-106. Contracts must accord with charter and bylaws.

Every policy or certificate or renewal receipt issued to a resident of this State by any corporation, association, or order transacting therein the business of insurance upon the assessment plan must be in accord with the provisions of the charter and bylaws of such corporation, association, or order, as filed with the Commissioner of Insurance. It is unlawful for any such domestic or foreign insurance company or fraternal order to transact or offer to transact any business not authorized by the provisions of its charter and terms of its bylaws, or, through an agent or otherwise, to offer or issue any policy, renewal certificate, or other contract whose terms are not in clear accord with the powers, terms, and stipulations of its charter and bylaws. (1899, c. 54, s. 84; 1903, c. 438, s. 9; Rev., s. 4791; C.S., s. 6357.)

CASE NOTES

The contract of insurance must conform to the charter and bylaws, and these are as authorized by the state of its origin. Hollingsworth v. Supreme Council of Royal Arcanum, 175 N.C. 615, 96 S.E. 81 (1918), distinguishing Caldwell Land & Lumber Co. v. Commissioners of Caldwell County, 174 N.C. 634, 94 S.E. 406 (1917).

Assessment companies are prohibited from issuing policies or transacting business not authorized by their charters. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

Duty and Liability under Bylaws. — The bylaws of an assessment association, when assented to by the members, as provided in the statute, constitute the measure of duty and liability of the parties, provided they are reasonable and not in violation of any principle of public law. Duffy v. Fidelity Mut. Life Ins. Co., 142 N.C. 103, 55 S.E. 79 (1906).

§ 58-107. "Assessment plan" printed on application and policy.

Every policy or certificate issued to a resident of the State by any corporation transacting in the State the business of life insurance upon the assessment plan, or admitted to do business in this State on the assessment plan, shall print in bold type near the top of the front page of the policy, upon every policy or certificate issued upon the life of any such resident of the State, the words "issued upon the assessment plan"; and the words "assessment plan" shall be printed conspicuously upon every application, circular, card, and any and all printed documents issued, circulated, or caused to be circulated by such corporation within the State. (1913, c. 159, s. 1; C.S., s. 6358; 1929, c. 93, s. 1; 1933, c. 34; 1945, c. 386.)

§ 58-108. Revocation for noncompliance.

If any corporation or association transacting insurance business in this State on the assessment plan or issuing any policy upon the life of a resident of North Carolina upon the assessment plan shall fail or refuse to comply with the foregoing section [G.S. 58-107], the Commissioner of Insurance shall forthwith suspend or revoke all authority of such corporation or association and of its agents to do business in this State. (1913, c. 159, s. 2; C.S., s. 6359.)

§ 58-109. Deposits and advance assessments required.

Every domestic insurance company, association, order, or fraternal benefit society doing business on the assessment plan shall collect and keep at all times in its treasury one regular loss assessment sufficient to pay one regular average loss; and no such company, association, order, or fraternal benefit society shall be licensed by the Commissioner of Insurance unless it makes and maintains with him for the protection of its obligations at least five thousand dollars ($5,000) in United States or North Carolina bonds, in farm loan bonds issued by federal loan banks, or in the bonds of some city, county, or town of North Carolina to be approved by the Commissioner of Insurance, or deposit with him a good and sufficient bond , secured by a deed of trust on real estate situated in North Carolina and approved by him, or by depositing with the Commissioner of Insurance a bond in an amount of not less than five thousand dollars ($5,000), issued by any corporate surety company authorized to do business in this State. The Commissioner of Insurance may increase the amount of deposit to the amount of reserve on the contracts of the association or society. The provisions of this section shall not apply to the farmers mutual fire insurance associations now doing business in the State and restricting their activities to not more than three adjacent counties. (Rev., s. 4792; 1913, c. 119, s. 1; 1917, c. 191, s. 2; C.S., s. 6360; 1933, c. 47; 1945, c. 386.)

§ 58-110. Deposits by foreign assessment companies or orders.

Each foreign insurance company, association, order, or fraternal benefit society doing business in this State on the assessment plan shall keep at all times deposited with the Commissioner of Insurance or in its head office in this State, or in some responsible banking or trust company, one regular assessment sufficient to pay the average loss or losses occurring among its members in this State during the time allowed by it for the collection of assessments and payment of losses. It shall notify the Commissioner of Insurance of the place of deposit and furnish him at all times such information as he requires in regard thereto; and no such company, association, order, or fraternal benefit society shall be licensed by the Commissioner unless it makes and maintains with him for the protection of its obligations at least five thousand dollars ($5,000) in United States or North Carolina bonds, in farm loan bonds issued by federal land banks, or in the bonds of some county, city, or town in North Carolina to be approved by the Commissioner of Insurance, or a good and sufficient bond or note, secured by deed of trust on real estate situate in North Carolina, and approved by the Commissioner. (1899, c. 54, s. 84; 1903, c. 438, s. 9; Rev., s. 4713; 1913, c. 119, ss. 2, 3; 1917, c. 191, s. 2; C.S., s. 6361; 1945, c. 386.)

§ 58-111: Repealed by Session Laws 1945, c. 377.

§ 58-112. Revocation of license.

If any such corporation, association, or order at any time fails to comply with the provisions of G.S. 58-109 and 58-110 or shall issue policies or certificates not in accord with its charter and bylaws, as provided in this Article, the Commissioner of Insurance shall forthwith suspend or revoke all authority to it, and of all its agents or officers, to do business in this State, and shall publish such revocation in some newspaper published in this State. (1899, c. 54, s. 85; Rev., s. 4793; C.S., s. 6362.)

§ 58-112.1. Mutual life insurance companies; assessments prohibited.

No domestic mutual life insurance company shall, after March 6, 1945, be organized to issue any policy of life insurance or any annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance; nor shall any such company have power to levy or collect any such assessment. No foreign or alien life insurance company shall be permitted to do business in this State if it does business, in this State or elsewhere, on such or any other assessment plan. (1945, c. 386.)

Article 11.

Fidelity Insurance Companies.

§§ 58-113 to 58-118: Repealed by Session Laws 1945, c. 743, s. 2.

§ 58-119: Repealed by Session Laws 1945, c. 377.

Editor's Note. — The repealed section was rewritten as § 58-39.2.

Article 12.

Promoting and Holding Companies.

§ 58-120. Terms defined.

As the terms are used in this Article,

(1) "Holding corporation" means a corporation or joint-stock association, which holds or is engaged in the acquisition of the capital stock or a major portion thereof of one or more insurance corporations for the purpose of controlling the management thereof, as voting trustee or otherwise;

(2) "Promoting corporation" means a corporation or joint-stock association, engaged in the business of organizing or promoting or endeavoring to organize or promote the organization of an insurance corporation or corporations, or in any way assisting therein; and

(3) "Securities" means the shares of capital stock, subscription, certificates, debenture bonds, and any and all other contracts or evidences of ownership of or interest in insurance corporations, or in promoting or holding corporations. (1913, c. 182, s. 1; C.S., s. 6383.)

§ 58-121. Certificate of authority to sell securities required.

No individual, partnership, association, or corporation, as the agent of another or as a broker, shall sell or offer for sale, or in any way assist in the sale in this State of the securities of any promoting or holding corporation, or of any insurance corporation, which is not at that time lawfully engaged or authorized to engage in the transaction of the business of insurance in this State, without first procuring, as hereinafter provided, a certificate of authority from the Insurance Department to sell such securities; nor shall any individual, partnership, association, or corporation sell or offer for sale in this State the securities of any promoting or holding corporation, or of any insurance corporation which is not at the time of such sale or offer of sale lawfully engaged or authorized to engage in the transaction of the business of insurance in the State, unless such corporation has first procured from the Commissioner of Insurance, as hereinafter provided, a certificate that the corporation has fully complied with the provisions of this Article, and is authorized to sell the securities. Every certificate issued by the Commissioner of Insurance pursuant to the provisions of this Article shall state in bold type that the Commissioner in no way recommends the securities thereby authorized to be sold, and shall be renewable annually, upon written application, filed on or before the first day of July of each year, and may be revoked for cause at any time by the Commissioner. The Commissioner shall prepare and furnish upon request suitable blank forms of application for the

certificates required by this Article. (1913, c. 182, s. 2; C.S., s. 6384; 1955, c. 179, s. 2.)

§ 58-122. Application for certificate by agent.

Every individual, partnership, association, or corporation desiring or intending to sell or to offer for sale in this State the securities of insurance corporations or of any holding or promoting corporation shall file with the Commissioner of Insurance an application for a certificate of such authority. This application must contain a statement, verified by oath, setting forth the name and address of the applicant's previous business experience, date and place of birth or organization, and such other information as the Commissioner requires. It is the duty of the Commissioner to examine the application and to make any further inquiry or examination of the applicant as he deems advisable. If upon examination the Commissioner finds the applicant, or if a corporation, the officers and directors thereof, to be trustworthy persons of good business credit, he may issue to the applicant a certificate of authority to sell or offer for sale in this State the securities of any insurance corporation, and of any promoting or holding corporation previously authorized under this Article, which shall be mentioned therein. (1913, c. 182, s. 3; C.S., s. 6385.)

§ 58-123. Application for certificate by corporation.

Every such unauthorized insurance corporation, and every promoting or holding corporation, whose securities are offered for sale in this State, must file with the Commissioner of Insurance copies of all securities to be offered for sale, and an application for certificate of authority under this Article which shall contain a statement in detail of the plans and purposes of such corporation, the amount and par value of the securities to be offered for sale, and the selling price thereof, the manner in which the money paid in therefor is to be spent or employed, the rate of commission to be paid for the sale of such securities, the salaries to be paid to the officers of such corporation, and such other information as the Commissioner of Insurance requires. No change shall thereafter be made in the form or character of the securities to be offered for sale, or in the plans or purposes of any such corporation, without the approval thereof in writing by the Commissioner. It is the duty of the Commissioner to examine the application and other documents filed, and to make any further inquiry or examination of the corporation as he deems advisable. If upon examination the Commissioner finds that the plans and purposes of the corporation are proper, that its condition is satisfactory, that the amount of its securities is reasonable, that the price at which such securities are to be sold is adequate, and that the manner in which the money is paid in therefor, the rate of commissions to be paid and the salaries of officers are fair, he may issue a certificate that the corporation has complied with all the provisions of this Article, and is authorized to sell or offer its securities for sale in this State. (1913, c. 182, s. 4; C.S., s. 6386.)

§ 58-124. Approval of advertising matter; misrepresentation.

No printed matter may be used in connection with the sale of securities of any such promoting, holding, or insurance corporation, for advertising purposes, or in the dissemination of information with reference thereto, unless it is first submitted to the Commissioner of Insurance and approved by him in writing. No such corporation, and no officer, director, or agent thereof, or any other person, copartnership, association, or corporation may issue, circulate, or employ or cause or permit to be used, issued, circulated, or employed any

circular or statement, whether printed or oral, misrepresenting or exaggerating the earnings of insurance corporations or the value of their corporate stock or other securities, or the profits to be derived either directly or indirectly from the organization and management of insurance corporations, or of organizing or holding corporations. No insurance or other corporation, and no individual, copartnership, or association transacting business in this State shall place or offer to place insurance in any corporation in connection with the sale or purchase of the securities of any insurance corporation or of any promoting or holding corporation. (1913, c. 182, s. 5; C.S., s. 6387.)

Article 12A.

Insurer Holding Registration and Disclosure Act.

§ 58-124.1. Definitions.

As used in this Article, the following terms shall have the respective meanings hereinafter set forth, unless the context shall otherwise require:

(1) Affiliate. — An "affiliate" of, or person "affiliated" with, a specific person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(2) Commissioner. — The term "Commissioner" shall mean the Commissioner of Insurance of North Carolina, his deputies, or the Department of Insurance of North Carolina, as appropriate.

(3) Control. — The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by G.S. 58-124.2(i) that control does not exist in fact. The Commissioner may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support such determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

(4) Insurance Holding Company System. — An "insurance holding company system" consists of two or more affiliated persons, one or more of which is an insurer.

(5) Insurer. — The term "insurer" shall have the same meaning as set forth in G.S. 58-2(3) except that it shall not include (i) agencies, authorities or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state, (ii) fraternal benefit societies, (iii) nonprofit medical and hospital service associations, or (iv) nonprofit dental service corporations.

(6) Person. — A "person" is an individual, a corporation, a partnership, an association, a joint-stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert, but shall not include any securities broker

performing no more than the usual and customary broker's function.

(7) Subsidiary. — A "subsidiary" of a specified person is an affiliate controlled by such person directly, or indirectly, through one or more intermediaries.

(8) Voting Security. — The term "voting security" shall include any security convertible into or evidencing a right to acquire a voting security. (1971, c. 513, s. 1.)

§ 58-124.2. Registration of insurers.

(a) Registration. — Every insurer which is authorized to do business in this State and which is a member of an insurance holding company system shall register with the Commissioner, except a foreign insurer subject to disclosure requirements and standards adopted by statute or regulation in the jurisdiction of its domicile which are substantially similar to those contained in this section. Any insurer which is subject to registration under this section shall register within 60 days after July 1, 1971, or 15 days after it becomes subject to registration, whichever is later, unless the Commissioner for good cause shown extends the time for registration, and then within such extended time. The Commissioner may require any authorized insurer which is a member of a holding company system which is not subject to registration under this section to furnish a copy of the registration statement or other information filed by such insurance company with the insurance regulatory authority of its domiciliary jurisdiction.

(b) Information and Form Required. — Every insurer subject to registration shall file a registration statement on a form provided by the Commissioner, which shall contain current information about:

(1) The capital structure, general financial condition, ownership and management of the insurer and any person controlling the insurer;

(2) The identity of every member of the insurance holding company system;

(3) The following agreements in force, relationships subsisting, and transactions currently outstanding between such insurer and its affiliates:

a. Loans, other investments, or purchases, sales or exchanges of securities of the affiliates by the insurer or of the insurer by its affiliates;

b. Purchases, sales, or exchanges of assets;

c. Transactions not in the ordinary course of business;

d. Guarantees or undertakings for the benefit of an affiliate which result in an actual contingent exposure of the insurer's assets to liability, other than insurance contracts entered into in the ordinary course of the insurer's business;

e. All management and service contracts and all cost-sharing arrangements, other than cost-allocation arrangements based upon generally accepted accounting principles; and

f. Reinsurance agreements covering all or substantially all of one or more lines of insurance of the ceding company; and

(4) Other matters concerning transactions between registered insurers and any affiliates as may be included from time to time in any registration forms adopted or approved by the Commissioner.

(c) Materiality. — No information need be disclosed on the registration statement filed pursuant to G.S. 58-124.2(b) if such information is not material for the purposes of this section. Unless the Commissioner by rule, regulation or order provides otherwise, sales, purchases, exchanges, loans or extensions of credit, or investments, involving one half of one percent (½ of 1%) or less of an insurer's admitted assets as of the thirty-first day of December next preceding, shall not be deemed material for purposes of this section.

(d) Amendments to Registration Statements. — Each registered insurer shall keep current the information required to be disclosed in its registration statement by reporting all material changes or additions on amendment forms provided by the Commissioner within 15 days after the end of the month in which it learns of each such change or addition, provided, however, that subject to G.S. 58-124.3(c), each registered insurer shall so report all dividends and other distributions to shareholders within two business days following the declaration thereof.

(e) Termination of Registration. — The Commissioner shall terminate the registration of any insurer which demonstrates that it no longer is a member of an insurance holding company system.

(f) Consolidated Filing. — The Commissioner may require or allow two or more affiliated insurers subject to registration hereunder to file a consolidated registration statement or consolidated reports amending their consolidated registration statement or their individual registration statements.

(g) Alternative Registration. — The Commissioner may allow an insurer which is authorized to do business in this State and which is part of an insurance holding company system to register on behalf of any affiliated insurer which is required to register under subsection (a) above and to file all information and material required to be filed under this section.

(h) Exemptions. — The provisions of this section shall not apply to any insurer, information or transaction if and to the extent that the Commissioner by rule, regulation, or order shall exempt the same from the provisions of this section.

(i) Disclaimer. — Any person may file with the Commissioner a disclaimer of affiliation with any authorized insurer or such a disclaimer may be filed by such insurer or any member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between such person and such insurer as well as the basis for disclaiming such affiliation. After a disclaimer has been filed, the insurer shall be relieved of any duty to register or report under this section which may arise out of the insurer's relationship with such person unless and until the Commissioner disallows such a disclaimer. The Commissioner shall disallow such a disclaimer only after furnishing all parties in interest with notice and opportunity to be heard and after making specific findings of fact to support such disallowance.

(j) Violations. — The failure to file a registration statement or any amendment thereto required by this section within the time specified for such filing shall be a violation of this section. (1971, c. 513, s. 1.)

§ 58-124.3. Standards.

(a) Transactions with Affiliates. — Material transactions by registered insurers with their affiliates shall be subject to the following standards:

(1) The terms shall be fair and reasonable;

(2) The books, accounts and records of each party shall be so maintained as to clearly and accurately disclose the precise nature and details of the transactions; and

(3) The insurer's surplus as regards policyholders following any dividends or distributions to shareholder affiliates shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

(b) Adequacy of Surplus. — For purposes of this Article, in determining whether an insurer's surplus as regards policyholders is reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs, the following factors, among others, shall be considered:

(1) The size of the insurer as measured by its assets, capital and surplus, reserves, premium writings, insurance in force and other appropriate criteria;
(2) The extent to which the insurer's business is diversified among the several lines of insurance;
(3) The number and size of risks insured in each line of business;
(4) The extent of the geographical dispersion of the insurer's insured risks;
(5) The nature and extent of the insurer's reinsurance program;
(6) The quality, diversification, and liquidity of the insurer's investment portfolio;
(7) The recent past and projected future trend in the size of the insurer's surplus as regards policyholders;
(8) The surplus as regards policyholders maintained by other comparable insurers;
(9) The adequacy of the insurer's reserves; and
(10) The quality and liquidity of investments in subsidiaries. The Commissioner may treat any such investment as a disallowed asset for purposes of determining the adequacy of surplus as regards policyholders whenever in his judgment such investment so warrants.

(c) Dividends and Other Distributions. — No insurer subject to registration under G.S. 58-124.2 shall pay any extraordinary dividend or make any other extraordinary distribution to its shareholders until (i) 30 days after the Commissioner has received notice of the declaration thereof and has not within such period disapproved such payment, or (ii) the Commissioner shall have approved such payment within such 30-day period.

For purposes of this section, an extraordinary dividend or distribution includes any dividend or distribution of cash or other property, whose fair market value together with that of other dividends or distributions made within the preceding 12 months exceeds the greater of (i) ten percent (10%) of such insurer's surplus as regards policyholders as of the thirty-first day of December next preceding, or (ii) the net gain from operations of such insurer, if such insurer is a life insurer, or the net investment income, if such insurer is not a life insurer, for the 12-month period ending the thirty-first day of December next preceding, but shall not include pro rata distributions of any class of the insured's own securities.

Notwithstanding any other provision of law, an insurer may declare an extraordinary dividend or distribution which is conditional upon the Commissioner's approval thereof, and such a declaration shall confer no rights upon shareholders until (i) the Commissioner has approved the payment of such dividend or distribution or (ii) the Commissioner has not disapproved such payment within the 30-day period referred to above. (1971, c. 513, s. 1.)

§ 58-124.4. Examination.

(a) Power of Commissioner. — Subject to the limitation contained in this section and in addition to the powers which the Commissioner has under G.S. 58-16, relating to the examination of insurers, the Commissioner shall also have the power to order any insurer registered under G.S. 58-124.2 to produce such records, books, or other information papers in the possession of the insurer or its affiliates as shall be necessary to ascertain the financial condition or legality of conduct of such insurer. In the event such insurer fails to comply with such order, the Commissioner shall have the power to examine such affiliates to obtain such information.

(b) Purpose and Limitation of Examination. — The Commissioner shall exercise his power under subsection (a) above only if the examination of the insurer under G.S. 58-16 is inadequate or the interests of the policyholders of such insurer may be adversely affected.

(c) Use of Consultants. — The Commissioner may retain at the registered insurer's expense such attorneys, actuaries, accountants and other experts not otherwise a part of the Commissioner's staff as shall be reasonably necessary to assist in the conduct of the examination under subsection (a) above. Any persons so retained shall be under the direction and control of the Commissioner and shall act in a purely advisory capacity.

(d) Expenses. — Each registered insurer producing for examination records, books and papers pursuant to subsection (a) above shall be liable for and shall pay the expense of such examination in accordance with the provisions of G.S. 58-16. (1971, c. 513, s. 1.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-124.5. Confidential treatment.

All information, documents and copies thereof obtained by or disclosed to the Commissioner or any other person in the course of an examination or investigation made pursuant to G.S. 58-124.4, and all information reported pursuant to G.S. 58-124.2, shall be given confidential treatment and shall not be made public by the Commissioner or any other person, except to insurance departments of other states, without the prior written consent of the insurer to which it pertains, unless the Commissioner, after giving the insurer and its affiliates who would be affected thereby, notice and opportunity to be heard, determines that the interests of policyholders, shareholders or the public will be served by the publication thereof, in which event he may publish all or any part thereof in such manner as he may deem appropriate. (1971, c. 513, s. 1.)

§ 58-124.6. Rules and regulations.

The Commissioner may, upon notice and opportunity for all interested persons to be heard, issue such rules, regulations, and orders as shall be necessary to carry out the provisions of this Article. (1971, c. 513, s. 1.)

§ 58-124.7. Injunctions.

Whenever it appears to the Commissioner that any insurer or any director, officer, employee or agent thereof has committed or is about to commit a violation of this Article or of any rule, regulation, or order issued by the Commissioner hereunder, the Commissioner may apply to the superior court for the county in which the principal office of the insurer is located or if such insurer has no such office in this State then to the Superior Court for Wake County for an order enjoining such insurer or such director, officer, employee or agent thereof from violating or continuing to violate this Article or any such rule, regulation or order, and for such other equitable relief as the nature of the case and the interests of the insurer's policyholders, creditors and shareholders or the public may require. (1971, c. 513, s. 1.)

§ 58-124.8. Criminal proceedings.

Whenever it appears to the Commissioner that any insurer or any director, officer, employee or agent thereof has committed a willful violation of this Article, the Commissioner may cause criminal proceedings to be instituted in the court having criminal jurisdiction for the county in which the principal office of the insurer is located or if such insurer has no such office in the State, then in the criminal court for Wake County against such insurer or the responsible director, officer, employee or agent thereof. Any insurer which willfully violates this Article may be fined not more than five hundred dollars ($500.00). Any individual who willfully violates this Article may be fined not more than five hundred dollars ($500.00) or, if such willful violation involves the deliberate perpetration of a fraud upon the Commissioner, imprisoned not more than two years, or both. (1971, c. 513, s. 1.)

§ 58-124.9. Receivership.

Whenever it appears to the Commissioner that any person has committed a violation of this Article which so impairs the financial condition of a domestic insurer as to threaten insolvency or make the further transaction of business by it hazardous to its policyholders, creditors, shareholders or the public, then the Commissioner may proceed under G.S. 1-507.1 and 58-155.11 to take possession of the property of such domestic insurer and to conduct the business thereof. (1971, c. 513, s. 1.)

§ 58-124.10. Revocation, suspension, or nonrenewal of insurer's license.

Whenever it appears to the Commissioner that any person has committed a violation of this Article which makes the continued operation of an insurer contrary to the interests of policyholders or the public, the Commissioner may, after giving notice and an opportunity to be heard, determine to suspend, revoke or refuse to renew such insurer's license or authority to do business in this State for such period as he finds is required for the protection of policyholders or the public. Any such determination shall be accompanied by specific findings of fact and conclusions of law. (1971, c. 513, s. 1.)

§ 58-124.11. Judicial review; mandamus.

(a) Any person aggrieved by any order made by the Commissioner pursuant to this Article may appeal therefrom in accordance with the provisions of G.S. 58-9.3.

(b) Any person aggrieved by any failure of the Commissioner to act or make a determination required by this Article may petition the Superior Court of Wake County for a writ in the nature of a mandamus or a peremptory mandamus directing the Commissioner to act or make such determination forthwith. (1971, c. 513, s. 1.)

Editor's Note. — Section 2, c. 513, Session Laws 1971, contains a severability clause.

§§ 58-124.12 to 58-124.16: Reserved for future codification purposes.

ARTICLE 12B.

North Carolina Rate Bureau.

§ 58-124.17. North Carolina Rate Bureau created.

There is hereby created a Bureau to be known as the "North Carolina Rate Bureau," with the following objects and functions:

(1) To assume the functions formerly performed by the North Carolina Rating Bureau, the North Carolina Automobile Rate Administrative Office, and the Compensation Rating and Inspection Bureau of North Carolina, with regard to the promulgation of rates, for insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof and valuable interest therein and other insurance coverages written in connection with the sale of such property insurance; for theft of and physical damage to private passenger (nonfleet) motor vehicles as the same are defined under Article 13C of this Chapter; for liability insurance for such motor vehicles, automobile medical payments insurance, uninsured motorists coverage and other insurance coverages written in connection with the sale of such liability insurance; and for workers' compensation and employers' liability insurance written in connection therewith except for insurance excluded from the Bureau's jurisdiction in G.S. 58-124.17(3).

(2) The Bureau shall provide reasonable means to be approved by the Commissioner whereby any person affected by a rate made by it may be heard in person or by his authorized representative before the governing committee or other proper executive of the Bureau.

(3) The Bureau shall have the duty and responsibility of promulgating and proposing rates for insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance; for insurance against theft of or physical damage to private passenger (nonfleet) motor vehicles; for liability insurance for such motor vehicles, automobile medical payments insurance, uninsured motorists coverage and other insurance coverages written in connection with the sale of such liability insurance; and for workers' compensation and employers' liability insurance written in connection therewith. The provisions of this subdivision shall not apply to motor vehicles operated under certificates of authority from the Utilities Commission, the Interstate Commerce Commission, or their successor agencies, where insurance or other proof of financial responsibility is required by law or by regulations specifically applicable to such certificated vehicles. The Bureau shall have no jurisdiction over excess workers' compensation insurance for employers qualifying as self-insurers as provided in G.S. 97-93; nor shall the Bureau's jurisdiction include farm buildings other than farm dwellings and their appurtenant structures; farm personal property; travel or camper trailers designed to be pulled by private passenger motor vehicles, unless insured under policies covering nonfleet private passenger motor vehicles; residential real and personal property insured in multiple line insurance policies covering business activities as the primary insurable interest; and marine, general liability, burglary and theft, glass, and animal collision insurance, except when such coverages are written as an integral part of a multiple line insurance policy for which there is an indivisible premium.

(4) Agreements may be made between or among members with respect to equitable apportionment among them of insurance which may be afforded applicants who are in good faith entitled to but who are unable to procure such insurance through ordinary methods. The members may agree between or among themselves on the use of reasonable rate modifications for such insurance, agreements, and rate modifications to be subject to the approval of the Commissioner.

(5) It is the duty of every insurer that writes workers' compensation insurance in this State and is a member of the Bureau, as defined in this section and G.S. 58-124.18 to insure and accept any workers' compensation insurance risk that has been certified to be "difficult to place" by any fire and casualty insurance agent who is licensed in this State. When any such risk is called to the attention of the Bureau by receipt of an application with an estimated or deposit premium payment and it appears that the risk is in good faith entitled to such coverage, the Bureau will bind coverage for 30 days and will designate a member who must issue a standard workers' compensation policy of insurance that contains the usual and customary provisions found in those policies. Coverage will be bound at 12:01 A.M. on the first day following the postmark time and date on the envelope in which the application is mailed including the estimated annual or deposit premium, or the expiration of existing coverage, whichever is later. If there should be no postmark, coverage will be effective 12:01 A.M. on the date of receipt by the Bureau unless a later date is requested. Those applications hand delivered to the Bureau will be effective as of 12:01 A.M. of the date following receipt by the Bureau unless a later date is requested. The designated carrier may request of the Bureau certification of the State Department of Labor that the insured is complying with the laws, rules, and regulations of that Department. The certification must be finished within 30 days by the State Department of Labor unless extension of time is granted by agreement between the Bureau and the State Department of Labor. The Bureau will make and adopt such rules as are necessary to carry this section into effect, subject to final approval of the Commissioner. As a prerequisite to the transaction of workers' compensation insurance in this State, every member of the Bureau that writes such insurance must file with the Bureau written authority permitting the Bureau to act in its behalf, as provided in this section, and an agreement to accept risks that are assigned to the member by the Bureau, as provided in this section. (1977, c. 828, s. 6; 1981, c. 888, ss. 1-3.)

Cross References. — As to the regulation of insurance rates, see § 58-131.34 et seq.

Editor's Note. — Session Laws 1977, c. 828, s. 24, contains a severability clause.

Effect of Amendments. — The 1981 amendment added "except for insurance excluded from the Bureau's jurisdiction in G.S. 58-124.17(3)" at the end of subdivision (1), added the last sentence of subdivision (3), and rewrote subdivision (5).

Legal Periodicals. — For note discussing compulsory rating bureaus and the antitrust laws, see 54 N.C.L. Rev. 481 (1967).

For a survey of 1977 law on insurance, see 56 N.C.L. Rev. 1084 (1978).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

For note discussing changes in automobile rate regulation and the role of the Insurance Commissioner in North Carolina, see 17 Wake Forest L. Rev. 822 (1981).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Legislative Intent. — It was the legislative intent in enacting this Article to eliminate unfair and unnecessary delay in the ratemaking process. State ex. rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Purpose of former Article relating to the North Carolina Fire Insurance Rating Bureau was to provide for the public, at reasonable cost, insurance in financially responsible companies. Not only fair play, but the accomplishment of this legislative purpose as well, required that the premium be fixed at a level which would enable the insuring company, i.e., the entire insurance industry in this State treated as if it were one company, (1) to pay the losses which will be incurred during the life of the policies to be issued under such rates, (2) to pay other operating expenses, and (3) to retain a "fair and reasonable profit" and no more. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Statutory plan of former Article relating to the North Carolina Fire Insurance Rating Bureau contemplated a uniform premium rate schedule for all companies operating in the State. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

In the statutory plan, the State has undertaken to make available to its people the economic necessity of fire insurance policies which actually insure by authorizing the Bureau to propose premium rates just as would a single company having a monopoly of the fire insurance business in North Carolina. To protect the public against the danger of exorbitant rates for this economic necessity, which danger is inherent in monopolistic price fixing, the legislature has vested in the Commissioner its own authority to withhold approval of such rates proposed by the Bureau and to fix rates which are fair and reasonable. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The Bureau is not a State agency. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

The rating bureau is a body separate and apart from the State, in that it is composed of private citizens as to its employees and governing committee, but it is also answerable to the Commissioner at every turn. Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965), aff'd, 361 F.2d 870 (4th Cir.), cert. denied, 385 U.S. 930, 87 S. Ct. 290, 17 L. Ed. 2d 212 (1966).

The Bureau is to be regarded as if it were the only insurance company operating in North Carolina, for ratemaking purposes, and as if it had an earned premium experience, an incurred loss experience and an operating expense experience equivalent to the composite of those of the companies actually in operation. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976).

For ratemaking purposes, the Bureau is treated as if it were the only insurance company writing policies upon the risks over which it has jurisdiction. The Bureau is regarded as having an earned premium experience, an incurred loss experience and an operating expense experience equivalent to the composite of all those companies over which it has jurisdiction. This is proper since all companies writing policies covering the risks over which the Bureau has jurisdiction are members of the Bureau. Foremost Ins. Co. v. Ingram, 292 N.C. 244, 232 S.E.2d 414 (1977).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980); State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 52 N.C. App. 79, 277 S.E.2d 844 (1981).

§ 58-124.18. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses.

(a) Before the Commissioner of Insurance shall grant permission to any stock, nonstock, or reciprocal insurance company or any other insurance organization to write in this State insurance against loss to residential real property with not more than four housing units located in this State or any contents thereof or valuable interest therein or other insurance coverages

written in connection with the sale of such property insurance; or insurance against theft of or physical damage to private passenger (nonfleet) motor vehicles; or liability insurance for such motor vehicles, automobile medical payments insurance, uninsured motorists coverage or other insurance coverage written in connection with the sale of such liability insurance; or workers' compensation and employers' liability insurance written in connection therewith; except for insurance excluded from the Bureau's jurisdiction in G.S. 58-124.17(3); it shall be a requisite that they shall subscribe to and become members of the Bureau.

(b) Each member of the Bureau writing any one or more of the above lines of insurance in North Carolina shall, as a requisite thereto, be represented in the Bureau and shall be entitled to one representative and one vote in the administration of the affairs of the Bureau. They shall, upon organization, elect a governing committee which governing committee shall be composed of equal representation by stock and nonstock members.

(c) The Bureau, when created, shall adopt such rules and regulations for its orderly procedure as shall be necessary for its maintenance and operation. No such rules and regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. The expense of such Bureau shall be borne by its members by quarterly contributions to be made in advance, such contributions to be made in advance by prorating such expense among the members in accordance with the amount of gross premiums derived from the above lines of insurance in North Carolina during the preceding year and members entering the Bureau since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the Bureau the necessary expense of the Bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee. The Bureau shall be empowered to subscribe for or purchase any necessary service, and employ and fix the salaries of such personnel and assistants as are necessary.

(d) The Commissioner of Insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the underwriting experience of lines of insurance referred to in this Article, and this information shall be available and for the use of the Bureau for the capitulation and promulgation of rates on lines of insurance as are subject to the ratemaking authority of the Bureau. (1977, c. 828, s. 6; 1981, c. 888, s. 4.)

Effect of Amendments. — The 1981 amendment inserted "except for insurance excluded from the Bureau's jurisdiction in G.S. 58-124.17(3);" near the end of subsection (a).

CASE NOTES

Membership Required. — Every company engaged in the writing of fire insurance policies, including extended coverage endorsements attached thereto, is required to be a member of the Bureau. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976), decided under former statutory provisions.

Power to Require Audited Data in Ratemaking Case. — An order of the Commissioner of Insurance that data submitted in a ratemaking case be audited was not in excess of his statutory powers as contemplated by § 58-9.6(b)(2) or § 150A-51(2). State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811 (1979).

§ 58-124.19. Method of rate making; factors considered.

The following standards shall apply to the making and use of rates:

(1) Rates shall not be excessive, inadequate or unfairly discriminatory.

(2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which such information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.

(3) In the case of fire insurance rates, as are subject to the rate-making authority of the Bureau, consideration may be given to the experience of such fire insurance business during the most recent five-year period for which such experience is available.

(4) Risks may be grouped by classifications and lines of insurance for establishment of rates and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions or both. Such standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses. The Bureau is directed to establish and implement a comprehensive classification rating plan for motor vehicle insurance under its jurisdiction within 90 days of September 1, 1977. No such classification plans shall base any standard or rating plan for private passenger (nonfleet) motor vehicles, in whole or in part, directly or indirectly, upon the age or sex of the persons insured. The Bureau shall at least once every three years make a complete review of the filed classification rates to determine whether they are proper and supported by statistical evidence, and shall at least once every 10 years make a complete review of the territories for nonfleet private passenger motor vehicle insurance to determine whether they are proper and reasonable.

(5) In the case of workers' compensation insurance and employers' liability insurance written in connection therewith, due consideration shall be given to the past and prospective effects of changes in compensation benefits and in legal and medical fees that are provided for in General Statutes Chapter 97. (1977, c. 828, s. 6; 1979, c. 824, s. 1; 1981, c. 521, s. 5; c. 790.)

Editor's Note. — Session Laws 1979, c. 824, s. 11, provides: "This act will not affect pending litigation."

Effect of Amendments. — The first 1981 amendment added subdivision (5).

The second 1981 amendment, effective Jan. 1, 1982, added at the end of the last sentence of subdivision (4), the language beginning "and shall at least once every 10 years."

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Fixing of Premium Rate as Exercise of Legislative Power. — In fixing by law the premium rate, it is the legislative power of the State which is being exercised. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The power to fix rates effective from a specified future date is a legislative power, and this is no less true because its exercise is preceded by investigations and hearings. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

"Inadequate" and "Exessive" Rates. — In enacting the provisions of subdivision (1), the legislative intent was that the term "inadequate" should operate to protect the interest of insurance companies in achieving rate levels which are sufficient for them to earn a reasonable profit, while the term "excessive" should operate to protect the interest of consumers in being offered rates which will not enable insurance companies to earn unreasonable profits. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 54 N.C. App. 601, 284 S.E.2d 339 (1981), appeal dismissed, — N.C. —, 290 S.E.2d 708 (1982).

Discrimination Prohibited. — Former section prevented discrimination between unprotected farm and unprotected nonfarm properties similar in location, construction and hazards, and having substantially the same degree of protection. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

The prohibition against discrimination in rates is directed to insurers, agents, brokers and other representatives of insurers. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

Separate Classes of Property May Have Same Rate. — Properties need not necessarily be included in the same class in order for them to have the same fire insurance rate, but separate classes may have the same rate provided the location, construction and degree of protection are substantially the same for both. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

There is no requirement that the Rate Bureau must always use the same rate-making formulas. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Rates are made prospectively, not retroactively; therefore, the entire procedure of ratemaking contemplates a looking to the future. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

It is not only impractical to fix premium rates retroactively, but is expressly required that premium rates fixed in accordance with the statutory plan be applied only to policies issued after the rates are so established. Consequently, the entire procedure contemplates a looking to the future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, S.E.2d 207 (1969).

As Distinguished from Surcharge Assessments. — Ratemaking is a prospective process, while surcharge assessments involve recoupment for losses already incurred. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

There is no presumption that a rate filing by the Bureau is correct and proper. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The burden is upon the Bureau to show that the rate schedule proposed by it is fair and reasonable and that it does not discriminate unfairly between risks. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

There is no statute or decision that makes a request of the Bureau for an increase or decrease in rates presumptively correct and proper. The burden is upon the Bureau to establish that the proposed rate is fair and reasonable and that it does not "unfairly discriminate between risks involving essentially the same construction and hazards, and having substantially the same degree of protection." In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Fair and Reasonable Profit as Ultimate Question. — The ultimate question for the Commissioner's determination is whether the proposed rates will, after provision for reasonably anticipated losses and operating expenses, leave for the insurers (considered as if the Bureau were a single company with the composite experience of all companies issuing homeowners insurance in North Carolina) a fair and reasonable profit and no more. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

The ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a "fair and reasonable profit" in the immediate

future (i.e., treating the Bureau as if it were an operating company whose experience in the past is the composite of the experiences of all of the operating companies), and if so, how much increase is required for that purpose. This cannot be determined without specific findings of fact, upon substantial evidence, as to: (1) The reasonably anticipated loss experience during the life of the policies to be issued in the near future; (2) The reasonably anticipated operating expenses in the same period; and (3) The percent of earned premiums which will constitute a "fair and reasonable profit" in that period. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

Criteria for Determining Rates Designed to Earn Fair and Reasonable Profit. — What rates are necessary to entitle the companies to earn a fair and reasonable profit, and no more, cannot be determined without specific findings of fact, upon substantial evidence, as to: (1) The reasonably anticipated loss experience during the life of the policies to be issued in the near future; (2) The reasonably anticipated operating expenses in the same period; and (3) The percent of earned premiums which will constitute a fair and reasonable profit in that period. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

The problem for the rate maker is to determine what amount, collected as premiums at the inception of the policies hereafter to be issued, will enable the company (1) to pay losses to be incurred during the life of such policies, at replacement costs prevailing at the time of such losses, (2) to pay other proper operating expenses of the company, and (3) to retain a "fair and reasonable profit." In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Proposed rates will be proper for future use in North Carolina if they provide for anticipated losses, loss adjustment expenses, and other expenses of the companies attributable to that line of insurance business and include in the formula an amount which would provide for a fair and reasonable underwriting profit to the companies. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

A "fair and reasonable profit" varies from time to time, like construction costs and consumer prices. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

A "reasonable profit" cannot be determined until there is first a determination of reasonable expenses attributable to the business operated in this State. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

"Prospective Loss Experience" and "Loss Trend". — "Prospective loss experience" and the present "loss trend" relate not only to the number of fires and to the extent of the physical destruction thereby, but also to the cost of replacement of the destroyed property. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Adjustment of Past Loss Experience. — The past loss experience should be adjusted to take into account any newly discovered practicable procedures and devices for reducing the risk of fire. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The use of past experience to estimate future needs involves, of necessity, a projection of known data into the unknown future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Evidence that present conditions are not those which prevailed during former experience is relevant to the translation of the past experience into an informed judgment concerning the future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Evidence, otherwise competent, of a cost trend, upward or downward, which continues from the past into the present, and expert testimony, otherwise competent, that such trend may reasonably be expected to continue into the future, so that future costs will be higher or lower than present costs, was evidence of "reasonable and related factors" which former section required the Commissioner to consider in making his own projection into the future. It was not a proper ground for the rejection of such evidence that such projection of an upward or downward cost trend into the future had never before been used in the rate-making process. The section did not contemplate that procedures and methods for determining replacement costs for the future be frozen. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Evidence of Change after Date of Filing. — While former statute required that a hearing by the Commissioner upon a filing by the Bureau be held promptly, it was well within the bounds of possibility that, between the filing and the hearing, experience might be had which would be most relevant to the determination of the direction of a projection of the present "loss trend" into the future. Such change in conditions after the date of the filing might indicate a sharply downward trend in construction costs or in fire hazard. The statute

did not contemplate that the Commissioner should shut his eyes to such a change in conditions after the date of the filing. Moreover, the Bureau could offer evidence of more recent experience which corroborated its allegations in the filing. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Statistical evidence which becomes available at any time during a public hearing for the establishment of fire insurance rates and the use of which will produce no unreasonable delay should be admitted and taken into consideration in fixing rates. In re North Caroline Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968), modified, 275 N.C. 15, 165 S.E.2d 207 (1969).

Fire Insurance Rate Not to Be Fixed upon Consideration of Hazard Alone. — The General Assembly has never authorized a fire insurance rate to be fixed upon a consideration of hazard alone. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Consideration of Fire Rate Based on Not Less than Five Years' Experience. — Upon hearing of a petition of the former Fire Insurance Rating Bureau for review of fire insuance rates on a particular classification, the Commissioner had no right to consider a rate which was not based on experience for a period of not less than five years next preceding the year in which the review is requested. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Income from Invested Capital Not Considered in Ratemaking Cases. — It has never been the law in this jurisdiction that income from invested capital is to be considered in an insurance ratemaking case. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

The Commissioner of Insurance erred as a matter of law in concluding that the law of this jurisdiction allowed consideration of income from invested capital in an insurance ratemaking case. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

Figures from Companies' Reports as Competent Evidence. — In a proceeding initiated by the Commissioner to consider the propriety of a reduction in the premium rate because of excessive profits accruing to the companies under existing rates, figures taken from the companies' reports to him would qualify as competent evidence of the "experience of the fire insurance business" within the meaning of this section and could be given "consideration" by him. Such evidence is equally competent in consideration of a filing by the Bureau. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

Where countrywide data was used only to supplement North Carolina evidence, filing was not in violation of this section. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Application for Increase Properly Denied. — Application for an increase in insurance rates on unprotected farm dwellings, which would result in a higher rate from that applicable to unprotected nonfarm dwellings, similar in location, construction and hazards, and having substantially the same degree of protection, was properly denied by the Commissioner of Insurance, since former § 58-131 proscribed such discrimination. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Increase of Automobile Insurance Rates Upheld. — Though information which was more current might have been available to the Commissioner, the record supported a conclusion that automobile insurance rates should be increased and that substantial justice had been done to all parties concerned, both affected insurance companies and the consuming public. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 18 N.C. App. 23, 195 S.E.2d 572, cert. denied, 283 N.C. 585, 196 S.E.2d 811 (1973).

As to the statutory scheme for workers' compensation rate-making, see State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

In a worker's compensation rate hearing, the Commissioner of Insurance could properly consider investment income in determining whether a certain margin for underwriting was reasonable; however, the Commissioner erred in requiring the investment income to be considered at a risk-free rate of return rather than the rate of return actually experienced by the companies, since such requirement would limit the range of investments by insurance companies contrary to the provisions of § 58-79.1. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 295 S.E.2d 922 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-124.20. Filing rates, plans with Commissioner; public inspection of filings.

(a) The Bureau shall file with the Commissioner copies of the rates, classification plans, rating plans and rating systems used by its members. Each filing shall become effective immediately on the date specified therein but not earlier than 90 days from the date such filing is received by the Commissioner.

(b) A filing shall be open to public inspection immediately upon submission to the Commissioner.

(c) The Bureau shall maintain reasonable records, of the type and kind reasonably adapted to its method of operation, of the experience of its members and of the data, statistics or information collected or used by it in connection with the rates, rating plans, rating systems, underwriting rules, policy or bond forms, surveys or inspections made or used by it.

(d) On or before July 1 of each calendar year the Bureau shall submit to the Commissioner for the motor vehicle liability insurance subject to the provisions of this Article the experience, data, statistics, and information referred to in subsection (c) of this section and a rate review based on such data.

(e) The Commissioner may require the filing of supporting data including:

(1) The Bureau's interpretation of any statistical data relied upon;

(2) Descriptions of the methods employed in setting the rates;

(3) Analysis of the incurred losses submitted on an accident year or policy year basis into their component parts; to wit, paid losses, reserves for losses and loss expenses, and reserves for losses incurred but not reported;

(4) The total number and dollar amount of paid claims;

(5) The total number and dollar amount of case basis reserve claims;

(6) Earned and written premiums at current rates by rating territory;

(7) Earned premiums and incurred losses according to classification plan categories; and

(8) Income from investment of unearned premiums and loss and loss expense reserves generated by business within this State.

Provided, however, that with respect to business written prior to January 1, 1980, the Commissioner shall not require the filing of such supporting data which has not been required to be recorded under statistical plans approved by the Commissioner.

(f) On or before September 1 of each calendar year the Bureau shall submit to the Commissioner the experience, data, statistics, and information referred to in subsection (c) of this section and a rate review based on such data for workers' compensation insurance and employers' liability insurance written in connection therewith. Any rate increase for such insurance that is implemented pursuant to this Article shall become effective solely to such insurance as is written having an inception date on or after the effective date of the rate increase. (1977, c. 828, s. 6; 1979, c. 824, s. 2; 1981, c. 521, s. 1.)

Effect of Amendments. — The 1981 amendment added subsection (f).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

"Reasonable Records". — The term "reasonable records," as used in this section, does not require, absent evidence of possible error, that data from all companies be presented in a rate filing. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980).

Power to Require Audited Data in Ratemaking Case. — An order of the Commissioner of Insurance requiring that data submitted in a ratemaking case be audited was not in excess of his statutory powers as contemplated by § 58-9.6(b)(2) or § 150A-51(2). State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

Right of Bureau to Amend Filing. — When the Bureau makes a filing in which it proposes an increase in the premium rates, unquestionably, the Bureau may amend its filing so as to purpose a smaller increase in premium rates than that proposed in the original filing. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976), decided under former statutory provisions.

Withdrawal of Filing. — Nothing in this section relating to filings by the Bureau supports the contention that a filing, once made, cannot be withdrawn for any reason satisfactory to the Bureau. In this respect, there is no basis for making a distinction between a filing which proposes an increase in the premium rate and a filing which proposes a decrease in such rate. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976), decided under former stautory provisions.

Underlying burden of proving the need and reasonableness of a rate increase rests upon the Rate Bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

But the Commissioner can no longer effectively disapprove a rate filing by inaction or a bare assertion that the Rate Bureau has not carried its burden of proof. Though the new statutory scheme does not shift the ultimate burden of proof from the Rate Bureau to the Commissioner, it does place on the Commissioner, in disapproving a filing, the burden of affirmatively and specifically showing how the Bureau has not carried its burden of proof, and, if the Commissioner fails to do so by substantial evidence, the presumption of prima facie correctness given to an order of the Commissioner by §§ 58-9.4 and 58-9.6 is rebutted. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Deemed Approval of Filing. — If the Commissioner fails to perform the affirmative duties imposed upon him by this Article after a filing by the Rate Bureau, the filing shall be deemed to be approved, just as there is a deemed approval upon his failure to give notice of hearing within 30 days under § 58-124.21(b). State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Review of Order of Disapproval. — If the Court of Appeals, on appeal from Commissioner's order of disapproval, finds that the order is not supported by material and substantial evidence, it is then the duty of the court to determine whether the filing complies with the statutory standards and methods and is supported by substantial evidence. If no such compliance is found, the disapproval order will be vacated and the cause remanded for proceedings as directed. If such compliance is found, the disapproval order will be vacated and the filing approved, and this will constitute a final determination under § 58-124.22, which will require an order distributing the escrowed funds to the members of the Rate Bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

As to the statutory scheme for workers' compensation rate-making, see State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 52 N.C. App. 79, 277 S.E.2d 844 (1981).

Cited in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-124.21. Disapproval; hearing, order; adjustment of premium, review of filing.

(a) At any time within 30 days from and after the date of any filing, the Commissioner may give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply with the requirements of this Article and fixing a date for hearing not less than 30 days from the date of mailing of such notice. At such hearing the factors specified in G.S. 58-124.19 shall be considered. If the Commissioner after hearing finds that the filing does not comply with the provisions of this Article, he may issue his order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a reasonable time, after which such filing shall no longer be effective. Any order of disapproval under this section must be entered within 90 days of the date such filing is received by the Commissioner.

(b) In the event that no notice of hearing shall be issued within 30 days from the date of any such filing, the filing shall be deemed to be approved. If the Commissioner disapproves such filing pursuant to subsection (a) as not being in compliance with G.S. 58-124.19, he may order an adjustment of the premium to be made with the policyholder either by collection of an additional premium or by refund, if the amount exceeds five dollars ($5.00). The Commissioner may thereafter review any filing in the manner provided; but if so reviewed, no adjustment of any premium on any policy then in force may be ordered. (1977, c. 828, s. 6; 1979, c. 824, s. 3.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

For rate-making purposes, the Bureau is to be regarded as if it were the only insurance company operating in North Carolina, and as if it had an earned premium experience, an incurred loss experience and an operating experience equivalent to the composite of those of the companies actually in operation. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

Purpose of Notice. — The purpose of the provision of this section that when a filing is made "the Commissioner may give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply" with the law is to provide the Bureau a reasonable opportunity to prepare and offer evidence, and to prevent surprise at the hearing. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979), aff'd in part and rev'd in part, 300 N.C. 381, 269 S.E.2d 547 (1980).

Purpose of Hearing. — The purpose of the hearing before the Commissioner is to determine whether the proposed rates are unreasonable, excessive or discriminatory. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

When Public Hearing Required. — Approval or disapproval of the Commissioner under former § 58-131.1 necessarily contemplated action by the Commisssioner, and a public hearing under § 58-27.2 was required prior to such action upon a proposed material rate change. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 70, 231 S.E.2d 882 (1977).

Commissioner to Comply with Statutory Procedures and Standards. — The Commissioner of Insurance has no authority to prescribe or regulate premium rates except insofar as that authority has been conferred upon him by statute. In exercising that authority he must comply with the statutory procedures and standards. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976).

Specificity Required in Notice of Hearing. — When the Commissioner of Insurance knows prior to the giving of public notice in what respect and to what extent he contends such filing fails to comply with the requirements of the stautes, he must give the specifics in his notice of public hearing. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

Where the Commissioner gave no notice of his intention to challenge the weighting process utilized in a filing which was set forth clearly and prominently in the filing, such omission clearly violated subsection (a) of this section. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980).

Mathematical Specificity Required in Rejecting Proposed Increases. — This section requires the Commissioner of Insurance to be mathematically specific in rejecting proposed rate increases, and orders of the Commissioner should specify "wherein and to what extent" proposed filings are deemed improper. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

Burden of Proof on Rate Bureau. — The burden of proof, as that term is ordinarily understood in civil litigation, rests with the Rate Bureau in a ratemaking hearing. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 485, 269 S.E.2d 602 (1980).

The underlying burden of proving the need and reasonableness of a rate increase rests upon the Rate Bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

The burden of proving the need and reasonableness of a rate increase rests upon the Rate Bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

Basis for Commissioner's Disapproval. — The fact that the Commisssioner personally disapproves of a proposed rate revision does not, standing alone, warrant disapproval of the filing. The Commissioner's disapproval must be based on an affirmative showing that the proposed filing (1) fails to comply with statutory standards, or (2) is not supported by substantial evidence, or both. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 30 N.C. App. 487, 228 S.E.2d 261 (1976), aff'd in part, rev'd in part, 292 N.C. 70, 231 S.E.2d 882 (1977).

The Commissioner's disapproval must be based on an affirmative showing that the proposed filing fails to comply with statutory standards. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Burden on Commissioner to Make Affirmative Showing. — The Commissioner can no longer effectively disapprove a rate filing by inaction or a bare assertion that the Rate Bureau has not carried its burden of proof. Though the new statutory scheme does not shift the ultimate burden of proof from the Rate Bureau to the Commissioner, it does place on the Commissioner, in disapproving a filing, the burden of affirmatively and specifically showing how the bureau has not carried its burden of proof, and, if the Commissioner fails to do so by substantial evidence, the presumption of prima facie correctness given to an order of the Commissioner by §§ 58-9.4 and 58-9.6 is rebutted. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Material and Substantial Evidence Must Support Commissioner's Findings. — The enactment of this section did not transfer the burden of proof to the Commissioner, and there is no burden upon the Commissioner to disprove the filing; the burden upon him is that of being certain that material and substantial evidence exists in the record to support his findings. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979), aff'd in part and rev'd in part, 300 N.C. 381, 269 S.E.2d 547 (1980).

Commissioner is not required to approve or disapprove filing in toto, and may approve it in part. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

The Commissioner need not approve or disapprove a filing by the Bureau in its entirety. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The Commissioner may not submit his own proposals, whether they be deemed "modifications" or "substitutions," nor may he order his scheme into effect. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 259 S.E.2d 922 (1979), cert. denied, 299 N.C. 735, 267 S.E.2d 670 (1980).

Credibility of Evidence. — The credibility of evidence, whether offered by the Bureau, the Department of Insurance or a protestant, and the weight to be given such evidence, are to be determined by the Commissioner. However, in this determination, as in other aspects of such rate-making proceeding, the Commissioner may not act arbitrarily, rejecting as

untrustworthy, for no stated or apparent reason, uncontradicted testimony or data submitted through competent and unimpeached witnesses. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

The Commissioner may not reject as untrustworthy evidence that is uncontradicted or unimpeached. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Deemed Approval of Filing. — If the Commissioner fails to perform the affirmative duties imposed upon him by this Article after a filing by the Rate Bureau, the filing shall be deemed to be approved, just as there is a deemed approval upon his failure to give notice of hearing within 30 days under § 58-124.21(b). State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Review of Order of Disapproval. — If the Court of Appeals, on appeal from the Commissioner's order of disapproval, finds that the order is not supported by material and substantial evidence, it is then the duty of the court to determine whether the filing complies with the statutory standards and methods and is supported by substantial evidence. If no such compliance is found the disapproval order will be vacated and the cause remanded for proceedings as directed. If such compliance is found, the disapproval order will be vacated and the filing approved, and this will constitute a final determination under § 58-124.22, which will require an order distributing the escrowed funds to the members of the Rate Bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

The Bureau may amend its filing so as to propose a smaller increase in premium rates than that proposed in the original filing; in the absence of such amendment, the Commissioner, upon proper findings of fact supported by substantial evidence, may fix premium rates at a level such as to allow part but not all of the increase proposed by the Bureau. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Effect of Withdrawal of Voluntary Filing on Order Subsequently Entered by Commissioner. — The Rate Bureau may withdraw a voluntary filing for dwelling fire and extended coverage rates after the Commissioner of Insurance sets the filing for a public hearing; hence, an order entered by the Commissioner of Insurance after such withdrawal, disapproving the fire insurance filing and approving a decrease in extended coverage rates, was null and void. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 52 N.C. App. 79, 277 S.E.2d 844 (1981).

As to the statutory scheme for workers' compensation rate-making, see State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

In a workers' compensation rate hearing, the Commissioner of Insurance could properly consider investment income in determining whether a certain margin for underwriting was reasonable; however, the Commissioner erred in requiring the investment income to be considered at a risk-free rate of return rather than the rate of return actually experienced by the companies, since such requirement would limit the range of investments by insurance companies, contrary to the provisions of § 58-79.1. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979); State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-124.22. Appeal of Commissioner's order.

(a) Any order or decision of the Commissioner shall be subject to judicial review as provided in Article 2 of this Chapter.

(b) Whenever a Bureau rate is held to be unfairly discriminatory or excessive and no longer effective by order of the Commissioner issued under G.S. 58-124.21, the members of the Bureau, in accordance with rules and regulations established and adopted by the governing committee, shall have the option to continue to use such rate for the interim period pending judicial review of such order, provided each such member shall place in escrow account the purportedly unfairly discriminatory or excessive portion of the premium collected during such interim period and the court, upon a final determination,

shall order the escrowed funds to be distributed appropriately, except that individual refunds that are five dollars ($5.00) or less shall not be required. The court may also require that purportedly excess premiums resulting from an adjustment of premiums ordered pursuant to G.S. 58-124.21(b) be placed in such escrow account pending judicial review. The amounts escrowed hereunder shall bear interest at the prime rate as of the date such rates were put into effect. (1977, c. 828, s. 6; 1979, c. 824, s. 4.)

CASE NOTES

Insurance rate making is a technical, complicated and involved procedure carried on by trained men, but not an exact science, and judgment based upon a thorough knowledge of the problem must be applied. While courts cannot abdicate their duty to examine the evidence and the adjudication, and to interpret and apply the law, they must recognize the value of the judgment of an insurance commissioner who is specializing in the field of insurance and the efficacy of an adjudication supported by evidence of experts who have devoted a lifetime of service to rate making. In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968), modified, 275 N.C. 15, 165 S.E.2d 207 (1969), decided under former statutory provisions.

Review of Order of Disapproval. — If the Court of Appeals, on appeal from the Commissioner's order of disapproval, finds that the order is not supported by material and substantial evidence, it is then the duty of the court to determine whether the filing complies with the statutory standards and methods and is supported by substantial evidence. If no such compliance is found the disapproval order will be vacated and the cause remanded for proceedings as directed. If compliance is found, the disapproval order will be vacated and the filing approved, and this will constitute a final determination under § 58-124.22, which will require an order distributing the escrowed funds to the members of the Rate Bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Neither the Court of Appeals nor the Supreme Court has the inherent power to fix rates of insurance premiums, nor to continue them in effect pending a hearing on remand. State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977), decided under former statutory provisions.

Deemed Approval. — If the Commissioner fails to perform the affirmative duties imposed upon him by this Article after a filing by the Rate Bureau, the filing shall be deemed to be approved, just as there is a deemed approval upon his failure to give notice of hearing within 30 days under § 58-124.21(b). State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

As to the statutory scheme for workers' compensation rate-making, see State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 485, 269 S.E.2d 602 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 50 N.C. App. 304, 272 S.E.2d 923 (1980).

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-124.23. Deviations.

(a) No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the Bureau. However, an insurer may deviate from the rates promulgated by the Bureau

provided the insurer has filed the deviation to be applied both with the Bureau and the Commissioner, and provided the said deviation is uniform in its application to all risks in the State of the class to which such deviation is to apply; and provided such deviation is approved by the Commissioner. The Commissioner shall approve proposed deviations if the same do not render the rates excessive, inadequate or unfairly discriminatory. If approved the deviation shall remain in force for a period of one year from the date of approval by the Commissioner. Such deviation may be renewed annually subject to all of the foregoing provisions. Those portions of this section providing for deviations shall not apply to workers' compensation and employers' liability insurance written in connection therewith.

(b) A rate in excess of that promulgated by the Bureau may be charged on any specific risk provided such higher rate is charged with the approval of the Commissioner and with the knowledge and written consent of the insured. (1977, c. 828, s. 6.)

§ 58-124.24. Appeal to Commissioner from decision of Bureau.

Any member of the Bureau may appeal to the Commissioner from any decision of the Bureau and the Commissioner shall, after a hearing held on not less than 10 days' written notice to the appellant and to the Bureau, issue an order approving the decision of the Bureau or directing it to give further consideration to such proposal. In the event the Bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1977, c. 828, s. 6.)

§ 58-124.25. Existing rates, rating systems, territories, classifications and policy forms.

Rates, rating systems, territories, classifications and policy forms lawfully in use on September 1, 1977, may continue to be used thereafter, notwithstanding any provision of this Article. (1977, c. 828, s. 6.)

CASE NOTES

Territories are not "classifications," and their use in a filing is therefore not prohibited by § 58-30.4 which concerns revised classifications and rates. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

§ 58-124.26. Cap on motor vehicle insurance rate increases.

Notwithstanding any other provisions of law, with respect to nonfleet private passenger motor vehicle liability, physical damage, medical payments, uninsured motorist, and underinsured motorist insurance, the North Carolina Rate Bureau shall not increase the total combined general rate level for such coverages by more than the percentage increase in the Consumer Price Index that occurred during the period beginning with the sixteenth month and ending with the fourth month prior to the filing under G.S. 58-124.20. The provisions of this section shall not apply to rates or rating plans filed by or on behalf of the North Carolina Motor Vehicle Reinsurance Facility. For the purpose of this section, the term "Consumer Price Index" means the Consumer Price Index for All Urban Consumers (all items — United States city average), as published by the Bureau of Labor Statistics of the United States Department of Labor or any successor agency: Provided that the provisions of this section

shall expire on July 1, 1983. (1977, c. 828, s. 6; 1979, c. 824, s. 5; 1981, c. 916, s. 1.)

Effect of Amendments. — The 1981 amendment rewrote this section.

Session Laws 1981, c. 916, s. 4, provides: "The provisions of this act shall apply only to policies that are issued or renewed on or after the respective effective dates of this act." The 1981 amendment was effective on ratification, July 10, 1981.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

For note discussing changes in automobile rate regulation and the role of the Insurance Commissioner in North Carolina, see 17 Wake Forest L. Rev. 822 (1981).

CASE NOTES

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 50 N.C. App. 304, 272 S.E.2d 923 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 52 N.C. App. 79, 277 S.E.2d 844 (1981).

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-124.27. Notice of coverage or rate change.

Whenever an insurer changes the coverage other than at the request of the insured or changes the premium rate, it shall give the insured written notice of such coverage change or premium rate change at least 15 days in advance of the effective date of such change or changes with a copy of such notice to the agent. This section shall apply to all policies and coverages subject to the provisions of this Article. (1977, c. 828, s. 6.)

§ 58-124.28. Limitation.

Nothing in this Article shall apply to any town or county farmers mutual fire insurance association restricting their operations to not more than three adjacent counties, or to domestic insurance companies, associations, orders or fraternal benefit societies now doing business in this State on the assessment plan. (1977, c. 828, s. 6.)

§ 58-124.29. Policy forms.

No policy form applying to insurance on risks or operations covered by this Article may be delivered or issued for delivery unless it has been filed with the Commissioner by the Bureau and either he has approved it, or 90 days have elapsed and he has not disapproved it. (1979, c. 824, s. 6.)

Editor's Note. — Session Laws 1979, c. 824, s. 9, contains a severability clause.

§ 58-124.30. Payment of dividends not prohibited or regulated; plan for payment into rating system.

Nothing in this Article will be construed to prohibit or regulate the payment of dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers. A plan for the

payment of dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers will not be deemed a rating plan or system. (1979, c. 824, s. 6.)

Editor's Note. — Session Laws 1979, c. 824, s. 9, contains a severability clause.

Article 13.

Fire Insurance Rating Bureau.

§§ 58-125 to 58-131.9: Repealed by Session Laws 1977, c. 828, s. 1.

Cross References. — As to the North Carolina Rate Bureau, see § 58-124.17 et seq. As to the regulation of insurance rates, see § 58-131.34 et seq.

Article 13A.

Casualty Insurance Rating Regulations.

§§ 58-131.10 to 58-131.25: Repealed by Session Laws 1977, c. 828, s. 1.

Cross References. — As to the North Carolina Rate Bureau, see § 58-124.17 et seq. As to the regulation of insurance rates, see § 58-131.34 et seq.

Article 13B.

Rate Regulation of Miscellaneous Lines.

§§ 58-131.26 to 58-131.33: Repealed by Session Laws 1977, c. 828, s. 1.

Cross References. — As to the North Carolina Rate Bureau, see § 58-124.17 et seq. As to the regulation of insurance rates, see § 58-131.34 et seq.

Article 13C.

Regulation of Insurance Rates.

§ 58-131.34. Purposes.

The purposes of this Article are

(1) To promote the public welfare by regulating rates to the end that they shall not be excessive, inadequate, or unfairly discriminatory;

(2) To authorize the existence and operation of qualified rating organizations and advisory organizations and require that specified rating services of such rating organizations be generally available to all admitted insurers;

(3) To encourage, as the most effective way to produce rates that conform to the standards of subsection (1) of this section, independent action by and reasonable price competition among insurers;

(4) To authorize cooperative action among insurers in the rate-making process, and to regulate such cooperation in order to prevent practices

that tend to bring about monopoly or to lessen or destroy competition; and

(5) To encourage the most efficient and economic marketing practices. (1977, c. 828, s. 2.)

Cross References. — As to the North Carolina Rate Bureau, see § 58-124.17 et seq.

Editor's Note. — Session Laws 1977, c. 828, s. 24, contains a severability clause.

Legal Periodicals. — For a survey of 1977 law on insurance, see 56 N.C.L. Rev. 1084 (1978).

CASE NOTES

The prohibition against discrimination in rates is directed to insurers, agents, brokers and other representatives of insurers. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975), decided under former statutory provisions.

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-131.35. Definitions.

As used in this Article:

(1) "Advisory organization" means every person, other than an admitted insurer, whether located within or outside this State, who prepares policy forms or makes underwriting rules incident to but not including the making of rates, or rating plans or rating systems, or which collects and furnishes to admitted insurers or rating organizations loss or expense statistics or other statistical information and data and acts in an advisory, as distinguished from a rate-making, capacity. No duly authorized attorney-at-law acting in the usual course of his profession shall be deemed to be an advisory organization.

(2) "Commissioner" means the Commissioner of Insurance.

(3) "Inland marine insurance" shall be deemed to include insurance now or hereafter defined by statute, or by interpretation thereof, or if not so defined or interpreted, by ruling of the Commissioner or as established by general custom of the business, as inland marine insurance.

(4) "Member," unless otherwise apparent from the context, means an insurer who participates in or is entitled to participate in the management of a rating, advisory or other organization.

(5) "Rating organization" means every person, other than an admitted insurer, whether located within or outside this State, who has as his object or purpose the making of rates, rating plans, or rating systems. Two or more insurers which act in concert for the purpose of making rates, rating plans, or rating systems, and which do not operate within the specific authorizations contained in G.S. 58-131.45, 58-131.46, 58-131.47 and 58-131.48, shall be deemed to be a rating organization. No single insurer shall be deemed to be a rating organization.

(6) "Subscriber," unless otherwise apparent from the context, means an insurer which is furnished at its request (i) with rates and rating manuals by a rating organization of which it is not a member, or (ii) with advisory services by an advisory organization of which it is not a member.

(7) "Willful" means in relation to an act or omission which constitutes a violation of this Article with actual knowledge or belief that such act or omission constitutes such violation and with specific intent to commit such violation.

(8) "Private passenger motor vehicle" means:
   a. A motor vehicle of the private passenger or station wagon type that is owned or hired under a long-term contract by the policy named insured and that is neither used as a public or livery conveyance for passengers nor rented to others without a driver; or
   b. A motor vehicle with a pick-up body, a delivery sedan or a panel truck that is owned by an individual or by husband and wife or individuals who are residents of the same household and that is not customarily used in the occupation, profession, or business of the insured other than farming or ranching. Such vehicles owned by a family farm copartnership or corporation shall be considered owned by an individual for purposes of this Article; or
   c. A motorcycle, motorized scooter or other similar motorized vehicle not used for commercial purposes.

(9) "Nonfleet" motor vehicle means a motor vehicle not eligible for classification as a fleet vehicle for the reason that the motor vehicle is one of four or less motor vehicles owned or hired under a long-term contract by the policy named insured. (1977, c. 828, s. 2.)

CASE NOTES

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

§ 58-131.36. Scope of application.

The provisions of this Article shall apply to all insurance on risks or on operations in this State, except:

(1) Reinsurance, other than joint reinsurance to the extent stated in G.S. 58-131.45;
(2) Any policy of insurance against loss or damage to or legal liability in connection with property located outside this State, or any motor vehicle or aircraft principally garaged and used outside of this State, or any activity wholly carried on outside this State;
(3) Insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine, as distinguished from inland marine, insurance policies;
(4) Accident, health, or life insurance;
(5) Annuities;
(6) Title insurance;
(7) Mortgage guaranty insurance;
(8) Workers' compensation and employers' liability insurance written in connection therewith;
(9) For private passenger (nonfleet) motor vehicle liability insurance, automobile medical payments insurance, uninsured motorists' coverage and other insurance coverages written in connection with the sale of such liability insurance;
(10) Theft of or physical damage to private passenger (nonfleet) motor vehicles; and
(11) Insurance against loss to residential real property with not more than four housing units located in this State or any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance. Provided,

however, that this Article shall apply to insurance against loss to farm buildings (other than farm dwellings and their appurtenant structures); farm personal property; travel or camper trailers designed to be pulled by private passenger motor vehicles unless insured under policies covering nonfleet private passenger motor vehicles; residential real and personal property insured in multiple line insurance policies covering business activities as the primary insurable interest; and marine, general liability, burglary and theft, glass, and animal collision insurance except when such coverages are written as an integral part of a multiple line insurance policy for which there is an indivisible premium.

The provisions of this Article shall not apply to hospital service or medical service corporations, investment companies, mutual benefit associations, or fraternal beneficiary associations. (1977, c. 828, s. 2; 1979, c. 714, s. 2; 1981, c. 888, s. 5.)

Effect of Amendments. — The 1981 amendment added the second sentence in subdivision (11).

§ 58-131.37. Rate standards.

(a) Rates shall not be excessive, inadequate, or unfairly discriminatory.

(b) Rates are not excessive if a reasonable degree of price competition exists at the consumer level with respect to the class of business to which they apply. It is presumed that a reasonable degree of price competition exists if there are a number of insurers actively engaged in the class of business and there are rate differentials in that class of business.

(c) If such competition does not exist, rates are excessive if they clearly produce a long-run underwriting profit that is unreasonably high for the class of business.

(d) No rate shall be held to be inadequate unless (i) the rate is unreasonably low for the insurance provided and the continued use of the rate endangers the solvency of the insurer, or unless (ii) the rate is unreasonably low for the insurance provided and the use of the rate by the insurer has, or if continued will have, the effect of destroying competition or creating a monopoly.

(e) A rate is not unfairly discriminatory in relation to another in the same class if it reflects equitably the differences in expected losses and expenses. Rates are not unfairly discriminatory because different premiums result for policyholders with like loss exposures but different expense factors, or like expense factors but different loss exposures, as long as the rates reflect the differences with reasonable accuracy. Rates are not unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise, or blanket policy. (1977, c. 828, s. 2.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-131.38. Rating methods.

In determining whether rates comply with the standards under G.S. 58-131.37, the following criteria shall be applied:

(1) Due consideration shall be given to past and prospective loss and expense experience within this State, to catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to trends within this State, to dividends or savings to be allowed or returned by insurers to their policyholders, members, or subscribers, and to all other relevant factors, including judgment factors; provided, however, that countrywide expense and loss experience and other countrywide data shall be considered where credible North Carolina experience or data is not available.

(2) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any differences among risks that have probable effect upon losses or expenses. Classifications or modifications of classifications of risks may be established based upon size, expense, management, individual experience, location or dispersion of hazard, or any other reasonable considerations. Such classifications and modifications shall apply to all risks under the same or substantially the same circumstances or conditions.

(3) The expense provisions included in the rates to be used by an insurer may reflect the operating methods of the insurer and, as far as it is credible, its own expense experience. (1977, c. 828, s. 2.)

CASE NOTES

Consideration of Past Experience. — When a filing is made the ratemaker must, of necessity, estimate what will happen in the future. The natural guide is past experience, and former § 58-248 specifically provided for consideration of factors relating to past experience. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 292 N.C. 1, 231 S.E.2d 867 (1977), decided under former § 58-248.

Former § 58-248 contemplated a trending method which, on the basis of trends in past loss experience, projected the losses to be anticipated during the future period in which the proposed rates would be in effect. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 292 N.C. 1, 231 S.E.2d 867 (1977), decided under former § 58-248.

§ 58-131.39. Filing of rates and supporting data.

(a) Except as to inland marine risks which by general custom of the business are not written according to manual rates and rating plans, every admitted insurer and every licensed rating organization, which has been designated by any insurer for the filing of rates under G.S. 58-131.41, shall file with the Commissioner all rates and all changes and amendments thereto made by it for use in this State prior to the time they become effective.

(b) The Commissioner may require the filing of supporting data including:

(1) The experience and judgment of the filer, and to the extent the filer wishes or the Commissioner requires, of other insurers or rating organizations;

(2) The filer's interpretation of any statistical data relied upon; and

(3) Descriptions of the methods employed in setting the rates.

(c) Upon written consent of the insured, stating his reasons therefor, a rate or deductible or both in excess of that provided by an otherwise applicable filing may be used on a specific risk, provided that it is filed with the Commissioner in accordance with subsection (a) of this section. (1977, c. 828, s. 2.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-131.40. Filing open to inspection.

Each filing and supporting data filed under this Article shall, as soon as filed, be open to public inspection at any reasonable time. Copies may be obtained by any person on request and upon payment of a reasonable charge therefor. (1977, c. 828, s. 2.)

§ 58-131.41. Delegation of rate making and rate filing obligation.

(a) An insurer may itself establish rates based on the factors in G.S. 58-131.38 or it may use rates prepared by a rating organization, with average expense factors determined by the rating organization or with such modification for its own expense and loss experience as the credibility of that experience allows.

(b) An insurer may discharge its obligation under G.S. 58-131.39 by giving notice to the Commissioner that it uses rates prepared by a designated rating organization, with such information about modifications thereof as are necessary to fully inform the Commissioner. The insurer's rates shall be those filed from time to time by the rating organization, including any amendments thereto as filed, subject, however, to the modifications filed by the insurer. (1977, c. 828, s. 2.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-131.42. Disapproval of rates; interim use of rates.

(a) If the Commissioner finds after a hearing that a rate is not in compliance with G.S. 58-131.37, he shall issue an order specifying in what respects it so fails, and stating when, following a reasonable period thereafter, the rate shall be deemed no longer effective. The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

(b) Whenever a rate of an insurer is held to be unfairly discriminatory or excessive and the rate is deemed no longer effective by order of the Commissioner issued under subsection (a) of this section, the insurer shall have the option to continue to use the rate for the interim period pending judicial review of the order, provided that the insurer shall place in an escrow account approved by the Commissioner the purported unfairly discriminatory

or excessive portion of the premium collected during the interim period. The court, upon a final determination, shall order the escrowed funds or any overcharge in the interim rates to be distributed appropriately, except that refunds to policyholders that are de minimis shall not be required. (1977, c. 828, s. 2.)

CASE NOTES

The Rate Office and the Commissioner possess only such respective powers as are granted by the General Assembly. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 292 N.C. 1, 231 S.E.2d 867 (1977), decided under former statutory provisions.

The Commissioner has the duty to consider rate proposals in accordance with statutory standards and has no authority merely to accept a proposal as being true and accurate for purposes of entering an interim order. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 287 N.C. 192, 214 S.E.2d 98 (1975), decided under former statutory provisions.

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-131.43. Rating organizations.

(a) No rating organization shall provide any service relating to rates subject to this Article and no insurer shall utilize the service of such organization for such purpose unless the organization has obtained a license from the Commissioner.

(b) No rating organization shall refuse to supply any services for which it is licensed in this State to any insurer admitted to do business in this State and offering to pay the fair and usual compensation for the services.

(c) A rating organization applying for a license shall include with its application:

(1) A copy of its constitution, charter, articles of organization, agreement, association, or incorporation, and a copy of its bylaws, plan of operation, and any other rules or regulations governing the conduct of its business;

(2) A list of its members and subscribers;

(3) The name and address of one or more residents of this State upon whom notices, process affecting it, or orders of the Commissioner may be served;

(4) A statement showing its technical qualifications for acting in the capacity for which it seeks a license; and

(5) Any other relevant information and documents that the Commissioner may require.

(d) If the Commissioner finds that the applicant and the natural persons through whom it acts are qualified to provide the services proposed, and that all requirements of law are met, he shall issue a license specifying the authorized activity of the applicant. He shall not issue a license if the proposed activity would tend to create a monopoly or to lessen or to destroy price competition. Licenses issued pursuant to this section shall remain in effect until the licensee withdraws from the State or until the license is suspended or revoked.

(e) Any change in or amendment to any document required to be filed under this section shall be promptly filed with the Commissioner.

(f) Every rating organization providing services in this State on September 1, 1977, may continue to provide services thereafter as a rating organization, subject to the provisions of this Article and pending its application to the

Commissioner for a license to provide services as a rating organization, which application shall be made within 30 days after September 1, 1977. (1977, c. 828, s. 2.)

§ 58-131.44. Advisory organizations.

(a) No advisory organization shall conduct its operations in this State unless and until it has filed with the Commissioner:

(1) A copy of its constitution, articles of incorporation, agreement, or association, and of its bylaws, or rules and regulations governing its activities, all duly certified by the custodian of the originals thereof;

(2) A list of its members and subscribers; and

(3) The name and address of a resident of this State upon whom notices, process affecting it, or orders of the Commissioner may be served.

(b) Any change in or amendment to any document required to be filed under this section shall be promptly filed with the Commissioner.

(c) No advisory organization shall engage in any unfair or unreasonable practice with respect to its activities. (1977, c. 828, s. 2.)

§ 58-131.45. Joint underwriting and joint reinsurance organizations.

(a) Every group, association, or other organization of insurers which engages in joint underwriting or joint reinsurance through such group, association, or organization, or by standing agreement among the members thereof, shall file with the Commissioner:

(1) A copy of its constitution, articles of incorporation, agreement, or association, and bylaws;

(2) A list of its members; and

(3) The name and address of a resident of this State upon whom notices, process affecting it, or orders of the Commissioner may be served.

(b) Any change in or amendment to any document required to be filed under this section shall be promptly filed with the Commissioner.

(c) If after a hearing, the Commissioner finds that any activity or practice of any such group, association, or other organization is unfair, unreasonable, or otherwise inconsistent with the provisions of this Article, he may issue a written order specifying in what respects the activity or practice is unfair, unreasonable, or otherwise inconsistent with the provisions of this Article, and requiring the discontinuance of the activity or practice. (1977, c. 828, s. 2.)

§ 58-131.46. Insurers authorized to act in concert.

Subject to and in compliance with the provisions of this Chapter authorizing insurers to be members or subscribers of rating or advisory organizations or to engage in joint underwriting or joint reinsurance, two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems, the preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections and investigations, the furnishing of loss or expense statistics or other information and data, or carrying on of research. (1977, c. 828, s. 2.)

§ 58-131.47. Insurers authorized to act in concert; admitted insurers with common ownership or management; matters relating to co-surety bonds.

With respect to any matters pertaining to the making of rates or rating

systems, the preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections and investigations, the furnishing of loss or expense statistics or other information and data, or carrying on of research, two or more admitted insurers having a common ownership or operating in this State under common management or control, are hereby authorized to act in concert between or among themselves the same as if they constituted a single insurer. To the extent that such matters relate to co-surety bonds, two or more admitted insurers executing co-surety bonds are authorized to act in concert between or among themselves the same as if they constituted a single insurer. (1977, c. 828, s. 2.)

§ 58-131.48. Agreements to adhere.

No insurer shall assume any obligation to any person, other than a policyholder or other insurers with which it is under common control or management or is a member of a joint underwriting or joint reinsurance organization, to use or adhere to certain rates or rules; and no other person shall impose any penalty or other adverse consequence for failure of an insurer to adhere to certain rates or rules. This section shall not apply to apportionment agreements among insurers approved by the Commissioner pursuant to G.S. 58-131.52: Provided, however, that members and subscribers of rating or advisory organizations may use the rates, rating systems, underwriting rules, or policy or bond forms of such organizations either consistently or intermittently. The fact that two or more admitted insurers, whether or not members or subscribers of a rating or advisory organization, consistently or intermittently use the rates or rating systems made or adopted by a rating organization, or the underwriting rules or policy or bond forms prepared by a rating or advisory organization, shall not be sufficient in itself to support a finding that an agreement to so adhere exists, and it may be used only for the purpose of supplementing or explaining direct evidence of the existence of any such agreement. (1977, c. 828, s. 2.)

§ 58-131.49. Exchange of information or experience data; consultation with rating organizations and insurers.

Rating organizations licensed pursuant to G.S. 58-131.43 and admitted insurers are authorized to exchange information and experience data between and among themselves in this State and with rating organizations and insurers in other states and may consult with them with respect to rate making and the application of rating systems. (1977, c. 828, s. 2.)

§ 58-131.50. Recording and reporting of experience.

The Commissioner shall promulgate or approve reasonable rules, including rules providing statistical plans, for use thereafter by all insurers in the recording and reporting of loss and expense experience, in order that the experience of such insurers may be made available to him. No insurer shall be required to record or report its experience on a classification basis inconsistent with its own rating system. The Commissioner may designate one or more rating organizations to assist him in gathering and making compilations of such experience. (1977, c. 828, s. 2.)

§ 58-131.51. Examination of rating, joint underwriting, and joint reinsurance organizations.

The Commissioner shall, at least once every three years, make or cause to be made an examination of each rating organization licensed pursuant to G.S. 58-131.43 and each advisory organization licensed pursuant to G.S. 58-131.44. He may, as often as he may deem it expedient, make or cause to be made, an examination of each group, association, or other organization referred to in G.S. 58-131.45. Such examination shall relate only to the activities conducted pursuant to this Article and to the organizations licensed under this Article. The reasonable cost of any such examination shall be paid by the organization examined upon presentation to it of a detailed account of such cost. The officers, manager, agents and employees of any such organization may be examined at any time under oath and shall exhibit all books, records, account, documents or agreements governing its method of operation. In lieu of any such examination, the Commissioner may accept the report of an examination made by the insurance advisory official of another state, pursuant to the laws of such state. (1977, c. 828, s. 2.)

§ 58-131.52. Apportionment agreements among insurers.

Agreements may be made between or among insurers with respect to equitable apportionment among them of insurance which may be afforded applicants who are in good faith entitled to but who are unable to procure such insurance through ordinary methods. The insurers may agree between or among themselves on the use of reasonable rate modifications for such insurance, agreements, and rate modifications to be subject to the approval of the Commissioner. (1977, c. 828, s. 2.)

§ 58-131.53. Request for review of rate, rating plan, rating system or underwriting rule.

Any person aggrieved by any rate charged, rating plan, rating system, or underwriting rule followed or adopted by an insurer or rating organization may request the insurer or rating organization to review the manner in which the rate, plan, system, or rule has been applied with respect to insurance afforded him. Such request may be made by his authorized representative, and shall be in writing. If the request is not granted within 30 days after it is made, the requestor may treat it as rejected. Any person aggrieved by the action of an insurer or rating organization in refusing the review requested or in failing or refusing to grant all or part of the relief requested, may file a written complaint and request for hearing with the Commissioner, and shall specify the grounds relied upon. If the Commissioner has information concerning a similar complaint he may deny the hearing. If the Commissioner believes that probable cause for the complaint does not exist or that the complaint is not made in good faith, he shall deny the hearing. If the Commissioner finds that the complaint charges a violation of this Article and that the complainant would be aggrieved if the violation is proven, he shall proceed as provided in G.S. 58-131.54. (1977, c. 828, s. 2.)

§ 58-131.54. Hearing and judicial review.

(a) Any insurer, person, or organization to which the Commissioner has directed an order or decision made without a hearing may, within 30 days after notice to it of the order or decision, make written request to the Commissioner for a hearing thereon. The Commissioner shall hear the party or parties within 20 days after receipt of the request and shall give not less than 10 days' written

notice of the time and place of hearing. Within 15 days after the hearing, the Commissioner shall affirm, reverse, or modify his previous action, and specify his reasons therefor. Pending such hearing and decision thereon, the Commissioner may suspend or postpone the effective date of his previous action.

(b) Any order or decision of the Commissioner shall be subject to judicial review as provided in Article 2 of this Chapter. (1977, c. 828, s. 2.)

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-131.55. Penalties.

(a) The Commissioner may, if he finds that any person or organization has violated any provision of this Article, impose a penalty of not more than five hundred dollars ($500.00) for each such provision violated; but if he finds such violation to be willful, he may impose a penalty of not more than five thousand dollars ($5,000) for each such provision violated. Such penalties may be in addition to any other penalty provided by law.

(b) The Commissioner may suspend the license of any rating organization or insurer that fails to comply with an order of the Commissioner within the time limited by such order, or within any extension thereof that the Commissioner may grant. The Commissioner shall not suspend the license of any rating organization or insurer for failure to comply with an order until the time prescribed for an appeal therefrom has expired or, if an appeal has been taken, until such order has been affirmed. The Commissioner may determine when a suspension of a license shall become effective, and such suspension shall remain in effect for the period fixed by him unless he modifies or rescinds such suspension, or until the order upon which such suspension is based is modified, rescinded, or reversed.

(c) No penalty shall be imposed and no license shall be suspended or revoked except upon a written order of the Commissioner stating his findings, made after a hearing held upon not less than 10 days' written notice to such person or organization, and specifying the alleged violation. (1977, c. 828, s. 2.)

§ 58-131.56. Policy forms.

Except for fidelity, surety, or guaranty bonds and except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, no policy form applying to insurance on risks or operations covered by this Article shall be delivered or issued for delivery unless it has been filed with the Commissioner and either he has approved it, or 90 days have elapsed and he has not disapproved it. (1977, c. 828, s. 2.)

§ 58-131.57. Existing rates, rating systems, territories, classifications and policy forms.

Rates, rating systems, territories, classifications, and policy forms lawfully in use on September 1, 1977, may continue to be used thereafter, notwithstanding any provision of this Article. (1977, c. 828, s. 2.)

§ 58-131.58. Payment of dividends not prohibited or regulated; plan for payment into rating system.

Nothing in this Article shall be construed to prohibit or regulate the payment of dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers. A plan for the payment of dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers shall not be deemed a rating plan or system. (1977, c. 828, s. 2.)

§ 58-131.59. Notice of coverage or rate change.

Whenever an insurer changes the coverage other than at the request of the insured or changes the premium rate, it shall give the insured written notice of such coverage change or premium rate change at least 15 days in advance of the effective date of such change or changes with a copy of such notice to the agent. This section shall apply to all policies and coverages subject to the provisions of this Article. (1977, c. 828, s. 2.)

§ 58-131.60. Limitation.

Nothing in this Article shall apply to any town or county farmers mutual fire insurance association restricting their operations to not more than three adjacent counties, or to domestic insurance companies, associations, orders or fraternal benefit societies now doing business in this State on the assessment plan. (1977, c. 828, s. 2.)

Article 14.

Real Estate Title Insurance Companies.

§ 58-132. Purpose of organization; formation.

(a) Companies may be formed in the manner provided in this Article for the purpose of furnishing information in relation to titles to real estate and of insuring owners and others interested therein against loss by reason of encumbrances and defective title; provided, however, that no such information shall be so furnished nor shall such insurance be so issued as to North Carolina real property unless and until the title insurance company has caused to be conducted a reasonable examination of the title, has obtained the opinion thereof of an attorney, not an employee of the company, licensed to practice law in North Carolina, and has caused to be made a determination of insurability of title in accordance with sound underwriting practices for title insurance companies.

(b) Such companies shall be subject to:

(1) The same capital, surplus and investment requirements as govern the formation and operation of domestic stock casualty companies.

(2) The same deposit requirements governing the operation of other state or foreign casualty companies in this State; and

(3) Article 17A of the Insurance Law of this State and G.S. 58-39. Such companies shall not be subject to the Insurance Law of this State except as otherwise provided in this Article.

(c) This Article shall not be interpreted so as to imply the repeal or amendment of any of the provisions of Chapter 84 of the General Statutes of North Carolina nor of any other provisions of common law or statutory law governing the practice of law. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C.S., s. 6395; 1923, c. 71; 1973, c. 128.)

§ 58-133. Certificate of authority to do business.

Before any such company may issue any policy or make any contract or guarantee of insurance, it shall file with the Commissioner of Insurance a certified copy of the record or the certificate of its organization in the office of the Secretary of State, and obtain from the Commissioner of Insurance his certificate that it has complied with the laws applicable to it and that it is authorized to do business. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C.S., s. 6396.)

§ 58-134. Annual statement and license required.

Every such corporation shall, on or before the thirtieth day of January of each year, file in the office of the Commissioner of Insurance a statement, such as he may require, showing its condition and its affairs for the year ending on the preceding thirty-first day of December, signed and sworn to by its president or secretary or treasurer and one of its directors. For neglect to file such annual statement or for making a wilfully false statement it shall be liable to the same penalties imposed upon other insurance companies. The Commissioner of Insurance shall annually license such companies and their agents, and have the same power and authority to visit and examine such corporations as he has in the case of other domestic insurance companies; and the duties and liabilities of such corporations and their agents in reference to such examinations are the same as those of other domestic insurance companies. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C.S., s. 6397.)

Cross References. — As to examinations to be made by the Commissioner, see § 58-16.

§ 58-134.1. Investment of capital.

Any real estate title insurance company having a capital stock of more than fifty thousand dollars ($50,000), may, with the consent of the Commissioner, after investing fifty thousand dollars ($50,000) of the capital, as provided in this Chapter, invest not to exceed one fourth of the total capital stock in abstract or title plants; and no such company shall guarantee or insure in any one risk on real property located in North Carolina more than forty percent (40%) of its combined capital and surplus without first having the approval of the Commissioner, which approval shall be endorsed upon the policy. (1945, c. 386; 1967, c. 936.)

Legal Periodicals. — For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

§ 58-134.2. Unearned premium reserve.

Every domestic title insurance company shall, in addition to other reserves, establish and maintain a reserve to be known as the "unearned premium reserve" for title insurance, which shall at all times and for all purposes be considered and constitute unearned portions of the original risk premiums and shall be charged as a reserve liability of such title insurance company in determining its financial conditions. While said sums are so reserved they shall be withdrawn from the use of the insurer for its general purposes and impressed with a trust in favor of the holders of title policies and held available for reinsurance of the title policies in the event of insolvency of the insurer. Nothing herein contained shall preclude such an insurer from investing said

reserve in investments authorized by law for such an insurer, and the income from such invested reserve shall be included in the general income of the insurer to be used by such insurer for any lawful purpose. (1969, c. 897; 1973, c. 1035, s. 1.)

§ 58-134.3. Amount of unearned premium reserve.

(a) The unearned premium reserve of every domestic title insurance company shall consist of the aggregate of:

(1) The amount of the unearned premium reserve held as of January 1, 1974.

(2) The amount of all additions required to be made to such reserve by this section, less the reduction of such aggregate amount required hereby.

(b) On each contract of title insurance issued by a domestic title insurance company on and after January 1, 1974, there shall be reserved initially as an unearned premium reserve a sum equal to ten per centum (10%) of the original risk premium charged therefor.

(c) The aggregate of the amounts set aside in unearned premium reserves in any calendar year, pursuant to subsection (b) of this section, shall be reduced annually at the end of each calendar year following the year in which the policy is issued, at the annual rate of one twentieth of the aggregate of such amounts.

(d) The entire amount of the unearned premium reserve held as of January 1, 1974, shall be added to the reserve as of that date and shall be released from said reserve and restored to net profits at the annual rate of one twentieth of the said entire amount, beginning in the next ensuing calendar year.

(e) If substantially the entire outstanding liability under all policies, contracts of title insurance or reinsurance agreements of any such title insurance company shall be reinsured, the value of the consideration received by a reinsuring title insurance company authorized to transact the business of title insurance in this State, shall constitute, in its entirety, unearned portions of original premiums and be added to its unearned premium reserve and deemed, for recovery purposes, to have been provided for liabilities assumed during the year of such reinsurance. The amount of such addition to the unearned premium reserve of such assuming title insurance company shall be not less, however, than two thirds of the amount of the unearned premium reserve required to be maintained by the ceding title insurance company at the time of such reinsurance. (1969, c. 897; 1973, c. 1035, ss. 2-4.)

§ 58-134.4. Unearned premium reserve on policies issued by foreign or alien title insurance companies.

Every foreign or alien title insurance company licensed to transact title insurance in this State shall reserve and maintain the same reserves as are required of domestic companies under the provisions of G.S. 58-134.4 [58-134.3], unless by the laws of the state or country of domicile of such company there is required to be set aside and maintained an unearned premium reserve in at least as great an amount as is required of domestic companies by that section. (1969, c. 897.)

Editor's Note. — It appears the reference in this section as enacted by Session Laws 1969, c. 897, to § 58-134.4 should be to § 58-134.3. The correct reference has been inserted in brackets.

§ 58-134.5. Maintenance of the unearned premium reserve.

If by reason of any cause, other than depreciation in the market value of investments, the amount of the assets of a title insurance company held as investments of its unearned premium reserve should on any date be less than the amount required to be maintained by law in such reserve, and the deficiency shall not be promptly cured, such title insurance company shall forthwith give written notice thereof to the Commissioner and shall make no further policies, contracts of title insurance or reinsurance agreements of title insurance until the deficiency shall have been eliminated and until it shall have received written approval from the Commissioner authorizing it to again issue such policies, contracts of title insurance or agreements. (1969, c. 897.)

§ 58-134.6. Use of the unearned premium reserve on liquidation, dissolution or insolvency.

(a) If a title insurance company becomes insolvent, or is in the process of liquidation or dissolution, or in the possession of the Commissioner:

(1) Such amount of the assets of such title insurance company equal to the unearned premium reserve then remaining as is necessary may be used by or with the written approval of the Commissioner, to pay for reinsurance of the liability of such title insurance company upon all outstanding policies or contracts or reinsurance agreements of title insurance, as to which claims for losses by the holders are not then pending, the balance, if any, of assets equal to the unearned premium reserve fund then remaining, then to be transferred to the general assets of the title insurance company.

(2) The assets other than the unearned premium reserve shall be available to pay claims for losses sustained by holders of policies then pending or arising up to the time reinsurance is effected. In the event that claims for losses are in excess of such other assets of the title insurance company, such claims, when established, shall be paid pro rata out of the surplus assets attributable to the unearned premium reserve, to the extent of such surplus, if any.

(b) In the event that reinsurance is not obtained, the unearned premium reserve and assets constituting minimum capital, or so much as remains thereof after outstanding claims have been paid, shall constitute a trust fund to be held by the Commissioner for 20 years, out of which claims of policyholders shall be paid as they arise. The balance, if any, of such fund shall, at expiration of 20 years, revert to the general assets of the title insurance company. (1969, c. 897.)

Article 15.

Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates.

§ 58-135. Issuance of collateral loan certificates; security.

Any domestic land mortgage company or title insurance company having a paid-in capital and surplus of at least two hundred thousand dollars ($200,000), may, under the supervision and control of the Commissioner of Insurance, issue collateral loan certificates, or other certificates of indebtedness secured by the deposit of first mortgages on real estate with the Commissioner, or under his direction, or secured by the deposit with the Commissioner, or under

his direction, of collateral trust bonds secured by first mortgages, the principal and interest of which said mortgages is guaranteed by a surety company having assets of at least ten million dollars ($10,000,000), upon a basis not to exceed one hundred dollars ($100.00) for each one hundred dollars ($100.00) of liability under the collateral loan certificates or other certificates of indebtedness outstanding and secured by such first mortgages or collateral trust bonds. (1927, c. 204, s. 1.)

§ 58-135.1. Prohibition against payment or receipt of title insurance kickbacks, rebates, commissions and other payments.

(a) No person or entity selling real property, or performing services as a real estate agent, attorney or lender, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate; commission or other payment in connection with the issuance of title insurance for any real property which is a part of such sale or settlement; nor shall any title insurance company, agency or agent make any such payment.

(b) Any person or entity violating the provisions of this Chapter shall be guilty of a misdemeanor and subject to a fine of not more than one thousand dollars ($1,000), or imprisonment for not more than six months, or both, in the discretion of the court.

(c) No persons or entity shall be in violation of this section solely by reason of ownership of stock in a bona fide title insurance company, agency, or agent. For purposes of this section, and in addition to any other statutory or regulatory requirements, a bona fide title insurance company, agency or agent is defined to be a company, agency or agent that passes upon and makes title insurance underwriting decisions on title risks, including the issuance of title insurance policies, binders and endorsements, and that maintains a separate and distinct staff and office or offices for such purposes. (1973, c. 1336, s. 1.)

§ 58-136. Licenses.

Any domestic land mortgage company, or title insurance company, wishing to do business under the provisions of this Article upon making written application and submitting proof satisfactory to the Commissioner of Insurance that its business, capital and other qualifications comply with the provisions of this Article, upon paying to the Commissioner of Insurance, the sum of two hundred dollars ($200.00) as a license fee and all other fees assessed against such company may be licensed to do business in this State under the provisions of this Article until the first day of the following July, and may have its license renewed for each year thereafter so long as it complies with the provisions of this Article and such rules and regulations as may be promulgated by the Commissioner of Insurance. For each such renewal such company shall pay to the Commissioner of Insurance the sum of two hundred dollars ($200.00), and all other fees assessed against such company and such renewal shall continue in force and effect until a new license be issued or specifically refused, unless revoked for good cause. The Commissioner of Insurance, or any person appointed by him, shall have the power and authority to make such rules and regulations and examinations not inconsistent with the provisions of this Article, as may be in his discretion necessary or proper to enforce the provisions hereof and secure compliance with the terms of this Article. For any examination made hereunder the Commissioner of Insurance shall charge the land mortgage companies or title insurance companies examined with the actual expense of such examination. (1927, c. 204, s. 2; 1955, c. 179, s. 3.)

§ 58-137. Annual statements furnished.

Every such domestic land mortgage company or title insurance company doing business in this State under this Article shall annually file with the Commissioner of Insurance on or before the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year, and shall also exhibit the amount of real estate mortgages deposited by such land mortgage company or title insurance company for the protection of the certificates issued under this Article. The Commissioner of Insurance is hereby empowered to require such further information as may be reasonably necessary to satisfy him that the statements contained in the sworn statements are true and correct. (1927, c. 204, s. 3.)

ARTICLE 16.

Reciprocal or Interinsurance Exchanges.

§ 58-138. Exchange of insurance contracts authorized; power of attorney.

Individuals, partnerships, and corporations of this State hereby designated as subscribers, are authorized to exchange reciprocal or interinsurance contracts with each other, or with individuals, partnerships, and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. Such contracts may be executed by an attorney, agent, or other representative, herein designated attorney, duly authorized and acting for such subscribers.

The attorney-in-fact for each of such exchanges shall be required to obtain a written power of attorney executed by each of the subscribers and have the same in his or its possession before any contracts of insurance of any kind or description shall be issued or renewed to subscribers, and a full copy of the provisions of the power of attorney used at the exchange and on file with the Commissioner of Insurance under the requirements of G.S. 58-139, subdivision (4), shall be incorporated into and made a part of all contracts or policies issued to subscribers in this State. (1913, c. 183, ss. 1, 2; C.S., s. 6398; 1937, c. 130.)

§ 58-139. Statement to be filed with Commissioner of Insurance.

The subscribers, so contracting among themselves, shall, through their attorney, file with the Commissioner of Insurance of this State a declaration verified by oath of such attorney, setting forth:

(1) The name or title of the office at which such subscribers propose to exchange such indemnity contracts. This name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the Commissioner of Insurance is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or interinsurance exchanges.

(2) The kind or kinds of insurance to be effected or exchanged.

(3) A copy of the form of policy, contract, or agreement under or by which the insurance is to be effected or exchanged.

(4) A copy of the form of power of attorney or other authority of such attorney under which the insurance is to be effected or exchanged.

(5) The location of the office or offices from which such contracts or agreements are to be issued.

(6) That applications have been made for indemnity upon at least 100 separate risks, aggregating not less than one and one-half million dollars ($1,500,000) as represented by executed contracts or bona fide applications, to become concurrently effective, or, in case of liability or compensation insurance, covering a total payroll of not less than one and one-half million dollars ($1,500,000): Provided, that when the attorney maintains the central office in this State the Commissioner of Insurance may authorize an exchange with a less number of risks and a smaller amount of indemnity to be exchanged and an amount of cash deposits less than twenty-five thousand dollars ($25,000).

(7) That there is on deposit with such attorney and available for payment of losses a sum of not less than one hundred thousand dollars ($100,000). (1913, c. 183, s. 3; C.S., s. 6399; 1945, c. 386.)

§ 58-140. Agreement for service of process.

At the time of filing the declaration provided for by the preceding section [G.S. 58-139], the attorney shall file with the Commissioner of Insurance an instrument in writing, executed by him for the subscribers, conditioned that upon the issuance of certificate of authority provided for in this Article, service of process may be had upon the Commissioner of Insurance in all suits in this State arising out of such policies, contracts, or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or interinsurance contracts through such attorney. Three copies of such process shall be served, and the Commissioner of Insurance shall file one copy, forward one copy to the attorney, and return one copy with his admission of service. (1913, c. 183, s. 4; C.S., s. 6400.)

§ 58-141. Statement as to amount of risks.

There shall be filed with the Commissioner of Insurance of this State by such attorney a statement under his oath showing the maximum amount of indemnity upon any single risk, and the attorney shall, whenever and as often as the same shall be required, file with the Commissioner of Insurance a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least 100,000 subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than ten percent (10%) of the net worth of such subscriber. (1913, c. 183, s. 5; C.S., s. 6401.)

§ 58-142. Certificate issued by Commissioner.

Upon the filing of the foregoing papers, and upon the payment of fees as provided for in this Article, the Commissioner of Insurance shall examine and pass upon the same, and if found correct, and in accordance with this Article, issue a certificate of authority, which shall expire on the first day of July next succeeding. (1913, c. 183, s. 6; C.S., s. 6402; 1955, c. 179, s. 4.)

§ 58-143. Reserve fund.

There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to fifty per centum (50%) of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements, for expenses. Said sum shall at no time be less than one hundred thousand dollars ($100,000), and if at any time fifty percent (50%) of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (1913, c. 183, s. 7; C.S., s. 6403; 1945, c. 386.)

§ 58-144. Annual reports; examination by Commissioner.

The attorney shall make an annual report to the Commissioner of Insurance for each calendar year, showing the financial condition of affairs at that office where such contracts are issued, and shall furnish such additional information and reports as may be required; but the attorney shall not be required to furnish the names and addresses of any subscribers. The business affairs and assets of the reciprocal or interinsurance exchanges shall be subject to examination by the Commissioner of Insurance. (1913, c. 183, s. 8; C.S., s. 6404.)

§ 58-145. Corporations empowered to exchange insurance.

Any corporation now or hereafter organized under the laws of this State shall, in addition to the rights, powers, and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned through exchanges complying with this Article. (1913, c. 183, s. 9; C.S., s. 6405.)

§ 58-146. Punishment for failing to comply with law.

Any attorney or representative who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contracts of indemnity of the kind and character specified in this Article, or directly or indirectly solicit or negotiate any applications for same without first complying with the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars ($100.00), nor more than five hundred dollars ($500.00). (1913, c. 183, s. 10; C.S., s. 6406.)

§ 58-147. Certificate to attorney; revocation.

Each attorney by or through whom are issued any policies or contracts for indemnity of the character referred to in this Article shall procure from the Commissioner of Insurance annually a certificate of authority, stating that all the requirements of this Article have been complied with, and upon such compliance and the payment of the fees and taxes required by this Article, the Commissioner of Insurance shall issue such certificate of authority. The Commissioner of Insurance may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this Article after reasonable notice has been given the attorney in writing so that he may appear and show cause why such action should not be taken. (1913, c. 183, s. 11; C.S., s. 6407.)

§ 58-148. Application of other sections.

Except as otherwise provided in this Article, and except where the context otherwise requires, all of the provisions of this Chapter relating to all insurers and those relating to insurers transacting the same kind or kinds of insurance which reciprocal insurers are permitted to transact, shall be applicable to reciprocal insurers authorized to do business in this State. Where any of such sections refer to a corporation, company or insurer, the same, when read in connection with and applicable to this Article shall be deemed to mean a reciprocal insurer. (1913, c. 183, s. 13; C.S., s. 6409; 1945, c. 386.)

ARTICLE 16A.

"Lloyds" Insurance Associations.

§ 58-148.1. "Lloyds" insurance associations may transact business of insurance other than life, on certain conditions.

Associations of individuals, whether organized within the State or elsewhere, formed upon the plan known as "Lloyds" — whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by policy — may be authorized to transact business of insurance, other than life, in this State, in like manner and upon the same terms and conditions as are required of and imposed upon insurance companies regularly organized; but all such "Lloyds" whether organized within the State or elsewhere, shall make the same deposit, and upon the same terms and conditions as required by Articles 17 and 20 of this Chapter for foreign or alien insurance companies incorporated under the laws of any government or state other than the United States or one of the several states of the Union. Provided, such associations shall be subject to all of the laws and regulations of the State of North Carolina relating to the transaction of insurance business within this State. (1967, c. 844.)

ARTICLE 17.

Foreign or Alien Insurance Companies.

§ 58-149. Admitted to do business.

Foreign or alien insurance companies, upon complying with the conditions of this Chapter applicable to them, may be admitted to transact in this State, by constituted agents resident herein, any class of insurance authorized by the laws in force relative to the duties, obligations, prohibitions, and penalties of insurance companies, and subject to all laws applicable to the transaction of such business by foreign or alien insurance companies and their agents. (1899, c. 54, s. 61; Rev., s. 4746; C.S., s. 6410; 1945, c. 384.)

CASE NOTES

When a foreign insurance company has complied with all the laws of the State, the courts thereof are open to it for the purpose of enforcing the liabilities of policyholders. Commonwealth Mut. Fire Ins. Co. v. Edwards & Broughton, 124 N.C. 116, 32 S.E. 404 (1899).

Stated in Hodges v. Home Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950).

§ 58-150. Conditions of admission.

A foreign or alien insurance company may be admitted and authorized to do business when it:

(1) Deposits with the Commissioner a certified copy of its charter or certificate of organization and a statement of its financial condition and business, in such form and detail as he requires, signed and sworn to by its president and secretary or other proper officer, and pays for the filing of this statement the sum required by law.

(2) Satisfies the Commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact, and that it has been successful in the conduct of such business; that it has, if a stock company, a free surplus and a fully paid-up and unimpaired capital, exclusive of stockholders' obligations of any description of an amount not less than that required for the organization of a domestic company writing the same kinds of business; and if a mutual company that its free surplus is not less than that required for the organization of a domestic company writing the same kind of business, and that such capital, surplus, and other funds are invested in substantial accordance with the requirements of this Chapter.

(3) By a duly executed instrument filed in his office constitutes and appoints the Commissioner and his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein agrees that any lawful process against it which may be served upon such attorney shall be of the same force and validity as if served on the company; and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this State. Copies of this instrument, certified by the Commissioner, are sufficient evidence thereof, and service upon such attorney is sufficient service upon the principal.

(4) Appoints as its agent or agents in this State some resident or residents thereof.

(5) Files with the Commissioner a certificate that it has complied with the laws of the state or government under which it was organized and is authorized to make contracts of insurance. (1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6; Rev., s. 4747; C.S., s. 6411; 1945, c. 384; 1951, c. 781, s. 3.)

Cross References. — As to deposits required of foreign companies, see §§ 58-110, 58-182 through 58-188.8.

Legal Periodicals. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

CASE NOTES

This section prescribes the conditions for a foreign insurance company to be admitted and authorized to do business in North Carolina. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Statement Setting Forth Principal Place of Business, etc., Not Required. — This section does not require a foreign insurance corporation desiring to be admitted and authorized to do business in North Carolina to file a statement in the office of the Commissioner of Insurance setting forth its "principal place of business" or "principal office" or "a registered office." Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Effect of Appointment of Commissioner as Attorney for Service of Process. — When an insurance company, pursuant to this section, designates the Commissioner of Insurance its true and lawful attorney upon whom all lawful processes in any action against it may be served, it creates "a passive agency" for the service of lawful process alone, and the statute gives no authority to the Commissioner even to accept service of process. It provides residents of this State a simple procedure to be followed in obtaining service of lawful process upon foreign insurance companies doing business here, and nothing more. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

The Commissioner of Insurance is not authorized to accept service for foreign insurance companies under the provisions of this section, the passive agency under this section being solely for the purpose of constituting him an agent upon whom service on foreign insurance companies may be made in the statutory manner. Hodges v. Homes Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950).

Irrevocability of Power of Attorney for Service of Process. — This section requires the power of attorney executed to the Commissioner of Insurance to be irrevocable as long as "any liability of the company remains outstanding" in this State. Biggs v. Life Ass'n, 128 N.C. 5, 37 S.E. 955 (1901); Insurance Co. v. Scott, 136 N.C. 157, 48 S.E. 581 (1904).

Service of process upon the Commissioner of Insurance was valid notwithstanding the insurance company attempted to annul the power of attorney conferred upon him under this section. Biggs v. Life Ass'n, 128 N.C. 5, 37 S.E. 955 (1901).

Service on the Commissioner is not valid when the insurance company has ceased doing business in the State and has no further liabilities therein. Williams v. Mutual Reserve Fund Life Ins. Ass'n, 145 N.C. 128, 58 S.E. 802 (1907).

Broker as Agent. — Where a citizen of this State applied for a policy in a foreign company through a broker here, and the application was accepted and the policy was delivered, the broker would be deemed to be the agent of the company, and the contract to be made here, subject to the laws of this State. Commonwealth Mut. Fire Ins. Co. v. Edwards & Broughton, 124 N.C. 116, 32 S.E. 404 (1899).

Power of Corporation to Sue and Be Sued. — Where a foreign insurance corporation has fully complied with the provisions of this section, and has moved its head office to this State and has domesticated here, it acquires the right to sue and be sued in the courts of this State as a domestic corporation. Occidental Life Ins. Co. v. Lawrence, 204 N.C. 707, 169 S.E. 636 (1933).

When the insurance company complies with the provisions of this section, it acquires the right to sue and be sued in the State courts, under the rules and statutes which apply to domestic corporations. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Cited in Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

§ 58-151. Limitation as to kinds of insurance.

Any foreign or alien company admitted to do business in this State shall be limited with respect to doing kinds of insurance in this State in the same manner and to the same extent as are domestic companies, provided that any foreign insurance company which has been licensed to do the business of life insurance in this State continuously during a period of 20 years next preceding March 6, 1945, may continue to be licensed, in the discretion of the Commissioner, to do the kind or kinds of insurance business which it was authorized to do immediately prior to March 6, 1945. (1899, c. 44, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6; Rev., s. 4748; 1911, c. 111, s. 2; C.S., s. 6412; 1945, c. 384.)

§ 58-151.1. Foreign companies; requirements for admission.

A company organized under the laws of any other of these United States for the transaction of life insurance may be admitted to do business in this State if it complies with the other provisions of this Chapter regulating the terms and conditions upon which foreign life insurance companies may be admitted and authorized to do business in this State, and, in the opinion of the Commissioner of Insurance, is in sound financial condition and has policies in force upon not less than 500 lives for an aggregate amount of not less than five hundred

thousand dollars ($500,000). Any life company organized under the laws of any other country than the United States, in addition to the above requirements, must make and maintain the deposit required of such companies by Article 4 of this Chapter. (1899, c. 54, s. 56; Rev., s. 4774; C.S., s. 6456; 1945, c. 379.)

§ 58-151.2. Company owned or controlled by alien government prohibited from doing business.

(a) Any insurance company or other insurance entity which is financially owned or financially controlled by any alien or foreign government outside the continental limits of the United States or the territories of the United States is hereby prohibited from doing any kind of insurance business in the State of North Carolina. For the purposes of this section, the term "alien or foreign government" is defined to mean any foreign government or any state, province, municipality, or political subdivision of any foreign government, and shall not be construed to apply to any insurance company organized under the laws of a foreign nation which is financially owned or financially controlled by the private citizens or private business interest of such foreign nation.

(b) The Commissioner of Insurance is hereby forbidden to grant a license to any insurance company or other insurance entity which is financially owned or financially controlled by any alien or foreign government outside the continental limits of the United States or the territories of the United States, or to authorize any such company or entity to transact any kind of insurance business in the State of North Carolina.

(c) Any insurance company or other insurance entity which is financially owned or financially controlled by any alien or foreign government outside the continental limits of the United States or the territories of the United States, or any representative or agent of any such company or entity which violates the provisions of this section, shall be guilty of a misdemeanor and, upon conviction, shall be fined in the discretion of the court. (1955, c. 449.)

§ 58-152. Retaliatory laws.

When, by the laws of any other state or nation, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions are imposed upon insurance companies of this State doing business in such other state or nation or upon their agents therein greater than those imposed by this State upon insurance companies of such other state, then, so long as such laws continue in force, the same taxes, fines, penalties, licenses, fees, deposits, obligations and prohibitions, of whatever kind, may in the discretion of the Commissioner be imposed upon all such insurance companies of such other state or nation doing business within this State and upon their agents here. Nothing herein repeals or reduces the license, fees, taxes, and other obligations now imposed by the laws of this State or to go into effect with the companies of any other state or nation unless some company of this State is actually doing or seeking to do business in such state or nation. When an insurance company organized under the laws of any state or country is prohibited by the laws of such state or country or by its charter from investing its assets other than capital stock in the bonds of this State, then and in such case the Commissioner of Insurance is authorized and directed to refuse to grant a license to transact business in this State to such insurance company. (1899, c. 54, s. 71; 1903, c. 536, s. 11; Rev., s. 4749; C.S., s. 6413; 1927, c. 32; 1945, c. 384.)

CASE NOTES

This section was not impliedly repealed by the Revenue Acts of 1923 or 1925 (Public Laws 1923, c. 4, § 903; 1925, c. 101, § 903). The 1927 amendment was legislative recognition that it was still in force. Atlantic Life Ins. Co. v. Wade, 195 N.C. 424, 142 S.E. 474 (1928).

§ 58-153. Service of legal process upon Commissioner of Insurance.

As an alternative to service of legal process under the provisions of Rule 4 of the Rules of Civil Procedure, the service of such process upon any company licensed or admitted and authorized to do business in this State under the provisions of this Chapter may be made by the sheriff delivering and leaving a copy of such process in the office of the Commissioner of Insurance with a deputy duly appointed by the Commissioner for such purpose or acceptance of service of such process may be made by the Commissioner of Insurance or such duly appointed deputy. As a condition precedent to a valid service of process and of the action of the Commissioner in the premises, the party obtaining such service shall pay to the Commissioner of Insurance at the time of service or acceptance of service the sum of one dollar ($1.00), which such party shall recover as part of the taxable costs if he prevails in his action. (1899, c. 54, ss. 16, 62; 1903, c. 438, s. 6; Rev., s. 4750; C.S., s. 6414; 1927, c. 167, s. 1; 1931, c. 287; 1951, c. 781, s. 9; 1971, c. 421, s. 1.)

Cross References. — As to other ways of serving a foreign insurance company with process, see §§ 55-143, 55-144, 55-146.

Editor's Note. — The Rules of Civil Procedure, referred to in this section, are found in § 1A-1.

Legal Periodicals. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

CASE NOTES

Appointment of Commissioner as Attorney to Receive Process as Condition Precedent to Doing Business. — One of the conditions precedent upon which a foreign insurance company is authorized to do business in this State is that such company will file a duly executed instrument with the Commissioner of Insurance appointing him its attorney, upon whom all lawful process against said company can be served. Biggs v. Life Ass'n, 128 N.C. 5, 37 S.E. 955 (1901). See § 58-150.

Irrevocability of Power of Attorney. — The service of a licensed insurance company made upon the Commissioner was valid even though the insurance company may have attempted to annul the power of attorney, for the statute requires power of attorney to be irrevocable so long as the insurance company has any liabilities in the State. Biggs v. Life Ass'n, 128 N.C. 5, 37 S.E. 955 (1901); Moore v. Mutual Reserve Fund Life Ass'n, 129 N.C. 31, 39 S.E. 637 (1901); Hinton v. Mutual Reserve Fund Life Ass'n, 135 N.C. 314, 47 S.E. 474 (1904).

To serve legal process under this section, an insurance company must be licensed or admitted and authorized to do business in this State. Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

Service can be made under this section only on licensed insurance companies. Parker v. Insurance Co., 143 N.C. 339, 55 S.E. 717 (1906).

A foreign insurance company that has no process agent in this State and is not licensed or transacting business here cannot be served with process under this section. Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Fraternal Society. — In an action against a foreign fraternal insurance society doing business in this State, service of summons on the Commissioner of Insurance would bring the corporation into court. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

Quoted in Hodges v. Home Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950).

Cited in Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954).

§ 58-153.1. Unauthorized Insurers Process Act.

(a) Purpose of Section. — The purpose of this section is to subject certain insurers to the jurisdiction of courts of this State in suits by or on behalf of insureds or beneficiaries under insurance contracts. The General Assembly declares that it is a subject of concern that many residents of this State hold policies of insurance issued by insurers not authorized to do business in this State, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such State interest, the General Assembly herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, 1st Session, s. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

(b) Service of Process upon Unauthorized Insurer.

(1) Any of the following acts in this State, effected by mail or otherwise, by an unauthorized foreign or alien insurer:

a. The issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein,

b. The solicitation of applications for such contracts,

c. The collection of premiums, membership fees, assessments or other considerations for such contracts, or

d. Any other transaction of business,

Is equivalent to and shall constitute an appointment by such insurer of the Commissioner of Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

(2) Such service of process shall be made by delivering to and leaving with the Commissioner of Insurance or some person in apparent charge of his office two copies thereof and the payment to him of one dollar ($1.00). The Commissioner of Insurance shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within 10 days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(3) Service of process in any such action, suit or proceeding shall in addition to the manner provided in subdivision (2) of this subsection be valid if served upon any person within this State who, in this State on behalf of such insurer, is

a. Soliciting insurance, or

b. Making, issuing or delivering any contract of insurance, or
c. Collecting or receiving any premium, membership fee, assessment or other consideration for insurance.

And a copy of such process is sent within 10 days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(4) No plaintiff or complainant shall be entitled to a judgment by default under this section until the expiration of 30 days from the date of the filing of the affidavit of compliance.

(5) Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

(c) Defense of Action by Unauthorized Insurer.

(1) Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either
a. Deposit with the clerk of the court in which such action, suit or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action; or
b. Procure a certificate of authority to transact the business of insurance in this State.

(2) The court in any action, suit, or proceeding, in which service is made in the manner provided in subdivisions (2) or (3) of subsection (b) may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of subdivision (1) of this subsection and to defend such action.

(3) Nothing in subdivision (1) of this subsection is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in subdivisions (2) or (3) of subsection (b) on the ground either
a. That such unauthorized insurer has not done any of the acts enumerated in subdivision (1) of subsection (b), or
b. That the person on whom service was made pursuant to subdivision (3) of subsection (b) was not doing any of the acts therein enumerated.

(d) Attorney Fees. — In any action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this State to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for 30 days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action; providing, however, that the fee or portion of fee included in the judgment shall be not less than twenty-five dollars ($25.00) nor more than twelve and one-half percent

(12½%) of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer. Failure of an insurer to defend any such action shall be deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

(e) Short Title. — This section may be cited as the Unauthorized Insurers Process Act. (1955, c. 1040.)

CASE NOTES

Section 58-164(e)(1) has been superseded by this section and is no longer in effect. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

The purpose of this section is to protect residents of this State who are insureds or beneficiaries of insurance contracts. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

The primary purpose of this section is to protect residents of this State, and to prevent the necessity of North Carolina residents resorting to distant forums to assert rights under insurance policies. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

Nonresident Reinsurers Licensed to Do Business in State. — Nonresident reinsurers were subject to the jurisdiction of the United States District Court in North Carolina by reason of the fact that they were licensed to do business in North Carolina. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

Nonresident Plaintiffs. — Where none of the plaintiffs are residents of North Carolina they are not entitled to take advantage of this section. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

A substitute service statute would be inequitable where a nonresident seeks to take advantage of it to sue on a foreign cause of action unrelated to the State. Under such circumstances, a showing of substantial business activity in the State by the defendants would be required. In fact, unless such statutes are construed to make these requirements, there is considerable doubt of their constitutionality. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

Holders of public liability policies were neither "residents" nor "insureds or beneficiaries" within the meaning of this section; therefore, this section was inapplicable in their declaratory judgment action against nonresident reinsurers who did not transact business in North Carolina, and service of process attempted under this section on such defendants was ineffectual and invalid. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

Applied in Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29 (1979).

§ 58-153.2. Alternative service of process on insurers.

In addition to the procedures set out in this Chapter, insurers may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes. (1967, c. 954, s. 3.)

§ 58-154. Commissioner to notify company of service or acceptance of service of process.

When service of legal process is made in the manner provided in G.S. 58-153, the Commissioner of Insurance or his duly appointed deputy shall within two business days thereafter notify the company served of such service or acceptance of service by registered or certified mail directed to its secretary, or its resident manager in the case of a foreign company having no secretary in the United States. Such notification shall be accompanied by a copy of the process served or accepted and any pleading or order accompanying the process. The Commissioner shall keep a record which shall show the day and

hour of such service or acceptance of service of process and whether any pleading or order accompanied the process. When service is made under the provisions of G.S. 58-153, the time within which to file a responsive pleading, as provided by Chapter 1A of the General Statutes, shall be deemed extended by 10 days. (1899, c. 54, s. 16; Rev., s. 4751; C.S., s. 6415; 1927, c. 167, s. 2; 1971, c. 421, s. 2.)

CASE NOTES

Cited in Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

§ 58-155. Action to enforce compliance with this Chapter.

Compliance with the provisions of this Chapter as to deposits, obligations, and prohibitions, and the payment of taxes, fines, fees, and penalties by foreign or alien insurance companies, may be enforced in the ordinary course of legal procedure by action brought in the Superior Court of Wake County by the Attorney General in the name of the State upon the relation of the Commissioner of Insurance. (1899, c. 54, s. 102; 1903, c. 438, s. 10; Rev., s. 4752; C. S., s. 6416; 1945, c. 384.)

Article 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

§ 58-155.1. Merger or consolidation.

(a) Subject to the provisions of G.S. 58-103 and 58-104, relating to the mutualization of stock insurers, a domestic insurer may merge or consolidate with another insurer, subject to the following conditions:

(1) The plan of merger or consolidation must be submitted to and be approved by the Commissioner in advance of the merger or consolidation.

(2) The Commissioner shall not approve any such plan unless, after a hearing, he finds that it is fair, equitable to policyholders, consistent with law, and will not conflict with the public interest. If the Commissioner fails to approve the plan, he shall state his reasons for such failure in his order made on such hearing.

(3) No director, officer, member or subscriber of any such insurer, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation.

(4) Any merger or consolidation as to an incorporated domestic insurer shall in other respects be governed by the general laws of this State relating to business corporations, except that the merger or consolidation of a domestic mutual insurer may be effected by vote of two thirds of the members voting thereon pursuant to such notice and procedure as the Commissioner may prescribe.

(b) Reinsurance of all or substantially all of the insurance in force of a domestic insurer by another insurer under an agreement whereby the

reinsuring company succeeds to all of the liabilities of and supplants the domestic insurance company thereon shall be deemed a consolidation for the purposes of this section, unless the Commissioner, after such investigation as he may deem expedient to make, finds that a consolidation would:

(1) Not be in the best interests of the policyholders of either of the insurers, or

(2) Not be in the best interests of the public, or

(3) Prevent reinsurance which would otherwise be for the best interests of the policyholders or the public, or

(4) Result in the reinsurance of a solvent company. (1947, c. 923; 1955, c. 905.)

Legal Periodicals. — For discussion of this Article, see 25 N.C.L. Rev. 429.

§ 58-155.2. Grounds for rehabilitation.

The Commissioner may apply for an order directing him to rehabilitate a domestic insurer upon one or more of the following grounds: That the insurer

(1) Is insolvent; or

(2) Has refused to submit its books, records, accounts or affairs to examination by the Commissioner; or

(3) Has failed to comply with the Commissioner's order to make good an impairment of capital of a stock insurer or an impairment of surplus of a mutual or reciprocal insurer, within the time prescribed; or

(4) Has transferred or attempted to transfer substantially its entire property or business, or has entered into any transaction the effect of which is to merge substantially its entire property or business in that of any other insurer without first having obtained the written approval of the Commissioner; or

(5) Is found, after examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to its members, subscribers, or stockholders, or to the public; or

(6) Has willfully violated its charter; or

(7) Has an officer, director, or manager who has refused to be examined under oath, concerning its affairs; or

(8) Has been the subject of an application for the appointment of a receiver, trustee, custodian or sequestrator of the insurer or of its property, or if a receiver, trustee, custodian, or sequestrator is appointed by a federal court or if such appointment is imminent; or

(9) Has consented to such an order through a majority of its directors, stockholders, members, or subscribers; or

(10) Has failed to remove from office any officer or director whom the Commissioner has found, after notice to and hearing of such insurer and such officer or director, to be a dishonest or untrustworthy person; or

(11) Has failed to pay a final judgment rendered against it in any state upon any insurance contract issued or assumed by it, within 30 days after the judgment became final or within 30 days after time for taking an appeal has expired, or within 30 days after dismissal of an appeal before final determination, whichever date is the later. (1947, c. 923.)

CASE NOTES

The Commissioner as rehabilitator has discretionary as well as ministerial powers. State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

§ 58-155.3. Order of rehabilitation; termination.

(a) An order to rehabilitate a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.

(b) If at any time the Commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

(c) The Commissioner, or any interested person upon due notice to the Commissioner, at any time may apply for an order terminating the rehabilitation proceeding and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court has determined that the purposes of the proceeding have been fully accomplished. (1947, c. 923.)

CASE NOTES

Settlement of an outstanding debt by the rehabilitator is clearly a step "toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct." State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

§ 58-155.4. Grounds for liquidation.

The Commissioner may apply for an order directing him to liquidate the business of a domestic insurer or of the United States branch of an alien insurer having trusteed assets in this State, regardless of whether or not there has been a prior order directing him to rehabilitate such insurer, upon any of the grounds specified in G.S. 58-155.2 or upon any one or more of the following grounds: That the insurer

(1) Has ceased transacting insurance for a period of one year; or

(2) Has commenced voluntary liquidation or dissolution, or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs, or to dissolve its corporate charter, or to procure the appointment of a receiver, trustee, custodian, or sequestrator under any law except this Chapter; or

(3) Has not organized or completed its organization and obtained a certificate of authority as an insurer. (1947, c. 923.)

§ 58-155.5. Order of liquidation.

An order to liquidate the business of a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer, to liquidate its business, to deal with the insurer's property and business in his own name as Commissioner or in the name of the insurer as the court may direct, to give notice to all creditors who may have claims against the insurer to present such claims, and to dissolve the insurer. (1947, c. 923.)

§ 58-155.6. Liquidation of alien insurers.

An order to liquidate the business of the United States branch of an alien insurer having trusteed assets in this State shall be in the same terms as those prescribed for domestic insurers, except that only the assets in this State of the business of such United States branch shall be included therein. (1947, c. 923.)

§ 58-155.7. Conservation of assets of foreign insurer.

The Commissioner may apply for an order directing him to conserve the assets within this State of a foreign insurer upon any one or more of the following grounds:

(1) Upon any of the grounds specified in subdivisions (1) to (9) inclusive of G.S. 58-155.2, and in subdivision (2) of G.S. 58-155.4.

(2) That its property has been sequestrated in the state of its domicile or in any other jurisdiction. (1947, c. 923.)

§ 58-155.8. Conservation of assets of alien insurer.

The Commissioner may apply for an order directing him to conserve the assets within this State of an alien insurer upon any one or more of the following grounds:

(1) Upon any of the grounds specified in subdivisions (1) to (9) inclusive of G.S. 58-155.2, and in subdivision (2) of G.S. 58-155.4; or

(2) That the insurer has failed to comply, within the time designated by the Commissioner, with an order of the Commissioner pursuant to law to make good an impairment of its trusteed funds; or

(3) That the property of the insurer has been sequestrated in its domiciliary sovereignty or elsewhere. (1947, c. 923.)

§ 58-155.9. Order of conservation or ancillary liquidation of foreign or alien insurers.

(a) An order to conserve the assets of a foreign or alien insurer shall direct the Commissioner forthwith to take possession of the property of the insurer within this State and to conserve it, subject to the further direction of the court.

(b) Whenever a domiciliary receiver is appointed for any such insurer in its domiciliary state which is also a reciprocal state, as defined in G.S. 58-155.10, the court shall on application of the Commissioner appoint the Commissioner as the ancillary receiver in this State, subject to the provisions of the Uniform Insurers Liquidation Act. (1947, c. 923.)

§ 58-155.10. Uniform Insurers Liquidation Act; definitions.

This section and G.S. 58-155.11 to 58-155.17 inclusive, comprise and may be cited as the Uniform Insurers Liquidation Act. For the purposes of this act:

(1) "Ancillary state" means any state other than a domiciliary state.

(2) "Deliquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

(3) "Domiciliary state" means the state in which an insurer is incorporated or organized, or, in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, having become authorized to do business in such state, has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders, or policyholders and creditors in the United States; and any such insurer is deemed to be domiciled in such state.

(4) "Foreign country" means territory not in any state.
(5) "General assets" means all property, real, personal, or otherwise, 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 such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. 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.
(6) "Insurer" means any person, firm, corporation, association or aggregation of persons doing an insurance business and subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization, or conservation by, the Commissioner, or the equivalent insurance supervisory official of another state.
(7) "Preferred claim" means any claim with respect to which the law of a state or of the United States accords priority of payment from the general assets of the insurer.
(8) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.
(9) "Reciprocal state" means any state other than this State in which in substance and effect the provisions of this act are in force, including the provisions requiring that the Commissioner of Insurance or equivalent supervisory official be the receiver of a delinquent insurer.
(10) "Secured claim" means any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.
(11) "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.
(12) "State" means any state of the United States, and also the District of Columbia, Alaska, Hawaii and Puerto Rico. (1943, c. 170; 1947, c. 923.)

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.11. Conduct of delinquency proceedings against insurers domiciled in this State.

Whenever under the laws of this State a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this State, the court shall appoint the Commissioner as such receiver. The court shall direct the Commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

(b) As domiciliary receiver the Commissioner shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer, or to

liquidate the United States branch of an alien insurer domiciled in this State, and he shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are hereinafter prescribed for ancillary receivers appointed in this State as to assets located in this State.

(c) The recording of the order directing possession to be taken, or a certified copy thereof, in the record of lis pendens in the office of the clerk of the superior court of the county wherein the property is located shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded.

(d) The Commissioner as domiciliary receiver shall be responsible on his official bond for the proper administration of all assets coming into his possession or control. The court may at any time require an additional bond from him or his deputies if deemed desirable for the protection of the assets.

(e) Upon taking possession of the assets of an insurer the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by the laws of this State for the purpose of liquidating, rehabilitating, reorganizing or conserving the affairs of the insurer.

(f) In connection with delinquency proceedings the Commissioner may appoint one or more special deputy commissioners to act for him, and may employ such counsel, clerks, and assistants as he deems necessary. The compensation of the special deputies, counsel, clerks or assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of the duties imposed upon them special deputies shall possess all the powers given to, and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to such proceedings. (1947, c. 923.)

CASE NOTES

Subsection (f) gives to the rehabilitator the power to appoint special counsel and to collect his fees directly out of the insurer's funds, subject to the approval of the court. State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

§ 58-155.12. Conduct of delinquency proceedings against insurers not domiciled in this State.

(a) Whenever under the laws of this State an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this State, the court shall appoint the Commissioner as ancillary receiver. The Commissioner shall file a petition requesting the appointment

(1) If he finds that there are sufficient assets of such insurer located in this State to justify the appointment of an ancillary receiver, or

(2) If 10 or more persons resident in this State having claims against such insurer file a petition with the Commissioner requesting the appointment of such ancillary receiver.

(b) The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all the property, contracts, and rights of action, and all of the books and records of the insurer located in this State, and he shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this State. He shall also be entitled

to recover the other assets of the insurer located in this State except that upon the appointment of an ancillary receiver in this State, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this State, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets, as a receiver of an insurer domiciled in this State.

(c) The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this State to recover any assets of such insurer to which he may be entitled under the laws of this State. (1947, c. 923.)

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

Cited in State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961).

§ 58-155.13. Claims of nonresidents against domestic insurers.

(a) In a delinquency proceeding begun in this State against an insurer domiciled in this State, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(b) Converted claims belonging to claimants residing in reciprocal states may either

(1) Be proved in this State as provided by law, or

(2) If ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings.

In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this State as provided in G.S. 58-155.14 with respect to ancillary proceedings in this State, the final allowance of such claim by the courts in the ancillary state shall be accepted in this State as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state. (1947, c. 923.)

§ 58-155.14. Claims against foreign insurers.

(a) In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer, who reside within this State, may file claims either with the ancillary receiver, if any, appointed in this State, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(b) Controverted claims belonging to claimants residing in this State may either

(1) Be proved in the domiciliary state as provided by the law of that state, or

(2) If ancillary proceedings have been commenced in this State, be proved in those proceedings.

In the event that any such claimant elects to prove his claim in this State, he shall file his claim with the ancillary receiver in the manner provided by the law of this State for the proving of claims against insurers domiciled in this State, and he shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least 40 days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver, within 30 days after the giving of such notice, shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this State involving the adjudication of the claim. The final allowance of the claim by the courts of this State shall be accepted as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this State. (1947, c. 923.)

§ 58-155.15. Priority of certain claims.

(a) In a delinquency proceeding against an insurer domiciled in this State, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this State. All such claims whether owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

(b) In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this State shall be preferred if like claims are preferred by the laws of that state.

(c) The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective deposits, have been paid percentages of their claims equal to the percentage paid from special deposit.

(d) The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this act [G.S. 58-155.10 to 58-155.17], or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amount shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state. (1947, c. 923.)

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.16. Attachment and garnishment of assets.

During the pendency of delinquency proceedings in this or any reciprocal state no action or proceeding in the nature of an attachment, garnishment or execution shall be commenced or maintained in the courts of this State against the delinquent insurer or its assets. Any lien obtained by such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding. (1947, c. 923.)

§ 58-155.17. Uniformity of interpretation.

This Uniform Insurers Liquidation Act [G.S. 58-155.10 to 58-155.17] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions, when applicable, conflict with other provisions of this Article, the provisions of this act shall control. (1947, c. 923.)

§ 58-155.18. Commencement of proceedings.

(a) Proceedings under this Article involving a domestic insurer shall be commenced in the superior court for the county in which is located the insurer's home office. Proceedings under this Article involving other insurers shall be commenced in the Superior Court of Wake County.

(b) The Commissioner shall commence any such proceeding, the Attorney General representing him, by an application to the court or to any judge thereof, for an order directing the insurer to show cause why the Commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers or the public may require. (1947, c. 923.)

CASE NOTES

The trial court has broad supervisory powers and must also be held to have broad initiative powers as well, so as to effect the mandate of such provisions as this section, which directs the court after full hearing to deny or grant the application for rehabilitation "together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers or the public may require." State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

Authority to Order Payment of Fair Compensation to Counsel. — The supervisory power of the trial court in a rehabilitation suit includes the authority to order that the insurer pay fair and reasonable compensation to its counsel of record for legal services rendered. State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

§ 58-155.19. Injunctions.

(a) Upon application by the Commissioner for such an order to show cause or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, employees and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

(b) The court may at any time during a proceeding under this Article issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof. (1947, c. 923.)

CASE NOTES

Cited in State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961).

§ 58-155.20. Removal of proceedings.

At any time after the commencement of a proceeding under this Article the Commissioner may apply ex parte to the court for an order changing the venue of, and removing the proceeding to Wake County, or, in the discretion of the Commissioner, to any other county of this State in which he deems that such proceeding may be most economically and efficiently conducted.

Upon the filing of any such application for removal, the court shall direct the clerk of the court in which the proceeding is then pending to transmit all the papers filed therein with such clerk to the clerk of the court to which the proceeding is removed, and the proceeding shall thereafter be conducted in such other court as though it had been commenced in such court. (1947, c. 923.)

§ 58-155.21. Deposit of moneys collected.

The moneys collected by the Commissioner in a proceeding under this Article, shall be, from time to time, deposited in one or more State or national banks, savings banks, or trust companies, and in the case of the insolvency or voluntary or involuntary liquidation of any such depositary which is an institution organized and supervised under the laws of this State, such deposits shall be entitled to priority of payment on an equality with any other priority given by the banking law of this State. The Commissioner may in his discretion deposit such moneys or any part thereof in a national bank or trust company as a trust fund. (1947, c. 923.)

§ 58-155.22. Exemption from filing fees.

The Commissioner shall not be required to pay any fee to any public officer in this State for filing, recording, issuing a transcript or certificate, or authenticating any paper or instrument pertaining to the exercise by the Commissioner of any of the powers or duties conferred upon him under this Article, whether or not such paper or instrument be executed by the Commissioner or his deputies, employees or attorneys of record and whether or not it is connected with the commencement of an action or proceeding by or against the Commissioner, or with the subsequent conduct of such action or proceeding. (1947, c. 923.)

§ 58-155.23. Borrowing on pledge of assets.

For the purpose of facilitating the rehabilitation, liquidation, conservation or dissolution of an insurer pursuant to this Article, the Commissioner may, subject to the approval of the court, borrow money and execute, acknowledge and deliver notes or other evidences of indebtedness therefor and secure the repayment of the same by the mortgage, pledge, assignment, transfer in trust or hypothecation of any or all of the property whether real, personal or mixed of such insurer, and the Commissioner, subject to the approval of the court, shall have power to take any and all other action necessary and proper to consummate any such loans and to provide for the repayment thereof. The Commissioner shall be under no obligation personally or in his official capacity as Commissioner to repay any loan made pursuant to this section. (1947, c. 923.)

§ 58-155.24. Report to the General Assembly.

The Commissioner shall transmit to the General Assembly in his biennial report, the names of all insurers proceeded against under this Article together with such facts as shall acquaint the policyholders, creditors, stockholders and the public with all proceedings. To that end the special deputy Commissioner in charge of any such insurer shall file annually with the Commissioner a report of the affairs of the insurer. (1947, c. 923.)

§ 58-155.25. Date rights fixed on liquidation.

The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is filed in the office of the clerk of the court which made the order, subject to the provisions of G.S. 58-155.29 with respect to the rights of claimants holding contingent claims. (1947, c. 923.)

CASE NOTES

Applied in State ex rel. Ingram v. Reserve Ins. Co., 48 N.C. App. 643, 269 S.E.2d 757 (1980).

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.26. Voidable transfers or liens.

(a) Any transfer of, or lien upon, the property of an insurer which is made or created within four months prior to the granting of an order to show cause under this Article with the intent of giving to any creditor or of enabling him to obtain a greater percentage of his debt than any other creditor of the same class and which is accepted by such creditor having reasonable cause to believe that such a preference will occur, shall be voidable.

(b) Every director, officer, employee, stockholder, member, subscriber and any other person acting on behalf of such insurer who shall be concerned in any such prohibited act or deed and every person receiving thereby any property of such insurer or the benefit thereof shall be personally liable therefor and shall be bound to account to the Commissioner.

(c) The Commissioner as liquidator, rehabilitator or conservator in any proceeding under this Article, may avoid any transfer of, or lien upon the property of an insurer which any creditor, stockholder, subscriber or member

of such insurer might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of the granting of an order to show cause under this Article. Such property or its value may be recovered from anyone who has received it except a bona fide holder for value as above specified. (1947, c. 923.)

§ 58-155.27. Priority of claims for compensation.

(a) Compensation actually owing to employees other than officers of an insurer, for services rendered within three months prior to the commencement of a proceeding against the insurer under this Article, but not exceeding three hundred dollars ($300.00) for each such employee, shall be paid prior to the payment of every other debt or claim, and in the discretion of the Commissioner may be paid as soon as practicable after the proceeding has been commenced; except that at all times the Commissioner shall reserve such funds as will in his opinion be sufficient for the expenses of administration.

(b) Such priority shall be in lieu of any other similar priority which may be authorized by law as to the wages or compensation of such employees. (1947, c. 923.)

§ 58-155.28. Offsets.

(a) In all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this Article, such credits and debts shall be set off and the balance only shall be allowed or paid, except as provided in subsection (b) of this section.

(b) No offset shall be allowed in favor of any such person where

(1) The obligation of the insurer to such person would not at the date of the entry of any liquidation order, or otherwise, as provided in G.S. 58-155.25, entitle him to share as a claimant in the assets of the insurer, or

(2) The obligation of the insurer to such person was purchased by or transferred to such person with a view of its being used as an offset, or

(3) The obligation of such person is to pay an assessment levied against the members of a mutual insurer, or against the subscribers of a reciprocal insurer, or is to pay a balance upon a subscription to the capital stock of a stock insurer. (1947, c. 923.)

§ 58-155.29. Allowance of certain claims.

(a) No contingent claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to G.S. 58-155.30 except that such claims shall be considered, if properly presented, and may be allowed to share where:

(1) Such claim becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim against the assets of such insurer, or

(2) There is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent.

(b) Where an insurer has been so adjudicated to be insolvent any person who has a cause of action against an insured of such insurer under a liability insurance policy issued by such insurer, shall have the right to file a claim in the liquidation proceedings, regardless of the fact that such claim may be contingent, and such claim may be allowed:

(1) If it may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured; and

(2) If such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claims against such insurer arising out of his cause of action other than those already presented can be made; and

(3) If the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its total liability would be were it not in liquidation.

No judgment against such an insured taken after the date of the entry of the liquidation order shall be considered in the liquidation proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default, inquest or by collusion prior to the entry of the liquidation order shall be considered as conclusive evidence in the liquidation proceeding either of the liability of such insured to such person upon such cause of action or of the amount of damages to which such person is therein entitled.

(c) No claim of any secured claimant shall be allowed at a sum greater than the difference between the value of the claim without security and the value of the security itself as of the date of entry of the order of liquidation or such other date set by the court for fixation of rights and liabilities as provided in G.S. 58-155.25 unless the claimant shall surrender his security to the Commissioner in which event the claim shall be allowed in the full amount for which it is valued. (1947, c. 923.)

§ 58-155.30. Time to file claims.

(a) If upon the granting of an order of liquidation under this Article or at any time thereafter during the liquidation proceeding the insurer shall not be clearly solvent, the court shall, after such notice and hearing as it deems proper, make an order declaring the insurer to be insolvent. Thereupon, regardless of any prior notice which may have been given to creditors, the Commissioner shall notify all persons who may have claims against such insurer and who have not filed proper proofs thereof, to present the same to him, at a place specified in such notice, within four months from the date of the entry of such order, or, if the Commissioner shall certify that it is necessary, within such longer time as the court shall prescribe. The last day for the filing of proofs of claim shall be specified in the notice. Such notice shall be given in a manner determined by the court.

(b) Proofs of claim may be filed subsequent to the date specified, but no such claim shall share in the distribution of the assets until all allowed claims, proofs of which have been filed before said date, have been paid in full with interest. (1947, c. 923.)

§ 58-155.31. Report for assessment.

Within three years from the date an order of rehabilitation or liquidation of a domestic mutual insurer or a domestic reciprocal insurer was filed in the office of the clerk of the court by which such order was made, the Commissioner may make a report to the court setting forth:

(1) The reasonable value of the assets of the insurer;

(2) The insurer's probable liabilities; and

(3) The probable necessary assessment, if any, to pay all possible claims and expenses in full, including expenses of administration. (1947, c. 923.)

§ 58-155.32. Levy of assessment.

(a) Upon the basis of the report provided for in G.S. 58-155.31 including any amendment thereof, the court, ex parte, may levy one or more assessments against all members of such insurer who, as shown by the records of the insurer, were members of a mutual insurer or subscribers in a reciprocal insurer, at any time within one year prior to the date of issuance of the order to show cause under G.S. 58-155.18.

(b) Such assessment or assessments shall cover the excess of the probable liabilities over the reasonable value of the assets, together with the estimated cost of collection and percentage of uncollectibility thereof. The total of all assessments against any member or subscriber with respect to any policy, by whomsoever levied or for whatsoever purposes levied, shall be for no greater amount than that specified in the policy or policies of the member or subscriber and as limited under this Chapter; except that if the court finds that the policy was issued at a rate of premium below the minimum rate lawfully permitted for the risk insured, the court may determine the upper limit of such assessment upon the basis of an adequate rate for the insurance.

(c) No assessment shall be levied against any member or subscriber with respect to any nonassessable policy issued in accordance with this Chapter. (1947, c. 923.)

§ 58-155.33. Order to pay assessment.

After levy of assessment as provided in G.S. 58-155.32, upon the filing of a further detailed report by the Commissioner, the court shall issue an order directing each member of a mutual insurer or each subscriber in a reciprocal insurer, if he shall not pay the amount assessed against him to the Commissioner on or before a day to be specified in the order, to show cause why he should not be held liable to pay such assessment together with costs as set forth in G.S. 58-155.35 and why the Commissioner should not have judgment therefor. (1947, c. 923.)

§ 58-155.34. Publication and transmittal of assessment order.

The Commissioner shall cause a notice of such assessment order setting forth a brief summary of the contents of such order to be:

(1) Published in such manner as shall be directed by the court; and

(2) Enclosed in a sealed envelope, addressed and mailed postage prepaid to each member or subscriber liable thereunder at his last known address as it appears on the records of the insurer, at least 20 days before the return day of the order to show cause provided for in G.S. 58-155.33. (1947, c. 923.)

§ 58-155.35. Judgment upon the assessment.

(a) On the return day of the order to show cause provided for in G.S. 58-155.33 if the member or subscriber does not appear and serve verified objections upon the Commissioner, the court shall make an order adjudging that such member or subscriber is liable for the amount of the assessment against him together with ten dollars ($10.00) costs, and that the Commissioner may have judgment against the member or subscriber therefor.

(b) If on such return day the member or subscriber shall appear and serve verified objections upon the Commissioner there shall be a full hearing before the court or a referee to hear and determine, who, after such hearing, shall make an order either negativing the liability of the member or subscriber to

pay the assessment or affirming his liability to pay the whole or some part thereof together with twenty-five dollars ($25.00) costs and the necessary disbursements incurred at such hearing, and directing that the Commissioner in the latter case may have judgment therefor.

(c) A judgment upon any such order, whether granted by a court or by a referee, shall have the same force and effect, and may be entered and docketed and may be appealed from as if it were a judgment in an original action brought in the court in which the proceeding is pending. (1947, c. 923.)

§ 58-155.36. Special deputy commissioners, counsel, clerks and assistants; expenses of liquidation or rehabilitation.

The Commissioner shall have power to appoint, under his official seal, one or more special deputies, as his agent or agents, and to employ such counsel, clerks and assistants as may by him be deemed necessary, for the purpose of efficiently conducting such liquidation or rehabilitation and may delegate to each of them such of the powers vested in him as he may deem wise and prudent. The compensation of such special deputy commissioners, counsel, clerks and assistants, and all expenses of taking possession of and conducting the business of liquidating or rehabilitating any such corporation shall be fixed by the Commissioner, subject to the approval of the court, and shall, on certificate of the Commissioner, be paid out of the funds or assets of such corporation. (1951, c. 781, s. 4.)

Legal Periodicals. — For brief comment on this section, see 29 N.C.L. Rev. 398.

§§ 58-155.37 to 58-155.40: Reserved for future codification purposes.

Article 17B.

Postassessment Insurance Guaranty Association.

§ 58-155.41. Short title.

This Article shall be known and may be cited as the "Insurance Guaranty Association Act." (1971, c. 670, s. 1.)

Editor's Note. — Session Laws 1971, c. 670, s. 2, contains a severability clause.

§ 58-155.42. Purpose of Article.

The purpose of this Article is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers. (1971, c. 670, s. 1.)

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.43. Scope.

This Article shall apply to all kinds of direct insurance, except life, annuities, title, surety, accident and health, credit, mortgage guaranty, ocean marine, and workmen's compensation and employer's liability insurance. (1971, c. 670, s. 1.)

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.44. Construction.

This Article shall be liberally construed to effect the purpose under G.S. 58-155.42 which shall constitute an aid and guide to interpretation. (1971, c. 670, s. 1.)

§ 58-155.45. Definitions.

As used in this Article:

(1) "Account" means any one of the two accounts created by G.S. 58-155.46.

(2) "Association" means the North Carolina Insurance Guaranty Association created under G.S. 58-155.46.

(3) "Commissioner" means the Commissioner of Insurance of North Carolina.

(4) "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State. "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.

(5) "Insolvent insurer" means (i) an insurer authorized to transact insurance in this State either at the time the policy was issued or when the insured event occurred and (ii) determined to be insolvent by a court of competent jurisdiction.

(6) "Member insurer" means any person who (i) writes any kind of insurance to which this Article applies under G.S. 58-155.43, including the exchange of reciprocal or interinsurance contracts, and (ii) is licensed to transact insurance in this State.

(7) "Net direct written premiums" means direct gross premiums written in this State on insurance policies to which this Article applies, less return premiums thereon and dividends paid or credited to policyholders on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.

(8) "Person" means any individual, corporation, partnership, association or voluntary organization. (1971, c. 670, s. 1.)

CASE NOTES

Applied in State ex rel. Ingram v. Reserve Ins. Co., 48 N.C. App. 643, 269 S.E.2d 757 (1980).

§ 58-155.46. Creation of the Association.

There is created a nonprofit, unincorporated legal entity to be known as the North Carolina Insurance Guaranty Association. All insurers defined as member insurers in G.S. 58-155.45(6) shall be and remain members of the Association as a condition of their authority to transact insurance in this State. The Association shall perform its functions under a plan of operation established and approved under G.S. 58-155.49 and shall exercise its powers through a board of directors established under G.S. 58-155.47. For purposes of administration and assessment, the Association shall be divided into two separate accounts: (i) the automobile insurance account; and (ii) the account for all other insurance to which the Article applies. (1971, c. 670, s. 1.)

CASE NOTES

Stated in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.47. Board of directors.

(a) The board of directors of the Association shall consist of not less than five nor more than nine persons serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the Commissioner. Vacancies of the board shall be filled for the remaining period of the term in the same manner as initial appointments. If no members are selected within 60 days after June 25, 1971, the Commissioner may appoint the initial members of the board of directors.

(b) In approving selections to the board, the Commissioner shall consider among other things whether all member insurers are fairly represented.

(c) Members of the board may be reimbursed from the assets of the Association for expenses incurred by them as members of the board of directors. (1971, c. 670, s. 1.)

§ 58-155.48. Powers and duties of the Association.

(a) The Association shall:

(1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination, but such obligation shall include only that amount of each covered claim which is in excess of one hundred dollars ($100.00) and is less than three hundred thousand dollars ($300,000). In no event shall the Association be obligated to a policyholder or claimant

in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

(2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

(3) Allocate claims paid and expenses incurred among the two accounts separately, and assess member insurers separately for each account amounts necessary to pay the obligation of the Association under subsection (a) above subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations under G.S. 58-155.53 and other expenses authorized by this Article. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the preceding calendar year on the kinds of insurance in the account; provided, for purposes of assessment only, premiums otherwise reportable by a servicing insurer under any plan of operation approved by the Commissioner of Insurance under Articles 18A or 18B of this Chapter shall not be deemed to be the net direct written premiums of such servicing insurer or association, but shall be deemed to be the net direct written premiums of the individual insurers to the extent provided for in any such plan of operation. Each member insurer shall be notified of the assessment not later than 30 days before it is due. No member insurer may be assessed in any year on any account an amount greater than two percent (2%) of that member insurer's net direct written premiums for the preceding calendar year on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the Association in any account, does not provide in any one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The Association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. Each member insurer may set off against any assessment, authorized payments made on covered claims and expenses incurred in the payment of such claims by the member insurer if they are chargeable to the account for which the assessment is made.

(4) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation and deny all other claims and may review settlements, releases and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which such settlements, releases and judgments may be properly contested.

(5) Notify such persons as the Commissioner directs under G.S. 58-155.50(b)(1).

(6) Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but such designation may be declined by a member insurer.

(7) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while

handling claims on behalf of the Association and shall pay the other expenses of the Association authorized by this Article.

(b) The Association may:

(1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association.

(2) Borrow funds necessary to effect the purposes of this Article in accord with the plan of operation.

(3) Sue or be sued.

(4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this Article.

(5) Perform such other acts as are necessary or proper to effectuate the purpose of this Article.

(6) Refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed the liabilities if, at the end of any calendar year, the board of directors finds that the assets of the Association in any account exceed the liabilities of that account as estimated by the board of directors for the coming year. (1971, c. 670, s. 1; 1977, c. 343; 1979, c. 295, s. 1.)

CASE NOTES

Stated in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.49. Plan of operation.

(a) The Association shall submit to the Commissioner a plan of operation and any amendment thereto necessary or suitable to assure the fair, reasonable, and equitable administration of the Association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the Commissioner.

If the Association fails to submit a suitable plan of operation within 90 days following June 25, 1971, or if at any time thereafter the Association fails to submit suitable amendments to the plan, the Commissioner shall, after notice and hearing, adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this Article. Such rules shall continue in force until modified by the Commissioner or superseded by a plan submitted by the Association and approved by the Commissioner.

(b) All member insurers shall comply with the plan of operation.

(c) The plan of operation shall:

(1) Establish the procedures whereby all the powers and duties of the Association under G.S. 58-155.48 will be performed.

(2) Establish procedures for handling assets of the Association.

(3) Establish the amount and method of reimbursing members of the board of directors under G.S. 58-155.47.

(4) Establish procedures by which claims may be filed with the Association and establish acceptable forms of proof of covered claims. Notice of claims to the receiver or liquidator of the insolvent insurer shall be deemed notice to the Association or its agent and a list of such claims shall be periodically submitted to the Association or similar organization in another state by the receiver or liquidator.

(5) Establish regular places and times for meetings of the board of directors.

(6) Establish procedures for records to be kept of all financial transactions of the Association, its agents, and the board of directors.

(7) Provide that any member insurer aggrieved by any final action or decision of the Association may appeal to the Commissioner within 30 days after the action or decision.

(8) Establish the procedures whereby selections for the board of directors will be submitted to the Commissioner.

(9) Contain additional provisions necessary or proper for the execution of the powers and duties of the Association.

(d) The plan of operation may provide that any or all powers and duties of the Association, except those under G.S. 58-155.48(a)(3) and G.S. 58-155.48(b)(2), are delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this Association, or its equivalent, in two or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid for its performance of any other functions of the Association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the Commissioner, and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than that provided by this Article. (1971, c. 670, s. 1; 1973, c. 1446, s. 2.)

§ 58-155.50. Duties and powers of the Commissioner.

(a) The Commissioner shall:

(1) Notify the Association of the existence of an insolvent insurer not later than three days after he receives notice of the determination of the insolvency.

(2) Upon request of the board of directors, provide the Association with a statement of the net direct written premiums of each member insurer.

(b) The Commissioner may:

(1) Require that the Association notify the insureds of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights under this Article. Such notification shall be by mail at their last known address, where available, but if sufficient information for notification by mail is not available, notice by publication in a newspaper of general circulation shall be sufficient.

(2) Suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this State of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative, the Commissioner may levy a fine on any member insurer which fails to pay an assessment when due. Such fine shall not exceed five percent (5%) of the unpaid assessment per month, except that no fine shall be less than one hundred dollars ($100.00) per month.

(3) Revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily.

(c) Any final action or order of the Commissioner under this Article shall be subject to judicial review in accordance with the provisions of G.S. 58-9.3. (1971, c. 670, s. 1.)

§ 58-155.51. Effect of paid claims.

(a) Any person recovering under this Article shall be deemed to have assigned his rights under the policy to the Association to the extent of his recovery from the Association. Every insured or claimant seeking the protection of this Article shall cooperate with the Association to the same extent as such person would have been required to cooperate with the insolvent insurer. The Association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the Association shall not operate to reduce the liability of insureds to the receiver, liquidator, or statutory successor for unpaid assessments.

(b) The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the Association or a similar organization in another state. The court having jurisdiction shall grant such claims priority equal to that to which the claimant would have been entitled in the absence of this Article against the assets of the insolvent insurer. The expenses of the Association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

(c) The Association shall periodically file with the receiver or liquidator of the insolvent insurer statements of the covered claims paid by the Association and estimates of anticipated claims on the Association which shall preserve the rights of the Association against the assets of the insolvent insurer. (1971, c. 670, s. 1.)

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.52. Nonduplication of recovery.

(a) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under such policy. Any amount payable on a covered claim under this Article shall be reduced by the amount of any recovery under such insurance policy.

(b) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property. Any recovery under this Article shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. (1971, c. 670, s. 1.)

§ 58-155.53. Prevention of insolvencies.

(a) To aid in the detection and prevention of insurer insolvencies, it shall be the duty of the board of directors, upon majority vote, to notify the Commissioner of any information indicating any member insurer may be insolvent or in a financial condition hazardous to the policyholders or the public.

(b) The board of directors may, upon majority vote, request that the Commissioner order an examination of any member insurer which the board in good faith believes may be in a financial condition hazardous to the policyholders or the public. Within 30 days of the receipt of such request, the Commissioner shall begin such examination. The examination may be conducted as a National Association of Insurance Commissioners examination or may be conducted by such persons as the Commissioner designates. The cost of such examination shall be paid by the Association and the examination report shall be treated as are other examination reports. In no event shall such examination report be released to the board of directors prior to its release to the public, but this shall not preclude the Commissioner from complying with subsection (c) below. The Commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the Commissioner but it shall not be open to public inspection prior to the release of the examination report to the public.

(c) It shall be the duty of the Commissioner to report to the board of directors when he has reasonable cause to believe that any member insurer examined or being examined at the request of the board of directors may be insolvent or in a financial condition hazardous to the policyholders or the public.

(d) The board of directors may, upon majority vote, make reports and recommendations to the Commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations shall not be considered public documents.

(e) The board of directors may, upon majority vote, make recommendations to the Commissioner for the detection and prevention of insurer insolvencies.

(f) The board of directors shall, at the conclusion of any insurer insolvency in which the Association was obligated to pay covered claims, prepare a report on the history and causes of such insolvency, based on the information available to the Association, and submit such report to the Commissioner. (1971, c. 670, s. 1.)

§ 58-155.54. Examination of the Association.

The Association shall be subject to examination and regulation by the Commissioner. The board of directors shall submit, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner. (1971, c. 670, s. 1.)

§ 58-155.55. Tax exemption.

The Association shall be exempt from payment of all fees and all taxes levied by this State or any of its subdivisions except taxes levied by its subdivisions on real or personal property. (1971, c. 670, s. 1.)

§ 58-155.56. Recognition of assessments in rates.

The rates and premiums charged for insurance policies to which this Article applies shall include amounts sufficient to recoup a sum equal to the amounts paid to the Association by the member insurer less any amounts returned to the member insurer by the Association and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer. (1971, c. 670, s. 1.)

§ 58-155.57. Immunity.

There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer, the Association or its agents or employees, the board of directors, or the Commissioner or his representatives for any action taken by them in the performance of their powers and duties under this Article. (1971, c. 670, s. 1.)

§ 58-155.58. Stay of proceedings; reopening of default judgments.

All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this State shall be stayed for 60 days from the date the insolvency is determined to permit proper defense by the Association of all pending causes of action as to any covered claims arising from a judgment under any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend an insured, the Association either on its own behalf or on behalf of such insured may apply to have such judgment, order, decision, verdict or finding set aside by the same court or administrator that made such judgment, order, decision, verdict or finding and shall be permitted to defend against such claim on the merits. (1971, c. 670, s. 1.)

§ 58-155.59. Termination; distribution of funds.

(a) The Commissioner shall by order terminate the operation of the North Carolina Insurance Guaranty Association as to any kind of insurance covered by this Article with respect to which he has found, after hearing, that there is in effect a statutory or voluntary plan which:

(1) Is a permanent plan which is adequately funded or for which adequate funding is provided; and

(2) Extends, or will extend to the North Carolina policyholders and residents protection and benefits with respect to insolvent insurers not substantially less favorable and effective to such policyholders and residents than the protection and benefits provided with respect to such kinds of insurance under this Article.

(b) The Commissioner shall by the same such order authorize discontinuance of future payments by insurers to the North Carolina Insurance Guaranty Association with respect to the same kinds of insurance; provided, the assessments and payments shall continue, as necessary, to liquidate covered claims of insurers adjudged insolvent prior to said order and the related expenses not covered by such other plan.

(c) In the event the operation of the North Carolina Insurance Guaranty Association shall be so terminated as to all kinds of insurance otherwise within its scope, the Association as soon as possible thereafter shall distribute the balance of moneys and assets remaining (after discharge of the functions of the Association with respect to prior insurer insolvencies not covered by such other plan, together with related expenses) to the insurers which are then writing in this State policies of the kinds of insurance covered by this Article and which had made payments to the Association, pro rata upon the basis of the aggregate of such payments made by the respective insurers during the period of five years next preceding the date of such order. Upon completion of such distribution with respect to all of the kinds of insurance covered by this Article, this Article shall be deemed to have expired. (1971, c. 670, s. 1.)

§ 58-155.60. Use of deposits made by insolvent insurer.

Notwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits made by insurance companies for the protection of policyholders, the Commissioner shall deliver to the Association, and the Association is hereby authorized to expend, any deposit or deposits previously or hereinafter made, whether or not required by statute, by an insolvent insurer to the extent those deposits are needed by the Association first to pay the covered claims in excess of one hundred dollars ($100.00) as required by this Article and then to the extent those deposits are needed to pay all expenses of the Association relating to the insurer.

However, in the case of a deposit made by an insolvent domestic insurer, only the portions of the deposit made for the protection of policyholders having covered claims shall be delivered by the Commissioner to the Association. Said portions shall be in the proportions that the insolvent domestic insurer's domestic net direct written premiums for the preceding calendar year on the kinds of insurance in the account bears to its total net direct written premiums for the preceding calendar year on the kinds of insurance in the account.

The Association shall account to the Commissioner and the insolvent insurer for all deposits received from the Commissioner hereunder, and shall repay to the Commissioner a portion of the deposits received which shall be equal to an amount computed by adding the lesser of the amount of the covered claim or one hundred dollars ($100.00) for each covered claim. Said repayment shall in no way prejudice the rights of the Association with regard to the portion of the deposit repaid to the Commissioner. After all of the deposits of the insolvent insurer have been expended by the Association for the purposes set out in this section, the member insurers shall be assessed as provided by this Article to pay any remaining liabilities of the Association arising under this Article. (1979, c. 628.)

CASE NOTES

Section to Be Applied Retroactively. — This section, the Quick Access Statute, which requires that deposits made by an insolvent casualty insurer be paid to the North Carolina Insurance Guaranty Association for use in paying claims against the insolvent insurer, is to be applied retroactively to deposits made before the date of its enactment and to the holders of policies issued prior to that date. State ex rel. Ingram v. Reserve Ins. Co., 48 N.C. App. 643, 269 S.E.2d 757 (1980), modified and aff'd, 303 N.C. 623, 281 S.E.2d 16 (1981).

However, claimants against the deposit of a foreign insurer under § 58-185 will retain their lien rights after payment of the deposit to the Guaranty Association and may proceed against the Guaranty Association the extent of the deposit for any claims they have under § 58-185 which are not paid by the Guaranty Association pursuant to this article. State ex rel. Ingram v. Reserve Ins. Co., 48 N.C. App. 643, 269 S.E.2d 757 (1980), modified and aff'd, 303 N.C. 623, 281 S.E.2d 16 (1981).

When Deposit Funds to Be Permanently Credited to Association. — While the Guaranty Association has the initial right to use deposit funds to cover operating expenses incident to the insolvent insurer, all deposit funds must be paid to claimants pro rata as provided by § 58-185, and if all claimants are satisfied either directly by the Guaranty Association or by the Commissioner of Insurance (if the claim is under $100.00) and deposit funds remain, then and only then are such funds to be permanently credited to the Guaranty Association for its expenses. State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§§ 58-155.61 to 58-155.64: Reserved for future codification purposes.

ARTICLE 17C.

Life and Accident and Health Insurance Guaranty Association.

§ 58-155.65. Title.

This Article shall be known and may be cited as the "Life and Accident and Health Insurance Guaranty Association Act." (1973, c. 1438, s. 1.)

Editor's Note. — Session Laws 1973, c. 1438, s. 2, contains a severability clause.

CASE NOTES

Cited in Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, — U.S. —, 102 S. Ct. 1357, — L. Ed. 2d — (1982).

§ 58-155.66. Purpose.

The purpose of this Article is to maintain public confidence in the promises of insurers, to provide a mechanism for the payment of covered claims under certain insurance policies, to assist in the detection and prevention of insurer insolvencies, and to protect policy owners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of the insurer issuing such policies or contracts. To provide this protection, (i) an association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages, (ii) members of the Association are subject to assessment to provide funds to carry out the purpose of this Article, and (iii) the Association is authorized to assist the Commissioner, in the prescribed manner, in the detection and prevention of insurer impairments. (1973, c. 1438, s. 1.)

CASE NOTES

Quoted in North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688 (1980).

§ 58-155.67. Scope.

(a) This Article shall apply to direct life policies, accident and health insurance policies, annuity contracts, variable contracts, and contracts supplemental to life and accident and health insurance policies and annuity contracts issued by persons authorized to transact insurance in this State at any time.

(b) This Article shall not apply to:

(1) Any such policies or contracts, or any part of such policies or contracts under which the risk is borne by the policyholder;

(2) Any such policy or contract or part thereof assumed by the impaired insurer under a contract of reinsurance, other than reinsurance for which assumption certificates have been issued;

(3) Any policy or contract issued by a corporation governed by the provisions of Chapter 57 of the General Statutes;
(4) Any policy or contract issued by a fraternal order or society. (1973, c. 1438, s. 1.)

§ 58-155.68. Construction.

This Article shall be liberally construed to effect the purpose under G.S. 58-155.66 which shall constitute an aid and guide to interpretation. (1973, c. 1438, s. 1.)

CASE NOTES

Quoted in North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688 (1980).

§ 58-155.69. Definitions.

As used in this Article:
(1) "Account" means either of the three accounts created under G.S. 58-155.70.
(2) "Association" means the Life and Accident and Health Insurance Guaranty Association created under G.S. 58-155.70.
(3) "Commissioner" means the Commissioner of Insurance of this State.
(4) "Contractual obligation" means any obligation under covered policies.
(5) "Covered policy" means any policy or contract within the scope of this Article under G.S. 58-155.67.
(6) "Impaired insurer" means (i) an insurer which after the effective date of this Article, becomes insolvent and is placed under a final order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction, or (ii) an insurer deemed by the Commissioner after April 13, 1974 to be unable or potentially unable to fulfill its contractual obligations.
(7) "Member insurer" means any person authorized to transact in this State any kind of insurance to which this Article applies under G.S. 58-155.70.
(8) "Premiums" means direct gross insurance premiums and annuity considerations written on covered policies, less return premiums and considerations thereon and dividends paid or credited to policyholders on such direct business. "Premiums" do not include premiums and considerations on contracts between insurers and reinsurers. As used in G.S. 58-155.73 "premiums" are those for the calendar year preceding the determination of impairment.
(9) "Person" means any individual, corporation, partnership, association or voluntary organization.
(10) "Resident" means any person who resides in this State at the time the impairment is determined and to whom contractual obligations are owed. (1973, c. 1438, s. 1.)

CASE NOTES

Applied in North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688 (1980).

§ 58-155.70. Creation of the Association.

(a) There is created a nonprofit legal entity to be known as the Life and Accident and Health Insurance Guaranty Association. As a condition of their authority to transact insurance in this State, all member insurers shall be and remain members of the Association and shall be jointly and severally liable for all contractual obligations incurred by impaired insurers of the Association. The Association shall perform its functions under the plan of operation established and approved under G.S. 58-155.74 and shall exercise its powers through a board of directors established under G.S. 58-155.71. For purposes of administration and assessment, the Association shall maintain three accounts:

(1) The accident and health insurance account;

(2) The life insurance account; and

(3) The annuity account.

(b) The Association shall come under the immediate supervision of the Commissioner and shall be subject to the applicable provisions of the insurance laws of this State. (1973, c. 1438, s. 1.)

§ 58-155.71. Board of directors.

(a) The board of directors of the Association shall consist of not less than five nor more than nine member insurers serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the Commissioner. Vacancies on the board shall be filled for the remaining period of the term in the manner described in the plan of operation. To select the initial board of directors, and initially organize the Association, the Commissioner shall give notice to all member insurers of the time and place of the organizational meeting. In determining voting rights at the organizational meeting each member insurer shall be entitled to one vote in person or by proxy. If the board of directors is not selected within 60 days after notice of the organizational meeting, the Commissioner may appoint the initial members.

(b) In approving selections or in appointing members to the board, the Commissioner shall consider, among other things, whether all member insurers are fairly represented.

(c) Members of the board may be reimbursed from the assets of the Association for expenses incurred by them as members of the board of directors but members of the board shall not otherwise be compensated by the Association for their services. (1973, c. 1438, s. 1; 1981, c. 357, s. 1.)

Effect of Amendments. — The 1981 amendment substituted "member insurers" for "members" in the first sentence of subsection (a).

§ 58-155.72. Powers and duties of the Association.

In addition to the powers and duties enumerated in other sections of this Article:

(1) If a domestic insurer is an impaired insurer, the Association may, prior to an order of liquidation or rehabilitation, and subject to any conditions imposed by the Association other than those which impair the contractual obligations of the impaired insurer, and approved by the impaired insurer and the Commissioner:

a. Guarantee or reinsure, or cause to be guaranteed, assumed, or reinsured, all the covered policies of the impaired insurer;

b. Provide such moneys, pledges, notes, guarantees, or other means as are proper to effectuate paragraph a, and assure payment of the contractual obligations of the impaired insurer pending action under paragraph a;

c. Loan money to the impaired insurer.

If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such domestic impaired insurer.

(2) If a foreign or alien insurer is an impaired insurer, the Association may, prior to an order of liquidation, rehabilitation, or conservation, with respect to the covered policies of residents and subject to any conditions imposed by the Association other than those which impair the contractual obligations of the impaired insurer, and approved by the impaired insurer and the Commissioner:

a. Guarantee or reinsure, or cause to be guaranteed, assumed, or reinsured, the insurer's covered policies of residents;

b. Provide such moneys, pledges, notes, guarantees or other means as are proper to effectuate paragraph a, and assure payment of the impaired insurer's contractual obligations to residents pending action under paragraph a;

c. Loan money to the impaired insurer.

If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such foreign or alien impaired insurer.

(3) If a domestic insurer is an impaired insurer under an order of liquidation or rehabilitation, the Association shall, subject to the approval of the Commissioner:

a. Guarantee, assume, or reinsure, or cause to be guaranteed, assumed or reinsured the covered policies of the impaired insurer;

b. Assure payment of the contractual obligations of the impaired insurer; and

c. Provide such moneys, pledges, notes, guarantees, or other means as are reasonably necessary to discharge such duties.

If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such domestic impaired insurer.

(4) If a foreign or alien insurer is an impaired insurer under an order of liquidation, rehabilitation, or conservation, the Association shall, subject to the approval of the Commissioner:

a. Guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured the covered policies of residents;

b. Assure payment of the contractual obligations of the impaired insurer to residents; and

c. Provide such moneys, pledges, notes, guarantees, or other means as are reasonably necessary to discharge such duties.

If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such foreign or alien impaired insurer.

(5) a. In carrying out its duties under subdivisions (3) and (4), the Association may request that there be imposed policy liens, contract liens, moratoriums on payments or other similar means and such liens, moratoriums, or similar means may be imposed if the Commissioner:

1. Finds that the amounts which can be assessed under this Article are less than the amounts needed to assure full and prompt performance of the impaired insurer's contractual obligations, or that the economic or financial conditions as they affect member insurers are sufficiently adverse to render the imposition of policy or contract liens,

moratoriums, or similar means to be in the public interest, and

2. Approves the specific policy liens, contract liens, moratoriums, or similar means to be used.

b. Before being obligated under subdivisions (3) and (4) the Association may request that there be imposed temporary moratoriums or liens on payments of cash values and policy loans and such temporary moratoriums and liens may be imposed if they are approved by the Commissioner.

(6) The Association shall have no liability under this section for any covered policy of a foreign or alien insurer whose domiciliary jurisdiction or state of entry provides by statute or regulation, for residents of this State protection substantially similar to that provided by this Article for residents of other states.

(7) The Association may render assistance and advice to the Commissioner, upon his request, concerning rehabilitation, payment of claims, continuations of coverage, or the performance of other contractual obligations of any impaired insurer.

(8) The Association shall have standing to appear before any court in this State with jurisdiction over an impaired insurer concerning which the Association is or may become obligated under this Article. Such standing shall extend to all matters germane to the powers and duties of the Association, including, but not limited to, proposals for reinsuring or guaranteeing the covered policies of the impaired insurer and the determination of the covered policies and contractual obligations.

(9) a. Any person receiving benefits under this Article shall be deemed to have assigned his rights under the covered policy to the Association to the extent of the benefits received because of this Article whether the benefits are payments of contractual obligations or continuation of coverage. The Association may require an assignment to it of such rights by any payee, policy or contract owner, beneficiary, insurer or annuitant as a condition precedent to the receipt of any rights or benefits conferred by this Article upon such person. The Association shall be subrogated to these rights against the assets of any impaired insurer.

b. The subrogation rights of the Association under this subdivision shall have the same priority against the assets of the impaired insurer as that possessed by the person entitled to receive benefits under this Article.

(10) The contractual obligations of the impaired insurer for which the Association becomes or may become liable shall be as great as but no greater than the contractual obligations of the impaired insurer would have been in the absence of an impairment unless such obligations are reduced as permitted by subdivision (5), but the aggregate liability of the Association shall not exceed three hundred thousand dollars ($300,000) for all benefits, including cash values, with respect to any one individual. The liability of the Association with respect to coverage under any health or disability insurance policy shall not extend beyond the next policy anniversary date after the date on which the insurer becomes an impaired insurer; provided, however, in no event shall the Association be liable for a period of less than six months after the date that the insurer becomes an impaired insurer. This six-month time limitation shall not affect the Association's liability to repay unearned premiums or the Association's liability under the policy provisions with respect to any valid claim occurring prior to the expiration of such time limitation.

(11) The Association may:

a. Enter into such contracts as are necessary or proper to carry out the provisions and purposes of this Article.

b. Sue or be sued, including taking any legal actions necessary or proper for recovery of any unpaid assessments under G.S. 58-155.73 or to enforce any other obligations under the provisions of this Article.

c. Borrow money to effect the purposes of this Article. Any notes or other evidence of indebtedness of the Association not in default shall be legal investments for domestic insurers and may be carried as admitted assets.

d. Employ or retain such persons as are necessary to handle the financial transactions of the Association, and to perform such other functions as become necessary or proper under this Article.

e. Negotiate and contract with any liquidator, rehabilitator, conservator, or ancilliary receiver to carry out the powers and duties of the Association.

f. Take such legal action as may be necessary to avoid payment of improper claims.

g. Exercise, for the purposes of this Article and to the extent approved by the Commissioner, the powers of a domestic life or accident and health insurer, but in no case may the Association issue insurance policies or annuity contracts other than those issued to perform the contractual obligations of the impaired insurer.

(12) In the event the Association fails to discharge any of its powers and duties within a reasonable time, the Commissioner shall have all the powers and duties of the Association and shall have the full power and duties of its board of directors. (1973, c. 1438, s. 1; 1981, c. 569.)

Effect of Amendments. — The 1981 amendment added all of subdivision (10) following "as permitted by subdivision (5)" in the first sentence.

CASE NOTES

Applied in North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688 (1980); Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, — U.S. —, 102 S. Ct. 1357, — L. Ed. 2d — (1982).

§ 58-155.73. Assessments.

(a) For the purpose of providing the funds necessary to carry out the powers and duties of the Association, the board of directors shall assess the member insurers, separately for each account, at such times and for such amounts as the board finds necessary. The board shall collect the assessments after 30 days' written notice to the member insurers before payment is due. In the event that the member insurers do not within the time prescribed pay the assessment set by the board, the Association may file suit against such member insurers jointly and severally for the amounts necessary to carry out the responsibilities of the Association as determined by the board of directors.

(b) There shall be three classes of assessments, as follows:

(1) Class A assessments shall be made for the purpose of meeting administrative costs and other general expenses not related to a particular impaired insurer.

(2) Class B assessments shall be made to the extent necessary to carry out the powers and duties of the Association under G.S. 58-155.72 with regard to an impaired domestic insurer.

(3) Class C assessments shall be made to the extent necessary to carry out the powers and duties of the Association under G.S. 58-155.72 with regard to an impaired foreign or alien insurer.

(c) (1) The amount of any Class A assessment shall be determined by the board of directors and may be made on a non-pro-rata basis. This assessment shall be credited against future insolvency assessments and shall not exceed fifty dollars ($50.00) per company in any one calendar year. The amount of any Class B or C assessment shall be divided among the accounts in the proportion that the premiums received by the impaired insurer on the policies covered by each account bears to the premiums received by such insurer on all covered policies.

(2) Class C assessments against member insurer for each account shall be in the proportion that the premiums received on business in this State by each assessed member insurer on policies covered by each account bears to such premiums received on business in this State by all assessed member insurers.

(3) Class B assessments for each account shall be made separately for each state in which the impaired domestic insurer was authorized to transact insurance at any time, in the proportion that the premiums received on business in such state by the impaired insurer on policies covered by such account bears to such premiums received in all such states by the impaired insurer. The assessments against member insurers shall be in the proportion that the premiums received on business in each such state by each assessed member insurer on policies covered by each account bears to such premiums received on business in each state by all assessed member insurers.

(4) Assessments for funds to meet the requirements of the Association with respect to an impaired insurer shall not be made until necessary to implement the purposes of this Article. Classification of assessments under subsection (2) and computation of assessments under this subsection shall be made with a reasonable degree of accuracy, recognizing that the exact determinations may not always be possible.

(d) The Association may abate or defer, in whole or in part, the assessment of a member insurer if, in the opinion of the board, payment of the assessment would endanger the ability of the member insurer to fulfill its contractual obligations. The total of all assessments upon a member insurer for each account shall not in any one calendar year exceed four percent (4%) of such insurer's premiums in this State on the policies covered by the account.

(e) In the event an assessment against a member insurer is abated, or deferred, in whole or in part, because of the limitations set forth in subsection (4), the amount by which such assessment is abated or deferred, shall be assessed against the other member insurers in a manner consistent with the basis for assessments set forth in this section. If the maximum assessment, together with the other assets of the Association in either account, does not provide in any one year in either account an amount sufficient to carry out the responsibilities of the Association, the necessary additional funds shall be assessed as soon thereafter as permitted by this Article. In the event a member insurer or a former member insurer fails or refuses to pay an assessment, the amount of such assessment shall be assessed against the other member insurers in a manner consistent with the basis for assessment set forth in this section, pending the recovery of any such unpaid assessment in order that the purpose of this Article may be effected.

(f) The board may, by an equitable method as established in the plan of operation, refund to member insurers, in proportion to the contribution of each insurer to that account, the amount by which the assets of the account exceed

the amount the board finds is necessary to carry out during the coming year the obligations of the Association with regard to that amount, including assets accruing from net realized gains and income from investments. A reasonable amount may be retained in any account to provide funds for the continuing expenses of the Association and for future losses if refunds are impractical.

(g) The Association shall issue to each insurer paying an assessment under this Article a certificate of contribution, in a form prescribed by the Commissioner, for the amount so paid. All outstanding certificates shall be of equal dignity and priority without reference to amounts or dates of issue. A certificate of contribution may be shown by the insurer in its financial statement as an asset in such form and for such amount, if any, and period of time as the Commissioner may approve.

(h) Any member insurer whose certificate of authority has been terminated for any reason whatever shall be liable for any assessment based on insolvencies occurring prior to such termination. (1973, c. 1438, s. 1; 1981, c. 357, ss. 2, 3.)

Effect of Amendments. — The 1981 amendment deleted "for each account" following "assessment" near the beginning of the first sentence, added "of directors and may be made on a non-pro-rata basis" at the end of the first sentence, and added the present second sentence, in subdivision (1) of subsection (c) and deleted "Class A and" at the beginning of subdivision (2) of subsection (c).

§ 58-155.74. Plan of operation.

(a) (1) The Association shall submit to the Commissioner a plan of operation and any amendments thereto necessary or suitable to assure the fair, reasonable, and equitable administration of the Association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the Commissioner.

(2) If the Association fails to submit a suitable plan of operation within 90 days following April 13, 1974 or if at any time thereafter the Association fails to submit suitable amendments to the plan, the Commissioner shall, after notice and hearing, formulate, adopt, promulgate and place into effect such plan of operation, amendments thereto, and such reasonable rules as are necessary or advisable to effectuate the provisions of this Article. Such plan and rules shall continue in force until modified by the Commissioner or superseded by a plan submitted by the Association and approved by the Commissioner.

(b) All member insurers shall comply with the plan of operation, and as a prerequisite to further engaging in writing such insurance in this State shall formally subscribe to and participate in the plan so approved.

(c) The plan of operation shall, in addition to requirements enumerated elsewhere in this Article:

(1) Establish procedures for handling the assets of the Association.

(2) Establish the amount and method of reimbursing members of the board of directors under G.S. 58-155.71.

(3) Establish regular places and times for meetings of the board of directors.

(4) Establish procedures for records to be kept of all financial transactions of the Association, its agents and the board of directors.

(5) Establish the procedures whereby selections for the board of directors will be made and submitted to the Commissioner.

(6) Establish any additional procedures for assessments under G.S. 58-155.73.

(7) Contain additional provisions necessary or proper for the execution of the powers and duties of the Association.

(d) The plan of operation may provide that any or all powers and duties of the Association except those under G.S. 58-155.72(11)(c) and G.S. 58-155.73, are delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this Association, or its equivalent in two or more states. Such a corporation, association, or organization shall be reimbursed for any payments made on behalf of the Association and shall be paid for its performance of any function of the Association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the Commissioner, and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than that provided by this Article. (1973, c. 1438, s. 1.)

§ 58-155.75. Duties and powers of the Commissioner.

In addition to the duties and powers enumerated elsewhere in this Article:

(1) The Commissioner shall:

a. Notify the board of directors of the existence of an impaired insurer not later than three days after a determination of impairment is made or he received notice of impairment.

b. Upon request of the board of directors, provide the Association with a statement of the premiums in the appropriate states for each member insurer.

c. When an impairment is declared and the amount of the impairment is determined, serve a demand upon the impaired insurer to make good the impairment within a reasonable time. Notice to the impaired insurer shall constitute notice to its shareholders, if any. The failure of the insurer to promptly comply with such demand shall not excuse the Association from the performance of its powers and duties under this Article.

d. In any liquidation or rehabilitation proceeding involving a domestic insurer, be appointed as the liquidator or rehabilitator. If a foreign or alien member insurer is subject to a liquidation proceeding in its domiciliary jurisdiction or state of entry, the Commissioner shall be appointed conservator.

(2) The Commissioner may suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this State of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative the Commissioner may levy a forfeiture on any member insurer which fails to pay an assessment when due. Such forfeiture shall not exceed five percent (5%) of the unpaid assessment per month, but no forfeiture shall be less than one hundred dollars ($100.00) per month.

(3) The liquidator, rehabilitator, or conservator of any impaired insurer may notify all interested persons of the effect of this Article. (1973, c. 1438, s. 1.)

§ 58-155.76. Prevention of impairments.

To aid in the detection and prevention of insurer impairments:

(1) The board of directors shall, upon majority vote, notify the Commissioner of any information indicating member insurer may be unable or potentially unable to fulfill its contractual obligations.

(2) The board of directors may, upon majority vote, request that the Commissioner order an examination of any member insurer which the

board in good faith believes may be unable or potentially unable to fulfill its contractual obligations. The Commissioner may conduct such examination. The examination may be conducted as a National Association of Insurance Commissioners examination or may be conducted by such persons as the Commissioner designates. The cost of such examination shall be paid by the Association and the examination report shall be treated as are other examination reports. In no event shall such examination report be released to the board of directors of the Association prior to its release to the public, but this shall not excuse the Commissioner from his obligation to comply with subdivision (3). The Commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the Commissioner but it shall not be open to public inspection prior to the release of the examination report to the public and shall be released at that time only if the examination discloses that the examined insurer is unable or potentially unable to meet its contractual obligations.

(3) The Commissioner shall report to the board of directors when he has reasonable cause to believe that any member insurer examined at the request of the board of directors may be unable or potentially unable to fulfill its contractual obligations.

(4) The board of directors may, upon majority vote, make reports and recommendations to the Commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations shall not be considered public documents.

(5) The board of directors may, upon majority vote, make recommendations to the Commissioner for the detection and prevention of insurer impairments.

(6) The board of directors shall, at the conclusion of any insurer impairment in which the Association carried out its duties under this Article or exercised any of its powers under this Article, prepare a report on the history and causes of such impairment, based on the information available to the Association, and submit such report to the Commissioner. (1973, c. 1438, s. 1.)

§ 58-155.77. Appointment of Association nominee.

The Association may recommend a natural person to serve as a special deputy to act for the Commissioner and under his supervision in the liquidation, rehabilitation, or conservation of any member insurer. (1973, c. 1438, s. 1.)

§ 58-155.78. Miscellaneous provisions.

(a) Nothing in this Article shall be construed to reduce the liability for unpaid assessments of the insureds of an impaired insurer operating under a plan with assessment liability.

(b) Records shall be kept of all negotiations and meetings in which the Association or its representatives are involved to discuss the activities of the Association in carrying out its powers and duties under G.S. 58-155.72. Records of such negotiations or meetings shall be made public only upon the termination of a liquidation, rehabilitation, or conservation proceeding involving the impaired insurer, upon the termination of the impairment of the insurer, or upon the order of a court of competent jurisdiction. Nothing in this subsection shall limit the duty of the Association to render a report of its activities under G.S. 58-155.79.

(c) For the purpose of carrying out its obligations under this Article, the Association shall be deemed to be a creditor of the impaired insurer to the extent of assets attributable to covered policies reduced by any amounts to which the Association is entitled as subrogee pursuant to G.S. 58-155.72(9), and any insured, beneficiary, or other person who has a valid claim against any impaired insurer shall likewise be deemed to be a creditor of the Association and its members, jointly and severally. All assets of the impaired insurer attributable to covered policies shall be used to continue all covered policies and pay all contractual obligations of the impaired insurer as required by this Article. Assets attributable to covered policies, as used in this subsection, is that proportion of the assets which the reserves that should have been established for such policies bear to the reserve that should have been established for all policies of insurance written by the impaired insurer.

(d) (1) Prior to the termination of any liquidation, rehabilitation, or conservation proceeding, the court may take into consideration the contributions of the respective parties, including the Association, the shareholders and policy owners of the impaired insurer, and any other party with a bona fide interest, in making an equitable distribution of the ownership rights of such impaired insurer. In such a determination, consideration shall be given to the welfare of the policyholders of the continuing or successor insurer.

(2) No distribution to stockholders, if any, of an impaired insurer shall be made until and unless the total amount of assessments levied by the Association with respect to such insurer has been fully recovered by the Association.

(e) It shall be a prohibited unfair trade practice for any person to make use in any manner of the protection afforded by this Article in the sale of insurance.

(f) (1) If an order for liquidation or rehabilitation of an insurer domiciled in this State has been entered, the receiver appointed under such order shall have a right to recover on behalf of the insurer, from any affiliate that controlled it, the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation or rehabilitation subject to the limitations of subdivisions (2) to (4).

(2) No such dividend shall be recoverable if the insurer shows that when paid the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect the ability of the insurer to fulfill its contractual obligations.

(3) Any person who as an affiliate that controlled the insurer at the time the distributions were paid shall be liable up to the amount of distributions he received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared, shall be liable up to the amount of distributions he would have received if they had been paid immediately. If two or more persons are liable with respect to the same distributions, they shall be jointly and severally liable.

(4) The maximum amount recoverable under this subsection shall be the amount needed in excess of all other available assets of the impaired insurer to pay the contractual obligations of the impaired insurer.

(5) If any person liable under subdivision (3) is insolvent, all its affiliates that controlled it at the time the dividend was paid, shall be jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate. (1973, c. 1438, s. 1.)

CASE NOTES

Stated in North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688 (1980).

§ 58-155.79. Examination of the Association; annual report.

The Association shall be subject to examination and regulation by the Commissioner. The board of directors shall submit to the Commissioner, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner and a report of its activities during the preceding calendar year. (1973, c. 1438, s. 1.)

§ 58-155.80. Tax exemptions.

The Association shall be exempt from payment of all fees and all taxes levied by this State or any of its subdivisions, except taxes levied on real property. (1973, c. 1438, s. 1.)

§ 58-155.81. Immunity.

There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer or its agents or employees, the Association or its agents or employees, members of the board of directors, or the Commissioner or his representatives, for any action taken by them in the performance of their powers and duties under this Article. (1973, c. 1438, 1.)

§ 58-155.82. Stay of proceedings; reopening default judgments.

All proceedings in which the impaired insurer is a party in any court in this State shall be stayed 60 days from the date an order of liquidation, rehabilitation, or conservation is final to permit proper legal action by the Association on any matters germane to its powers or duties. As to a judgment under any decision, order, verdict, or findings based on default the Association may apply to have such judgment set aside by the same court that made such judgment and shall be permitted to defend against such suit on the merits. (1973, c. 1438, s. 1.)

§ 58-155.83. Hearings; review.

(a) Any person aggrieved with respect to the operation of the Association may request a formal hearing and ruling by the board of directors on any alleged failure to comply with the plan of operation or any alleged improper act or ruling in the administration of the Association. The request for hearing must be made within 15 days after the date of the alleged violation or improper act or ruling. The hearing shall be held within 15 days after the receipt of the request. Except as may be otherwise provided by the board of directors the hearing shall be held by a panel appointed by the Chairman consisting of three board members entitled to vote. The ruling of a majority of the panel shall be deemed to be the formal action of the board unless the full board on its own motion shall modify or rescind the panel's action.

(b) Any formal action of the board may be appealed to the Commissioner by filing notice of appeal with the Association and Commissioner within 30 days after the date of the board's action. The Commissioner shall issue an order approving or disapproving the action or decision, or directing the board to reconsider the action.

(c) Any aggrieved person, any member insurer, or the Association may request a public hearing and ruling by the Commissioner on the provisions of the plan of operation, rules, or regulations approved by the Commissioner. The request for a hearing shall specify the matters to be considered. The hearing shall be held within 30 days after receipt of the request. The Commissioner shall give public notice of the hearing and the matters to be considered not less than 15 days in advance of the hearing date.

(d) In any hearing held pursuant to this Article the board of directors or the Commissioner, as the case may be, shall issue a ruling or order within 30 days after the close of the hearing.

(e) All rulings or orders of the Commissioner under this Article are subject to judicial review as provided in G.S. 58-9.3. (1973, c. 1438, s. 1.)

§ 58-155.84. Use of deposits made by impaired insurer.

Notwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits made by insurance companies for the protection of policyholders, the Commissioner shall deliver to the Association, and the Association is hereby authorized to expend, any deposit or deposits previously or hereinafter made, whether or not made pursuant to statute, by an insurer determined to be impaired under this Article to the extent those deposits are needed by the Association to pay contractual obligations of that impaired insurer owed under covered policies as required by this Article, and to the extent those deposits are needed to pay all expenses of the Association relating to the impaired insurer. The Association shall account to the Commissioner and the impaired insurer for all deposits received from the Commissioner hereunder. After all of the deposits of the impaired insurer have been expended by the Association for the purposes set out in this section, the member insurers shall be assessed as provided by this Article to pay any remaining liabilities of the Association arising under this Article. (1979, c. 418.)

SUBCHAPTER III. FIRE INSURANCE.

ARTICLE 18.

General Regulations of Business.

§ 58-156: Repealed by Session Laws 1945, c. 378.

§ 58-157. Performance of contracts as to devices not prohibited.

Nothing contained in this Chapter shall be construed as prohibiting the performance of any contract hereafter made for the introduction or installation of automatic sprinklers or other betterments or improvements for reducing the risk by fire or water on any property located in this State, and containing provisions for obtaining insurance against loss or damage by fire or water, for a specified time at a fixed rate; provided, every policy issued under such contract shall be as provided by law. (1929, c. 145, s. 1.)

§ 58-158. Limitation as to amount and term; indemnity contracts for difference in actual value and cost of replacement.

No insurance company or agent shall knowingly issue any fire insurance policy upon property within this State for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor for a longer term than seven years: Provided, any fire insurance company authorized to transact business in this State may, by appropriate riders or endorsements or otherwise, provide insurance indemnifying the insured for the difference between the actual value of the insured property at the time any loss or damage occurs, and the amount actually expended to repair, rebuild or replace on the premises described in the policy, or some other location within the State of North Carolina with new materials of like size, kind and quality, such property as has been damaged or destroyed by fire or other perils insured against. Policies issued in violation of this section are binding upon the company issuing them, but the company is liable for the forfeitures by law prescribed for such violation. (1899, c. 54, ss. 39, 99; 1903, c. 438, s. 10; Rev., s. 4755; C.S., s. 6418; 1949, c. 295, s. 1.)

Cross References. — As to forfeiture prescribed, see § 58-173.

CASE NOTES

Replacement Cost Not Recoverable Where No Repair Performed. — In an action to recover fire insurance for loss of a home under a homeowner's policy which included a replacement cost provision, plaintiffs were entitled to recover only the actual cash value of the home at the time of the fire, rather than the replacement cost of the home, where they did not repair or rebuild the home, but bought another home, and they were not entitled to recover anything more from defendant insurer where they failed to show that the actual cash value of the property destroyed was greater than the amount they had been paid by defendant. Edmund v. Firemen's Fund Ins. Co., 42 N.C. App. 237, 256 S.E.2d 268 (1979).

Construction of Policy in Light of Premium Charged. — Where insurer contended that policy covered only one of three stores contained in plaintiffs' building and not the entire building, and the amount of the policy was greatly in excess of the value of the one store but was about the value of the entire building, and insured paid the premium based upon the amount for which the policy was issued, it was held that in construing the policy it would not be presumed that the insurer charged a premium based upon a valuation greatly in excess of the value of the property insured in violation of this section and § 58-175, but that the policy covered the entire building. Williams v. Greensboro Fire Ins. Co., 209 N.C. 765, 185 S.E. 21 (1936).

Competency of Agent's Statement in Determining Amount of Loss. — A statement of an agent acting for his company in writing fire insurance, made after an inspection of the property to be insured, is competent upon the question of the amount of the loss, in an action brought by the insured to recover upon the policy issued, especially as this section requires that the insurer should know the true value of the property, etc., to be insured before issuing the policy thereon. Queen v. Dixie Fire Ins. Co., 177 N.C. 34, 97 S.E. 741 (1919).

§ 58-159. Limit of liability on total loss.

Subject to the provisions of G.S. 58-158, when buildings insured against loss by fire and situated within the State are totally destroyed by fire, the company is not liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it appears that the insured has paid a premium on a sum in excess of the actual value, he shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the

policy and the ascertained values, with interest at six per centum (6%) per annum from the date of issue. (1899, c. 54, s. 40; Rev., s. 4756; C.S., s. 6419; 1949, c. 295, s. 2.)

CASE NOTES

Replacement Cost Not Recoverable Where No Repair Performed. — In an action to recover fire insurance for loss of a home under a homeowner's policy which included a replacement cost provision, plaintiffs were entitled to recover only the actual cash value of the home at the time of the fire, rather than the replacement cost of the home, where they did not repair or rebuild the home, but bought another home, and they were not entitled to recover anything more from defendant insurer where they failed to show that the actual cash value of the property destroyed was greater than the amount they had been paid by defendant. Edmund v. Firemen's Fund Ins. Co., 42 N.C. App. 237, 256 S.E.2d 268 (1979).

§ 58-160. Policies for the benefit of mortgagees.

Where by an agreement with the insured, or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to a mortgagee of the property for his benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claims appear, not beyond the amount for which the company is liable, and such payments are, to the extent thereof, payment and satisfaction of the liabilities of the company under the policy. Any payment due by the insuring company to mortgagees or loss payees under the terms of the policy shall be made within 90 days of the loss or within 60 days of the filing of proof of loss, whichever is the longer period; provided, the payment of or settlement of the claim of the mortgagee or loss payee under the policy shall in no way constitute an admission of liability as to the insured and the fact of such payment or settlement shall be inadmissible in any action at law. (1899, c. 54, s. 41; Rev., s. 4757; C.S., s. 6420; 1969, c. 1077, s. 1.)

CASE NOTES

Priority between Mortgagees. — Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies; hence, where the policies were of the New York standard form, made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage had a superior lien on the proceeds to the one having the later registered security. Wayne Nat'l Bank v. National Bank, 197 N.C. 68, 147 S.E. 691 (1929).

Where a mortgagor procured insurance for the benefit of first mortgagee, whose mortgage was registered December 14, 1920, and for the benefit of subsequent mortgagee, whose mortgage was not executed until May 11, 1925, the claim of the first mortgagee would first be paid out of funds derived from the policy under this section, providing that where, by terms of a fire policy taken out by a mortgagor, loss is payable to a mortgagee for his benefit, the company shall pay all mortgages in order of their priority of claim, and in view of § 47-20, by which priority is given to the mortgage which was first recorded. Wayne Nat'l Bank v. National Bank, 197 N.C. 68, 147 S.E. 691 (1929).

Division of Proceeds Where Neither Mortgagee Has Claim to Priority. — If neither of two mortgagees for whom insurance has been procured has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims. Wayne Nat'l Bank v. National Bank, 197 N.C. 68, 147 S.E. 691 (1929).

Cited in Peeler v. United States Cas. Co., 197 N.C. 286, 148 S.E. 261 (1929).

§ 58-161: Repealed by Session Laws 1945, c. 378.

§ 58-162. Reinsurance assumed from unlicensed companies prohibited.

No fire, marine, or fire and marine insurance company licensed to do business in North Carolina shall assume reinsurance on property located in the State of North Carolina from a company which is not licensed to do business in North Carolina. A company violating the provisions of this section shall be subject to cancellation of its license to do business in this State and upon conviction thereof shall be punished by a fine of five hundred dollars ($500.00) for each offense. (1899, c. 54, s. 63; 1901, c. 391, s. 5; Rev., s. 4770; C.S., s. 6422; 1945, c. 378.)

§ 58-162.1. Limitation of fire insurance risks.

No insurer authorized to do in this State the business of fire insurance shall expose itself to any loss on any one fire risk, whether located in this State or elsewhere, in an amount exceeding ten percent (10%) of its surplus to policyholders, except that in the case of risks adequately protected by automatic sprinklers or risks principally of noncombustible construction and occupancy such insurer may expose itself to any loss on any one risk in an amount not exceeding twenty-five percent (25%) of the sum of (i) its unearned premium reserve and (ii) its surplus to policyholders. Any risk or portion of any risk which shall have been reinsured shall be deducted in determining the limitation of risk prescribed in this section. (1945, c. 378.)

§ 58-163: Repealed by Session Laws 1945, c. 378.

§ 58-164. Uniform Unauthorized Insurers Act.

(a) No person, corporation, association or partnership shall in this State act as agent for any insurer not authorized to transact business in this State, or negotiate for or place or aid in placing insurance coverage in this State for another with any such insurer.

(b) No person, corporation, association or partnership shall in this State aid any unauthorized insurer in effecting insurance or in transacting insurance business in this State, either by fixing rates, by adjusting or investigating losses, by inspecting or examining risks, by acting as attorney-in-fact or as attorney for service for process, or otherwise, except as provided in subsection (e) hereof.

(c) No person, corporation, association or partnership shall make, negotiate for or place, or aid in negotiating or placing any insurance contract in this State for another who is an applicant for insurance covering any property or risk in another state, territory or district of the United States with any insurer not authorized to transact insurance business in the state, territory or district wherein such property or risk or any part thereof is located.

(d) The provisions of the three foregoing subsections do not apply to contracts of reinsurance, or to contracts of insurance made through authorized surplus line agents or authorized surplus line brokers as provided in G.S. 58-53.1, 58-53.2 and 58-53.3, nor do they apply to any insurer not authorized in this State, or its representatives, in investigating, adjusting losses or otherwise complying in this State with the terms of its insurance contracts

made in a state wherein the insurer was authorized; provided, the property or risk insured under such contracts at the time such contract was issued was located in such other state. A motor vehicle used and kept garaged principally in another state shall be deemed to be located in such state.

(e) (1) The transacting of business in this State by a foreign or alien insurer without a license and the issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this State or to a resident thereof, or to a corporation authorized to do business therein, is equivalent to an appointment by such insurer of the Commissioner and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance, and the said issuance or delivery is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this State upon it.

(2) Such service of process shall be made by delivering and leaving with the Commissioner or to some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The Commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all such process so served upon him. Such service of process is sufficient provided notice of such service and a copy of the process are sent within 10 days thereafter by registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow. However, no plaintiff or complainant shall be entitled to a judgment by default under this subdivision (2) until the expiration of 30 days from the date of the filing of the affidavit of compliance.

(3) Service of process in any such action, suit or proceeding shall be in addition to the manner provided in the preceding subdivision (2) be valid if served upon any person within this State who, in this State on behalf of such insurer, is

a. Soliciting insurance, or

b. Making any contract of insurance or issuing or delivering any policies or written contracts of insurance, or

c. Collecting or receiving any premium for insurance; and a copy of such process is sent within 10 days thereafter by registered mail by plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

d. Nothing in this subsection (e) shall limit or abridge the right to serve process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

(f) No unauthorized insurer shall institute or file, or cause to be instituted or filed, any suit, action or proceeding in this State to enforce any right, claim or demand arising out of the transaction of business in this State until such insurer shall have obtained a license to transact insurance business in this State. Nothing in this subsection shall be construed to require an unauthorized insurance company to obtain a certificate of authority before instituting or filing, or causing to be instituted or filed, any suit, action or proceeding either in connection with any of its investments in this State or in connection with any contract issued by it at a time when it was authorized to do business in the state where such contract was issued.

(g) (1) Before any unauthorized insurer shall file or cause to be filed by any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either

a. File with the clerk of the court in which such action, suit or proceeding is pending a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action or

b. Procure a license to transact the business of insurance in this State.

(2) The court in any action, suit or proceeding in which service is made in the manner prescribed in subdivisions (2) and (3) of subsection (e) may order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of subdivision (1) of this subsection (g) and to defend such action.

(3) Nothing in subdivision (1) of this subsection (g) shall be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in subdivisions (2) and (3) of subsection (e) on the ground either

a. That no policy or contract of insurance has been issued or delivered to a citizen or resident of this State or to a corporation authorized to do business therein, or

b. That such insurer has not been transacting business in this State, or

c. That the person on whom service was made pursuant to subdivision (3) of subsection (e) was not doing any of the acts enumerated therein.

(h) Any person, corporation, association or partnership violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00).

(i) This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(j) This section may be cited as the Uniform Unauthorized Insurers Act. (1899, c. 54, s. 105; Rev., s. 4763; C.S., s. 6424; 1945, c. 386.)

CASE NOTES

Subdivision (e)(1) of this section is no longer in effect and has been superseded by § 58-153.1. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

This section applies only to fire insurance. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), aff'd, 316 F.2d 234 (4th Cir. 1963).

This section does not make the policy void in the hands of the assured, and the company issuing a policy in violation of this section may not receive the premiums and rely upon the statute to invalidate the policy, for this would permit it to take advantage of its own wrong. T.T. Hay & Bro. v. Union Fire Ins. Co., 167 N.C. 82, 83 S.E. 241 (1914).

Applied in Suits v. Old Equity Life Ins. Co., 241 N.C. 483, 85 S.E.2d 602 (1955).

§ 58-165: Repealed by Session Laws 1945, c. 378.

Editor's Note. — The repealed section was rewritten as § 58-53.1.

§ 58-166: Transferred to G.S. 58-53.2 by Session Laws 1945, c. 378.

§ 58-167: Transferred to G.S. 58-53.3 by Session Laws 1945, c. 378.

§ 58-168. Resident agents required.

Foreign fire insurance companies legally authorized to do business in this State through regularly commissioned and licensed agents located in the State shall not make contracts of fire insurance on property herein, except through such resident agents as are regularly commissioned by them and licensed to write policies of fire insurance in this State. This section does not apply to direct insurance covering the rolling stock of railroad corporations or property in transit while in the possession and custody of railroad corporations or other common carriers. (1899, c. 54, s. 107; 1901, c. 391, s. 8; Rev., s. 4764; C.S., s. 6428.)

§ 58-169. Policies through nonresident agent prohibited.

Every fire insurance company authorized to do business in the State is prohibited from authorizing or allowing any person, agent, firm, or corporation who is a nonresident of this State, to issue or cause to be issued, except through a licensed agent, any policy of insurance on property located in the State. (1903, c. 488, s. 1; 1905, c. 170; Rev., s. 4765; C.S., s. 6429.)

CASE NOTES

Validity as to Insured. — Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another state which is unauthorized to write it here, the policy is nevertheless valid as to the right of action of the insured thereon. T.T. Hay & Bro. v. Union Fire Ins. Co., 167 N.C. 82, 83 S.E. 241 (1914).

§§ 58-170, 58-171: Repealed by Session Laws 1945, c. 458.

Editor's Note. — Repealed § 58-170 was rewritten as §§ 58-44.1, 58-44.2 and 58-44.3. Repealed § 58-171 was rewritten as § 58-44.4.

§ 58-172. Agreements restricting agent's commission; penalty.

It is unlawful for any insurance company doing the business of insurance as defined in subdivisions (3) to (22), inclusive, of G.S. 58-72 and employing an agent representing another such company, either directly or through any organization or association, to enter into, make or maintain any stipulation or agreement in anywise limiting the compensation such agent may receive from any such other company or forbidding or prohibiting reinsurance of the risks of any such domestic company in whole or in part by any other company holding membership in or cooperating with such organization or association. The penalty for any violation of this section shall be a fine of not less than two hundred and fifty dollars ($250.00) nor more than five hundred dollars ($500.00), and the forfeiture of license to do business in this State for a period of 12 months following conviction. (1905, c. 424; Rev., ss. 3491, 4768; 1915, c. 166, ss. 2, 3; C.S., s. 6432; 1945, c. 458.)

§ 58-173. Punishment for issuing fire policies contrary to law.

Any insurance company or agent who makes, issues, or delivers a policy of fire insurance in willful violation of the provisions of this Chapter which prohibit a domestic insurance company from issuing policies before obtaining certificate and authority from the Commissioner of Insurance; or which prohibit the issuing of a fire insurance policy for more than the fair value of the property or for a longer term than seven years; or which prohibit stipulations in insurance contracts restricting the jurisdiction of courts, or limiting the time within which an action may be brought to less than one year after the cause of action accrues or to less than six months after a nonsuit by the plaintiff, shall forfeit for each offense not less than fifty ($50.00) nor more than two hundred dollars ($200.00); but the policy shall be binding upon the company issuing it. (1899, c. 54, s. 99; 1903, c. 438, s. 10; Rev., s. 4832; C.S., s. 6433.)

Article 18A.

Essential Property Insurance for Beach Area Property.

§ 58-173.1. Declarations and purpose of Article.

It is hereby declared by the General Assembly of North Carolina that an adequate market for essential property insurance is necessary to the economic welfare of the beach area of the State of North Carolina and that without such insurance the orderly growth and development of the beach area of the State of North Carolina would be severely impeded; that furthermore, adequate insurance upon property in the beach area is necessary to enable homeowners and commercial owners to obtain financing for the purchase and improvement of their property; and that while the need for such insurance is increasing, the market for such insurance is not adequate and is likely to become less adequate in the future; and that the present plans to provide adequate insurance on property in the beach area, while deserving praise, have not been sufficient to meet the needs of this area. It is further declared that the State has an obligation to provide an equitable method whereby every licensed insurer writing essential property insurance in North Carolina is required to meet its public responsibility instead of shifting the burden to a few willing and

public-spirited insurers. It is the purpose of this Article to accept this obligation and to provide a mandatory program to assure an adequate market for essential property insurance in the beach area of North Carolina. (1967, c. 1111, s. 1; 1969, c. 249; 1979, c. 601, s. 1.)

§ 58-173.2. Definition of terms.

In this Article, unless the context otherwise requires,

(1) "Association" means the North Carolina Insurance Underwriting Association established pursuant to the provisions of this Article;

(2) "Beach area" means all of that area of the State of North Carolina south and east of the inland waterway from the South Carolina line to Fort Macon (Beaufort Inlet); thence south and east of Core, Pamlico, Roanoke and Currituck sounds to the Virginia line, being those portions of land generally known as the Outer Banks;

(3) "Commissioner" means the Commissioner of Insurance of the State of North Carolina;

(4) "Essential property insurance" means insurance against direct loss to property as defined in the standard statutory fire policy and extended coverage, vandalism and malicious mischief endorsements thereon, as approved by the Commissioner;

(5) "Insurable property" means real property at fixed locations in beach areas of the State as that term is hereinafter defined or the tangible personal property located therein, but shall not include insurance on motor vehicles, farm and manufacturing risks, which property is determined by the Association, after inspection and pursuant to the criteria specified in the plan of operation, to be in an insurable condition: Provided, however, any one and two family dwellings built in substantial accordance with the North Carolina Uniform Residential Building Code and any structure or building built in substantial compliance with the North Carolina Building Code, including the design-wind requirements, which is not otherwise rendered uninsurable by reason of use or occupancy, shall be an insurable risk within the meaning of this Article, but neighborhood, area, location, environmental hazards beyond the control of the applicant or owner of the property shall not be considered in determining insurable condition. Provided further, that any structure commenced on or after January 1, 1970, not built in substantial compliance with the North Carolina Uniform Residential Building Code or the North Carolina Building Code, including the design-wind requirements therein, shall not be an insurable risk. The owner or applicant shall furnish with the application proof in the form of a certificate from a local building inspector, contractor, engineer or architect that the structure is built in substantial accordance with the North Carolina Uniform Residential Building Code or the North Carolina Building Code;

(6) "Net direct premiums" means gross direct premiums (excluding reinsurance assumed and ceded) written on property in this State for essential property insurance, including the fire and extended coverage components of homeowners and commercial multiple peril package policies as computed by the Commissioner, less return premiums upon cancelled contracts, dividends paid or credited to policyholders or the unused or unabsorbed portion of premium deposits, and further excluding premiums on farm properties and manufacturing risks;

(7) "Plan of operation" means the plan of operation of the Association approved or promulgated by the Commissioner of Insurance, pursuant to the provisions of this Article. (1967, c. 1111, s. 1; 1969, c. 249; 1979, c. 601, ss. 2, 3.)

§ 58-173.3. North Carolina Insurance Underwriting Association created.

There is hereby created the North Carolina Insurance Underwriting Association, consisting of all insurers authorized to write and engage in writing within this State, on a direct basis, property insurance, except town and county mutual insurance associations and assessable mutual companies as authorized by G.S. 58-77(5)b, 58-77(5)d, and 58-77(7)b and except an insurer who only writes insurance in this State on property exempted from taxation by the provisions of G.S. 105-296 and 105-297. Every such insurer shall be a member of the Association and shall remain a member of the Association so long as the Association is in existence as a condition of its authority to continue to transact the business of insurance in this State. (1967, c. 1111, s. 1; 1969, c. 249; 1971, c. 1067, s. 2.)

Editor's Note. — The provisions as to property exempt from taxation formerly contained in §§ 105-296 and 105-297, referred to in this section, now appear in §§ 105-278.1 through 105-278.9.

§ 58-173.4. Powers and duties of Association.

The Association shall, pursuant to the provisions of this Article and the plan of operation, and with respect to essential property insurance on insurable property, have the power on behalf of its members:

(1) To cause to be issued policies of insurance to applicants;

(2) To assume reinsurance from its members;

(3) To cede reinsurance to its members and to purchase reinsurance in behalf of its members. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.5. Temporary directors of Association.

Within 10 days after April 17, 1969, the Commissioner shall appoint a temporary board of directors of this Association, which shall consist of 11 representatives of members of the Association. Such temporary board of directors shall prepare and submit a plan of operation in accordance with G.S. 58-173.7 and shall serve until the permanent board of directors shall take office in accordance with said plan of operation. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.6. Each member of Association to participate in its writings, expenses, profits and losses in proportion to net direct premium of such member.

All members of the Association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premium of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums written in this State by all members of the Association, as certified to the Association by the Commissioner after review of annual statements, other reports and any other statistics the Commissioner shall deem necessary to provide the information herein required and which the Commissioner is hereby authorized and empowered to obtain from any member of the Association, provided, however, that a member shall annually receive credit for essential property insurance voluntarily written in the beach area and its participation in the writings in the Association shall be reduced accordingly. Each member's participation in the Association shall be

determined annually in the same manner as the initial determination. Any insurer authorized to write and engage in writing any insurance, the writing of which requires such insurer to be a member of the Association, pursuant to the provisions of G.S. 58-173.3 of this Article, who is authorized and engaged in writing such insurance after April 17, 1969, shall become a member of the Association on the January 1 immediately following such authorization and the determination of such insurer's participation in the Association shall be made as of the date of such membership in the same manner as for all other members of the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.7. Directors to submit plan of operation to Commissioner; review and approval; amendments.

Within 90 days after April 17, 1969, the directors of the Association shall submit to the Commissioner for his review and approval, a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors, and shall grant proper credit annually to each member of the Association for essential property insurance voluntarily written in the beach area and shall provide for the efficient, economical, fair and nondiscriminatory administration of the Association and for the prompt and efficient provision of essential property insurance in the beach areas of North Carolina so as to promote orderly community development in those areas and to provide means for the adequate maintenance and improvement of the property in such areas. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation; the establishment of necessary facilities; management of the Association; plan for the assessment of members to defray losses and expenses; underwriting standards; procedures for the acceptance and cession of reinsurance; procedures for determining the amounts of insurance to be provided to specific risks; time limits and procedures for processing applications for insurance and for such other provisions as may be deemed necessary by the Commissioner to carry out the purposes of this Article.

The proposed plan shall be reviewed by the Commissioner and approved by him if he finds that such plan fulfills the purposes provided by G.S. 58-173.1 of this article. In the review of the proposed plan the Commissioner may, in his discretion, consult with the directors of the Association and may seek any further information which he deems necessary to his decision. If the Commissioner approves the proposed plan, he shall certify such approval to the directors and the plan shall become effective 10 days after such certification. If the Commissioner disapproves all or any part of the proposed plan of operation he shall return the same to the directors with his written statement for the reasons for disapproval and any recommendations he may wish to make. The directors may alter the plan in accordance with the Commissioner's recommendation or may within 30 days from the date of disapproval return a new plan to the Commissioner. Should the directors fail to submit a proposed plan of operation within 90 days of April 17, 1969, or a new plan which is acceptable to the Commissioner, or accept the recommendations of the Commissioner within 30 days after his disapproval of the plan, the Commissioner shall promulgate and place into effect a plan of operation certifying the same to the directors of the Association. Any such plan promulgated by the Commissioner shall take effect 10 days after certification to the directors: Provided, however, that until a plan of operation is in effect, pursuant to the provisions of this Article, any existing temporary placement facility may be continued in effect on a mandatory basis on such terms as the Commissioner may determine.

The directors of the Association may, subject to the approval of the Commissioner, amend the plan of operation at any time. The Commissioner may review the plan of operation at any time he deems expedient or prudent, but not less than once in each calendar year. After review of such plan the Commissioner may amend the plan after consultation with the directors and upon certification to the directors of such amendment. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.8. Persons eligible to apply to Association for coverage; contents of application.

(a) Any person having an insurable interest in insurable property, may, on or after the effective date of the plan of operation, be entitled to apply to the Association for such coverage and for an inspection of the property. Such application may be made on behalf of the applicant by a broker or agent authorized by him. Every such application shall be submitted on forms prescribed by the Association after consultation with the Commissioner, which application shall contain statement as to whether or not there is any unpaid premiums due from the applicant for fire insurance on the property.

The term "insurable interest" as used in this subsection shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.

(b) If the Association determines that the property is insurable and that there is no unpaid premium due from the applicant for prior insurance on the property, the Association upon receipt of the premium, or such portion thereof, as is prescribed in the plan of operation, shall cause to be issued a policy of essential property insurance for a term of one year. Any policy issued pursuant to the provisions of this section shall be renewed annually, upon application therefor, so long as the property meets the definition of "insurable property" set forth in G.S. 58-173.2(5).

(c) If the Association, for any reason, denies an application and refuses to cause to be issued an insurance policy on insurable property to any applicant or takes no action on an application within the time prescribed in the plan of operation, such applicant may appeal to the Commissioner and the Commissioner, or a member of his staff designated by him, after reviewing the facts, may direct the Association to issue or cause to be issued an insurance policy to the applicant. In carrying out his duties pursuant to this section, the Commissioner may request, and the Association shall provide any information the Commissioner deems necessary to a determination concerning the reason for the denial or delay of the application. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.9. Association members may cede insurance to Association.

Any member of the Association may cede to the Association essential property insurance written on insurable property, to the extent, if any, and on the terms and conditions set forth in the plan of operation. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.10. Rates, rating plans and rate rules applicable.

The rates, rating plans and rating rules applicable to the insurance written by the Association shall be in accord with the manual rates in current usage throughout the State of North Carolina. No special surcharge (other than those presently in effect) may be applied to the essential property insurance rates of properties located in the beach area. (1967, c. 1111, s. 1; 1969, c. 249; 1979, c. 601, s. 4.)

§ 58-173.11. Appeal from acts of Association to Commissioner; appeal from Commissioner to superior court.

Any person insured pursuant to this Article, or his representative, or any affected insurer, who may be aggrieved by an act, ruling or decision of the Association, may, within 30 days after such ruling appeal to the Commissioner. Any hearings held by the Commissioner of Insurance pursuant to such an appeal shall be in accordance with the procedure set forth in G.S. 58-9.2: Provided, however, the Commissioner of Insurance is authorized to appoint a member of his staff as deputy commissioner for the purpose of hearing such appeals and a ruling based upon such hearing shall have the same effect as if heard by the Commissioner. All persons or insureds aggrieved by any order or decision of the Commissioner of Insurance may appeal as is provided by the provisions of G.S. 58-9.3. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.12. Reports of inspection made available.

All reports of inspection performed by or on behalf of the Association shall be made available to the members of the Association, applicants, agent or broker, and the Commissioner. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.13. Association and Commissioner immune from liability.

There shall be no liability on the part of and no cause of action of any nature shall arise against the Commissioner of Insurance or any of his staff, the Association or its agents or employees, or against any participating insurer, for any inspections made hereunder or any statements made in good faith by them in any reports or communications concerning risks submitted to the Association, or at any administrative hearings conducted in connection therewith under the provisions of this Article. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.14. Association to file annual report with Commissioner.

The Association shall file in the office of the Commissioner on an annual basis on or before July 1 a statement which shall summarize the transactions, conditions, operations and affairs of the Association during the preceding year. Such statement shall contain such matters and information as are prescribed by the Commissioner and shall be in such form as is approved by him. The Commissioner may at any time require the Association to furnish to him any additional information with respect to its transactions or any other matter which the Commissioner deems to be material to assist him in evaluating the operation and experience of the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.15. Commissioner may examine affairs of Association.

The Commissioner may from time to time make an examination into the affairs of the Association when he deems it to be prudent and in undertaking such examination he may hold a public hearing pursuant to the provisions of G.S. 58-9.2. The expenses of such examination shall be borne and paid by the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.16. Commissioner authorized to promulgate reasonable rules and regulations.

The Commissioner of Insurance shall have authority to make reasonable rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Article. The Commissioner shall not be liable for any act or omission in connection with the administration of the duties imposed upon him by the provisions of this Article. (1967, c. 1111, s. 1; 1969, c. 249.)

ARTICLE 18B.

Fair Access to Insurance Requirements.

§ 58-173.17. Purpose of Article.

It is the purpose of this Article to provide a program whereby adequate basic property insurance may be made available to property owners having insurable property in urban areas of the State and to enable insurers doing business in the State to participate in the federal reinsurance provisions or Public Law 90-448, 90th Congress, August 1, 1968. It is further the purpose of this Article to encourage the improvement of properties located in urban areas of the State and to arrest the decline of properties located in such areas. (1969, c. 1284.)

§ 58-173.18. Organization of underwriting association.

All insurers licensed to write and writing property insurance in this State on a direct basis are authorized, subject to the approval and regulation by the Commissioner, to establish and maintain a FAIR Plan (Fair Access to Insurance Requirements) and to establish and maintain an underwriting association and to formulate, and from time to time, to amend the plans and articles of the association and rules and regulations in connection therewith, and to assess and share on a fair and equitable basis all expenses, income and losses incident to such FAIR Plan and underwriting association in a manner consistent with the provisions of this Article and in conformity with the Urban Property Protection and Reinsurance Act of 1968. (Title XI of Housing and Urban Development Act of 1968, Public Law 90-448, 90th Congress, August 1, 1969). (1969, c. 1284.)

§ 58-173.19. Participation in association.

Every insurer authorized to write basic property insurance in this State except town and county mutual insurance associations and assessable mutual companies as authorized by G.S. 58-77(5)b, 58-77(5)d and 58-77(7)b and except an insurer who only writes insurance on property exempted from taxation by the provisions of G.S. 105-296 and 105-297 shall be required to become and remain a member of the Plan and underwriting association and comply with the requirements thereof as a condition of its authority to transact basic property insurance business in the State of North Carolina. The premiums paid by insurers of North Carolina property to the National Insurance Development Fund for reinsurance, shall be used for the payment of losses occurring in this State and shall, to the extent not so used, be credited to the participation of such insurers in the reinsurance facility provided by this Article and the federal act. (1969, c. 1284; 1971, c. 1067, s. 1.)

Editor's Note. — The provisions as to property exempt from taxation formerly contained in §§ 105-296 and 105-297, referred to in this section, now appear in §§ 105-278.1 through 105-278.9.

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The credit referred to in this section is to be accumulated by the Federal Insurance Development Fund and is available to pay reinsured riot-caused losses. It is not a credit which accrues to the benefit of the individual participating insurers in the State, but it does reduce the possibility of a call upon the State. See opinion of the Attorney General to the Honorable Edwin S. Lanier, Commissioner of Insurance, 40 N.C.A.G. 333 (1969).

§ 58-173.20. Requirements of Plan and authority of association.

The association formed pursuant to the provisions of this Article shall have authority on behalf of its members to cause to be issued basic property insurance policies, to reinsure in whole or in part, any such policies, and to cede any such reinsurance. The Plan adopted, pursuant to the provision of this Article, shall provide, among other things, for the perils to be covered, the geographical areas of coverage, compensation and commissions, assessments of members, the sharing of expenses, income and losses on an equitable basis, cumulative weighted voting for the board of directors of the association, the administration of the Plan and association and any other matter necessary or convenient for the purpose of assuring fair access to insurance requirements, provided the same permits each member insurer thereof to qualify for federal insurance under the Urban Property Protection and Reinsurance Act of 1968. (1969, c. 1284.)

§ 58-173.21. Authority of Commissioner.

(a) Within 90 days following July 2, 1969, and before August 1, 1969, the directors of the association shall submit to the Commissioner of Insurance for his review, a proposed FAIR Plan and articles of the association consistent with the provisions of this Article.

(b) The FAIR Plan and articles of association shall be subject to approval by the Commissioner and shall take effect 10 days after having been approved by him. If the Commissioner disapproves all or any part of the proposed Plan and articles, the directors of the association shall within 30 days submit for review an appropriately revised Plan and articles and if the directors fail to do so, the Commissioner shall thereafter promulgate such Plan and articles not inconsistent with the provisions of this Article. (1969, c. 1284.)

§ 58-173.22. Temporary directors of association.

Within 10 days after July 2, 1969, the Commissioner shall appoint a temporary board of directors of the association, which temporary board of directors may prepare and submit a Plan of operation and articles of association in accordance with G.S. 58-173.21. (1969, c. 1284.)

§ 58-173.23. Appeals; judicial review.

The association shall provide reasonable means, to be approved by the Commissioner, whereby any person or insurer affected by any act or decision of the administrators of the Plan or underwriting association, may be heard in person or by authorized representative, before the governing board of the association or a designated committee. Any person or insurer aggrieved by any

decision of the governing board or designated committee, may be appealed to the Commissioner within 30 days from the date of such ruling or decision. The Commissioner, after hearing held pursuant to the procedure set forth in G.S. 58-9.2, shall issue an order approving or disapproving the act or decision with respect to the matter which is the subject of appeal. The Commissioner is authorized to appoint a member of his staff as deputy commissioner for the purpose of hearing such appeals and a ruling based on such hearing shall have the same effect as if heard by the Commissioner personally. All persons or insurers or their representatives aggrieved by any order or decision of the Commissioner may appeal as provided by the provisions of G.S. 58-9.3. (1969, c. 1284.)

§ 58-173.24. Reports of inspection made available; immunity from liability.

All reports of inspection performed by or on behalf of the association shall be made available to the members of the association, applicants and the Commissioner. There shall be no liability on the part of and no cause of action of any nature shall arise against the Commissioner, any of his staff, the association or any of its agents or employees, or against any participating insurer for any inspections made hereunder or any statements made in good faith by them in any reports or communications concerning risks submitted to the association, or at any administrative hearing conducted in connection therewith under the provisions of this Article. (1969, c. 1284.)

§ 58-173.25. Riot Reinsurance Reimbursement Fund; assessment of insurers.

In the event it shall become necessary because of loss occasioned in this State at any time since August 1, 1968, to reimburse the Secretary of the Department of Housing and Urban Development under the provisions of section 1223(a)(1) of the Urban Property Protection and Reimbursement Act of 1968, the Commissioner of Insurance shall assess all insurers engaged in the business of writing property insurance in the State in an amount sufficient to pay any unpaid reimbursements to the Secretary of the Department of Housing and Urban Development. Provided, that the amount assessed each insurer shall be in the same proportion that the premiums earned by each such insurer in this State bears to the aggregate premiums earned in this State by all insurance companies on those lines of property insurance for which reinsurance was available in this State from the Secretary of the Department of Housing and Urban Development during the preceding calendar year. All assessments made by the Commissioner of Insurance under this section shall be payable to the Treasurer of the State of North Carolina and he shall maintain a special fund designated as the "Riot Reinsurance Reimbursement Fund." All moneys received by the Treasurer pursuant to an assessment under this section shall be deposited in such special fund.

Whenever the Commissioner of Insurance shall certify to the Governor, the Council of State and the Treasurer of the State of North Carolina that it has become necessary to reimburse the Secretary of the Department of Housing and Urban Development under the provisions of the Urban Property Protection and Reinsurance Act of 1968, because of losses occasioned in this State since August 1, 1968, the Treasurer is hereby authorized and is directed to pay such amounts certified by the Commissioner of Insurance out of the Riot Reinsurance Reimbursement Fund to an extent, not exceeding in the aggregate for any one year, five percent (5%) of the aggregate property insurance premiums earned in this State during the preceding calendar year

on those lines of insurance reinsured by the Secretary of Housing and Urban Development in this State during the current year. Nothing herein shall be construed to pledge the faith and credit of the State to any obligation or obligations. (1969, c. 1284.)

§ 58-173.26. Assessment; inability to pay.

In the event any insurer fails by reason of insolvency to pay any assessment as provided herein, the amount assessed each insurer, as computed under G.S. 58-173.25, shall be immediately recalculated excluding therefrom the insolvent insurer so that its assessment is, in effect, assumed and redistributed among the remaining insurers. Such an assessment against an insolvent insurer shall not be a charge against any special deposit fund held under the provisions of Article 20 of Chapter 58 for the benefit of policyholders. (1969, c. 1284.)

§ 58-173.27. Termination; outstanding obligations; revival and extension.

This Article shall expire on December 31, 1983, except that rights and obligations incurred by the Association and its members to be established pursuant to the provisions of this Chapter shall not be impaired by the expiration of this Article, and such Association shall be continued for the purpose of performing such obligations. If the Urban Property Protection and Reimbursement Act of 1968 expires at any time prior to December 31, 1983, this Article shall remain in full force and effect until said date. (1969, c. 1284; 1973, c. 1440, s. 1; 1977, c. 109; 1979, 2nd Sess., c. 1159; 1981, c. 875.)

Effect of Amendments. — The 1981 amendment deleted "or after the expiration of the Urban Property Protection and Reimbursement Act of 1968, whichever shall first occur," following "1983" near the beginning of the first sentence and, at the end of the second sentence, substituted "prior to December 31, 1983, this Article shall remain in full force and effect until said date" for "and is subsequently revived or extended, this Article shall be revived and extended and shall be and remain effective simultaneously with the effective dates of the Urban Property Protection and Reimbursement Act of 1968."

§ 58-173.28. Recoupment by insurers.

Any insurer assessed under the provisions of this Article may add to the premiums applicable to the lines on which the assessment is levied an amount to be approved by the Commissioner of Insurance sufficient to recover within not more than three years an amount assessed under G.S. 58-173.25 of this Article during the preceding calendar year, together with the amounts, costs and expenses reasonably attributable to such assessment and recovery thereof. Every insurer adding to the premiums of its policyholders to make a recoupment under the provisions of this section, shall keep separate records as to the costs and expenses and as to the amounts collected and shall file copies of such records with the Commissioner of Insurance in the year following such recoupment. (1969, c. 1284.)

CASE NOTES

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§§ 58-173.29 to 58-173.33: Reserved for future codification purposes.

ARTICLE 18C.

North Carolina Health Care Liability Reinsurance Exchange.

§ 58-173.34. Declarations and purpose of the Article.

It is hereby declared by the General Assembly of North Carolina that the availability of health care liability insurance for physicians and surgeons, dentists, nurses, nurse anesthetists, hospitals and others engaged in the healing practicing arts is necessary for the economic welfare of the State and that without such insurance health care services may be severely curtailed; and that while the need for such insurance is increasing, the supply is not adequate and is likely to become less adequate in the future; and that present plans to provide adequate health care liability insurance in North Carolina have not been sufficient to meet the needs of our citizens. It is further declared that the State has an obligation to provide an equitable method whereby every insurer licensed to write general liability insurance in North Carolina be required to meet this market demand. It is the purpose of this Article to define this obligation and provide a mandatory program to assure an adequate supply of health care liability insurance coverages in the State of North Carolina. (1975, c. 427, s. 1.)

Editor's Note. — Session Laws 1975, c. 427, s. 2, contains a severability clause.

Legal Periodicals. — For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

This Article Is Unconstitutional. — Since it is specifically declared in this section that the purpose of this Article is to impose upon all companies licensed to write in North Carolina insurance against liability for personal injury or property damage, a mandatory program for the writing by them of health care liability insurance, all parts of this Article are related to, and designed to accomplish, this unconstitutional purpose, and the entire Article is in excess of the power of the General Assembly under the Constitution of this State. Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

The State may not, consistent with the Law of the Land Clause of the State Constitution or the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, require an insurance company to engage in the health care liability insurance business as a condition to its right to continue to carry on an entirely different business for which it is duly licensed by the State and in which it wants to be, and is, engaged. Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

A binder for medical malpractice insurance issued by plaintiff insurer to defendant physicians while general liability insurers were required by this Article to write such insurance was not void because the Article was thereafter declared unconstitutional, where the record showed that plaintiff did not enter into the insurance binder contract involuntarily under coercion of the unconstitutional statute, but that plaintiff deliberately and voluntarily decided to assume the liability and entered into a contract to insure defendants for 30 days regardless of the constitutionality of the Article. American Mfrs. Mut. Ins. Co. v. Ingram, 301 N.C. 138, 271 S.E.2d 46 (1980), rehearing denied, 301 N.C. 728, 274 S.E.2d 227 (1981).

§ 58-173.35. Scope.

This Article shall apply to all kinds of health care liability insurance for physicians and surgeons, dentists, nurses, nurse anesthetists, hospitals and others engaged in the healing practicing arts which is designed to afford protection against liability that may arise from rendering or failing to render services of a professional nature. (1975, c. 427, s. 1.)

§ 58-173.36. Construction.

This Article shall be liberally construed to effect the purposes of this Article which shall constitute [an] aid and guide to interpretation. (1975, c. 427, s. 1.)

§ 58-173.37. Definitions.

As used in this Article:

(1) "Cede" or "cession" means the act of transferring the profit or loss of otherwise unacceptable business (to the extent permitted in the plan of operation) from the individual insurer to all insurers through the operation of the Exchange.

(2) "Commissioner" means the Commissioner of Insurance of this State.

(3) "Company" means each member of the Exchange.

(4) "Eligible risk" means a person who is a resident of this State who holds a valid license to practice or perform in this State a given health care profession as set forth in the license requirements of the statutory board issuing said license, and hospitals as defined in G.S. 131-126.1(3), including but not limited to the following categories: physicians, surgeons, dentists, nurses, nurse anesthetists, physiotherapists, medical or X-ray laboratories, chiropractors, chiropodists, optometrists, osteopaths and blood banks, provided, however, that no person shall be deemed an eligible risk if timely payment of premium is not tendered or if there is a valid unsatisfied judgment of record against such person for recovery of amounts due for health care liability insurance premiums and such person has not been discharged from paying said judgment.

(5) "Exchange" means the North Carolina Health Care Liability Reinsurance Exchange established pursuant to the provisions of this Article.

(6) "General liability insurance" means insurance against legal liability of the insured as authorized under G.S. 58-72(13) and (14), excluding insurance against liability arising out of the ownership, operation, maintenance and use of a motor vehicle as defined in G.S. 20-4.01.

(7) "Health care liability insurance" means insurance against legal liability of the insured caused by injury arising out of the rendering of, or failure to render, health care services by the insured, or by any person for whose acts or omissions such insured is legally responsible.

(8) "Person" means every natural person, firm, partnership, association, corporation or government or agency thereof.

(9) "Plan of operation" means the plan of operation approved pursuant to the provisions of this Article.

(10) "Premiums" means direct written premium for all general liability insurance coverages on policyholders in this State (excluding reinsurance assumed and ceded). (1975, c. 427, s. 1.)

CASE NOTES

Quoted in Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

§ 58-173.38. North Carolina Health Care Liability Reinsurance Exchange; creation; membership.

(a) There is created a nonprofit unincorporated legal entity to be known as the North Carolina Health Care Liability Reinsurance Exchange consisting of all insurers licensed to write and engaged in writing within this State general liability insurance or any component thereof except town and county mutual insurance associations and assessable mutual companies as authorized by G.S. 58-77(5)b, 58-77(5)d and 58-77(7)b. Every such insurer, as a prerequisite to further engaging in writing such insurance in this State, shall be a member of the Exchange and shall be bound by the rules of operation thereof as provided for in this Article and as promulgated by the board of governors. No company may withdraw from membership in the Exchange unless it ceases to write general liability insurance in this State or ceases to be licensed to write such insurance.

(b) The Exchange shall be under the immediate supervision of the Commissioner and shall be subject to applicable provisions of the insurance laws of this State. (1975, c. 427, s. 1.)

CASE NOTES

Quoted in Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976). Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

Cited in American Mfrs. Mut. Ins. Co. v.

§ 58-173.39. Obligations after termination of membership.

Any company whose membership in the Exchange has been terminated by withdrawal shall, nevertheless, with respect to its business prior to midnight of the effective date of such termination continue to be governed by this Article. (1975, c. 427, s. 1.)

§ 58-173.40. Insolvency.

Any unsatisfied net liability to the Exchange of any insolvent member shall be assumed by and apportioned among the remaining members in the Exchange in the same manner in which assessments or gain are apportioned by the Exchange. The Exchange shall have all rights allowed by law in behalf of the remaining members against the estate or funds of such insolvent for sums due the Exchange in accordance with this Article. (1975, c. 427, s. 1.)

§ 58-173.41. Merger, consolidation or cession.

When a member has been merged or consolidated into another insurer, or has ceded its entire general liability insurance business in the State to another insurer, such company or its successor in interest shall remain liable for all obligations hereunder and such company and its successor in interest and the other insurers with which it has been merged or consolidated shall continue to participate in the Exchange according to the rules of operation. (1975, c. 427, s. 1.)

§ 58-173.42. General obligations of insurers.

Except as otherwise provided in this Article all insurers as a prerequisite to the further engaging in this State in the writing of general liability insurance or any component thereof shall accept and insure any applicant therefor who is an eligible risk if cession of the particular coverage and coverage limits applied for are permitted in the Exchange. All such insurers shall equitably share the results of any health care liability insurance business ceded to and through the Exchange and shall be bound by the acts of their agents in accordance with the provision of this Article. No insurer shall impose upon any of its agents, solely on account of ceded business received from such agents, any quota or matching requirement for any other insurance as a condition for further acceptance of ceded business from such agents. Any insurer with obligations under this section may elect with approval of the Exchange to assign the underwriting, issuance of policies, and claim handling to a designated carrier approved by the board of governors. Assignment of these functions, however, shall not relieve an insurer of its obligation to share proportionately in the financial operation of the Exchange. (1975, c. 427, s. 1.)

CASE NOTES

Quoted in Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

§ 58-173.43. General obligations of agents.

Except as otherwise provided in this Article, no licensed agent of an insurer authorized to solicit and accept premiums for general liability insurance or any component thereof by the company he represents shall refuse on behalf of said company to accept any application from an eligible risk for health care liability insurance and to immediately bind the coverage applied for and for a period of not less than one year if cession of the particular coverage and coverage limits applied for are permitted in the Exchange, provided the application is submitted during the agent's normal business hours, at his customary place of business and in accordance with the agent's customary practices and procedures. The compensation to agents on ceded business shall not be less than the customary compensation paid on business not ceded. (1975, c. 427, s. 1.)

§ 58-173.44. The Exchange; functions; administration.

(a) The operation of the Exchange shall assure the availability of all health care liability insurance coverages to any eligible risk by means of reinsurance and the Exchange shall accept for transfer to the account of all members the profit or loss of the business ceded in accordance with this Article, the plan of operation adopted pursuant thereto, and any amendments to either.

(b) The Exchange shall reinsure for each coverage available therein to the standard percentage of one hundred percent (100%) as follows: For the following coverages of health care liability insurance and in at least the following amounts of insurance: bodily injury and property damage liability: per occurrence twenty-five thousand dollars ($25,000), annual aggregate seventy-five thousand dollars ($75,000).

(c) Additional ceding privileges for health care liability insurance shall be provided by the board of governors if there is substantial demand for a coverage or coverage limit of any component of health care liability insurance up to the

following: per occurrence one hundred thousand dollars ($100,000), annual aggregate three hundred thousand dollars ($300,000).

(d) Further additional ceding privileges for health care liability insurance shall be provided by the board of governors if there is substantial demand for excess coverage of health care liability insurance up to the following: per occurrence one million dollars ($1,000,000), annual aggregate one million dollars ($1,000,000).

(e) The Exchange shall require each member to adjust losses for ceded business fairly and efficiently in the same manner as other insurance losses are adjusted and to effect settlement where settlement is appropriate; however, the Exchange shall provide reasonable means whereby any insurer may elect to assign the underwriting, issuance of policies, and claim handling to a designated carrier approved by the board of governors. Assignment of these functions, however, shall not relieve an insurer of its obligation to share proportionately in the financial operation of the Exchange.

(f) The Exchange shall be administered by a board of governors. The board of governors shall consist of nine members having one vote each from the classifications hereinafter enumerated plus the Commissioner who shall serve ex officio without vote. Each Exchange insurance company member serving on the board shall be represented by a senior officer of the company. Not more than one company in a group under the same ownership or management shall be represented on the board at the same time. Five members of the board shall be selected by the member insurers, which members shall be fairly representative of the industry. To insure representative member insurers, one each shall be selected from the following groups: the American Insurance Association (or its successors), the American Mutual Insurance Alliance (or its successors), the National Association of Independent Insurers (or its successors), all other stock insurers not affiliated with the above groups, and all other nonstock insurers not affiliated with the above groups. The Commissioner of Insurance shall appoint four members of the board who shall be fire and casualty insurance agents licensed in this State and actively engaged in writing general liability insurance in this State. The Commissioner shall select one agent from among a list of two nominees submitted by the Independent Insurance Agents of North Carolina, Inc., and one agent from among a list of two nominees submitted by the Carolinas Association of Mutual Insurance Agents, North Carolina Division. The initial term of office of said board members shall be two years. Following completion of initial terms, successors to the members of the original board of governors shall be selected to serve three years. All members of the board of governors shall serve until their successors are selected and qualified and the Commissioner may fill any vacancy on the board from any of the aforementioned classifications until such vacancies are filled in accordance with the provisions of this Article.

(g) The Commissioner and member companies shall provide for a board of governors within 30 days after ratification of this Article. If any member seat on the initial board of governors is not filled in accordance with this Article within such time, then in that event the Commissioner shall appoint natural persons from any of the classifications specified in subsection (f) of this section to serve the initial term on the board of governors. As soon as possible after its selections, the Commissioner shall call for the initial meeting of the board. After the board of governors has been selected it shall then elect from its membership a chairman and shall then meet thereafter as often as the chairman shall require or at the request of three members of the board of governors. The chairman shall retain the right to vote on all issues. Five members of the board of governors shall constitute a quorum. The same member may not serve as chairman for more than two consecutive years.

(h) The board of governors shall have full power and administrative responsibility for the operation of the Exchange. Such administrative responsibility shall include but not be limited to:

(1) Proper establishment and implementation of the Exchange.
(2) Employment of a manager who shall be responsible for the continuous operation of the Exchange and such other employees, officers and committees as it deems necessary.
(3) Provision for appropriate housing and equipment to assure the efficient operations of the Exchange.
(4) Promulgation of reasonable rules and regulations for the administration and operation of the Exchange and delegation to the manager of such authority as it deems necessary to insure the proper administration and operation thereof.

(i) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Exchange is vested in the board of governors, which power and responsibility include but are not limited to the following:

(1) To sue and be sued in the name of the Exchange. No judgment against the Exchange shall create any direct liability to the individual member companies of the Exchange.
(2) To receive and record reinsurance cessions from member companies.
(3) To assess members on the basis of participation ratios established in the plan of operation to cover anticipated or incurred costs of operation and administration of the Exchange at such intervals as are established in the plan of operation.
(4) To contract for goods and services from others to assure the efficient operation of the Exchange.
(5) To hear and determine complaints of any company, agent or other interested party concerning the operation of the Exchange.
(6) To review the market for health care liability insurance throughout North Carolina to make certain that eligible risks can readily obtain such insurance and to provide in the plan of operation a reasonable means for achieving this objective. The Exchange is authorized to require all companies in a fair and equitable manner who are writers of general liability insurance in this State to appoint and license any fire and casualty agent duly licensed to write insurance in North Carolina, in such places where a market need has been demonstrated, to be their agent to write health care liability insurance.
(7) To maintain all loss, expense, and premium data relative to all risks reinsured in the Exchange, and to require each member to furnish such statistics relative to insurance reinsured by the Exchange and statistics on such insurance not reinsured in the Exchange at such times and in such form and detail as may be required.
(8) To establish fair and reasonable procedures for the sharing among the members of profit and loss on Exchange business and other costs, charges, expenses, liabilities, income, property and other assets of the Exchange and for assessing or distributing to members their appropriate shares. Such shares may be based on the member's direct written premium for general liability insurance or by any other fair and reasonable method.
(9) To receive or distribute all sums required by the operation of the Exchange.
(10) To accept all risks submitted from the companies in accordance with this Article.
(11) To establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Exchange will be handled fairly and efficiently.
(12) To adopt and enforce all rules and to do anything else where the board is not elsewhere herein specifically empowered which is otherwise necessary to accomplish the purpose of the Exchange and is not in conflict with the other provisions of this Article.

(j) Each member company shall authorize the Exchange to audit that part of the company's business which is written subject to the Exchange in a manner and time prescribed by the board of governors.

(k) The board of governors shall fix a date for an annual meeting and shall annually meet on that date. Twenty days' notice of such meeting shall be given in writing to all members of the board of governors.

(l) There shall be furnished to each member an annual report of the operation of the Exchange in such form and detail as may be determined by the board of governors.

(m) Each member shall furnish statistics in connection with insurance subject to the Exchange as may be required by the Exchange. Such statistics shall be furnished at such time and in such form and detail as may be required but at least will include premiums, charges, expenses and losses. (1975, c. 427, s. 1.)

CASE NOTES

Quoted in Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

§ 58-173.45. Plan of operation.

(a) Within 60 days after the initial organizational meeting, the Exchange shall submit to the Commissioner, for his approval, a proposed plan of operation, consistent with the provisions of this Article, which shall provide for economical, fair and nondiscriminating administration and for the prompt and efficient provision on health care liability insurance to eligible risks. Should no plan be submitted within the aforesaid 60-day period, then the Commissioner of Insurance shall formulate and place into effect a plan consistent with the provisions of this Article.

(b) The plan of operation, unless sooner approved in writing, shall be deemed to meet the requirements of the Article if it is not disapproved by order of the Commissioner within 30 days from the date of filing. Prior to the disapproval of all or any part of the proposed plan of operation the Commissioner shall notify the Exchange in what respect the plan of operation fails to meet the specific requirements of this Article. The Exchange shall, within 30 days thereafter, submit for his approval a revised plan of operation which meets the specific requirements of this Article. In the event the Exchange fails to submit a revised plan of operation which meets the specific requirements of this Article within the aforesaid 30-day period, the Commissioner of Insurance shall enter an order accordingly and shall immediately thereafter formulate and place into effect a plan consistent with the provisions of this Article.

(c) Any revision of the proposed plan of operation or any subsequent amendments to an approved plan of operation shall be subject to approval or disapproval by the Commissioner in the manner herein provided in subsection (b) with respect to the initial plan of operation.

(d) Any order of the Commissioner with respect to the plan of operation or any revision of [or] amendment thereof shall be subject to court review as provided in G.S. 58-9.3.

(e) Upon approval of the Commissioner of the plan so submitted or the promulgation of a plan deemed approved by the Commissioner, all insurance companies licensed to write general liability insurance in this State or any component thereof as a prerequisite to further engaging in writing such insurance shall formally subscribe to and participate in the plan so approved.

The plan of operation shall provide for, among other matters, the establishment of necessary facilities, the management of the Exchange, the preliminary assessment of all members for initial expenses necessary to commence operations, the assessment of members to defray losses and expenses, the distribution of gains, the standard amount one hundred percent (100%) of coverage afforded on eligible risks which a member company may cede to the Exchange, and the procedure by which reinsurance shall be accepted by the Exchange; and establish procedure for receiving and maintaining separate statistics on all health care liability insurance written by each member company; and shall further provide that:

(1) Members of the board of governors shall receive reimbursement from the Exchange for their actual and necessary expenses incurred on Exchange business, en route to perform Exchange business, and while returning from Exchange business plus a per diem allowance of twenty-five dollars ($25.00) a day which may be waived.

(2) In order to obtain a transfer of business to the Exchange effective when the binder or policy or renewal thereof first becomes effective, the company must within 30 days of the binding or policy effective date notify the Exchange of the identification of the insured, the coverage and limits afforded, classification data, and premium. The Exchange shall accept risks at other times on receipt of necessary information, but such acceptance shall not be retroactive. The Exchange shall accept renewal business after the member on underwriting review elects to again cede the business. (1975, c. 427, s. 1.)

§ 58-173.46. No limit on cessions; compulsory cessions.

Upon receipt by the company of a risk which it does not elect to retain, the company shall follow such procedures for ceding the risk as are established by the plan of operation. A company may cede to the Exchange one hundred percent (100%) of its health care liability insurance business in North Carolina. In order to prevent significant adverse selection resulting from cessions to the Exchange, the board of governors upon a finding of significant adverse selection shall require one hundred percent (100%) ceding by all members of the coverages on any of the separate eligible risk categories enumerated in G.S. 58-173.37(4). There shall be a presumption that significant adverse selection exists if for any period of one year or more the result from dividing the losses incurred by the premiums earned on business ceded to the Exchange is in excess of one hundred and five percent (105%) of the result of dividing the losses incurred by the premiums earned on business retained by the members. (1975, c. 427, s. 1.)

CASE NOTES

Quoted in Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

§ 58-173.47. Approval of rates.

The premium rates that may be charged on all health care liability insurance, including premiums ceded to the Health Care Liability Reinsurance Exchange established by this Article, shall be established from time to time by the Commissioner of Insurance on the basis of the latest available statistical data submitted by rating bureaus or insurers authorized to write general liability insurance in this State. Every rating bureau authorized to engage in

rate making or insurer licensed in this State to write general liability insurance coverages may submit proposed changes in rates or classifications to the extent necessary to produce rates and classifications which are reasonable, adequate, not unfairly discriminatory and in the public interest, or the Commissioner, upon his own motion, may, upon the latest available statistical data, order a reduction or increase in rates. Any premium rate change shall be established by the Commissioner only after due notice and hearing as provided in G.S. 58-9.2 and with full rights of appeal as provided in G.S. 58-9.4. The rate so established by the Commissioner shall be reasonable, adequate, not excessive, not unfairly discriminatory and in the public interest. Such rates shall not be deemed unreasonable, inadequate, excessive, unfairly discriminatory or not in the public interest if they are adequate to defray the total cost of the Exchange system and if they make adequate provision for premium rates for the future which will provide for anticipated losses, anticipated loss adjustment expenses, other anticipated expenses attributable to the selling and servicing of this line of insurance, and a fair and reasonable underwriting profit. The determination of a fair and reasonable underwriting profit shall take into consideration earnings from the investment of unearned premium reserves and loss reserves on North Carolina business. Every rating method, schedule, [and] classification submitted to the Commissioner for approval shall be deemed approved if the Commissioner, within 60 days after submission, has not issued a notice of hearing on the matter. (1975, c. 427, s. 1.)

CASE NOTES

Quoted in Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

§ 58-173.48. Termination of insurance.

No member may terminate insurance to the extent that cession of a particular type of coverage and limits is available under the provision of this Article except for the following reasons:

(1) Nonpayment of premium when due to the insurer or producing agent.
(2) The named insured has become a nonresident of this State and would not otherwise be entitled to insurance on submission of new application under this Article.
(3) The license of a named insured to practice his profession is in a state of suspension or has been revoked. (1975, c. 427, s. 1.)

§ 58-173.49. Hearings; review.

(a) Any applicant for a policy from any carrier, any person insured under such a policy, any member of the Exchange and any agent duly licensed to write health care liability insurance may request a formal hearing and ruling by the board of governors of the Exchange on any alleged violation of or failure to comply with the plan of operation or the provisions of this Article or any alleged improper act or ruling of or in the case of a member directly affecting him as to coverage or premium or in the case of a member directly affecting its assessment, and in the case of an agent, any matter affecting his appointment to a carrier or his account therewith. The request for hearing must be made within 15 days after the date of the alleged violation or improper act or ruling. The hearing shall be held within 15 days after the receipt of the request. The hearing may be held by any panel of the board of governors consisting of not

less than three members thereof, and the ruling of a majority of the panel shall be deemed to be the ruling of the board, unless the full board on its own motion shall modify or rescind the action of the panel.

(b) Any formal ruling by the board of governors may be appealed to the Commissioner by filing notice of appeal with the Exchange and Commissioner within 30 days after issuance of the ruling.

(c) The Commissioner shall hear the matter de novo and issue an order approving the action or decision, disapproving the action or decision, or directing the board of governors to act in accordance with the ruling of the Commissioner.

(d) Any aggrieved person or organization, any member of the Exchange or the Exchange may request a public hearing and ruling by the Commissioner on the provisions of the plan of operation, rules, regulations or policy forms approved by the Commissioner. The request for hearing shall specify the matter or matters to be considered. The hearing shall be held within 30 days after receipt of the request. The Commissioner shall give public notice of the hearing and the matter or matters to be considered not less than 15 days in advance of the hearing date.

(e) In any hearing held pursuant to this section by the board of governors or the Commissioner, the board or the Commissioner, as the case may be, shall issue a ruling or order within 30 days after the close of the hearing.

(f) All rulings or orders of the Commissioner under this section shall be subject to judicial review as provided in Article 2 of Chapter 58 of the General Statutes. (1975, c. 427, s. 1.)

§ 58-173.50. Examination of the Exchange; annual report.

The Exchange shall be subject to examination and regulation by the Commissioner. The board of governors shall submit to the Commissioner, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner and a report of its activities during the preceding calendar year. (1975, c. 427, s. 1.)

§ 58-173.51. Tax exemptions.

The Exchange shall be exempt from payment of all fees and all taxes levied by this State or any of its subdivisions, except ad valorem taxes. (1975, c. 427, s. 1.)

Article 19.

Fire Insurance Policies.

§ 58-174. Terms and conditions must be set out in policy.

In all insurance against loss by fire the conditions of insurance must be stated in full, and the rules and bylaws of the company are not a warranty or a part of the contract, except as incorporated in full into the policy. (1899, c. 54, s. 42; Rev., s. 4758; C.S., s. 6434.)

§ 58-175. Items to be expressed in policies.

Upon request there shall be printed, stamped, or written on each fire policy issued in this State the basis rate, deficiency charge, the credit for improvements, and the rate at which written, and whenever a rate is made or changed on any property situated in this State upon request a full statement

thereof showing in detail the basis rate, deficiency charges and credits, as well as rate proposed to be made, shall be delivered to the owner or his representative having the insurance on the property in charge, by the company, association, their agent or representative. (1915, c. 109, s. 3; C.S., s. 6435; 1925, c. 70, s. 3; 1945, c. 378.)

§ 58-175.1. Agent to inspect risks.

Every agent of a fire insurance company shall, before issuing a policy of insurance on property situated in a city or town, inspect the same, informing himself as to its value and insurable condition. (1915, c. 109, s. 3; C.S., s. 6435; 1925, c. 70, s. 3; 1945, c. 378.)

Editor's Note. — This section was formerly a part of § 58-175.

CASE NOTES

Cited in State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

§ 58-176. Fire insurance contract; standard policy provisions.

(a) The printed form of a policy on fire insurance, as set forth in subsection (c) shall be known and designated as the "Standard Fire Insurance Policy for North Carolina."

(b) No policy or contract of fire insurance except contracts of automobile fire, theft, comprehensive and collision, marine and inland marine insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this State, unless it conforms in substance with all of the provisions, stipulations, agreements, and conditions of the policy form in subsection (c) of this section.

There shall be printed at the head of said policy the name of the insurer or insurers issuing the policy; the location of the home office thereof; a statement whether said insurer or insurers are stock or mutual corporations or are reciprocal insurers. No provisions of this section limit a company to the use of any particular size or manner of folding the paper upon which the policy is printed; provided, however, that any company organized under special charter provisions may so indicate upon its policy, and may add a statement of the plan under which it operates in this State.

The standard fire insurance policy provided for herein need not be used for effecting reinsurance between insurers.

(c) The form of the standard fire insurance policy for North Carolina (with permission to substitute for the word "company" a more accurate descriptive term for the type of insurer and with permission to change the manner of folding the policy and arrangement of the pages and the arrangement of the wording of page 1, page 3, and the back of the policy and relocation of the signatures, and any other relocations or rearrangement of the contents of the policy, with the approval of the Commissioner (shall be in substance as follows: (See the three following pages for a form photographically reproduced.)

Standard Fire Insurance Policy for Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

No._____
REPLACES POLICY NO.

COVERAGE AFFORDED BY THIS POLICY IS PROVIDED BY THE COMPANY INDICATED BELOW

SPACE FOR COMPANY NAME, INSIGNIA, AND LOCATION

Insured's Name and Mailing Address

SPECIMEN

Inception (Mo. Day Yr.) Expiration (Mo. Day Yr.) Years

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

INSURANCE IS PROVIDED AGAINST ONLY THOSE PERILS AND FOR ONLY THOSE COVERAGES INDICATED BELOW BY A PREMIUM CHARGE AND AGAINST OTHER PERILS AND FOR OTHER COVERAGES ONLY WHEN ENDORSED HEREON OR ADDED HERETO.

AMOUNT	RATE	PREPAID TERM PREMIUM DUE AT INCEPTION.	ANNUAL PAYMENT DUE UNDER DEF. PREM. PAY. PLAN	PERIL(S) Insured Against and Coverage(s) Provided (Insert Name of Each)
$	$	$	$	FIRE AND LIGHTNING
xxxxxxx	$	$	$	EXTENDED COVERAGE
	$	$	$	
	$	$	$	
$ TOTAL PREMIUM FOR POLICY TERM UNDER D. P. P. P		TOTAL(S) $	$	

Item No.	Amount Fire or Fire and Extended Coverage, or Other Peril	Per Cent of Co-Insurance Applicable	DESCRIPTION AND LOCATION OF PROPERTY COVERED Show construction, type of roof and occupancy of building(s) covered or containing the property covered. If occupied as a dwelling state number of families.
1. -	$		

Subject to Form No(s). **attached hereto.**

Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to:

Agency at

Countersignature Date

_____ Agent

IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO AND OF the premium above specified, this Company, for the term of *years specified above* from *inception date shown above* At Noon (Standard Time) to *expiration date shown above* At Noon (Standard Time) at location of property involved, to an amount not exceeding the amount(s) above specified, does insure *the insured named above* and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all **DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED,** to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

FP 1002.2

ATTACH FORM BELOW THIS LINE

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other Insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; **and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item, and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within three years next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

INSERT SIGNATURES AND TITLES OF PROPER OFFICERS

(1899, c. 54, s. 43; 1901, c. 391, s. 4; Rev., s. 4760; 1915, c. 109, s. 9; C.S., s. 6437; 1945, c. 378; 1951, c. 767; 1955, c. 622; c. 807, s. 2; 1971, c. 476, s. 1; 1977, c. 828, s. 3; 1979, c. 755, ss. 2-4.)

Cross References. — As to limitation of actions, see § 58-31. As to the standard fire insurance policy and permissible variations, see § 58-177. For the Readable Insurance Policies Act, see § 58-364 et seq.

Legal Periodicals. — For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

I. In General.
II. Conditions.
A. In General.
B. Former Conditions as to Title or Interest of Insured.
III. Proof of Loss and Limitation of Suit.
IV. Appraisal and Recovery.

I. IN GENERAL.

For history of legislation in respect to the "standard fire insurance policy", see Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Provisions of Standard Form Are Those of the Law. — The material provisions of the standard form of a fire insurance policy written in accordance with this section are those of the law. Greene v. Aetna Ins. Co., 196 N.C. 335, 145 S.E. 616 (1928).

Commissioner has no power to authorize or acquiesce in issuance of policies unauthorized or forbidden by statute. Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 45 S.E.2d 45 (1947).

Agreements in a policy contrary to statutory provisions are void. Buckner v. United States Fire Ins. Co., 209 N.C. 640, 184 S.E. 520 (1936).

The provisions of the standard form of fire insurance policy are valid. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948); Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

And Binding on the Parties. — The terms and conditions of the standard form of a fire insurance policy, and the stipulations as to a valid waiver thereof, are valid and binding on the parties. Midkiff v. North Carolina Home Ins. Co., 197 N.C. 139, 147 S.E. 812 (1929).

And Rights and Liabilities of Both Parties Must Be Determined in Accordance Therewith. — The provisions of the standard form of fire insurance policy are valid, and the rights and liabilities of both parties under the policy must be ascertained and determined in accordance with its terms. Gardner v. Carolina Ins. Co., 230 N.C. 750, 55 S.E.2d 694 (1949).

The rights and liabilities of both insurer and insured must be determined in accordance with the terms of the standard form of fire insurance policy. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

The rights of the parties under a loss-payable clause in a policy of fire insurance will be determined in accordance with the terms and provisions of the contract, which derive no extra validity by reason of the fact that the form is prescribed by law. Atlantic Joint Stock Land Bank v. Foster, 217 N.C. 415, 8 S.E.2d 235 (1940).

When a policy of insurance, in the form prescribed by this section, has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms and provisions have been prescribed by statute, and are valid in all respects; they are just both to the insurer and to the insured. Both are presumed to know all the terms, provisions and conditions which are included in the policy, and both are ordinarily bound by them. Lancaster v. Southern Ins. Co., 153 N.C. 285, 69 S.E. 214 (1910); Midkiff v. North Carolina Home Ins. Co., 197 N.C. 139, 147 S.E. 812 (1929). See Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Binders Not Contrary to Law. — Our statute, by establishing a standard form of fire insurance, does not prevent the binding effect of a parol agreement of insurance, looking to the delivery of the policy according to the form prescribed and evidenced by a written memorandum thereof, called a binder; and when such binder is shown to have been made in a manner to bind the company, it is in force from that time, and thereafter the insured is responsible for the loss in accordance with the terms of the statutory form of policy. Lea &

Adcock v. Atlantic Fire Ins. Co., 168 N.C. 478, 84 S.E. 813 (1915). See § 58-177(4).

Waivers Making Policy More Restrictive Are Void. — Waivers inserted in or attached to a policy of fire insurance which have the effect of making the provisions of the standard policy form more restrictive are void under this section and § 58-177. Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 45 S.E.2d 45 (1947).

A waiver attached to a policy of fire insurance which provided that the policy should not cover loss caused by fire originating on the property of a neighbor if the insured property was situated within a stipulated distance of the combustible property of a neighbor was restrictive of the provisions of the standard policy form and was therefore void. Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 45 S.E.2d 45 (1947).

Knowledge of Insurer as Waiver. — A breach of a condition in the policy will not avoid it, if the insurer has knowledge thereof, and does not object, in which case the breach is considered as waived. Argall v. Old N. State Ins. Co., 84 N.C. 355 (1881); Scottish Fire Ins. Co. v. Stuyvesant Ins. Co., 161 N.C. 485, 76 S.E. 728 (1913).

Sending a check in payment of the claim may constitute a waiver, whether received or not, of unfulfilled conditions. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

Waiver by or Estoppel against Insurer from Act or Omission of Agent. — A waiver by, or an estoppel against, an insurer may arise from the act, conduct, omission, or knowledge of a duly authorized representative of the insurer acting within the scope of his actual or apparent authority. Northern Assurance Co. of Am. v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965), affd, 373 F.2d 35 (4th Cir. 1966).

When Knowledge of Agent Imputed to Company. — In the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, even though a direct stipulation to the contrary appears in the policy or the application. Faircloth v. Ohio Farmers Ins. Co., 253 N.C. 522, 117 S.E.2d 404 (1960).

In the absence of fraud or collusion, and when acting within the scope of his authority, the agent's knowledge is in law the knowledge of the insurer, even though it is not in fact communicated to the insurer. Northern Assurance Co. of Am. v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965), aff'd, 373 F.2d 35 (4th Cir. 1966).

Limitations on Agent's Authority as to Conditions Arising After Issuance of Policy and Loss. — Limitations on the agent's authority expressed in unambiguous language in the policy must be held binding on the insured. And while provisions in the policy restricting the local agent's power to waive conditions as a general rule do not include conditions existing at the inception of the contract, the rule is otherwise as to those arising after the policy has been issued and loss has occurred. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

At the time of issuing the policy the local agent pro hac vice represents the company and his knowledge is ordinarily held to be notice to his principal. But this rule does not apply to authorize extension of time for the performance of conditions precedent to establishing liability after the loss has occurred, and in direct contradiction of the terms of the written contract of insurance. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

The provision restricting the agent's power to waive conditions does not, as a general rule, refer to or include conditions existing at the inception of the contract, but those arising after the policy is issued. Conditions which form a part of the contract of insurance at its inception may be waived by the agent of the insurer, although they are embraced in the policy when it is delivered; and the local agent's knowledge of such conditions is deemed to be the knowledge of his principal. Bullard v. Pilot Fire Ins. Co., 189 N.C. 34, 126 S.E. 179 (1925). See Hayes v. United States Fire Ins. Co., 132 N.C. 702, 44 S.E. 404 (1903); Weddington v. Piedmont Fire Ins. Co., 141 N.C. 234, 54 S.E. 271 (1906); Johnson v. Rhode Island Ins. Co., 172 N.C. 142, 90 S.E. 124 (1916); Fireman's Fund Ins. Co. v. Rowland Lumber Co., 186 N.C. 269, 119 S.E. 362 (1923); Smith v. National Ben Franklin Fire Ins. Co., 193 N.C. 446, 137 S.E. 310 (1927).

Agent May Not Alter Terms of Policy after Loss. — Suggestions made by the local agent to the insured after loss are not within the scope of his authority, nor may he alter the terms of the policy after its issue and loss thereunder has been reported. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

An agent of a fire insurance company, whether general or local, cannot waive the requirements of a standard policy except in the form prescribed by the statute. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

Effect of Agent's Parol Contract Inconsistent with Standard Form. — In the absence of fraud, an insurance company cannot be held liable upon a parol contract alleged to have been made by its agent, which is contradictory of and totally inconsistent with the standard form prescribed by statute. Hardin v. Liverpool & London & Globe Ins. Co., 189 N.C. 423, 127 S.E. 353 (1925).

Liability of Agent and Insurer Due to Apparent Authority of Employee. — One dealing with an insurance agency under ordinary circumstances need not concern himself with the extent of the authority of an employee in the agent's office who undertakes to act for the agent; the apparent authority with which such employee is clothed by the agent renders him and his principal liable regardless of the actual limits of the authority of the employee. Northern Assurance Co. of Am. v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965), aff'd, 373 F.2d 35 (4th Cir. 1966).

Liability of Agent for Loss Occasioned Insured by Negligence. — Where the general agent of a fire insurance company for a limited territory, through the negligence of an employee, fails to write into the policy a statement required to make it valid, the agents are liable in damages to the insured for loss by fire, in an action based solely on the ground of negligence and not upon the invalid contract of insurance negligently issued by them. Case v. Ewbanks, Ewbanks & Co., 194 N.C. 775, 140 S.E. 709 (1927).

The inception of the risk is not delayed until the policy is countersigned. Pruitt v. Great Am. Ins. Co., 241 N.C. 725, 86 S.E.2d 401 (1955).

When a loss occurs the rights of the parties to a fire insurance policy become fixed. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

The standard fire policy does not provide for automatic termination of the insurance upon default in the payment of premium installments. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

When Policy May Be Rescinded or Terminated. — An insurance policy is a contract; a contract may be rescinded for fraud or mutual mistake, it may be terminated in accordance with the provisions thereof or by mutual consent, a meeting of the minds, but one of the parties may not terminate it without the assent of the other unless the contract so provides. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Either party to the contract may cancel the standard form policies without the consent of the other, by following the applicable provisions of the policy. Roberta Mfg. Co. v. Royal Exch. Assurance Co., 161 N.C. 88, 76 S.E. 865 (1912).

Provision in a policy that insurer must give notice to insured as a condition precedent to cancellation is for insured's benefit and may be waived by him. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

The provision for five days' notice before cancellation is for the protection of the insured, and the insurer cannot effect cancellation until the expiration of five days from the receipt of the written notice by plaintiff; whether plaintiff intends to waive this provision and does waive it by returning the policy as requested is for the determination of the jury. Wilson v. National Union Fire Ins. Co., 206 N.C. 635, 174 S.E. 745 (1934).

And Must Be Strictly Complied With. — To effect a cancellation by insurer, the five days' notice provision must be strictly complied with. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Unless Waived by Insured. — Unless the requirement is waived by insured, an insurer must comply with the terms of the policy or statute that it give notice of its intention to cancel. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

The burden is on insurer to show a waiver by the insured, and it must appear clearly that the insured expressly or impliedly waived notice of cancellation if he is to be held bound by such waiver. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Communication of Insured's Intent to Cancel. — To effect a cancellation by the insured a definite and unconditional request therefor must be communicated to the insurer by the insured or his authorized agent. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

A mere intention to cancel, not communicated to insurer, is not sufficient to effect a cancellation by the insured. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Procuring additional insurance without requesting original insurer to cancel does not terminate the policy. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Substitution of One Policy for Another Must Be by Mutual Consent. — In order for cancellation to take place by the substitution of one policy for another it must be done by mutual consent or agreement. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Mere procuring of substituted insurance with the intent to replace existing insurance and without the intent to thereby acquire additional insurance does not per se work a cancelling of the existing insurance. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Language insuring property located in a building occupied by the insured is expressly authorized by this section. It is a material part of the contract, and cannot be ignored. Parker v. Worcester Mut. Fire Ins. Co., 264 N.C. 339, 141 S.E.2d 466 (1965).

Where a policy insured the contents of a building occupied by the insured, it meant the building occupied by insured when the policy was issued, and not elsewhere. Parker v. Worcester Mut. Fire Ins. Co., 264 N.C. 339, 141 S.E.2d 466 (1965).

Effect of Standard or Union Mortgage Clause. — When the standard or union mortgage clause is attached to or inserted in a policy insuring property against loss, it operates as a distinct and independent contract between the insurance company and the mortgagee, effecting a separate insurance of the mortgage interest. Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556 (1960).

A standard loss-payable clause in a policy of fire insurance issued to the mortgagor constitutes a separate contract insuring the mortgage interest, and loss paid by insurer thereunder must be applied to the reduction of the mortgage debt. Employers' Fire Ins. Co. v. British Am. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

Limitation on Mortgagee's Interest. — The clause in the standard policy that provides the insured shall not collect "in any event for more than the interest of the insured" limits a mortgagee's interest to the debt due him. Employers' Fire Ins. Co. v. British Am. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

Deed to mortgagee upon foreclosure of mortgage does not defeat mortgagee's right under a standard or union mortgage clause. Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556 (1960).

When Insurer Subrogated to Rights of Mortgagee. — When a mortgagee purchases with his funds insurance solely for his protection, the insurer, upon payment of the mortgagee's loss as provided in the policy, is subrogated to the rights of the mortgagee against the mortgagor; but where the insurance is procured by the mortgagee pursuant to the authorization and at the expense of the mortgagor, no right of subrogation exists and the amount paid by the insurer must be applied to discharge or reduce mortgagor's obligation to mortgagee. Employers' Fire Ins. Co. v. British Am. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

Where the mortgagee has insured the mortgaged property for his own benefits, and where the mortgagor has assumed the risk of loss under his contract of purchase, the insurer, having paid the loss, is subrogated to the rights of the mortgagee. Stuyvesant Ins. Co. v. Reid, 171 N.C. 513, 88 S.E. 779 (1916).

Insurer Held Not Entitled to Subrogation to Mortgagee's Rights. — Where, pursuant to the terms of a deed of trust, the mortgagee insured the property and added the amount of the premiums to the mortgage debt, and the contract of insurance provided that in case of loss the insurer should be subrogated to the rights of the mortgagee, and that in case of conflict between the contract of insurance and the standard policy set out in this section the standard policy should prevail, and the mortgagor had no notice of the subrogation agreement, it was held that the insurer had no right to subrogation, either under the terms of the policy or on any equitable principle, and that the mortgagor was entitled to have the amount paid by the insurer applied on the mortgage debt. Buckner v. United States Fire Ins. Co., 209 N.C. 640, 184 S.E. 520 (1936).

Mortgagee Held Not Liable for Premiums. — Provision in the loss-payable clause of a fire insurance policy taken out by a mortgagor that the mortgagee would pay the premium on demand should the mortgagor not do so was held to be a condition upon which the mortgagee might receive the benefit of the protection afforded by the policy as a special contract made in his favor, and not as a covenant that he would pay the premium on demand of the insurer upon the mortgagor's default; and upon the mortgagee's refusal or neglect to pay the premiums in default upon the insurer's demand, the latter might after 10 days' written notice cancel the policy. Whitehead v. Wilson Knitting Mills, 194 N.C. 281, 139 S.E. 456, 56 A.L.R. 674 (1927).

Proration of Loss between Insurers. — Where property destroyed by fire was insured by two policies, one issued to the mortgagee under authority of the mortgagor, the mortgagor being liable for the premiums thereon, and one issued to the mortgagor both containing a standard loss-payable clause, it was proper to prorate the loss between the insurers. Employers' Fire Ins. Co. v. British Am. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

Insurer Subrogated to Rights of Insured Against Tort-Feasor. — Upon paying the loss by fire, the insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by provision of this section and under equitable principles. Fidelity Ins. Co. v. Atlantic Coast Line R.R., 165 N.C. 136, 80 S.E. 1069 (1914); Powell & Powell, Inc. v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916); Lumberman's Mut. Ins. Co. v. Southern Ry., 179 N.C. 255, 102 S.E. 417 (1920); Buckner v. United States Fire Ins. Co., 209 N.C. 640, 184 S.E. 520 (1936); Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953); General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963); Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

Evidence Sufficient to Support Finding of Insurable Interest. — Evidence that the

owner of property advised insurer's agent that he was giving the property in question to his son, that he requested the agent to change the insurance so as to name his son as insured, that the owner thereafter died and that the son remained in exclusive possession of the property and continued the insurance in force, was sufficient to support the conclusion that the son had an insurable interest in the property so as to be entitled to recover on the policy. King v. National Union Fire Ins. Co., 258 N.C. 432, 128 S.E.2d 849 (1963).

Applied in Pettit v. Wood-Owen Trailer Co., 214 N.C. 335, 199 S.E. 279 (1938); Gower v. Aetna Ins. Co., 281 N.C. 577, 189 S.E.2d 165 (1972); Knapp v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 17 N.C. App. 455, 194 S.E.2d 572 (1973); Andrews v. North Carolina Farm Bureau Mut. Ins. Co., 26 N.C. App. 163, 215 S.E.2d 373 (1975); Collins v. Quincy Mut. Fire Ins. Co., 297 N.C. 680, 256 S.E.2d 718 (1979).

Quoted in In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968).

Cited in Cuthrell v. Milwaukee Mechanics Ins. Co., 234 N.C. 137, 66 S.E.2d 649 (1951); Crowell v. Eastern Air Lines, 240 N.C. 20, 81 S.E.2d 178 (1954); Firemen's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 146 S.E.2d 53 (1966); Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978); Collins v. Quincy Mut. Fire Ins. Co., 39 N.C. App. 38, 249 S.E.2d 461 (1978); F & D Co. v. Aetna Ins. Co., — N.C. —, 287 S.E.2d 867 (1982).

II. CONDITIONS.

A. In General.

Validity of "Additional Insurance" Clauses. — This section does not prohibit the inclusion of other insurance clauses in policies written in this State. The statute clearly permits such a clause to be included in a policy by endorsement. It merely declines to make the clause a standard policy provision as it was formerly. Allstate Ins. Co. v. Old Republic Ins. Co., 49 N.C. App. 32, 270 S.E.2d 510 (1980).

The condition against additional insurance on the property, formerly appearing in the standard policy, was valid and enforceable. Black v. Atlantic Home Ins. Co., 148 N.C. 169, 61 S.E. 672 (1908).

When the standard fire insurance policy under this section provided that the policy should be void if the insured procured other contemporaneous insurance on the same property during the term covered, unless the insurer agreed thereto and a writing to that effect was attached to the policy contract, the provision was valid and binding. Johnson v. Aetna Ins. Co., 201 N.C. 362, 160 S.E. 454 (1931).

Where defendant included a provision against additional insurance in all its policies, its binders were also governed thereby. Allstate Ins. Co. v. Old Republic Ins. Co., 49 N.C. App. 32, 270 S.E.2d 510 (1980).

Avoidance of Policy for Breach of "Additional Insurance" Prohibition. — This section does not change prior law that if a valid other insurance clause is breached, the insurer may void the entire policy. Allstate Ins. Co. v. Old Republic Ins. Co., 49 N.C. App. 32, 270 S.E.2d 510 (1980).

Where insured obtains other insurance contrary to the provisions of his policy, the insurer may avoid liability for breach of the provision prohibiting other insurance, since breach of the provision against additional insurance, both before and after the 1945 amendment to this section, does not merely limit the amount of insurer's liability, but is a breach of condition defeating recovery. Hiatt v. American Ins. Co., 250 N.C. 553, 109 S.E.2d 185 (1959).

When the insured had violated the provision of the former standard policy by placing more concurrent insurance on the property than the policy permitted, the policy was invalid. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

Waiver of "Additional Insurance" Provision by Agent. — Where the insured, before taking out additional insurance, mentioned his intention to the insurer's subagent who had issued its policy to the insured, and was told that it was all right, this constituted a waiver of the condition. Grubbs v. North Carolina Home Ins. Co., 108 N.C. 472, 13 S.E. 236 (1891).

Right of Insurer to Have Other Coverage Determined and Maintained. — Provision of an insurance contract providing that the insurer "shall not be liable for a greater portion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved," gives it the right to have determined whether there was at the time of the loss other coverage, what its liability is, and to insist that other coverage not be extinguished after the loss by acts of the insured which will cast the entire loss on it. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

"Additional Insurance" Provision Held Inapplicable.—Where a policy of fire insurance was issued to devisee of the fee in property subject to a charge in favor of other beneficiaries under the will, and thereafter the guardian of such other beneficiaries took out a policy, following the former standard form, to protect the interest of his wards, the insurer issuing the policy to the guardian could not avoid liability thereon on the ground of the additional insurance issued to the owner of the

fee, since such additional insurance was not issued to or for the benefit of those insured under its policy. Bryan v. Old Colony Ins. Co., 213 N.C. 391, 196 S.E. 345 (1938).

Condition or Use of Property Provision May Be Waived. — An insurance company may waive, or be estopped to rely on, a provision or condition in a policy of insurance relating to use or condition of property. Northern Assurance Co. of Am. v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965), aff'd, 373 F.2d 35 (4th Cir. 1966).

Permit When House Unoccupied. — Provision in the standard fire insurance policy requiring a permit in writing from the insurer when insured house is unoccupied for more than 10 (now 60) days must be complied with to make the insurer liable for damages by fire occurring after such vacancy, and after the policy has been issued and is in binding effect the local agent of the insurer is without authority to bind his principal by acts and parol representations made contrary to the terms of this provision. Greene v. Aetna Ins. Co., 196 N.C. 335, 145 S.E. 616 (1928).

As to validity of the "iron-safe clause" in policies of insurance, see Coggins v. Aetna Ins. Co., 144 N.C. 7, 56 S.E. 506 (1907). See also, § 58-177(3).

A substantial compliance with an "iron-safe" provision will suffice. Arnold v. Indemnity Fire Ins. Co., 152 N.C. 232, 67 S.E. 574 (1910).

Waiver of "Iron-Safe" Provision. — If the company, knowing the insured has not complied with the "iron-safe" clause, collects the premiums and recognizes the validity and binding force and effect of the policy it has issued, it should not be heard to insist upon the introduction of records, the keeping of which it has thus tacitly waived. Bullard v. Pilot Fire Ins. Co., 189 N.C. 34, 126 S.E. 179 (1925).

Inventory. — An inventory of a stock of general merchandise containing the number of articles and cost of each class at a certain date, made about one month before the fire, and testified to as being practically the same as on the date of the fire, was a substantial compliance with the inventory provision in the standard form of a fire insurance policy, and was competent as evidence upon the trial. Mortt v. Liverpool & London & Globe Ins. Co., 192 N.C. 8, 133 S.E. 337 (1926). See also Coggins v. Aetna Ins. Co., 144 N.C. 7, 56 S.E. 506 (1907).

Violation Which Ceased Three Months Prior to Loss. — Where an insured mill was operated at night, in violation of the former standard policy, but under a permit from the insurance agent, such operation was no defense to an action on the policy for a loss happening three months after the violation had ceased. Strause v. Palatine Ins. Co., 128 N.C. 64, 38 S.E. 256 (1901).

Willful Concealment or Misrepresentation. — The provisions of this section pertaining to willful concealment or misrepresentation are inserted in the insurance contract by this section as a part of the public policy of the State, and the rights and liabilities of the parties under the policy must be ascertained and determined in accordance with its terms. Hanks v. Nationwide Mut. Fire Ins. Co., 47 N.C. App. 393, 267 S.E.2d 409 (1980).

Effect of "Forfeiture Clause" Where Both Personal and Real Property Involved. — Where a fire insurance policy contained a forfeiture clause for willful misrepresentation of a material fact and contained one basic premium in payment for the coverage of both plaintiffs' house and their personal property therein, and the risk to the real and personal property was identical, both being subject to the same fire, the policy was not divisible; therefore, where plaintiffs willfully misrepresented material facts in swearing to their proof of loss with respect to their personal property, the policy was void with respect to their real property as well. Dale v. Iowa Mut. Ins. Co., 40 N.C. App. 715, 254 S.E.2d 41, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979).

B. Former Conditions as to Title or Interest of Insured.

Editor's Note. — The cases under this analysis line were decided before the 1945 amendments to this section and § 58-177. Most of them construe provisions in the former standard policy to the effect that the policy should be void if the interest of the insured was other than unconditional and sole ownership, if, with the knowledge of the insured, foreclosure proceedings were commenced or notice given of sale of the property under any mortgage or deed of trust, or if any change, other than by the death of an insured, took place in the interest, title or possession of the property.

Requirement of "unconditional and sole ownership" in a policy of fire insurance in the former standard form as required by this section was statutory as well as contractual. Roberts v. American Alliance Ins. Co., 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310 (1937).

Title under Executory Contract. — A vendee of land occupying it under an executory contract, on which he had paid a portion of the price and on which he had erected a building, was an "unconditional and sole owner" in fee simple within the conditions of a fire policy providing that it should be void if the interest of the insured was other than sole ownership of the fee simple title. Jordan v. Hanover Fire Ins. Co., 151 N.C. 341, 66 S.E. 206 (1909).

Existence of Lien Did Not Violate Provision. — The stipulation in a fire policy for sole and unconditional ownership was not violated by the existence of a lien on the

property. Lancaster v. Southern Ins. Co., 153 N.C. 285, 69 S.E. 214 (1910).

Misrepresentations as to Title. — Misrepresentations as to title of part of the premises insured avoided the entire contract of insurance. Cuthbertson v. North Carolina Home Ins. Co., 96 N.C. 480, 2 S.E. 258 (1887).

Policy Invalidated by Mortgage. — Where the insured failed to state that the property was mortgaged, when in fact it was mortgaged, and the policy provided that the contract of insurance would be void if the insured property was mortgaged, the policy was invalid though the omission was made without the intent to deceive. Hayes v. United States Fire Ins. Co., 132 N.C. 702, 44 S.E. 404 (1903).

Execution of a mortgage on the insured property so affected title as to void an insurance policy then existing thereon and forfeit its benefit, if the mortgage was made without the knowledge or consent of the insurance company and not attested as prescribed by the policy contract, unless the company thereafter, by its acts, conduct and statements had waived the effect of the mortgage and was estopped to assert the forfeiture. Modlin v. Atlantic Fire Ins. Co., 151 N.C. 35, 65 S.E. 605 (1909).

Assignment for Creditors. — Making an assignment for creditors avoided a policy containing an unconditional ownership clause. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

Right of Insurer to Know of Encumbrances. — The validity of a provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. The facts in regard to title, ownership, encumbrances, and possession of the insured property are all important to be known by the insurer, as the character of the hazard is often affected by these circumstances. Weddington v. Piedmont Fire Ins. Co., 141 N.C. 234, 54 S.E. 271 (1906); Watson v. North Carolina Home Ins. Co., 159 N.C. 638, 75 S.E. 1105 (1912).

Removal of Encumbrance before Loss. — Where the owner of an unencumbered automobile insured it under a statutory form of policy stipulating, among other things, that the policy would be void if the interest of the assured was other than unconditional or sole ownership, or if the property was or became encumbered by a chattel mortgage, and thereafter gave a mortgage thereon which was canceled four days before the destruction of the machine by fire, this loss coming within the terms of the policy, the cancellation of the mortgage revived the original status of the policy, the temporary violation of the stipulation being immaterial, and put the policy again in force, the effect of the mortgage being to invalidate the policy during the continuance of the lien, or to suspend the obligation of the insurance company during the violation of the stipulation. Cottingham v. Maryland Motor Car Ins. Co., 168 N.C. 259, 84 S.E. 274 (1915).

Commencement of foreclosure against insured property terminated the policy where there was a provision in the policy to that effect. Hayes v. United States Fire Ins. Co., 132 N.C. 702, 44 S.E. 404 (1903).

Waiver of Sole Ownership Provision. Where agent issued a policy with full knowledge of the state of the title, the condition of sole ownership was waived. Gerringer v. North Carolina Home Ins. Co., 133 N.C. 407, 45 S.E. 773 (1903).

Where a policy of fire insurance was issued under the former statutory standard form, the condition therein of sole and unconditional ownership of the insured could not be held to have been waived by the insurer or its agent in the absence of knowledge that the insured's ownership was otherwise than as stated in the policy contract. Hardin v. Liverpool & London & Globe Ins. Co., 189 N.C. 423, 127 S.E. 353 (1925).

The condition that the policy should be void if the insured had not the sole and unconditional title was valid and enforceable by the company without the necessity of disclaiming liability upon notice or knowledge of its infraction, and the company's inaction in this respect was not a waiver of the condition. Smith v. National Ben Franklin Fire Ins. Co., 193 N.C. 446, 137 S.E. 310 (1927).

The provision in a policy of fire insurance written in accordance with the former standard statutory form, that the policy should be void if the insured was not the unconditional owner of the property in fee simple, was not waived by a written agreement providing that the agreement was solely for the purpose of determining the loss and to save time to the parties and that it should not operate as a waiver of any conditions or provisions of the policy. Sasser v. Pilot Fire Ins. Co., 203 N.C. 232, 165 S.E. 684 (1932).

III. PROOF OF LOSS AND LIMITATION OF SUIT.

Filing of Proof of Loss Within Prescribed Period Required. — Under the terms of the standard fire insurance policy in effect in this State, no action may be maintained on a policy unless proof of loss shall be filed within the prescribed period. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957). See now § 58-180.2.

Insurer's denial of liability upon fire insurance policy is a waiver of its right to require proof of loss therein specified. Profitt Mercantile Co. v. State Mut. Fire Ins. Co., 176 N.C. 545, 97 S.E. 476 (1918).

Waiver by Inducing Delay in Filing. — An insurance company which causes or induces the insured to delay in furnishing sufficient notice and proofs of loss thereby waives such delay. Northern Assurance Co. of Am. v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965), aff'd, 373 F. 2d 35 (4th Cir. 1966).

Violation of Provision Held Not a Forfeiture. — A clause in a policy requiring proof of loss and forbidding the bringing of any suit upon the policy until 60 days thereafter is a continuing one, and does not mean that failure to file proof within 60 days of the fire works a forfeiture of the policy. Higson v. North River Ins. Co., 152 N.C. 206, 67 S.E. 509 (1910).

Limitations on Bringing Suit. — The provisions of the limitation of suit, "and unless commenced within twelve months next after the inception of the loss," are used conjunctively, so that there must be compliance with all the requirements of the policy, and the suit or action must be commenced within 12 months next after inception of the loss. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Construction with § 58-31. — The provisions of a standard fire insurance policy, as set out in this section, must be construed with the provisions of § 58-31, and when the action is brought within the time therein prescribed it will not be barred. Modlin v. Atlantic Fire Ins. Co., 151 N.C. 35, 65 S.E. 605 (1909).

Under the standard policy and § 58-31, the insured has 60 days to file his proof of loss, and then he has 12 months within which to commence his suit. Muse v. London Assurance Corp., 108 N.C. 240, 13 S.E. 94 (1891); Dibbrell v. Georgia Home Ins. Co., 110 N.C. 193, 14 S.E. 783 (1892); Lowe v. United States Mut. Accident Ass'n, 115 N.C. 18, 20 S.E. 169 (1894); Gerringer v. North Carolina Home Ins. Co., 133 N.C. 407, 45 S.E. 773 (1903).

The word "inception" means "act or process of beginning; commencement; initiation." Hence, "inception" necessarily means that the beginning, the commencement, the initiation of the loss was that caused by the fire. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Noncompliance With Time Limitation Bars Action. — If, in an action upon a fire insurance policy, the judge sustained a demurrer to the complaint and a new complaint was filed more than 12 months "after the inception of the loss," nothing else appearing, the action would be barred for failure to comply with this section. Gaskins v. Hartford Fire Ins. Co., 260 N.C. 122, 131 S.E.2d 872 (1963).

In an action upon a policy of fire insurance in the standard form, judgment of nonsuit was proper when the record disclosed that more than 12 months elapsed between the inception of the loss and the commencement of the suit. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Where, after the occurrence of loss, insurer's local agent advised insured to defer filing formal claim until such time as materials could be obtained for repairs, and insured failed to file proof of loss within the time specified in the policy and did not institute action on the policy until after the expiration of the time limited therein, insurer's demurrer should have been sustained. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

Exception Where Longer Time Agreed Upon. — Statutory requirement that an action on a fire insurance policy must be instituted within 12 months after the loss unless a longer time to institute suit is agreed upon between the parties and such agreement appears on the face of the policy is binding upon the parties in the absence of waiver or estoppel; and where insured, instituting action more than 12 months after the loss, relies upon such statutory exception, he must plead facts bringing himself thereunder. Meekins v. Aetna Ins. Co., 231 N.C. 452, 57 S.E.2d 777, 15 A.L.R.2d 949 (1950); Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Time Stipulation Is Not Construed as Statute of Limitations. — As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement. Dibbrell v. Georgia Home Ins. Co., 110 N.C. 193, 14 S.E. 783 (1892). See Meekins v. Aetna Ins. Co., 231 N.C. 452, 57 S.E.2d 777, 15 A.L.R.2d 949 (1950).

The standard policy is not regulated by the statute of limitations, and the disabilities which stop the running of the statute have no effect upon it. Hence, the imprisonment of the insured will not give him a right to recover when he has delayed his action for more than a year. This rule applies likewise to minors. Holly v. London Assurance Co., 170 N.C. 4, 86 S.E. 694 (1915).

And Is Subject to Waiver or Estoppel. — A provision in a standard fire insurance policy that action on it must be commenced within 12 months after inception of the loss is contractual. It is, therefore, subject to waiver or estoppel. Gaskins v. Hartford Fire Ins. Co., 260 N.C. 122, 131 S.E.2d 872 (1963).

Waiver of Time Provision. — Where insurer enters into negotiations with insured and promises that the claim will be paid or satisfactorily adjusted upon completion of investigation, and thereafter insurer demands additional proof of loss without denying the claim after it is too late for suit to be brought within the 12 months' period, insurer waives

the policy provision requiring action to be instituted within 12 months next after loss. Meekins v. Aetna Ins. Co., 231 N.C. 452, 57 S.E.2d 777, 15 A.L.R.2d 949 (1950).

Where insured filed a complaint stating an enforceable cause of action within 12 months of the loss by fire, and after the expiration of the 12-month period the parties consented that defendant's demurrer should be sustained, and thereafter an amended complaint was filed in accordance with the consent order, defendant insurer was not permitted to assert the provision of the policy that action be instituted within 12 months after loss, since the provision was contractual and subject to waiver or estoppel. Gaskins v. Hartford Fire Ins. Co., 260 N.C. 122, 131 S.E.2d 872 (1963).

The valid provision of a standard fire insurance policy, approved by statute, limiting to 12 months from the time of loss by fire the time within which an action might be maintained, was not waived by the time taken under an agreement for an appraisal and award for the damage sustained by the insured. John Tatham & Co. v. Liverpool, London & Globe Ins. Co., 181 N.C. 434, 107 S.E. 450 (1921).

IV. APPRAISAL AND RECOVERY.

Option to Repair, Rebuild, or Replace Property as Contract Between Insurer and Insured. — A provision in a policy of fire insurance by which, in case of loss, it is made optional with the insurer to repair, rebuild, or replace the property destroyed, by giving notice within a certain time, constitutes a contract exclusively between insurer and insured; and neither a judgment creditor nor a mortgagee can interpose to prevent its performance. Moreover, if the insurer has not given notice of an intention to repair, etc., within the time specified, no one but the insured can take advantage of it and require the payment of the insurance money instead. Stamps v. Commercial Fire Ins. Co., 77 N.C. 209, 24 Am. R. 443 (1877).

Cost of Replacement at Time of Fire Determinative. — The amount which the company is obligated to pay is measured not by the cost of such replacement at the inception of the policy but by the cost of such replacement at the time of the fire. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Appointment of Umpire Is Not Judgment of Court. — The appointment of an umpire pursuant to the "appraisal" clause is not the judgment of a court, but a mere ministerial act pursuant to contract, albeit authorized by statute. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

No Notice or Hearing Required for Appointment of Umpire. — The appointment of an umpire is made at the request of either the insurer or insured; no notice to the other is required and no hearing is contemplated. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

Appointment Need Not Be Made at Any Particular Time or Place. — There is no requirement that the appointment of an umpire be made in term or at any particular time or place. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

The appointment of an umpire may be challenged only by an action instituted for that purpose. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

The legal effect of the appointment of an umpire and any acts done pursuant thereto may be challenged in any action in which they arise. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

Damage by Water. — In an early case decided prior to enactment of this section, it was held that an insurance company was liable on a fire insurance policy for damages done to goods by water used in saving them from destruction by fire. Whitehurst v. Fayetteville Mut. Ins. Co., 51 N.C. 352 (1859).

Loss by theft is excluded from the standard policy set out in this section. However, it was formerly held that such loss consequent on the removal of goods in case of fire was fairly within a contract to insure against fire. Whitehurst v. Fayetteville Mut. Ins. Co., 51 N.C. 352 (1859).

For cases decided prior to the enactment of this statute, holding that the amount the insured was entitled to recover was the "fair" cash value of the property at the time and place of the loss, see Fowler v. Old N. State Ins. Co., 74 N.C. 89 (1876); Grubbs v. North Carolina Home Ins. Co., 108 N.C. 472, 13 S.E. 236, 23 Am. St. R. 62 (1891); Boyd v. Royal Ins. Co., 111 N.C. 372, 16 S.E. 389 (1892).

§ 58-177. Standard policy; permissible variations.

No fire insurance company shall issue fire insurance policies, except policies of automobile fire, theft, comprehensive and collision, marine and inland marine insurance, on property in this State other than those of the substance of the standard form as set forth in G.S. 58-176 except as follows:

(1) A company may print on or in its policies the date of incorporation, the amount of its paid-up capital stock, the names of its officers, and to the

words at the top of the back of said policy, "Standard Fire Insurance Policy for" may be added after or before the words "North Carolina" the names of any states or political jurisdiction in which the said policy form may be standard when the policy is used.

(2) A company may print in its policies or use in its policies written or printed forms of description and specification of the property insured.

(3) A company may write or print upon the margin or across the face of a policy, in unused spaces or upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by an officer or agent of the company so using them. Provided, however, such provisions shall not have the effect of making the provisions of the standard policy form more restrictive except for such restictions as are provided for in the charter or bylaws of a domestic mutual fire insurance company doing business in no more than three adjacent counties of the State and chiefly engaged in writing policies of insurance on rural properties upon an assessment or nonpremium basis, provided all such restrictions contained in the charter and bylaws of such domestic mutual fire insurance company shall be actually included within the printed terms of the policy contract so affected as a condition precedent to their being effective and binding on any policyholder. The iron safe or any similar clause requiring the taking of inventories, the keeping of books and producing the same in the adjustment of any loss, shall not be used or operative in the settlement of losses on buildings, furniture and fixtures, or any property not subject to any change in bulk and value.

(4) Binders or other contracts for temporary insurance may be made, orally or in writing, for a period which shall not exceed 60 days, and shall be deemed to include all the terms of such standard fire insurance policy and all such applicable endorsements, approved by the Commissioner, as may be designated in such contract of temporary insurance; except that the cancellation clause of such standard fire insurance policy, and the clause thereof specifying the hour of the day at which the insurance shall commence, may be superseded by the express terms of such contract of temporary insurance.

(5) Two or more companies authorized to do in this State the business of fire insurance, may, with the approval of the Commissioner, issue a combination standard form of fire insurance policy which shall contain the following provisions:

a. A provision substantially to the effect that the insurers executing such policy shall be severally liable for the full amount of any loss or damage, according to the terms of the policy, or for specified percentages or amounts thereof, aggregating the full amount of such insurance under such policy.

b. A provision substantially to the effect that service of process, or of any notice or proof of loss required by such policy, upon any of the companies executing such policy, shall be deemed to be service upon all such insurers.

(6) Appropriate forms of supplemental contract or contracts or extended coverage endorsements and other endorsements whereby the interest in the property described in such policy shall be insured against one or more of the perils which the company is empowered to assume, in addition to the perils covered by said standard fire insurance policy may be approved by the Commissioner, and their use in connection with a standard fire insurance policy may be authorized by him. In his discretion the Commissioner may authorize the printing of such supplemental contract or contracts or extended coverage

endorsements and other endorsements in the substance of the form of the standard fire insurance policy. The first page of the policy may in form approved by the Commissioner be arranged to provide space for listing of amounts of insurance, rates and premiums, description of construction, occupancy and location of property covered for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached or printed therein, and such other data as may be conveniently included for duplication on daily reports for office records.

(7) A company may print on or in its policy, with the approval of the Commissioner, any provisions which it is required by law to insert in its policies not in conflict with the substance of provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: "Provisions Required by Law to Be Inserted in This Policy." (1899, c. 54, s. 43; 1901, c. 391, s. 4; Rev., s. 4759; 1907, c. 800, s. 1; 1915, c. 109, s. 10; C.S., s. 6436; 1925, c. 70, s. 5; 1945, c. 378; 1949, c. 418; 1951, c. 767; c. 781, s. 5; 1955, c. 807, s. 3; 1979, c. 755, ss. 5-7.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Legal Periodicals. — For brief comment on the second 1951 amendment, see 29 N.C.L. Rev. 398.

CASE NOTES

The word "restrictive" in subdivision (3) of this section, construed in light of the statutory object and not in a narrow or technical sense, was intended to cover any clause or provision included in or appended to the standard fire policy whereby an essential provision of the standard fire policy, materially influencing the rights of the insured, is limited or modified. Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978).

Limiting Provisions. — An insurer may insure only such properties as are situated outside the limits set out in a limiting provision, which provision is descriptive, not restrictive, of the standard coverage. What an insurer may not do is promise general coverage, receive appropriate premium payment and then restrict coverage by a restrictively limiting provision. Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978).

"Binder". — In insurance parlance, a "binder" is insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until insured gives notice of its election to terminate. Mayo v. American Fire & Cas. Co., 15 N.C. App. 309, 190 S.E.2d 398, vacated on other grounds, 282 N.C. 346, 192 S.E.2d 828 (1972).

No specific form is necessary to constitute a binder as a valid contract of insurance. Mayo v. American Fire & Cas. Co., 282 N.C. 346, 192 S.E.2d 828 (1972).

Binder Not Required to Set Forth All Terms of Contract. — It is not required that the writing, or oral communication, intended as a binder set forth all the terms of the contemplated contract of insurance. Mayo v. American Fire & Cas. Co., 282 N.C. 346, 192 S.E.2d 828 (1972).

The statutory fire insurance provisions are read into all binders, whether oral or written. Allstate Ins. Co. v. Old Republic Ins. Co., 49 N.C. App. 32, 270 S.E.2d 510 (1980).

An extension of credit to the insured for the premium does not destroy the validity of the binder. Mayo v. American Fire & Cas. Co., 282 N.C. 346, 192 S.E.2d 828 (1972).

Getting a rating from the Rating Bureau is not a prerequisite to entering into a contract of insurance. Mayo v. American Fire & Cas. Co., 282 N.C. 346, 192 S.E.2d 828 (1972).

Applied in Faircloth v. Ohio Farmers Ins. Co., 253 N.C. 522, 117 S.E.2d 404 (1960).

Cited in Hodges v. Home Ins. Co., 233 N.C. 289, 63 S.E.2d 819 (1951); Cuthrell v. Milwaukee Mechanics Ins. Co., 234 N.C. 137, 66 S.E.2d 649 (1951); Pruitt v. Great Am. Ins. Co., 241 N.C. 725, 86 S.E.2d 401 (1955); Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

§ 58-177.1. Optional provisions as to loss or damage from nuclear reaction, nuclear radiation or radioactive contamination.

Insurers issuing the standard fire insurance policy pursuant to G.S. 58-176, or any permissible variation thereof, and policies issued pursuant to G.S. 58-177 and 58-126.1, are hereby authorized to affix thereto or include therein a written statement that the policy does not cover loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination, all whether directly or indirectly resulting from an insured peril under said policy; provided, however, that nothing herein contained shall be construed to prohibit the attachment to any such policy of an endorsement or endorsements specifically assuming coverage for loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination. (1963, c. 1148.)

Editor's Note. — Section 58-126.1, referred to in this section, was repealed by Session Laws 1977, c. 828.

§ 58-178. Notice by insured or agent as to increase of hazard, unoccupancy and other insurance.

If notice in writing signed by the insured, or his agent, is given before loss or damage by any peril insured against under the standard fire insurance policy to the agent of the company of any fact or condition stated in paragraphs (a), (b) or with respect to "other insurance" of the standard form of policy set out in G.S. 58-176 it is equivalent to an agreement in writing added thereto, and has the force of the agreement in writing referred to in the foregoing form of policy with respect to the liability of the company and the waiver; but this notice does not affect the right of the company to cancel the policy as therein stipulated. (1899, c. 54, s. 43; Rev., s. 4761; 1907, c. 578, s. 1; 1915, c. 109, s. 11; C.S., s. 6438; 1929, c. 60, s. 1; 1945, c. 378.)

CASE NOTES

Cited in State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

§ 58-178.1. Judge to select umpire.

The resident judge of the superior court of the district in which the property insured is located is designated as the judge of the court of record to select the umpire referred to in the standard form of policy. (1945, c. 378.)

§ 58-179: Repealed by Session Laws 1945, c. 378.

§ 58-180. Effect of failure to give notice of encumbrance.

No policy of insurance issued upon any property shall be held void because of the failure to give notice to the company of a mortgage or deed of trust existing thereon or thereafter placed thereon, except during the life of the mortgage or deed of trust. (1915, c. 109, s. 4; C.S., s. 6440.)

CASE NOTES

Cited in State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

§ 58-180.1. Policy issued to husband or wife on joint property.

Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof. (1945, c. 378.)

Legal Periodicals. — For article on tenancy by the entirety in North Carolina, see 41 N.C.L. Rev. 67 (1962).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For note on innocent spouse's right to recover after husband's arson, see 17 Wake Forest L. Rev. 1022 (1981).

CASE NOTES

Right of Wife to Proceeds of Policy Issued to Husband Alone. — A policy of fire insurance issued to a husband on a house held by the entirety but occupied by him alone while separated from his wife inured to the benefit of the entire estate as owned by both husband and wife, and where the entire estate, as so insured, was severed by absolute divorce after fire, the wife was entitled to receive half the proceeds of the insurance moneys paid into court. Carter v. Continental Ins. Co., 242 N.C. 578, 89 S.E.2d 122 (1955), commented on in 35 N.C.L. Rev. 134 (1956).

Where husband and wife sell lands held by entireties and take a note secured by a deed of trust in part payment of the purchase price, the wife's interest in the note is personalty and she owns no interest in the dwelling on the land so as to bring her within the purview of this section; therefore, she is not covered by the mortgage clause in a policy of fire insurance on the premises in which she is not named. Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556 (1960).

Recovery by Wife Where Husband Burns Property. — An innocent wife can recover under an insurance policy issued to her husband which insures property owned by them as tenants by the entirety, when the loss by fire resulted from intentional burning of the property by the husband. Lovell v. Rowan Mut. Fire Ins. Co., 302 N.C. 150, 274 S.E.2d 170 (1981).

§ 58-180.2. Bar to defense of failure to render timely proof of loss.

In any action brought to enforce an insurance policy subject to the provisions of this Article, any party claiming benefit under the policy may reply to the pleading of any other party against whom liability is sought which asserts as a defense, the failure to render timely proof of loss as required by the terms of the policy that such failure was for good cause and that the failure to render timely proof of loss has not substantially harmed the party against whom liability is sought in his ability to defend. The issues raised by such reply shall be determined by the jury if jury trial has been demanded. (1973, c. 1391.)

CASE NOTES

Facts held sufficient to require the court to charge the jury under the provisions of this section. Brandon v. Nationwide Mut. Fire Ins. Co., 46 N.C. App. 472, 265 S.E.2d 497, modified and aff'd, 301 N.C. 366, 271 S.E.2d 380 (1980).

Applied in Brandon v. Nationwide Mut. Fire Ins. Co., 301 N.C. 366, 271 S.E.2d 380 (1980).

§ 58-180.3. Farmowners' and other property policies; ice, snow, or sleet damage.

Under any policy of farmowners' or other property insurance that insures against all direct loss by fire, lightning, or other perils that may be delivered or issued for delivery in this State with respect to any farm dwellings, appurtenant private structures, barns, or other farm buildings or farm structures located in this State, coverage shall be available for inclusion therein or supplemental thereto to include direct loss caused by weight of ice, snow, or sleet that results in physical damage to such buildings or structures, and shall be offered to all insureds requesting these policies. (1981, c. 550, s. 1.)

Editor's Notes. — Session Laws 1981, c. 550, s. 3, makes the act effective October 1, 1981.

Session Laws 1981, c. 550, s. 2, provides: "This act shall apply to all new and renewal policies of insurance specified in section 1 of this act that are delivered or issued for delivery on or after the effective date of this act."

§ 58-181: Repealed by Session Laws 1945, c. 378.

Article 20.

Deposits and Bonds by Insurance Companies.

§ 58-182. Amount of deposits required of foreign or alien fire and/or marine insurance companies.

Unless otherwise provided in this Article, every fire, marine, or fire and marine insurance company chartered by any other state or foreign government shall make and maintain deposits of securities with the Commissioner in the following amounts:

(1) Companies whose premium income derived from this State is less than fifty thousand dollars ($50,000) per annum, ten thousand dollars ($10,000);

(2) Companies whose premium income is more than fifty thousand dollars ($50,000) but less than one hundred thousand dollars ($100,000) per annum, twenty thousand dollars ($20,000);

(3) Companies whose premium income is more than one hundred thousand dollars ($100,000) per annum, twenty-five thousand dollars ($25,000),

for which deposit the Commissioner shall give a receipt. (1909, c. 923, s. 1; 1911, c. 164, s. 1; Ex. Sess. 1913, c. 62, ss. 1, 2, 3; 1915, c. 166, s. 6; C.S., s. 6442; 1933, c. 60; 1945, c. 384.)

Legal Periodicals. — For discussion of the 1933 amendment, see 11 N.C.L. Rev. 234.

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981); Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, — U.S. —, 102 S. Ct. 1357, — L. Ed. 2d — (1982).

§ 58-182.1. Amount of deposits required of foreign or alien fidelity, surety and casualty insurance companies.

Unless otherwise provided in this Article every fidelity, surety or casualty insurance company chartered by any other state or foreign government shall make and maintain deposits of securities with the Commissioner in the following amounts:

(1) Companies whose premium income derived from this State is less than one hundred thousand dollars ($100,000), twenty-five thousand dollars ($25,000);

(2) Companies whose premium income is in excess of one hundred thousand dollars ($100,000), fifty thousand dollars ($50,000),

for which deposit the Commissioner shall give a receipt. (1945, c. 384.)

CASE NOTES

Title and Rights to Deposited Securities. — It is the manifest intention of the North Carolina legislature that the title and rights to securities deposited in accord with this section and §§ 58-182.3, 58-182.5, 58-182.6 and 58-188.5 be vested in the Commissioner, the Treasurer, and the State. Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Federal Receiver of Foreign Insurance Company Not Entitled to Recover Deposit. — A federal receiver of a foreign insurance company, who pursuant to an order of the federal court appointing him filed a petition and motion to recover the deposit of the company from State officials, was not entitled to recover the deposit, since such a deposit was not the property of the foreign insurance company, but was held in trust by the State Treasurer for payment of qualified claimants against the foreign insurance company. Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Quoted in Resolute Ins. Co. v. North Carolina, 276 F. Supp. 660 (E.D.N.C. 1967).

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-182.2. Minimum deposit required upon admission.

Upon admission to do business in the State of North Carolina every foreign or alien fire, marine, or fire and marine, fidelity, surety or casualty company shall deposit with the Commissioner securities in the minimum amounts required under the provisions of G.S. 58-182 and 58-182.1. (1945, c. 384.)

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-182.3. Type of deposits.

The deposits required to be made under the provisions of G.S. 58-182 and 58-182.1 shall be composed of bonds of the United States, or of the State of North Carolina, or of the cities or counties of this State. (1945, c. 384.)

CASE NOTES

Stated in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-182.4. Replacements upon depreciation of securities.

Whenever any of the securities deposited by companies under the provisions of G.S. 58-182 and 58-182.1 shall be depreciated or reduced in value, such company shall forthwith increase the deposit in order to maintain the required deposit in accordance with the amounts required by the said sections. (1945, c. 384.)

§ 58-182.5. Power of attorney.

With the securities deposited in accordance with G.S. 58-182 and 58-182.1 the company shall at the same time deliver to the Commissioner of Insurance a power of attorney executed by its president and secretary or other proper officers authorizing the sale or transfer of said securities or any part thereof for the purpose of paying any of the liabilities provided for in this Article. (1945, c. 384.)

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

Stated in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-182.6. Securities held by Treasurer; faith of State pledged therefor; nontaxable.

The securities required to be deposited by each insurance company in this Article shall be delivered for safekeeping by the Commissioner to the Treasurer of the State who shall receipt him therefor. For the securities so deposited the faith of the State is pledged that they shall be returned to the companies entitled to receive them or disposed of as herein provided for. The securities deposited by any company under this Article shall not, on account of such securities being in this State, be subjected to taxation but shall be held exclusively and solely for the protection of contract holders. (1945, c. 384.)

CASE NOTES

Stated in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-182.7. Authority to increase deposit.

When, in the opinion of the Commissioner, it is necessary for the protection of the public interest to increase the amount of deposits specified in G.S. 58-182 and 58-182.1, the companies described in said sections shall, upon demand, make additional deposits in such sums as the Commissioner may require, and such additional deposits shall be held in accordance with and for the purposes set out in this Article. (1945, c. 384.)

§ 58-182.8. Deposits of domestic companies.

The Commissioner may in the public interest require domestic fire, marine or fire and marine, fidelity, surety or casualty companies to make and maintain deposits under the provisions of G.S. 58-182 to 58-182.7 inclusive. (1945, c. 384.)

§ 58-183. Right of company to receive interest on deposits.

The Commissioner of Insurance, at the time of receiving the securities, shall give to the company authority to draw the interest thereon, as the same may become due and payable, for the use of the company, and this authority shall continue in force until the company fails to pay any liability arising upon any policy made in favor of any person, firm, or corporation which shall be, at the time the liability arises, a resident of this State, or which shall own property in the State covered by policies issued. In case of such failure the corporation charged with the payment of such interest shall be forthwith notified, and thereafter the interest, so long as the liability exists, shall be payable to the Commissioner of Insurance, to be applied, if necessary, to the payment of such liability. (1909, c. 923, s. 2; C.S., s. 6443.)

CASE NOTES

Company Entitled to Interest Until It Fails to Satisfy Liability. — A foreign insurance company which makes a deposit of securities is entitled to the interest income of the securities deposited until such time as the company fails to satisfy a liability. Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-184. Sale of deposits for payment of liabilities.

If the company fails to pay any of its liabilities on its contracts according to the terms thereof, after the liabilities have been adjusted between the parties in the manner prescribed by the contracts, if any manner is prescribed thereby, or after the same have been ascertained in any manner agreed upon by the parties or by the judgment, order, or decree of the court having jurisdiction of the subject, the Commissioner of Insurance shall, upon application of the party to whom the debt or money is due, and upon satisfactory proof that the notice herein required has been given to the company, proceed to sell at public auction such an amount of the securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses; and the company shall be required forthwith to make good any deficit in the amount of the deposit caused by such sale. The party making application shall give to the company or to its agent in this State 20 days' notice of his intention to apply to the Commissioner of Insurance for the sale of securities. The Commissioner of Insurance shall advertise the sale of the securities for 30 days prior to the day of the sale in some daily newspaper

published in the City of Raleigh, and shall state in the advertisement the securities to be sold and the company depositing them, and shall mail a copy to the company. (1909, c. 923, s. 3; C.S., s. 6444.)

CASE NOTES

For case denying injunction against sale of securities under this section, see Resolute Ins. Co. v. North Carolina, 276 F. Supp. 660 (E.D.N.C. 1967), aff'd, 397 F.2d 586 (4th Cir.), cert. denied, 393 U.S. 978, 89 S. Ct. 446, 21 L. Ed. 2d 439 (1968).

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

Cited in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-185. Lien of policyholders; action to enforce.

Upon the securities deposited with the Commissioner of Insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this State at such time, or who hold policies issued upon property in the State, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the Superior Court of the County of Wake to enforce the lien for the benefit of all the holders of such contracts. The Commissioner of Insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the Commissioner of Insurance. (1909, c. 923, s. 4; C.S., s. 6445.)

CASE NOTES

Lien Rights Not Lost by Operation of § 58-155.60. — The Quick Access Statute, § 58-155.60, which requires that deposits made by an insolvent casualty insurer be paid to the North Carolina Insurance Guaranty Association for use in paying claims against the insolvent insurer, is to be applied retroactively to deposits made before the date of its enactment and to the holders of policies issued prior to that date. However, claimants against the deposit of a foreign insurer under this section will retain their lien rights after payment of the deposit to the Guaranty Association, and may proceed against the Guaranty Association to the extent of the deposit for any claims they have under this section which are not paid by the Guaranty Association pursuant to Art. 17B of this chapter. State ex rel. Ingram v. Reserve Ins. Co., 48 N.C. App. 643, 269 S.E.2d 757 (1980), modified and aff'd, 303 N.C. 623, 281 S.E.2d 16 (1981).

All deposit funds under § 58-155.60 must be paid to claimants pro rata as provided by this section, and if all claimants are satisfied either directly by the Guaranty Association or by the Commissioner of Insurance (if the claim is under $100.00) and deposit funds remain, then and only then are such funds to be permanently credited to the Guaranty Association for its expenses. State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

The federal receiver of a foreign insurance company would be entitled to appear and contest any doubtful claim in an action brought under this section to subject the insurance company's deposit to the payment of unsatisfied claims of State claimants. Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Cited in State ex rel. Boney v. Central Mut. Ins. Co., 213 N.C. 470, 196 S.E. 837, 117 A.L.R. 231 (1938).

§ 58-186. Substitution for securities paid.

Where the principal of any of the securities so deposited is paid to the Commissioner of Insurance, he shall notify the company or its agent in this State, and pay the money so received to the company upon receiving other securities of the character named in this Article to an equal amount, or, upon the failure of the company for 30 days after receiving notice to deliver such securities to an equal amount to the Commissioner of Insurance, he may invest the money in any such securities and hold the same as he held those which were paid. (1909, c. 923, s. 5; C.S., s. 6446.)

§ 58-187. Return of deposits.

If such company ceases to do business in this State and its liabilities, whether fixed or contingent upon its contracts, to persons residing in this State or having policies upon property situated in this State have been satisfied or have been terminated, or have been fully reinsured, with the approval of the Commissioner, in a solvent company licensed to do an insurance business in North Carolina approved by the Commissioner, upon satisfactory evidence of this fact to the Commissioner of Insurance the State Treasurer shall deliver to such company, upon the order of the Commissioner of Insurance, the securities in his possession belonging to it, or such of them as remain after paying the liabilities aforesaid. (1909, c. 923, s. 6; C.S., s. 6447; 1951, c. 781, s. 1.)

Legal Periodicals. — For a brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-188. Deposit required before license granted; exception.

When any fire insurance company files an application with the Commissioner of Insurance to be admitted to do business in this State, he shall require of it a compliance with the provisions of this Article before issuing a license to such company; but this Article shall not apply to companies licensed to do a reinsurance business only. (1909, c. 923, s. 7; 1915, c. 166, s. 6; C.S., s. 6448.)

§ 58-188.1. Deposits held in trust by Commissioner or Treasurer.

(a) Deposits by Domestic Company. — The Commissioner of Insurance or the Treasurer, in his official capacity, shall take and hold in trust deposits made by any domestic insurance company for the purpose of complying with the laws of any other state to enable the company to do business in that state. The company making the deposits is entitled to the income thereof, and may, from time to time, with the consent of the Commissioner of Insurance or Treasurer, and when not forbidden by the law under which the deposit was made, change in whole or in part the securities which compose the deposit for other solvent securities of equal par value. Upon request of any domestic insurance company such officer may return to the company the whole or any portion of the securities of the company held by him on deposit, when he is satisfied that they are subject to no liability and are not required to be longer held by any provision of law or purpose of the original deposit.

(b) Deposits by Foreign or Alien Company. — The Commissioner or Treasurer may return to the trustees or other representatives authorized for

that purpose any deposit made by a foreign or alien insurance company, when it appears that the company has ceased to do business in the State and is under no obligation to policyholders or other persons in the State for whose benefit the deposit was made.

(c) Action to Enforce or Terminate the Trust. — An insurance company which has made a deposit in this State pursuant to this Chapter, or its trustees or resident managers in the United States, or the Commissioner of Insurance, or any creditor of the company, may at any time bring an action in the Superior Court of Wake County against the State and other parties properly joined therein, to enforce, administer, or terminate the trust created by the deposit. The process in this action shall be served on the officer of the State having the deposit, who shall appear and answer in behalf of the State and perform such orders and judgments as the court may make in such action. (1899, c. 54, s. 17; 1901, c. 391, s. 2; 1903, c. 438, s. 1; c. 536, s. 4; Rev., s. 4709; C.S., s. 6313; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-55.

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Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-188.2. Deposits subject to approval and control of Commissioner.

The deposits of securities required to be made by any insurance company of this State shall be approved by the Commissioner of Insurance of the State, and he may examine them at all times, and may order all or any part thereof changed for better security, and no change or transfer of the same may be made without his assent. (1903, c. 536, s. 5; Rev., s. 4710; C.S., s. 6314; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-56.

§ 58-188.3. Deposits by alien companies required and regulated.

An alien company, other than life, shall not be admitted to do business in this State until, in addition to complying with the conditions by law prescribed for the licensing and admission of such companies to do business in this State, it has made a deposit with the Treasurer or Commissioner of Insurance of this State, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this Chapter. This deposit must be in exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States, and may be made in the securities, but subject to the limitations, specified in this Chapter with regard to the investment of the capital of domestic companies formed and organized under the provisions of this Chapter. The deposit shall be deemed for all purposes of the insurance law the capital of the company making it. (1899, c. 54, s. 64; 1903, c. 438, s. 6; Rev., s. 4711; C.S., s. 6315; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-57.

§ 58-188.4. Deposits by life companies not chartered in United States.

Every alien life insurance company organized under the laws of any other country than the United States must have and keep on deposit with some state insurance department or in the hands of trustees, in exclusive trust for the security of its contracts with policyholders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than three hundred thousand dollars ($300,000). (1899, c. 54, s. 56; Rev., s. 4712; C.S., s. 6316; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-58.

§ 58-188.5. Registration of bonds deposited in name of Treasurer.

The Commissioner of Insurance is hereby empowered, upon the written consent of any insurance company depositing with the Commissioner or the State Treasurer under any law of this State, any state, county, city, or town bonds or notes which are payable to bearer, to cause such bonds or notes to be registered as to the principal thereof in lawful books of registry kept by or in behalf of the issuing state, county, city or town, such registration to be in the name of the Treasurer of North Carolina in trust for the company depositing the notes or bonds and the State of North Carolina, as their respective interest may appear, and is further empowered to require of any and all such companies the filing of written consent to such registration as a condition precedent to the right of making any such deposit or right to continue any such deposit heretofore made. (1925, c. 145, s. 2; 1945, c. 384.)

Editor's Notes. — This section was transferred from § 58-59.

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Title and rights to securities deposited in accord with this section are vested in the Commissioner of Insurance, the Treasurer and the State. North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688, cert. denied and appeal dismissed, 301 N.C. 527, 273 S.E.2d 453 (1980), rev'd on other grounds, — U.S. —, 102 S. Ct. 1357, 71 L. Ed. 558 (1982).

Stated in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-188.6. Notation of registration; release.

Bonds or notes so registered shall bear notation of such registration on the reverse thereof, signed by the registering officer or agent, and may be released from such registration and may be transferred on such books of registry by the signature of the State Treasurer. (1925, c. 145, s. 3; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-60.

§ 58-188.7. Expenses of registration.

The necessary expenses of procuring such registration and any transfer thereof shall be paid by the company making the deposits. (1925, c. 145, s. 4; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-61.

§ 58-188.8. Bond in lieu of deposit.

In lieu of any deposit required in this Chapter a company may give a surety bond issued by a company licensed in this State, the form of which bond shall be approved by the Commissioner. (1945, c. 384.)

§ 58-188.9. Bond on real property warrantor.

Any person, firm, or corporation issuing warranties allowed under G.S. 58-3.2(2) shall post a surety bond with the Secretary of State in the principal sum of not less than seventy-five thousand dollars ($75,000); such bond shall be approved by the Secretary of State and any person to whom the warranty is issued shall have the right to institute an action to recover against the warrantor and the surety bond for breach of warranty. (1979, c. 773, s. 2.)

Article 21.

Insuring State Property, Officials and Employees.

§ 58-189. State Property Fire Insurance Fund created.

Upon the expiration of all existing policies of fire insurance upon state-owned buildings, fixtures, furniture, and equipment, including all such property the title to which may be in any State department, institution, or agency, the State of North Carolina shall not reinsure any of such properties.

There is hereby created a "State Property Fire Insurance Fund," which shall be as a special fund in the State treasury, for the purpose of providing a reserve against loss from fire at State departments and institutions. The State Treasurer shall be the custodian of the "State Property Fire Insurance Fund" and shall invest its assets in accordance with the provisions of G.S. 147-69.2 and 147-69.3. The unexpended appropriations of State departments and institutions for fire insurance premiums for the fiscal year 1944-1945 and the appropriations for fire insurance premiums made for the biennium 1945-1947 or that may thereafter be made for this purpose shall be transferred to the "State Property Fire Insurance Fund." (1945, c. 1027, s. 1; 1963, c. 462; 1975, c. 519, s. 1; 1979, c. 467, s. 4.)

§ 58-190. Appropriations; fund to pay administrative expenses.

Upon the expiration of the existing fire insurance policies on said properties and in making appropriations for any biennium after the next biennium, the Commissioner of Insurance shall file with the Department of Administration his estimate of the appropriations which will be necessary in order to set up and maintain an adequate reserve to provide a fund sufficient to protect the State, its departments, institutions, and agencies from loss or damage to any of said properties up to fifty per centum (50%) of the value thereof. Appropriations

made for the creating of such fire insurance reserves against property of the Department of Agriculture, or the Department of Transportation or any special operating fund shall be charged against the funds of such departments.

The State Property Fire Insurance Fund is authorized and empowered to pay all the administrative expenses occasioned by the administration of Article 21 of Chapter 58 of the General Statutes. (1945, c. 1027, s. 2; 1957, c. 65, s. 11; c. 269, s. 1; 1959, c. 182, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

§ 58-191. Payment of losses; rules and regulations; sprinkler leakage insurance.

In case of total loss of any property of any State institution or partial loss thereof or the loss or damage of any other aforesaid state-owned property, the Commissioner of Insurance is authorized, empowered and directed to determine the amount of the loss and to certify the amount of loss to the department or institution concerned, to the Budget Bureau and to the Governor and Council of State. The Governor and Council of State may authorize transfers from the "State Property Fire Insurance Fund" to the State agency having suffered a fire damage in such amounts as they may consider necessary to restore the loss sustained, and in the event there is not a sufficient sum in said State Property Fire Insurance Fund, the Governor and Council of State may supplement said fund from the Contingency and Emergency Fund, and if there is not a sufficient amount therein, then from the State Postwar Reserve Fund. Such funds as shall be allocated from such reserve fund shall be paid therefrom upon warrant of the State Auditor.

The Commissioner of Insurance, with the approval of the Council of State, is authorized and empowered to adopt and promulgate all such rules and regulations as may be necessary to carry out the purpose and intent of the provisions of this Article and all such rules and regulations as may be adopted in accordance herewith shall be binding upon all the departments, bureaus, agencies and institutions of the State. The Commissioner of Insurance, with the approval of the Governor and Council of State, is authorized and empowered to purchase from insurers admitted to do business in North Carolina such insurance or reinsurance as may be necessary to protect the State Property Fire Insurance Fund against loss on any one building and contents in excess of not less than fifty thousand dollars ($50,000). The premiums on such coverage shall be paid from the State Property Fire Insurance Fund hereinbefore provided.

Upon request of any State department, agency or institution, sprinkler leakage insurance shall be provided on designated state-owned property of such department, agency or institution which is insured by the State Property Fire Insurance Fund. Premiums for such insurance coverage shall be paid by each requesting department, agency or institution in accordance with rates fixed by the Commissioner of Insurance. Losses covered by such insurance may be paid out of the State Property Fire Insurance Fund in the same manner as fire losses. The Commissioner of Insurance, with the approval of the Governor and Council of State, is authorized and empowered to purchase from insurers admitted to do business in North Carolina such insurance or reinsurance as may be necessary to protect the State Property Fire Insurance Fund against loss with respect to such insurance coverage. (1945, c. 1027, s. 3; 1951, c. 802; 1959, c. 182, s. 2.)

Editor's Note. — The Budget Bureau, referred to in this section, no longer exists. See now the Executive Budget Act, § 143-1 et seq.

§ 58-191.1. Extended coverage insurance.

Upon request of any State department, agency or institution, extended coverage insurance, and other property insurance, may be provided on designated state-owned property of such department, agency or institution which is insured by the State Property Fire Insurance Fund. Premiums for such insurance coverage shall be paid by each requesting department, agency or institution in accordance with rates fixed by the Commissioner of Insurance. Losses covered by such insurance may be paid for out of the State Property Fire Insurance Fund in the same manner as fire losses. The Commissioner of Insurance, with the approval of the Governor and Council of State, is authorized and empowered to purchase from insurers admitted to do business in North Carolina such insurance or reinsurance as may be necessary to protect the State Property Fire Insurance Fund against loss with respect to such insurance coverage. The words "extended coverage insurance," as used in this section, mean insurance against loss or damage caused by windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles or smoke. (1957, c. 67; 1975, c. 519, s. 2.)

§ 58-191.2. Use and occupancy and business interruption insurance.

Upon request of any State department, agency or institution, use and occupancy and business interruption insurance shall be provided on state-owned property of such department, agency or institution which is insured by the State Property Fire Insurance Fund. Premiums for such insurance coverage shall be paid by each requesting department, agency or institution in accordance with rates fixed by the Commissioner of Insurance. Losses covered by such insurance may be paid for out of the State Property Fire Insurance Fund in the same manner as fire losses. The Commissioner of Insurance, with the approval of the Governor and Council of State, is authorized and empowered to purchase from insurers admitted to do business in North Carolina such insurance or reinsurance as may be necessary to protect the State Property Fire Insurance Fund against loss with respect to such insurance coverage. (1957, c. 67.)

§ 58-191.3. Professional liability insurance for officials and employees of the State.

The Commissioner of Insurance may acquire professional liability insurance covering the officers and employees of any State department, institution or agency upon the request of such State department, institution or agency. Premiums for such insurance coverage shall be paid by the requesting department, institution or agency at rates fixed by the Commissioner from funds made available to it for the purpose. The Commissioner, in placing a contract for such insurance is authorized to place such insurance through the Public Officers and Employees' Liability Insurance Commission of the Department of Administration, and shall exercise all efforts to place such insurance through the said commission prior to attempting to procure such insurance through any other source.

The Commissioner, pursuant to this section, may acquire professional liability insurance covering the officers and employees of a department, institution or agency of State government only if the coverage to be provided by such policy is coverage of claims in excess of the protection provided by Articles 31 and 31A of Chapter 143 of the General Statutes.

The purchase, by any State department, institution or agency of professional liability insurance covering the law-enforcement officers, officers or employees of such department, institution or agency shall not be construed as a waiver of any defense of sovereign immunity by such department, institution or agency. The purchase of such insurance shall not be deemed a waiver by any employee of the defense of sovereign immunity to the extent that such defense may be available to him.

The payment, by any State department, institution or agency of funds as premiums for professional liability insurance through the plan provided herein, covering the law-enforcement officers or officials or employees of such department, institution or agency is hereby declared to be for a public purpose. (1979, c. 206, s. 1.)

§ 58-192. Information furnished Commissioner by officers in charge.

It is the duty of the different officers or boards having in their custody any property belonging to the State to inform the Commissioner, giving him in detail a full description of same, and to keep him informed of any changes in such property or its location or surroundings. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 2; Rev., s. 4828; C.S., s. 6452.)

§ 58-193. Commissioner to inspect State property; plans submitted.

It is the duty of the Commissioner at least once in each year, or oftener, if deemed necessary, to visit, inspect, and thoroughly examine each State institution or other State property with a view to its protection from fire, as well as to the safety of its inmates or the property therein in case of fire, and call to the attention of the board or officer having the same in charge any defect noted by him or any improvement deemed necessary. No board, commission, superintendent, or other person or persons authorized and directed by law to select plans and erect buildings for the use of the State of North Carolina or any institution thereof, or for the use of any county, city, or incorporated town or school district shall receive and approve of any plans until they are submitted to and approved by the Commissioner of Insurance of the State as to the safety of the proposed buildings from fire, as well as the protection of the inmates in case of fire. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 3; Rev., s. 4829; 1909, c. 880; 1919, c. 186, s. 3; C.S., s. 6453.)

§ 58-194. Report required of Commissioner.

The Commissioner of Insurance must submit to the Governor a full report of his official action under this Article, with such recommendations as commend themselves to him, and it shall be embodied in or attached to his biennial report to the General Assembly. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 4; Rev., s. 4830; C.S., s. 6454; 1945, c. 386.)

§ 58-194.1. Liability insurance required for state-owned vehicles.

Every department, agency or institution of the State shall acquire motor vehicle liability insurance on all state-owned motor vehicles under its control. A general fund department, agency or institution which does not have sufficient funds within its existing budget to pay the premiums for such insurance may, with the approval of the Advisory Budget Commission, make

application to the Director of the Budget for allocation of funds for payment of premiums out of the contingent or emergency appropriation in the manner prescribed by G.S. 143-12. (1959, c. 1248.)

§ 58-194.2. Insurance and official fidelity bonds for State agencies to be placed by Department; exception; costs of placement.

Except as provided in G.S. 143B-424.1, all insurance and all official fidelity and surety bonds authorized for State departments, institutions, and agencies shall be effected and placed by the Department, and the cost of such placement shall be paid by the Department, institution, or agency involved upon bills rendered to and approved by the Commissioner. (1975, c. 875, s. 11; 1981, c. 1109, s. 4.)

Effect of Amendments. — The 1981 amendment added "Except as provided in G.S. 143B-424.1," at the beginning of the section, substituted "State" for "the several" preceding "departments, institutions, and agencies," and deleted "Insurance" preceding "Department" near the middle of the section and preceding "Commissioner" near the end of the section.

SUBCHAPTER IV. LIFE INSURANCE.

ARTICLE 22.

General Regulations of Business.

§ 58-195. Definitions; requisites of contract.

All corporations or associations doing business in this State, under any charter or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract, or pledge for the payment of endowments or annuities, or who employ agents to solicit such business, are life insurance companies, in all respects subject to the laws herein made and provided for the government of life insurance companies, and shall not make any such insurance, guaranty, contract, or pledge in this State with any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment, the consideration therefor and such other provisions as the Commissioner may require. (1899, c. 54, s. 55; Rev., s. 4773; C.S., s. 6455; 1945, c. 379.)

§ 58-195.1. Industrial life insurance defined.

Industrial life insurance is hereby declared to be that form of life insurance under which the premiums are payable monthly or oftener, provided the face amount of insurance stated in the policy does not exceed one thousand dollars ($1,000) and the words "Industrial Policy" are printed upon the policy as a part of the descriptive matter. (1945, c. 379; 1947, c. 721.)

§ 58-195.2. Credit life insurance defined.

Credit life insurance is declared to be insurance upon the life of a debtor who may be indebted to any person, firm, or corporation extending credit to said debtor. Credit life insurance may include the granting of additional benefits in the event of total and permanent disability of the debtor. (1953, c. 1096, s. 1.)

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Insurable Interest Requirement as Public Policy. — The long established public policy of this State prevents one who lacks a legally recognized insurable interest in the life of another from taking out and enforcing for his own benefit a policy of insurance on such other person's life. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Creditor has an insurable interest in debtor's life. Hatley v. Johnston, 265 N.C. 73, 143 S.E.2d 260 (1965).

Credit life insurance, as between creditor and insured debtor, is collateral security. Hatley v. Johnston, 265 N.C. 73, 143 S.E.2d 260 (1965).

And Payment of Debt with Credit Life Insurance Is Payment by Debtor. — Credit life insurance, as between the creditor and insured debtor, is collateral security. Consequently, payment of the debt with credit life insurance, when the insured authorizes the creditor to procure the policy and pays the premium himself, is payment by the insured debtor, just as payment with any collateral security is payment by the owner thereof. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Payment of the debt with credit life insurance, when the insured authorizes the creditor to procure the policy and pays the premium himself, is payment by the insured debtor, just as payment with any collateral security is payment by the owner thereof. The presence of an assuming grantee, who has no right to change the beneficiary under the policy, and therefore no claim of ownership, would not alter that result. Hatley v. Johnston, 265 N.C. 73, 143 S.E.2d 260 (1965).

Insurer Not Secondarily Liable on Debt. — As between the creditor and the insured debtor the credit life insurance is collateral security, but this does not place the defendant insurance company in the position of a surety or in any sense render it secondarily liable on the debt. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Credit life insurance, as between the creditor and the insured debtor, is collateral security, but this does not place the insurance company in the position of a surety or in any sense render it secondarily liable on the debt, the insurance company becoming liable solely because, for a premium paid to it, it assumed the risk of the debtor's continued life and his death occurs while the insurance policy is in effect. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

When Liability Established. — Liability of the insurer under a credit life insurance policy is established at the moment of the insured debtor's death, and payment thereafter of the debt to the creditor, thereby terminating the creditor's insurable interest in the life of the debtor, does not terminate the insurer's liability under its policy of insurance. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Insurer is liable upon its policy of credit life insurance where the creditor repossesses the mortgaged chattel subsequent to the insured debtor's death, notwithstanding the policy provided that it should terminate automatically upon repossession of the chattel, since insurer's liability under the policy became fixed when the debtor died before repossession of the chattel occurred. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Beneficiary May Enforce Terms of Contract. — North Carolina has long recognized the right of one for whose benefit a contract has been made to sue to enforce its terms, even though he is not directly a party to the contract. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

When a creditor named as beneficiary of a credit life insurance policy effects payment of its indebtedness after the death of the insured debtor by repossessing the chattel purchased by the debtor under a conditional sales contract, thereby giving up its rights in the proceeds of the policy, the credit life insurance policy becomes one for the benefit of the insured, collectible by his executors or administrators. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

The creditor who is named as beneficiary loses all interest in the proceeds of the policy upon payment of the indebtedness, and the policy then becomes one for the benefit of the insured, collectible by his executors or administrators. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Action by Debtor's Administratrix to Recover Policy Proceeds. — The fact that the insured debtor's estate is not named directly as beneficiary in a credit life insurance policy is no bar to the right of the insured's administratrix to maintain an action upon the policy, since one for whose benefit a contract has been made may sue to enforce its terms even though he is not directly a party to the contract, the credit life insurance being for the benefit of insured's estate in that the proceeds of the policy are, by contractual and statutory provision, to be applied to discharge an indebtedness of the estate. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

When the debt to the creditor is satisfied subsequent to the insured debtor's death by repossession of the mortgaged chattel, the debtor's estate becomes subrogated to the rights of the creditor as beneficiary under the credit life insurance policy as against the insurer, and the debtor's administratrix may maintain an action against the insurer to recover the proceeds of the policy. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Creditor Not Entitled to Proceeds Following Repossession After Debtor's Death. — Creditor relinquished its rights in the proceeds of a credit life insurance policy when, following the death of the insured debtor, it effected payment of its indebtedness by repossession of the chattel purchased by debtor under a conditional sales contract, and the creditor could not thereafter collect and retain for its own account the proceeds of the credit life insurance policy, since it no longer had an insurable interest in the life of the debtor. Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Nothing in statutes grant to Commissioner express or implied authority to set rates for credit life insurance. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

The conspicuous absence of express rate-making authority with regard to credit life insurance, when such authority existed with regard to credit accident and health insurance, manifests the fact that no such authority has been conferred. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Nor Does Companies' Acquiescence Raise Such Authority. — Contention that acquiescence by companies writing credit life insurance in rates set by prior Commissioners of Insurance gave present Commissioner the authority to fix credit life rates was untenable. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Former Statute Inapplicable. — Since former § 54-260.2 applied only to credit accident and health insurance as defined in § 58-254.8, it had no application to credit life insurance, and could not be seen as granting implied authority to set credit life rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Quoted in Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

§ 58-195.3. Any type of survivorship fund in life insurance contract prohibited.

No life insurance company shall hereafter deliver in this State, as a part of or in combination with any insurance, endowment or annuity contract, any agreement or plan, additional to the rights, dividends, and benefits arising out of any such insurance, endowment or annuity contract, which provides for the accumulation of profits over a period of years and for payment of all or any part of such accumulated profits only to members or policyholders of a designated group or class who continue as members or policyholders until the end of a specified period of years. Nor shall any such company deliver in this State any individual life insurance policy which provides that on the death of anyone not specifically named therein, the owner or beneficiary of the policy shall receive the payment or granting of anything of value. (1955, c. 492.)

§ 58-195.4. Tie-in sales with life insurance prohibited.

No life insurance company shall hereafter deliver in this State, as a part of or in combination with any insurance, endowment or annuity contract, any agreement or plan, additional to the rights, dividends, and benefits arising out of any such insurance, endowment, or annuity contract which provides for the sale, solicitation, or delivery of any stock or shares of stock in the company issuing the policy or in any other insurance company or other corporation, or benefit certificate, securities, or any special advisory board contract, or other contracts or resolutions of any kind promising returns and profits, or dividends equivalent to stock dividends as an inducement to or in connection with the sale of the insurance or to the taking of the policy. Nothing herein contained shall be construed as prohibiting any participating insurer from distributing

to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits. (1957, c. 752.)

§ 58-195.5. Policies to be issued to any person possessing the sickle cell trait or hemoglobin C trait.

No insurance company licensed in this State pursuant to the provisions of Chapter 58 shall refuse to issue or deliver any policy of life insurance authorized thereunder solely by reason of the fact that the person to be insured possesses sickle cell trait or hemoglobin C trait; nor shall any such policy issued and delivered in this State carry a higher premium rate or charge by reason of the fact that the person to be insured possesses said traits. The term "sickle cell trait" is defined as the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin S (sickle hemoglobin) as defined by standard chemical and physical analytic techniques, including electrophoresis, and the proportion of hemoglobin A is greater than the proportion of hemoglobin S or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in the normal proportions by standard chemical and physical analytic tests. The term "hemoglobin C trait" is defined as the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin C as defined by standard chemical and physical analytic techniques, including electrophoresis, and the proportion of hemoglobin A is greater than the proportion of hemoglobin C or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in the normal proportions by standard chemical and physical analytic tests. (1975, c. 600, s. 1.)

§ 58-196: Transferred to G.S. 58-151.1 by Session Laws 1945, c. 379.

§ 58-197. Soliciting agent represents the company.

A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured. (1907, c. 958, s. 1; C.S., s. 6457.)

CASE NOTES

This section does not attempt to prescribe the extent of the agent's authority or to convert a special or limited agency into one with general powers. Fountain & Herrington, Inc. v. Mutual Life Ins. Co., 55 F.2d 120 (4th Cir. 1932). See also Provident Mut. Life Ins. Co. v. Parsons, 70 F.2d 863 (4th Cir.), cert. denied, 293 U.S. 582, 55 S. Ct. 95, 79 L. Ed. 678 (1934).

Liability of Insurer for Delay of Agent. — If defendant's agent wrongfully failed to deliver policy within a reasonably short time after its receipt, during which time plaintiff's intestate was in good health and ready, able, and willing to pay the premium on delivery, as stipulated, and plaintiff's intestate thereafter became ill, the defendant could not withhold delivery so as to release it from responsibility. American Trust Co. v. Life Ins. Co., 173 N.C. 558, 92 S.E. 706 (1917); Fox v. Volunteer State Life Ins. Co., 185 N.C. 121, 116 S.E. 266 (1923).

When Knowledge of Agent Imputed to Company. — In the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, even though a direct stipulation to the contrary appears in the policy or the application for the same. However, when it clearly appears that an insurance agent and the insured participated in a fraud by inserting false answers with respect to material facts in an application for insurance, the knowledge of the agent will not be imputable to his principal.

Thomas-Yelverton Co. v. State Capital Life Ins. Co., 238 N.C. 278, 77 S.E.2d 692 (1953); Faircloth v. Ohio Farmers Ins. Co., 253 N.C. 522, 117 S.E.2d 404 (1960).

Responsibility of Insured for False Answers Inserted by Agent in Application. — The rule that the insured is not responsible for false answers in the application where they have been inserted by the agent through mistake, negligence, or fraud is not absolute, and applies only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud. Jones v. Home Sec. Life Ins. Co., 254 N.C. 407, 119 S.E.2d 215 (1961).

§ 58-198. Discrimination between insurants forbidden.

A life insurance company doing business in this State shall not make any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor pay or allow as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; nor give, sell, or purchase, or offer to give, sell, or purchase as inducement to insurance or in connection therewith any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue therein, or anything of value whatsoever not specified in the policy. (1899, c. 54, s. 57; 1903, c. 438, ss. 5, 10; Rev., s. 4775; 1911, c. 196, s. 7; C.S., s. 6458.)

CASE NOTES

Purpose of Section. — The purpose of this section is to prevent discrimination among policyholders of like class and expectancy, and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurant and the company in reference thereto shall be plainly expressed in the policy. Smathers v. Bankers Life Ins. Co., 151 N.C. 98, 65 S.E. 746 (1909).

The purpose of this section is to require all of the contract between the parties to be set forth in the policy and to afford protection to the policyholder. The purpose is to require the parties to incorporate in the insurance contract anything pertaining to its validity at the time it is written. New York Life Ins. Co. v. Guyes, 22 F. Supp. 454 (M.D.N.C.), aff'd, 99 F.2d 303 (4th Cir. 1938).

The prohibition of discrimination is a restriction applicable to the insurer, and the statute purports to operate upon insurance companies alone. Robinson v. Security Life & Annuity Co., 163 N.C. 415, 79 S.E. 681 (1913).

Exercise of an option given by a mutual life insurance company to one of its policyholders of greater value than that given to the others was an illegal and void discrimination, prohibited by our statute and general principles of law. Graham v. Mutual Life Ins. Co., 176 N.C. 313, 97 S.E. 6 (1918).

This section does not invalidate contracts of insurance made in violation of its provisions. Security Life & Annuity Co. v. Costner, 149 N.C. 293, 63 S.E. 304 (1908); Robinson v. Security Life & Annuity Co., 163 N.C. 415, 79 S.E. 681 (1913).

And Insured May Recover for Cancellation of Policy. — Where the insured has, in good faith, entered into a policy contract with the company whereby he has secured a policy at a reduced rate of premium, the parties are not in pari delicto; and he may recover damages, upon the cancellation by the company of his policy, for its discrimination forbidden by the statute. Robinson v. Security Life & Annuity Co., 163 N.C. 415, 79 S.E. 681 (1913).

Transactions up to the issuance of a life policy merge therein upon its issuance and acceptance by the insured. Floars v. Aetna Life Ins. Co., 144 N.C. 232, 56 S.E. 915 (1907); Graham v. Mutual Life Ins. Co., 176 N.C. 313, 97 S.E. 6 (1918); New York Life Ins. Co. v. Guyes, 22 F. Supp. 454 (M.D.N.C.), aff'd, 99 F.2d 303 (4th Cir. 1938).

And Collateral Agreements Are Not Binding Unless Included in Policy. — Under this section, the terms and conditions of the insurance must be plainly expressed in the policy as issued, and collateral agreements with local agents are not binding unless included in the policy. Graham v. Mutual Life Ins. Co., 176 N.C. 313, 97 S.E. 6 (1918).

Prohibited Collateral Agreement Not Enforceable. — A policyholder cannot enforce against the insurance company a severable collateral agreement to his policy contract of life insurance which is prohibited by this statute, upon the principle that the law was not passed for the benefit of the company resisting recovery, but for the protection of the policyholders, when it appears that the agreement was executory in character and gave him a preference over the general body of policyholders for whose benefit the statute was passed. In such cases, the parties are in pari delicto. Smathers v. Bankers Life Ins. Co., 151 N.C. 98, 65 S.E. 746 (1909).

When a collateral agreement delivered to insured with his policy provided for the reduction of premiums to be paid thereon, and was claimed to be the sole inducement moving him to take the policy, it was necessary for these inducements so claimed to be specified in the policy contract. Otherwise the collateral agreement would be prohibited by the statute and not enforceable. Smathers v. Bankers Life Ins. Co., 151 N.C. 98, 65 S.E. 746 (1909).

Agreement for Earlier Effective Date. — It would seem that an agreement by a local agent that the policy would be in effect from the date of application and payment of the first premium, where the policy provided it would be effective from delivery, would be in contravention of this section. Jones v. Gate City Life Ins. Co., 216 N.C. 300, 4 S.E.2d 848 (1939).

A valid policy of life insurance is severable from an invalid collateral agreement made at one and the same time, respecting a benefit prohibited by the statute. Security Life & Annuity Co. v. Costner, 149 N.C. 293, 63 S.E. 304 (1908).

And Insurer May Recover on Note Given in Payment of Policy. — When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for the deduction of a certain amount by way of renewal commissions in violation of the provisions of this section. Security Life & Annuity Co. v. Costner, 149 N.C. 293, 63 S.E. 304 (1908); Smathers v. Bankers Life Ins. Co., 151 N.C. 98, 65 S.E. 746 (1909).

§ 58-199. Misrepresentations of policy forbidden.

No life insurance company doing business in this State, and no officer, director, solicitor, or other agent thereof, shall make, issue, or circulate, or cause to be made, issued, or circulated any estimate, illustration, circular, or statement of any sort misrepresenting the terms of the policy issued by it or the dividends or share of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. Nor shall any such company, agent, or broker make any misrepresentation to any person insured in said company or in any other insurer or governmental agency for the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. (1913, c. 95; C.S., s. 6459; 1947, c. 721.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-200: Repealed by Session Laws 1945, c. 379.

§ 58-201. Reserve fund of domestic companies to be calculated.

The valuation of the reserves on the policies and bonds of every life insurance company incorporated by the laws of this State shall be based upon any recognized standard of valuation and mortality table as the Commissioner should deem best for the security of the business and the safety of the persons insured. The Commissioner shall annually value or cause to be valued the

reserves on all policies and annuities of each domestic company and may accept the valuation of such reserves made by the company upon such evidence of its correctness as he may require. Upon this valuation being made by the Commissioner and a certificate thereof furnished by him, each company shall pay to such officer, to defray the expenses thereof, the sum of one cent (1¢) for every thousand dollars ($1,000) of the whole amount insured by its policies so valued. The reserve fund hereinbefore provided for shall not be available for or used for any other purpose than the discharge of policy obligations, but is a trust fund to be held and expended only for the benefit of policyholders. In case of the insolvency of the company, the reserve on outstanding policies may, with the consent of the Commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (1903, c. 536, s. 4; 1905, c. 410; Rev., s. 4777; 1907, c. 1000, s. 7; C.S., s. 6461; 1945, c. 379.)

§ 58-201.1. Standard Valuation Law.

(a) This section shall be known as the Standard Valuation Law.

(b) The Commissioner shall annually value, or cause to be valued, the reserve liabilities (hereinafter called reserves) for all outstanding life insurance policies and annuity and pure endowment contracts of every life insurance company doing business in this State, except that in the case of an alien company, such valuation shall be limited to its United States business, and may certify the amount of such reserves, specifying the mortality table or tables, rate or rates of interest and methods (net level premium method or other) used in the calculation of such reserves. Group methods and approximate averages for fractions of a year or otherwise may be used in calculating such reserves and the valuation made by the company may be accepted by the Commissioner upon such evidence of its correctness as the Commissioner may require. In lieu of the valuation of the reserves herein required of any foreign or alien company, he may accept any valuation made, or caused to be made, by the insurance supervisory official of any state or other jurisdiction when such valuation complies with the minimum standard herein provided and if the official of such state or jurisdiction accepts as sufficient and valid for all legal purposes the certificate of valuation of the Commissioner when such certificate states the valuation to have been made in a specified manner according to which the aggregate reserves would be at least as large as if they had been computed in the manner prescribed by the law of that state or jurisdiction.

(c) (1) Except as otherwise provided in subdivisions (3) and (4) of this subsection, the minimum standard for the valuation of all such policies and contracts issued prior to the operative date of G.S. 58-201.2 shall be that provided by the laws in effect immediately prior to such date, except that the minimum standard for the valuation of annuities and pure endowments purchased under group annuity and pure endowment contracts issued prior to such effective date shall be that provided by the laws in effect immediately prior to such date but replacing the interest rates specified in such laws by an interest rate of five percent (5%) per annum.

(2) Except as otherwise provided in subdivisions (3) and (4) of this subsection, the minimum standards for the valuation of all such policies and contracts issued on or after the operative date of G.S. 58-201.2 shall be the Commissioner's reserve valuation methods defined in subsections (d), (d-1) and (g), five percent (5%) interest for group annuity and pure endowment contracts and three and one-half percent (3½%) interest for all other policies and contracts, or, in the case of policies and contracts other than annuity and pure endowment contracts, issued on or after July 1, 1975, four percent (4%) interest for

such policies issued prior to April 19, 1979, and four and one-half percent (4½%) interest for such policies issued on or after April 19, 1979, and the following tables:

a. For all ordinary policies of life insurance issued on the standard basis, excluding any disability and accidental death benefits in such policies — the Commissioner's 1941 Standard Ordinary Mortality Table for such policies issued prior to the operative date of subdivision (e)(2) of G.S. 58-201.2, the Commissioner's 1958 Standard Ordinary Mortality Table for such policies issued on or after the operative date of subdivision (e)(2) of G.S. 58-201.2 prior to the operative date of subdivision (e)(4) of G.S. 58-201.2, provided that for any category of such policies issued on female risks, all modified net premiums and present values referred to in this section may be calculated according to an age not more than six years younger than the actual age of the insured; and, for such policies issued on or after the operative date of subdivision (e)(4) of G.S. 58-201.2, (i) the Commissioner's 1980 Standard Ordinary Mortality Table, or (ii) at the election of the company for any one or more specified plans of life insurance, the Commissioner's 1980 Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors, or (iii) any ordinary mortality table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such policies;

b. For all industrial life insurance policies issued on the standard basis, excluding any disability and accidental death benefits in such policies — the 1941 Standard Industrial Mortality Table for such policies issued prior to the operative date of subdivision (e)(3) of G.S. 58-201.2 and for such policies issued on or after such operative date the Commissioner's 1961 Standard Industrial Mortality Table or any industrial mortality table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such policies;

c. For individual annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies — the 1937 Standard Annuity Mortality Table or, at the option of the company, the Annuity Mortality Table for 1949, Ultimate, or any modification of either of these tables approved by the Commissioner;

d. For group annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies — the Group Annuity Mortality Table for 1951, any modification of such table approved by the Commissioner, or, at the option of the company, any of the tables or modifications of tables specified for individual annuity and pure endowment contracts;

e. For total and permanent disability benefits in or supplementary to ordinary policies or contracts — for policies or contracts issued on or after January 1, 1966, the tables of Period 2 disablement rates and the 1930 to 1950 termination rates of the 1952 Disability Study of the Society of Actuaries, with due regard to the type of benefit or any tables of disablement rates and termination rates, adopted after 1980 by the National Association of Insurance Commissioners, that are approved by regulation promulgated by the Commissioner for use in determining the minimum standard

of valuation for such policies; for policies or contracts issued on or after January 1, 1961, and prior to January 1, 1966, either such tables or, at the option of the company, the Class (3) Disability Table (1926); and for policies issued prior to January 1, 1961, the Class (3) Disability Table (1926). Any such table shall, for active lives, be combined with a mortality table permitted for calculating the reserves for life insurance policies;

f. For accidental death benefits in or supplementary to policies — for policies issued on or after January 1, 1966, the 1959 Accidental Death Benefits Table or any accidental death benefits table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such policies; for policies issued on or after January 1, 1961, and prior to January 1, 1966, either such table or, at the option of the company, the Inter-Company Double Indemnity Mortality Table; and for policies issued prior to January 1, 1961, the Inter-Company Double Indemnity Mortality Table. Either table shall be combined with a mortality table permitted for calculating the reserves for life insurance policies;

g. For group life insurance, life insurance issued on the substandard basis and other special benefits — such tables as may be approved by the Commissioner.

(3) Except as provided in subdivision (4) of this subsection, the minimum standard for the valuation of all individual annuity and pure endowment contracts issued on or after the operative date of this subdivision (3), as defined herein, and for all annuities and pure endowments purchased on or after such operative date under group annuity and pure endowment contracts, shall be the Commissioner's reserve valuation methods defined in subsections (d) and (d-1) and the following tables and interest rates:

a. For individual annuity and pure endowment contracts issued prior to April 19, 1979, excluding any disability and accidental death benefits in such contracts — the 1971 Individual Annuity Mortality Table, or any modification of this table approved by the Commissioner, and six percent (6%) interest for single premium immediate annuity contracts, and four percent (4%) interest for all other individual annuity and pure endowment contracts;

b. For individual single premium immediate annuity contracts issued on or after April 19, 1979, excluding any disability and accidental death benefits in such contracts — the 1971 Individual Annuity Mortality Table or any individual annuity mortality table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such contracts, or any modification of these tables approved by the Commissioner, and seven and one-half percent (7½%) interest;

c. For individual annuity and pure endowment contracts issued on or after April 19, 1979, other than single premium immediate annuity contracts, excluding any disability and accidental death benefits in such contracts — the 1971 Individual Annuity Mortality Table or any individual annuity mortality table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such contracts, or any modification of these tables

approved by the Commissioner, and five and one-half percent (5½%) interest for single premium deferred annuity and pure endowment contracts and four and one-half percent (4½%) interest for all other such individual annuity and pure endowment contracts;

d. For all annuities and pure endowments purchased prior to April 19, 1979, under group annuity and pure endowment contracts, excluding any disability and accidental death benefits purchased under such contracts — the 1971 Group Annuity Mortality Table, or any modification of this table approved by the Commissioner, and six percent (6%) interest;

e. For all annuities and pure endowments purchased on or after April 19, 1979, under group annuity and pure endowment contracts, excluding any disability and accidental death benefits purchased under such contracts — the 1971 Group Annuity Mortality Table or any group annuity mortality table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such annuities and pure endowments, or any modification of these tables approved by the Commissioner, and seven and one-half percent (7½%) interest.

After July 1, 1975, any company may file with the Commissioner a written notice of its election to comply with the provisions of this subdivision (3) after a specified date before January 1, 1979, which shall be the operative date of this subdivision for such company, provided, a company may elect a different operative date for individual annuity and pure endowment contracts from that elected for group annuity and pure endowment contracts. If a company makes no such election, the operative date of this subdivision for such company shall be January 1, 1979.

(4) a. Applicability of This Subdivision. The interest rates used in determining the minimum standard for the valuation of:

1. All life insurance policies issued in a particular calendar year, on or after the operative date of subdivision (e)(4) of G.S. 58-201.2,
2. All individual annuity and pure endowment contracts issued in a particular calendar year on or after January 1, 1982,
3. All annuities and pure endowments purchased in a particular calendar year on or after January 1, 1982, under group annuity and pure endowment contracts, and
4. The net increase, if any, in a particular calendar year after January 1, 1982, in amounts held under guaranteed interest contracts

shall be the calendar year statutory valuation interest rates as defined in this subdivision.

b. Calendar Year Statutory Valuation Interest Rates.

1. The calendar year statutory valuation interest rates, I shall be determined as follows and the results rounded to the nearer one-quarter of one percent (¼ of 1%):

I. For life insurance,

$$I = .03 \text{ plus } W(R_1 - .03) \text{ plus } W(R_2 - .09);$$

II. For single premium immediate annuities and for annuity benefits involving life contingencies arising from other annuities with cash settlement options and from guaranteed interest contracts with cash settlement options,

$I = .03 \text{ plus } W (R - .03)$

where R_1 is the lesser of R and .09,

R_2 is the greater of R and .09,

R is the reference interest rate defined in this subdivision, and W is the weighting factor defined in this subdivision,

III. For other annuities with cash settlement options and guaranteed interest contracts with cash settlement options, valued on an issue year basis, except as stated in II above, the formula for life insurance stated in I above shall apply to annuities and guaranteed interest contracts with guarantee durations in excess of 10 years and the formula for single premium immediate annuities stated in II above shall apply to annuities and guaranteed interest contracts with guarantee duration of 10 years or less,

IV. For other annuities with no cash settlement options and for guaranteed interest contracts with no cash settlement options, the formula for single premium immediate annuities stated in II above shall apply,

V. For other annuities with cash settlement options and guaranteed interest contracts with cash settlement options, valued on a change in fund basis, the formula for single premium immediate annuities stated in II above shall apply.

2. However, if the calendar year statutory valuation interest rate for any life insurance policies issued in any calendar year determined without reference to this sentence differs from the corresponding actual rate for similar policies issued in the immediately preceding calendar year by less than one-half of one percent (½ of 1%), the calendar year statutory valuation interest rate for such life insurance policies shall be equal to the corresponding actual rate for the immediately preceding calendar year. For purposes of applying the immediately preceding sentence, the calendar year statutory valuation interest rate for life insurance policies issued in a calendar year shall be determined for 1980 (using the reference interest rate defined for 1979) and shall be determined for each subsequent calendar year regardless of when subdivision (e)(4) of G.S. 58-201.2 becomes operative.

c. Weighting Factors.

1. The weighting factors referred to in the formulas stated above are given in the following tables:

I. Weighting Factors for Life Insurance:

Guarantee Duration (Years)	Weighting Factors
10 or less	.50
More than 10, but not more than 20	.45
More than 20	.35

For life insurance, the guarantee duration is the maximum number of years the life insurance can remain in force on a basis guaranteed in the policy or under options to convert to plans of life insurance with premium rates or nonforfeiture values or both which are guaranteed in the original policy;

II. Weighting factor for single premium immediate annuities and for annuity benefits involving life contingencies

arising from other annuities with cash settlement options and guaranteed interest contracts with cash settlement options:

.80

III. Weighting factors for other annuities and for guaranteed interest contracts, except as stated in II. above, shall be as specified in tables (i), (ii), and (iii) below, according to the rules and definitions in (iv), (v) and (vi) below:

(i) For annuities and guaranteed interest contracts valued on an issue year basis:

Guarantee Duration (Years)	Weighting Factor For Plan Type A	B	C
5 or less:	.80	.60	.50
More than 5, but not more than 10:	.75	.60	.50
More than 10, but not more than 20:	.65	.50	.45
More than 20:	.45	.35	.35

(ii) For annuities and guaranteed interest contracts valued on a change in fund basis, the factors shown in (i) above increased by:

	Plan Type A	B	C
	.15	.25	.05

(iii) For annuities and guaranteed interest contracts valued on an issue year basis (other than those with no cash settlement options) which do not guarantee interest on considerations received more than one year after issue or purchase and for annuities and guaranteed interest contracts valued on a change in fund basis which do not guarantee interest rates on considerations received more than 12 months beyond the valuation date, the factors shown in (i) or derived in (ii) increased by:

	Plan Type A	B	C
	.05	.05	.05

(iv) For other annuities with cash settlement options and guaranteed interest contracts with cash settlement options, the guarantee duration is the number of years for which the contract guarantees interest rates in excess of the calendar year statutory valuation interest rate for life insurance

policies with guarantee duration in excess of 20 years. For other annuities with no cash settlement options and for guaranteed interest contracts with no cash settlement options, the guarantee duration is the number of years from the date of issue or date of purchase to the date annuity benefits are scheduled to commence.

(v) Plan type as used in the above tables is defined as follows:

Plan Type A: At any time policyholder may withdraw funds only (1) with an adjustment to reflect changes in interest rates or asset values since receipt of the funds by the insurance company, or (2) without such adjustment but in installments over five years or more, or (3) as an immediate life annuity, or (4) no withdrawal permitted.

Plan Type B. Before expiration of the interest rate guarantee, policyholder may withdraw funds only (1) with an adjustment to reflect changes in interest rates or asset values since receipt of the funds by the insurance company, or (2) without such adjustment but in installments over five years or more, or (3) no withdrawal permitted. At the end of interest rate guarantee, funds may be withdrawn without such adjustment in a single sum or installments over less than five years.

Plan Type C: Policyholder may withdraw funds before expiration of interest rate guarantee in a single sum or installments over less than five years either (1) without adjustment to reflect changes in interest rates or asset values since receipt of the funds by the insurance company, or (2) subject only to a fixed surrender charge stipulated in the contract as a percentage of the fund.

(vi) A company may elect to value guaranteed interest contracts with cash settlement options and annuities with cash settlement options on either an issue year basis or on a change in fund basis. Guaranteed interest contracts with no cash settlement options and other annuities with no cash settlement options must be valued on an issue year basis. As used in this section, an issue year basis of valuation refers to a valuation basis under which the interest rate used to determine the minimum valuation standard for the entire duration of the annuity or guaranteed interest contract is the calendar year valuation interest rate for the year of issue or year of purchase of the annuity or guaranteed interest contract, and the change in fund basis of valuation refers to a valuation basis under which the interest rate used to determine the minimum valuation standard applicable to each change in the fund held under the annuity or guaranteed interest contract is the

calendar year valuation interest rate for the year of the change in the fund.

d. Reference Interest Rate.

1. The reference interest rate referred to in paragraph b of this subdivision shall be defined as follows:

I. For all life insurance, the lesser of the average over a period of 36 months and the average over a period of 12 months, ending on June 30 of the calendar year next preceding the year of issue, of Moody's Corporate Bond Yield Average — Monthly Average Corporates, as published by Moody's Investors Service, Inc.

II. For single premium immediate annuities and for annuity benefits involving life contingencies arising from other annuities with cash settlement options and guaranteed interest contracts with cash settlement options, the average over a period of 12 months, ending on June 30 of the calendar year of issue or year of purchase, of Moody's Corporate Bond Yield Average — Monthly Average Corporates, as published by Moody's Investors Service, Inc.

III. For other annuities with cash settlement options and guaranteed interest contracts with cash settlement options, valued on a year of issue basis, except as stated in II above, with guarantee duration in excess of 10 years, the lesser of the average over a period of 36 months and the average over a period of 12 months, ending on June 30 of the calendar year of issue or purchase, of Moody's Corporate Bond Yield Average — Monthly Average Corporates, as published by Moody's Investors Service, Inc.

IV. For other annuities with cash settlement options and guaranteed interest contracts with cash settlement options, valued on a year of issue basis, except as stated in II above, with guarantee duration of 10 years or less, the average over a period of 12 months, ending on June 30 of the calendar year of issue or purchase, of Moody's Corporate Bond Yield Average — Monthly Average Corporates, as published by Moody's Investors Service, Inc.

V. For other annuities with no cash settlement options and for guaranteed interest contracts with no cash settlement options, the average over a period of 12 months, ending on June 30 of the calendar year of issue or purchase, of Moody's Corporate Bond Yield Average — Monthly Average Corporates, as published by Moody's Investors Service, Inc.

VI. For other annuities with cash settlement options and guaranteed interest contracts with cash settlement options, valued on a change in fund basis, except as stated in II above, the average over a period of 12 months, ending on June 30 of the calendar year of the change in the fund, of Moody's Corporate Bond Yield Average — Monthly Average Corporates, as published by Moody's Investors Service, Inc.

e. Alternative Method for Determining Reference Interest Rates.

1. In the event that Moody's Corporate Bond Yield Average — Monthly Average Corporates is no longer published by

Moody's Investors Service, Inc., or in the event that the National Association of Insurance Commissioners determines that Moody's Corporate Bond Yield Average — Monthly Average Corporates as published by Moody's Investors Service, Inc., is no longer appropriate for the determination of the reference interest rate, than an alternative method for determination of the reference interest rate, which is adopted by the National Association of Insurance Commissioners and approved by regulation promulgated by the Commissioner, may be substituted.

(d) Except as otherwise provided in subsections (d-1) and (g), reserves according to the Commissioner's reserve valuation method, for the life insurance and endowment benefits of policies providing for a uniform amount of insurance and requiring the payment of uniform premiums, shall be the excess, if any, of the present value, at the date of valuation, of such future guaranteed benefits provided for by such policies, over the then present value of any future modified net premiums therefor. The modified net premiums for any such policy shall be such uniform percentage of the respective contract premiums for such benefits that the present value, at the date of issue of the policy, of all such modified net premiums shall be equal to the sum of the then present value of such benefits provided for by the policy and the excess of (1) and (2), as follows:

(1) A net level annual premium equal to the present value, at the date of issue, of such benefits provided for after the first policy year, divided by the present value, at the date of issue, of an annuity of one per annum payable on the first and each subsequent anniversary of such policy on which a premium falls due; provided, however, that such net level annual premium shall not exceed the net level annual premium on the 19-year premium whole life plan for insurance of the same amount at an age one year higher than the age at issue of such policy.

(2) A net one year term premium for such benefits provided for in the first policy year.

Provided that for any life insurance policy issued on or after January 1, 1985, for which the contract premium in the first policy year exceeds that of the second year and for which no comparable additional benefits are provided in the first year for such excess and which provides an endowment benefit or a cash surrender value of a combination thereof in an amount greater than such excess premium, the reserve according to the Commissioner's reserve valuation method as of any policy anniversary occurring on or before the assumed ending date defined herein as the first policy anniversary on which the sum of any endowment benefit and any cash surrender value then available is greater than such excess premium shall, except as otherwise provided in subsection (g), be the greater of the reserve as of such policy anniversary calculated as described in the preceding paragraph and the reserve as of such policy anniversary calculated as described in that paragraph, but with (i) the value defined in subparagraph (2) of that paragraph being reduced by fifteen percent (15%) of the amount of such excess first year premium, (ii) all present values of benefits and premiums being determined without reference to premiums or benefits provided for by the policy after the assumed ending date, (iii) the policy being assumed to mature on such date as an endowment, and (iv) the cash surrender value provided on such date being considered as an endowment benefit. In making the above comparison the mortality and interest bases stated in subdivisions (2) and (4) of subsection (c) shall be used.

Reserves according to the Commissioner's reserve valuation method for: (i) life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums; (ii) group annuity and pure endowment contracts purchased under a retirement plan or plan of deferred compensation,

established or maintained by an employer (including a partnership or sole proprietorship) or by an employee organization, or by both, other than a plan providing individual retirement accounts or individual retirement annuities under section 408 of the Internal Revenue Code, as now or hereafter amended; (iii) disability and accidental death benefits in all policies and contracts; and (iv) all other benefits, except life insurance and endowment benefits in life insurance policies and benefits provided by all other annuity and pure endowment contracts, shall be calculated by a method consistent with the principles of this subsection except that any extra premiums charged because of impairments or special hazards shall be disregarded in the determination of modified net premiums.

(d-1) This subsection shall apply to all annuity and pure endowment contracts other than group annuity and pure endowment contracts purchased under a retirement plan or plan of deferred compensation, established or maintained by an employer (including a partnership or sole proprietorship) or by an employee organization, or by both, other than a plan providing individual retirement accounts or individual retirement annuities under section 408 of the Internal Revenue Code, as now or hereafter amended.

Reserves according to the Commissioner's annuity reserve method for benefits under annuity or pure endowment contracts, excluding any disability and accidental death benefits in such contracts, shall be the greatest of the respective excesses of the present values, at the date of valuation, of the future guaranteed benefits, including guaranteed nonforfeiture benefits, provided for by such contracts at the end of each respective contract year, over the present value, at the date of valuation, of any future valuation considerations derived from future gross considerations, required by the terms of such contract, that become payable prior to the end of such respective contract year. The future guaranteed benefits shall be determined by using the mortality table, if any, and the interest rate, or rates, specified in such contracts for determining guaranteed benefits. The valuation considerations are the portions of the respective gross considerations applied under the terms of such contracts to determine nonforfeiture values.

(e) In no event shall a company's aggregate reserves for all life insurance policies, excluding disability and accidental death benefits, issued on or after the effective date of G.S. 58-201.2, be less than the aggregate reserves calculated in accordance with the methods set forth in subsections (d), (d-1), (g) and (h) and the mortality table or tables and rate or rates of interest used in calculating nonforfeiture benefits for such policies.

(f) Reserves for all policies and contracts issued prior to the operative date of G.S. 58-201.2 may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for all such policies and contracts than the minimum reserves required by the laws in effect immediately prior to such date.

Reserves for any category of policies, contracts or benefits as established by the Commissioner, issued on or after the operative date of G.S. 58-201.2, may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for such category than those calculated according to the minimum standard herein provided, but the rate or rates of interest used for policies and contracts, other than annuity and pure endowment contracts, shall not be higher than the corresponding rate or rates of interest used in calculating any nonforfeiture benefits provided for therein.

Any such company which at any time shall have adopted any standard of valuation producing greater aggregate reserves than those calculated according to the minimum standard herein provided may, with the approval of the Commissioner, adopt any lower standard of valuation, but not lower than the minimum herein provided.

(g) If in any contract year the gross premium charged by any life insurance company on any policy or contract is less than the valuation net premium for the policy or contract calculated by the method used in calculating the reserve thereon but using the minimum valuation standards of mortality and rate of interest, the minimum reserve required for such policy or contract shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy or contract, or the reserve calculated by the method actually used for such policy or contract but using the minimum valuation standards of mortality and rate of interest and replacing the valuation net premium by the actual gross premium in each contract year for which the valuation net premium exceeds the actual gross premium. The minimum valuation standards of mortality and rate of interest referred to in this subsection are those standards stated in subdivisions (1), (2) and (4) of subsection (c).

Provided that for any life insurance policy issued on or after January 1, 1985, for which the gross premium in the first policy year exceeds that of the second year and for which no comparable additional benefit is provided in the first year for such excess and which provides an endowment benefit or a cash surrender value or a combination thereof in an amount greater than such excess premium, the foregoing provisions of this subsection (g) shall be applied as if the method actually used in calculating the reserve for such policy were the method described in subsection (d), ignoring the second paragraph of subsection (d). The minimum reserve at each policy anniversary of such a policy shall be the greater of the minimum reserve calculated in accordance with subsection (d), including the second paragraph of that subsection, and the minimum reserve calculated in accordance with this subsection (g).

(h) In the case of any plan of life insurance which provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or in the case of any plan of life insurance or annuity which is of such a nature that the minimum reserves cannot be determined by the methods described in subsections (d), (d-1), and (g), the reserves which are held under any such plan must:

(1) Be appropriate in relation to the benefits and the pattern of premiums for that plan, and

(2) Be computed by a method which is consistent with the principles of this Standard Valuation Law, as determined by regulations promulgated by the Commissioner. (1945, c. 379; 1959, c. 484, s. 1; 1961, c. 255, ss. 1-3; 1963, c. 791, ss. 1, 2; 1975, c. 603, s. 1; 1979, c. 409, ss. 1-6; 1981, c. 761, ss. 1-5.)

Effect of Amendments. — The 1981 amendment, in subsection (c), substituted "subdivisions (3) and (4)" for "subdivision (3)" near the beginning of subdivision (1) and (2) and "prior to April 19, 1979," for "prior to the effective date of this amendatory act of 1979," near the end of the introductory paragraph in subdivision (2), substituted "the operative date of subdivision (e)(2) of G.S. 58-201.2 prior to the operative date of subdivision (e)(4) of G.S. 58-201.2," for "such operative date;" near the middle of paragraph a of subdivision (2) and added at the end of that paragraph the language beginning "and, for such policies issued on or after the operative date of subdivision (e)(4) of G.S. 58-201.2, (i)." In paragraph b of subdivision (c)(2), the amendment deleted "the Commissioner's 1961 Standard Industrial Mortality Table" following "G.S. 58-201.2" and added at the end of the paragraph the language beginning "the Commissioner's 1961 Standard Industrial Mortality Table or any industrial mortality table." In paragraph e of subdivision (c)(2), the amendment inserted near the middle of the paragraph "or any tables of disablement rates and termination rates, adopted after 1980 by the National Association of Insurance Commissioners, that are approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such policies" in the first sentence. In paragraph f of subdivision (c)(2), the amendment inserted "or any accidental

death benefits table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such policies" in the first sentence. In subdivision (c)(3), the amendment added "Except as provided in subdivision (4) of this subsection," at the beginning of the introductory paragraph, inserted in paragraph b "or any individual annuity mortality table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such contracts" and substituted "these tables" for "this table" in paragraph b, inserted "or any individual annuity mortality table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such contracts," and substituted "these tables" for "this table" in paragraph c, inserted "or any group annuity mortality table, adopted after 1980 by the National Association of Insurance Commissioners, that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard of valuation for such annuities and pure endowments" and substituted "these tables" for "this table" in paragraph e and substituted "a company" for "that an insurer" in the proviso to the first sentence of the last paragraph of the subdivision. The amendment added subdivision (4) to subsection (c). In subsection (d), the amendment substituted "and" for "over" between "(1)" and "(2)" near the end of the introductory paragraph, added the next-to-last paragraph, and made a change in form in the last paragraph, which formerly contained tabulated subdivisions (1) through (4) rather than clauses (i) through (iv). In subsection (e), the amendment substituted "effective date" for "operative date" and inserted the reference to subsection (h). In subsection (g), the amendment inserted "valuation" preceding "standards of mortality" the last time that phrase appears in the first sentence and added the second sentence in the first paragraph and added the second paragraph. The amendment added subsection (h).

§ 58-201.2. Standard nonforfeiture provisions.

(a) This section shall be known as the Standard Nonforfeiture Law for Life Insurance.

(b) In the case of policies issued on or after the operative date of this section, as defined in subsection (h), no policy of life insurance, except as stated in subsection (g), shall be delivered or issued for delivery in this State unless it shall contain in substance the following provisions, or corresponding provisions which in the opinion of the Commissioner are at least as favorable to the defaulting or surrendering policyholder as are the minimum requirements hereinafter specified and are essentially in compliance with subsection (f1) of this section:

(1) That, in the event of default in any premium payment after premiums have been paid for at least one full year in the case of ordinary insurance or three full years in the case of industrial insurance, the company will grant, upon proper request not later than 60 days after the due date of the premium in default, a paid-up nonforfeiture benefit on a plan stipulated in the policy, effective as of such due date, of such amount as may be hereinafter specified. In lieu of such stipulated paid-up nonforfeiture benefit, the company may substitute, upon proper request not later than 60 days after the due date of the premium in default, an actuarially equivalent alternative paid-up nonforfeiture benefit which provides a greater amount or longer period of death benefits or, if applicable, a greater amount of earlier payment of endowment benefits.

(2) That, upon surrender of the policy within 60 days after the due date of any premium payment in default after premiums have been paid for at least three full years in the case of ordinary insurance or five full years in the case of industrial insurance, the company will pay, in lieu of any paid-up nonforfeiture benefit, a cash surrender value of such amount as may be hereinafter specified.

(3) That a specified paid-up nonforfeiture benefit shall become effective as specified in the policy unless the person entitled to make such election elects another available option not later than 60 days after the due date of the premium in default. Nothing herein shall prevent the use of an automatic premium loan provision.

(4) That, if the policy shall have become paid up by completion of all premium payments or if it is continued under any paid-up nonforfeiture benefit which became effective on or after the third policy anniversary in the case of ordinary insurance or the fifth policy anniversary in the case of industrial insurance, the company will pay, upon surrender of the policy within 30 days after any policy anniversary, a cash surrender value of such amount as may be hereinafter specified.

(5) In the case of policies which cause on a basis guaranteed in the policy unscheduled changes in benefits or premiums, or which provide an option for changes in benefits or premiums other than a change to a new policy, a statement of the mortality table, interest rate, and method used in calculating cash surrender values and the paid-up nonforfeiture benefits available under the policy. In the case of all other policies, a statement of the mortality table and interest rate used in calculating the cash surrender values and the paid-up nonforfeiture benefits available under the policy, together with a table showing the cash surrender value, if any, and paid-up nonforfeiture benefit, if any available under the policy on each policy anniversary either during the first 20 policy years or during the term of the policy, whichever is shorter, such values and benefits to be calculated upon the assumption that there are no dividends or paid-up additions credited to the policy and that there is no indebtedness to the company on the policy.

(6) A brief and general statement of the method to be used in calculating the cash surrender value and the paid-up nonforfeiture benefit available under the policy on any policy anniversary with an explanation of the manner in which the cash surrender values and the paid-up nonforfeiture benefits are altered by the existence of any paid-up additions credited to the policy or any indebtedness to the company on the policy.

Any of the foregoing provisions or portions thereof not applicable by reason of the plan of insurance may, to the extent inapplicable, be omitted from the policy.

The company shall reserve the right to defer the payment of any cash surrender value for a period of six months after demand therefor with surrender of the policy.

(c) Any cash surrender value available under the policy in the event of default in a premium payment due on any policy anniversary, whether or not required by subsection (b), shall be an amount not less than the excess, if any, of the present value, on such anniversary, of the future guaranteed benefits which would have been provided for by the policy, including any existing paid-up additions, if there had been no default, over the sum of (i) the then present value of the adjusted premiums as defined in subsection (e), corresponding to premiums which would have fallen due on and after such anniversary, and (ii) the amount of any indebtedness to the company on the policy.

Provided, however, that for any policy issued on or after the operative date of subdivision (4) of subsection (e) as defined therein, which provides supplemental life insurance or annuity benefits at the option of the insured and for an identifiable additional premium by rider or supplemental policy provision, the cash surrender value referred to in the first paragraph of this

subsection shall be an amount not less than the sum of the cash surrender value as defined in such paragraph for an otherwise similar policy issued at the same age without such rider or supplemental policy provision and the cash surrender value as defined in such paragraph for a policy which provides only the benefits otherwise provided by such rider or supplemental policy provision.

Provided, further, that for any family policy issued on or after the operative date of subdivision (4) of subsection (e) as defined therein, which defines a primary insured and provides term insurance on the life of the spouse of the primary insured expiring before the spouse's age 71, the cash surrender value referred to in the first paragraph of this subsection shall be an amount not less than the sum of the cash surrender value as defined in such paragraph for an otherwise similar policy issued at the same age without such term insurance on the life of the spouse and cash surrender value as defined in such paragraph for a policy which provides only the benefits otherwise provided by such term insurance on the life of the spouse.

Any cash surrender value available within 30 days after any policy anniversary under any policy paid up by completion of all premium payments or any policy continued under any paid-up nonforfeiture benefit, whether or not required by subsection (b), shall be an amount not less than the present value, on such anniversary, of the future guaranteed benefits provided for by the policy, including any existing paid-up additions, decreased by any indebtedness to the company on the policy.

(d) Any paid-up nonforfeiture benefit available under the policy in the event of default in a premium payment due on any policy anniversary shall be such that its present value as of such anniversary shall be at least equal to the cash surrender value then provided for by the policy or, if none is provided for, at least equal to that cash surrender value which would have been required by this section in the absence of the condition that premiums shall have been paid for a [at] least a specified period.

(e) (1) This subdivision (1) of subsection (e) shall not apply to policies issued on or after the operative date of subdivision (4) of subsection (e) as defined therein. Except as provided in the third paragraph of this subdivision, the adjusted premiums for any policy shall be calculated on an annual basis and shall be such uniform percentage of the respective premiums specified in the policy for each policy year, excluding any extra premiums charged because of impairments or special hazards, that the present value, at the date of issue of the policy, of all such adjusted premiums shall be equal to the sum of (i) the then present value of the future guaranteed benefits provided for by the policy; (ii) two percent (2%) of the amount of insurance, if the insurance be uniform in amount, or of the equivalent uniform amount, as hereinafter defined, if the amount of insurance varies with duration of the policy; (iii) forty percent (40%) of the adjusted premium for the first policy year; (iv) twenty-five percent (25%) of either the adjusted premium for the first policy year or the adjusted premium for a whole life policy of the same uniform or equivalent uniform amount with uniform premiums for the whole of life issued at the same age for the same amount of insurance, whichever is less. Provided, however, that in applying the percentages specified in (iii) and (iv) above, no adjusted premium shall be deemed to exceed four percent (4%) of the amount of insurance or uniform amount equivalent thereto. The date of issue of a policy for the purpose of this subsection shall be the date as of which the rated age of the insured is determined.

In the case of a policy providing an amount of insurance varying with duration of the policy, the equivalent uniform amount thereof for the purpose of this section shall be deemed to be the uniform amount of insurance provided by an otherwise similar policy containing the

same endowment benefit or benefits, if any, issued at the same age and for the same term, the amount of which does not vary with duration and the benefits under which have the same present value at the date of issue as the benefits under the policy, provided, however, that in the case of a policy providing a varying amount of insurance issued on the life of a child under age 10, the equivalent uniform amount may be computed as though the amount of insurance provided by the policy prior to the attainment of age 10 were the amount provided by such policy at age 10.

The adjusted premiums for any policy providing term insurance benefits by rider or supplemental policy provision shall be equal to (i) the adjusted premiums for an otherwise similar policy issued at the same age without such term insurance benefits, increased, during the period for which premiums for such term insurance benefits are payable, by (ii) the adjusted premiums for such term insurance, the foregoing items (i) and (ii) being calculated separately and as specified in the first two paragraphs of this subsection except that, for the purposes of (ii), (iii) and (iv) of the first such paragraph, the amount of insurance or equivalent uniform amount of insurance used in the calculation of the adjusted premiums referred to in (ii) of this paragraph shall be equal to the excess of the corresponding amount determined for the entire policy over the amount used in the calculation of the adjusted premiums in (i).

Except as otherwise provided in subdivisions (2) and (3) of this subsection, all adjusted premiums and present values referred to in this section shall for all policies of ordinary insurance be calculated on the basis of the Commissioner's 1941 Standard Ordinary Mortality Table, provided that for any category of ordinary insurance issued on female risks, adjusted premiums and present values may be calculated according to an age not more than three years younger than the actual age of the insured, and such calculations for all policies of industrial insurance shall be made on the basis of the 1941 Standard Industrial Mortality Table. All calculations shall be made on the basis of the rate of interest, not exceeding three and one-half percent (3½%) per annum, specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits. Provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may not be more than one hundred and thirty percent (130%) of the rates of mortality according to such applicable table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the Commissioner.

(2) This subdivision (2) of subsection (e) shall not apply to ordinary policies issued on or after the operative date of subdivision (4) of subsection (e) as defined therein. In the case of ordinary policies issued on or after the operative date of this subdivision (2) as defined herein, all adjusted premiums and present values referred to in this section shall be calculated on the basis of the Commissioner's 1958 Standard Ordinary Mortality Table and the rate of interest specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits, provided that such rate of interest shall not exceed three and one-half percent (3½%) per annum except that a rate of interest not exceeding four percent (4%) per annum may be used for policies issued on or after July 1, 1975, and prior to April 19, 1979, and a rate of interest not exceeding five and one-half percent (5½%) per annum

may be used for policies issued on or after April 19, 1979, and, provided that for any category of ordinary insurance issued on female risks, adjusted premiums and present values may be calculated according to an age not more than six years younger than the actual age of the insured; provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than those shown in the Commissioner's 1958 Extended Term Insurance Table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the Commissioner.

After May 12, 1959, any company may file with the Commissioner a written notice of its election to comply with the provisions of this subdivision (2) after a specified date before January 1, 1966. After the filing of such notice, then upon such specified date (which shall be the operative date of this subdivision (2) for such company), this subdivision (2) shall become operative with respect to the ordinary policies thereafter issued by such company. If a company makes no such election, the operative date of this subdivision (2) for such company shall be January 1, 1966.

(3) This subdivision (3) of subsection (e) shall not apply to industrial policies issued on or after the operative date of subdivision (4) of subsection (e) as defined therein. In the case of industrial policies issued on or after the operative date of this subdivision (3) as defined herein, all adjusted premiums and present values referred to in this section shall be calculated on the basis of the Commissioner's 1961 Standard Industrial Mortality Table and the rate of interest specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits, provided that such rate of interest shall not exceed three and one-half percent (3½%) per annum except that a rate of interest not exceeding four percent (4%) per annum may be used for policies issued on or after July 1, 1975, and prior to April 19, 1979, and a rate of interest not exceeding five and one-half percent (5½%) per annum may be used for policies issued on or after April 19, 1979; provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than those shown in the Commissioner's 1961 Industrial Extended Term Insurance Table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the Commissioner.

After June 11, 1963, any company may file with the Commissioner a written notice of its election to comply with the provisions of this subdivision (3) after a specified date before January 1, 1968. After the filing of such notice, then upon such specified date (which shall be the operative date of this subdivision (3) for such company), this subdivision (3) shall become operative with respect to the industrial policies thereafter issued by such company. If a company makes no such election, the operative date of this subdivision (3) for such company shall be January 1, 1968.

(4) a. This subdivision shall apply to all policies issued on or after the operative date of this subdivision (4) of subsection (e) as defincd herein. Except as provided in paragraph g of this subdivision, the

adjusted premiums for any policy shall be calculated on an annual basis and shall be such uniform percentage of the respective premiums specified in the policy for each policy year, excluding amounts payable as extra premiums to cover impairments or special hazards and also excluding any uniform annual contract charge or policy fee specified in the policy in a statement of the method to be used in calculating the cash surrender values and paid-up nonforfeiture benefits, that the present value, at the date of issue of the policy, of all adjusted premiums shall be equal to the sum of (i) the then present value of the future guaranteed benefits provided for by the policy; (ii) one percent (1%) of either the amount of insurance, if the insurance be uniform in amount, or the average amount of insurance at the beginning of each of the first 10 policy years; and (iii) one hundred twenty-five percent (125%) of the nonforfeiture net level premium as hereinafter defined. Provided, however, that in applying the percentage specified in (iii) above no nonforfeiture net level premium shall be deemed to exceed four percent (4%) of either the amount of insurance, if the insurance be uniform in amount, or the average amount of insurance at the beginning of each of the first 10 policy years. The date of issue of a policy for the purpose of this subdivision shall be the date as of which the rated age of the insured is determined.

b. The nonforfeiture net level premium shall be equal to the present value, at the date of issue of the policy, of the guaranteed benefits provided for by the policy divided by the present value, at the date of issue of the policy, of an annuity of one per annum payable on the date of issue of the policy and on each anniversary of such policy on which a premium falls due.

c. In the case of policies which cause on a basis guaranteed in the policy unscheduled changes in benefits or premiums, or which provide an option for changes in benefits or premiums other than a change to a new policy, the adjusted premiums and present values shall initially be calculated on the assumption that future benefits and premiums do not change from those stipulated at the date of issue of the policy. At the time of any such change in the benefits or premiums the future adjusted premiums, nonforfeiture net level premiums and present values shall be recalculated on the assumption that future benefits and premiums do not change from those stipulated by the policy immediately after the change.

d. Except as otherwise provided in paragraph g of this subdivision, the recalculated future adjusted premiums for any such policy shall be such uniform percentage of the respective future premiums specified in the policy for each policy year, excluding amounts payable as extra premiums to cover impairments and special hazards, and also excluding any uniform annual contract charge or policy fee specified in the policy in a statement of the method to be used in calculating the cash surrender values and paid-up nonforfeiture benefits, that the present value, at the time of change to the newly defined benefits or premiums, of all such future adjusted premiums shall be equal to the excess of (A) the sum of (i) the then present value of the then future guaranteed benefits provided for by the policy and (ii) the additional expense allowance, if any, over (B) the then cash surrender value, if any, or present value of any paid-up nonforfeiture benefit under the policy.

e. The additional expense allowance, at the time of the change to the newly defined benefits or premiums, shall be the sum of (i) one percent (1%) of the excess, if positive, of the average amount of insurance at the beginning of each of the first 10 policy years subsequent to the change over the average amount of insurance prior to the change at the beginning of each of the first 10 policy years subsequent to the time of the most recent previous change, or, if there has been no previous change, the date of issue of the policy; and (ii) one hundred twenty-five percent (125%) of the increase, if positive, in the nonforfeiture net level premium.

f. The recalculated nonforfeiture net level premium shall be equal to the result obtained by dividing (A) by (B) where

(A) Equals the sum of

(i) The nonforfeiture net level premium applicable prior to the change times the present value of an annuity of one per annum payable on each anniversary of the policy on or subsequent to the date of the change on which a premium would have fallen due had the change not occurred, and

(ii) The present value of the increase in future guaranteed benefits provided for by the policy, and

(B) Equals the present value of an annuity of one per annum payable on each anniversary of the policy on or subsequent to the date of change on which a premium falls due.

g. Notwithstanding any other provisions of this subdivision to the contrary, in the case of a policy issued on a substandard basis which provides reduced graded amounts of insurance so that, in each policy year, such policy has the same tabular mortality cost as an otherwise similar policy issued on the standard basis which provides higher uniform amounts of insurance, adjusted premiums and present values for such substandard policy may be calculated as if it were issued to provide such higher uniform amounts of insurance on the standard basis.

h. All adjusted premiums and present values referred to in this section shall for all policies of ordinary insurance be calculated on the basis of (i) the Commissioner's 1980 Standard Ordinary Mortality Table or (ii) at the election of the company for any one or more specified plans of life insurance, the Commissioner's 1980 Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors; shall for all policies of industrial insurance be calculated on the basis of the Commissioner's 1961 Standard Industrial Mortality Table; and shall for all policies issued in a particular calendar year be calculated on the basis of a rate of interest not exceeding the nonforfeiture interest rate as defined in this subdivision for policies issued in that calendar year. Provided, however, that:

1. At the option of the company, calculations for all policies issued in a particular calendar year may be made on the basis of a rate of interest not exceeding the nonforfeiture interest rate, as defined in this subdivision, for policies issued in the immediately preceding calendar year.

2. Under any paid-up nonforfeiture benefit, including any paid-up dividend additions, any cash surrender value available, whether or not required by subsection (b), shall be calculated on the basis of the mortality table and rate of interest used in determining the amount of such paid-up nonforfeiture benefit and paid-up dividend additions, if any.

3. A company may calculate the amount of any guaranteed paid-up nonforfeiture benefit including any paid-up additions under the policy on the basis of an interest rate no lower than that specified in the policy for calculating cash surrender values.
4. In calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than those shown in the Commissioner's 1980 Extended Term Insurance Table for policies of ordinary insurance and not more than the Commissioner's 1961 Industrial Extended Term Insurance Table for policies of industrial insurance.
5. For insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on appropriate modifications of the aforementioned tables.
6. Any ordinary mortality tables, adopted after 1980 by the National Association of Insurance Commissioners, that are approved by regulation promulgated by the Commissioner for use in determining the minimum nonforfeiture standard may be substituted for the Commissioner's 1980 Standard Ordinary Mortality Table with or without Ten-Year Select Mortality Factors or for the Commissioner's 1980 Extended Term Insurance Table.
7. Any industrial mortality tables, adopted after 1980 by the National Association of Insurance Commissioners, that are approved by regulation promulgated by the Commissioner for use in determining the minimum nonforfeiture standard may be substituted for the Commissioner's 1961 Standard Industrial Mortality Table or the Commissioner's 1961 Industrial Extended Term Insurance Table.

i. The nonforfeiture interest rate per annum for any policy issued in a particular calendar year shall be equal to one hundred and twenty-five percent (125%) of the calendar year statutory valuation interest rate for such policy as defined in the Standard Valuation Law, rounded to the nearer one quarter of one percent (¼ of 1%).

j. Notwithstanding any other provision in this Chapter to the contrary, any refiling of nonforfeiture values or their methods of computation for any previously approved policy form which involves only a change in the interest rate or mortality table used to compute nonforfeiture values shall not require refiling of any other provisions of that policy form.

k. After the effective date of this subdivision (4) of subsection (e), any company may file with the Commissioner a written notice of its election to comply with the provisions of this subdivision after a specified date before January 1, 1989, which shall be the operative date of this subdivision for such company. If a company makes no such election, the operative date of this subdivision for such company shall be January 1, 1989.

(e1) In the case of any plan of life insurance which provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or in the case of any plan of life insurance which is of such a nature that minimum values cannot be determined by the methods described in subsections (b), (c), (d), or (e) herein, then:

(1) The Commissioner must be satisfied that the benefits provided under the plan are substantially as favorable to policyholders and insureds as the minimum benefits otherwise required by subsections (b), (c), (d), or (e) herein;

(2) The Commissioner must be satisfied that the benefits and the pattern of premiums of that plan are not such as to mislead prospective policyholders or insureds;

(3) The cash surrender values and paid-up nonforfeiture benefits provided by such plan must not be less than the minimum values and benefits required for the plan computed by a method consistent with the principles of this Standard Nonforfeiture Law, as determined by regulations promulgated by the Commissioner.

(f) Any cash surrender value and any paid-up nonforfeiture benefit, available under the policy in the event of default in a premium payment due at any time other than on the policy anniversary, shall be calculated with allowance for the lapse of time and the payment of fractional premiums beyond the last preceding policy anniversary. Any values referred to in subsections (c), (d) and (e) may be calculated upon the assumption that any death benefit is payable at the end of the policy year of death. The net value of any paid-up additions, other than paid-up term additions, shall be not less than the amounts used to provide such additions. Notwithstanding the provisions of Section 3 [subsection (c)], additional benefits payable (i) in the event of death or dismemberment by accident or accidental means, (ii) in the event of total and permanent disability, (iii) as reversionary annuity or deferred reversionary annuity benefits, (iv) as term insurance benefits provided by a rider or supplemental policy provision to which, if issued as a separate policy, this section would not apply, (v) as term insurance on the life of a child or on the lives of children provided in a policy on the life of a parent of the child, if such term insurance expires before the child's age is 26, is uniform in amount after the child's age is one, and has not become paid up by reason of the death of a parent of the child, and (vi) as other policy benefits additional to life insurance and endowment benefits, and premiums for all such additional benefits, shall be disregarded in ascertaining cash surrender values and nonforfeiture benefits required by this section, and no such additional benefits shall be required to be included in any paid-up nonforfeiture benefits.

(f1) This subsection, in addition to all other applicable subsections of this section, shall apply to all policies issued on or after January 1, 1985. Any cash surrender value available under the policy in the event of default in a premium payment due on any policy anniversary shall be in an amount which does not differ by more than two-tenths of one percent (2/10 of 1%) of either the amount of insurance, if the insurance be uniform in amount, or the average amount of insurance at the beginning of each of the first 10 policy years, from the sum of (1) the greater of zero and the basic cash value hereinafter specified and (2) the present value of any existing paid-up additions less the amount of any indebtedness to the company under the policy.

The basic cash value shall be equal to the present value, on such anniversary, of the future guaranteed benefits which would have been provided for by the policy, excluding any existing paid-up additions and before deduction of any indebtedness to the company, if there had been no default, less the then present value of the nonforfeiture factors, as hereinafter defined, corresponding to premiums which would have fallen due on and after such anniversary. Provided, however, that the effects on the basic cash value of supplemental life insurance or annuity benefits or of family coverage, as described in subsection (c) or (e)(1), whichever is applicable, shall be the same as are the effects specified in subsection (c) or (e)(1), whichever is applicable, on the cash surrender values defined in that subsection.

The nonforfeiture factor for each policy year shall be an amount equal to a percentage of the adjusted premium for the policy year, as defined in subsection (e)(1) or (e)(4), whichever is applicable. Except as is required by the next succeeding sentence of this paragraph, such percentage:

(1) Must be the same percentage for each policy year between the second policy anniversary and the later of (i) the fifth policy anniversary and (ii) the first policy anniversary at which there is available under the policy a cash surrender value in an amount, before including any paid-up additions and before deducting any indebtedness, of at least two-tenths of one percent (2/10 of 1%) of either the amount of insurance, if the insurance be uniform in amount, or the average amount of insurance at the beginning of each of the first 10 policy years; and

(2) Must be such that no percentage after the later of the two policy anniversaries specified in the preceding item (1) may apply to fewer than five consecutive policy years.

Provided, that no basic cash value may be less than the value which would be obtained if the adjusted premiums for the policy, as defined in subsection (e)(1) or (e)(4), whichever is applicable, were substituted for the nonforfeiture factors in the calculation of the basic cash value.

All adjusted premiums and present values referred to in this subsection shall for a particular policy be calculated on the same mortality and interest bases as are used in demonstrating the policy's compliance with the other subsections of this section. The cash surrender values referred to in this subsection shall include any endowment benefits provided for by the policy.

Any cash surrender value available other than in the event of default in a premium payment due on a policy anniversary, and the amount of any paid-up nonforfeiture benefit available under the policy in the event of default in a premium payment shall be determined in manners consistent with the manners specified for determining the analogous minimum amounts in subsections (b), (c), (d), (e)(4), and (f). The amounts of any cash surrender values and of any paid-up nonforfeiture benefits granted in connection with additional benefits such as those listed as items (i) through (vi) in subsection (f) shall conform with the principles of this subsection (f1).

(g) The provisions of this section shall not apply to any of the following:

(1) Industrial sick benefit insurance as defined in this Chapter,

(2) Reinsurance,

(3) Group insurance,

(4) Pure endowment,

(5) Annuity or reversionary annuity contract,

(6) Term policy of uniform amount, which provides no guaranteed nonforfeiture or endowment benefits, or renewal thereof, of 20 years or less, for which uniform premiums are payable during the entire term of the policy,

(7) Term policy of decreasing amount, which provides no guaranteed nonforfeiture or endowment benefits, on which each adjusted premium, calculated as specified in subsection (e), is less than the adjusted premium so calculated, on a term policy of uniform amount, or renewal thereof, which provides no guaranteed nonforfeiture or endowment benefits, issued at the same age and for the same initial amount of insurance and for a term of 20 years or less expiring before age 71, for which uniform premiums are payable during the entire term of the policy,

(8) Policy, which provides no guaranteed nonforfeiture or endowment benefits, for which no cash surrender value, if any, or present value of any paid-up nonforfeiture benefit, at the beginning of any policy year, calculated as specified in subsections (c), (d) and (e), exceeds two

and one-half percent (2½%) of the amount of insurance at the beginning of the same policy year, nor

(9) Policy which shall be delivered outside this State through an agent or other representative of the company issuing the policy.

For purposes of determining the applicability of this section, the age at expiry for a joint term life insurance policy shall be the age at expiry of the oldest life.

(h) After March 6, 1945, any company may file with the Commissioner a written notice of its election to comply with the provisions of this section after a specified date before January 1, 1950. After the filing of such notice then upon such specified date (which shall be the operative date for such company) this section shall become operative with respect to the policies thereafter issued by such company. If a company makes no such election, the operative date of this section for such company shall be January 1, 1950. (1945, c. 379; 1959, c. 484, s. 2; 1961, c. 255, ss. 4-7; 1963, c. 791, ss. 3, 4; 1975, c. 603, ss. 2, 3; 1979, c. 409, ss. 7-9; 1981, c. 761, ss. 6-14.)

Effect of Amendments. — The 1981 amendment, in subsection (b), substituted "delivered or issued for delivery" for "issued or delivered" near the middle of the introductory paragraph, added "as are the minimum requirements hereinafter specified and are essentially in compliance with subsection (f1) of this section" at the end of the introductory paragraph, substituted "amount" for "value" near the end of the first sentence in subdivision (1) and added the second sentence in subdivision (1), rewrote the first sentence and added the second sentence in subdivision (5). In subsection (c), the amendment substituted "subsection (b)" for "subsection (f)" near the beginning of the first paragraph and added the second and third paragraphs. The amendment reenacted subsection (d) without change, with the exception that "a" was substituted for "at," apparently through inadvertence, preceding "least" near the end of the subsection; "at" has been inserted in brackets in the section as set out above. In subsection (e), the amendment added the first sentences in subdivisions (1), (2) and (3), substituted "subsection" for "section" near the middle of the third paragraph in subdivision (1) and added subdivision (4). The amendment added subsection (e1). In subsection (f), the amendment substituted "amounts" for "dividends" in the third sentence and, apparently through inadvertence, substituted "Section 3" for "subsection (c)" near the beginning of the fourth sentence. "Subsection (c)" has been inserted in brackets in the section as set out above. The amendment added subsection (f1), rewrote subsection (g) and reenacted subsection (h) without change.

§ 58-201.3. Standard Nonforfeiture Law for Individual Deferred Annuities.

(a) This section shall be known as the Standard Nonforfeiture Law for Individual Deferred Annuities.

(b) This section shall not apply to any reinsurance, group annuity purchased under a retirement plan or plan of deferred compensation established or maintained by an employer (including a partnership or sole proprietorship) or by an employee organization, or by both, other than a plan providing individual retirement accounts or individual retirement annuities under section 408 of the Internal Revenue Code, as now or hereafter amended, premium deposit fund, variable annuity, investment annuity, immediate annuity, any deferred annuity contract after annuity payments have commenced, or reversionary annuity, nor to any contract which shall be delivered outside this State through an agent or other representative of the company issuing the contract.

(c) In the case of contracts issued on or after the operative date of this section as defined in subsection (1), no contract of annuity, except as stated in subsection (b), shall be delivered or issued for delivery in this State unless it contains in substance the following provisions, or corresponding provisions which in the opinion of the Commissioner are at least as favorable to the contract holder, upon cessation of payment of considerations under the contract.

(1) That upon cessation of payment of considerations under a contract, the company will grant a paid-up annuity benefit on a plan stipulated in the contract of such value as is specified in subsections (e), (f), (g), (h) and (j).

(2) If a contract provides for a lump sum settlement at maturity, or at any other time, that upon surrender of the contract at or prior to the commencement of any annuity payments, the company will pay in lieu of any paid-up annuity benefit a cash surrender benefit of such amount as is specified in subsections (e), (f), (h) and (j). The company shall reserve the right to defer the payment of such cash surrender benefit for a period of six months after demand therefor with surrender of the contract.

(3) A statement of the mortality table, if any, and interest rates used in calculating any minimum paid-up annuity, cash surrender or death benefits that are guaranteed under the contract, together with sufficient information to determine the amounts of such benefits.

(4) A statement that any paid-up annuity, cash surrender or death benefits that may be available under the contract are not less than the minimum benefits required by any statute of the state in which the contract is delivered and an explanation of the manner in which such benefits are altered by the existence of any additional amounts credited by the company to the contract, any indebtedness to the company on the contract or any prior withdrawals from or partial surrenders of the contract.

Notwithstanding the requirements of this section, any deferred annuity contract may provide that if no considerations have been received under a contract for a period of two full years and the portion of the paid-up annuity benefit at maturity on the plan stipulated in the contract arising from considerations paid prior to such period would be less than twenty dollars ($20.00) monthly, the company may at its option terminate contract by payment in cash of the then present value of such portion of the paid-up annuity benefit, calculated on the basis of the mortality table, if any, and interest rate specified in the contract for determining the paid-up annuity benefit, and by such payment shall be relieved of any further obligation under such contract.

(d) The minimum values as specified in subsections (e), (f), (g), (h) and (j) of any paid-up annuity, cash surrender or death benefits available under an annuity contract shall be based upon minimum nonforfeiture amounts as defined in this section.

(1) With respect to contracts providing for flexible considerations, the minimum nonforfeiture amount at any time at or prior to the commencement of any annuity payments shall be equal to an accumulation up to such time at a rate of interest of three percent (3%) per annum of percentages of the net considerations (as hereinafter defined) paid prior to such time, decreased by the sum of:

(i) Any prior withdrawals from or partial surrenders of the contract accumulated at a rate of interest of three percent (3%) per annum; and

(ii) The amount of any indebtedness to the company on the contract, including interest due and accrued,

and increased by any existing additional amounts credited by the company to the contract.

The net considerations for a given contract year used to define the minimum nonforfeiture amount shall be an amount not less than zero and shall be equal to the corresponding gross considerations credited to the contract during that contract year less an annual contract charge of thirty dollars ($30.00) and less a collection charge of one

dollar and twenty-five cents ($1.25) per consideration credited to the contract during that contract year. The percentages of net considerations shall be sixty-five percent (65%) of the net consideration for the first contract year and eighty-seven and one-half (87½%) of the net considerations for the second and later contract years. Notwithstanding the provisions of the preceding sentence, the percentage shall be sixty-five percent (65%) of the portion of the total net consideration for any renewal contract year which exceeds by not more than two times the sum of those portions of the net considerations in all prior contract years for which the percentage was sixty-five percent (65%).

(2) With respect to contracts providing for fixed scheduled considerations, minimum nonforfeiture amounts shall be calculated on the assumption that considerations are paid annually in advance and shall be defined as for contracts with flexible considerations which are paid annually with two exceptions:

(i) The portion of the net consideration for the first contract year to be accumulated shall be the sum of sixty-five percent (65%) of the net consideration for the first contract year plus twenty-two and one-half percent (22½%) of the excess of the net consideration for the first contract year over the lesser of the net considerations for the second and third contract years.

(ii) The annual contract charge shall be the lesser of (i) thirty dollars ($30.00) or (ii) ten percent (10%) of the gross annual considerations.

(3) With respect to contracts providing for a single consideration, minimum nonforfeiture amounts shall be defined as for contracts with flexible considerations except that the percentage of net consideration used to determine the minimum nonforfeiture amount shall be equal to ninety percent (90%) and the net consideration shall be the gross consideration less a contract charge of seventy-five dollars ($75.00).

(e) Any paid-up annuity benefit available under a contract shall be such that its present value on the date annuity payments are to commence is at least equal to the minimum nonforfeiture amount on that date. Such present value shall be computed using the mortality table, if any, and the interest rate specified in the contract for determining the minimum paid-up annuity benefits guaranteed in the contract.

(f) For contracts which provide cash surrender benefits, such cash surrender benefits available prior to maturity shall not be less than the present value as of the date of surrender of that portion of the maturity value of the paid-up annuity benefit which would be provided under the contract at maturity arising from considerations paid prior to the time of cash surrender reduced by the amount appropriate to reflect any prior withdrawals from or partial surrenders of the contract, such present value being calculated on the basis of an interest rate not more than one percent (1%) higher than the interest rate specified in the contract for accumulating the net considerations to determine such maturity value, decreased by the amount of any indebtedness to the company on the contract, including interest due and accrued, and increased by any existing additional amounts credited by the company to the contract. In no event shall any cash surrender benefit be less than the minimum nonforfeiture amount at that time. The death benefit under such contracts shall be at least equal to the cash surrender benefit.

(g) For contracts which do not provide cash surrender benefits, the present value of any paid-up annuity benefit available as a nonforfeiture option at any time prior to maturity shall not be less than the present value of that portion of the maturity value of the paid-up annuity benefit provided under the contract arising from considerations paid prior to the time the contract is

surrendered in exchange for, or changed to, a deferred paid-up annuity, such present value being calculated for the period prior to the maturity date on the basis of the interest rate specified in the contract for accumulating the net considerations to determine such maturity value, and increased by any existing additional amounts credited by the company to the contract. For contracts which do not provide any death benefits prior to the commencement of any annuity payments, such present values shall be calculated on the basis of such interest rate and the mortality table specified in the contract for determining the maturity value of the paid-up annuity benefit. However, in no event shall the present value of a paid-up annuity benefit be less than the minimum nonforfeiture amount at that time.

(h) For the purpose of determining the benefits calculated under subsections (f) and (g), in the case of annuity contracts under which an election may be made to have annuity payments commence at optional maturity dates, the maturity date shall be deemed to be the latest date for which election shall be permitted by the contract, but shall not be deemed to be later than the anniversary of the contract next following the annuitant's seventieth birthday or the tenth anniversary of the contract, whichever is later.

(i) Any contract which does not provide cash surrender benefits or does not provide death benefits at least equal to the minimum nonforfeiture amount prior to the commencement of any annuity payments shall include a statement in a prominent place in the contract that such benefits are not provided.

(j) Any paid-up annuity, cash surrender or death benefits available at any time, other than on the contract anniversary under any contract with fixed scheduled considerations, shall be calculated with allowance for the lapse of time and the payment of any scheduled considerations beyond the beginning of the contract year in which cessation of payment of considerations under the contract occurs.

(k) For any contract which provides, within the same contract by rider or supplemental contract provision, both annuity benefits and life insurance benefits that are in excess of the greater of cash surrender benefits or a return of the gross considerations with interest, the minimum nonforfeiture benefits shall be equal to the sum of the minimum nonforfeiture benefits for the annuity portion and the minimum nonforfeiture benefits, if any, for the life insurance portion computed as if each portion were a separate contract. Notwithstanding the provisions of subsections (e), (f), (g), (h) and (j), additional benefits payable (1) in the event of total and permanent disability, (2) as reversionary annuity or deferred reversionary annuity benefits, or (3) as other policy benefits additional to life insurance, endowment and annuity benefits, and considerations for all such additional benefits, shall be disregarded in ascertaining the minimum nonforfeiture amounts, paid-up annuity, cash surrender and death benefits that may be required by this section. The inclusion of such additional benefits shall not be required in any paid-up benefits, unless such additional benefits separately would require minimum nonforfeiture amounts, paid-up annuity, cash surrender and death benefits.

(l) After April 19, 1979, any company may file with the Commissioner a written notice of its election to comply with the provisions of this section after a specified date before the second anniversary of the effective date of this section. After the filing of such notice, then upon such specified date, which shall be the operative date of this section for such company, this section shall become operative with respect to annuity contracts thereafter issued by such company. If a company makes no such election, the operative date of this section for such company shall be the second anniversary of the effective date of this section. (1979, c. 409, s. 11.)

§ 58-202. Reinsurance of companies regulated.

The receiver of any life insurance company organized under the laws of this State, when the assets of the company are sufficient for that purpose, and the consent of two thirds of its policyholders has been secured in writing, may reinsure all the policy obligations of such company in some other solvent life insurance company, or, when the assets are insufficient to secure the reinsurance of all the policies in full, he may reinsure such a percentage of each and every policy outstanding as the assets will secure; but there must be no preference or discrimination as against any policyholder, and the contract for such reinsurance by the receiver must be approved by the Commissioner of Insurance of this State before it has effect. (1899, c. 54, s. 58; 1903, c. 536, s. 9; Rev., s. 4778; C.S., s. 6462; 1945, c. 379.)

§ 58-203: Repealed by Session Laws 1945, c. 379.

§ 58-204. Insurable interest as between stockholders, partners, etc.

Where two or more persons have heretofore contracted or hereafter contract with one another for the purchase, at the death of one, by the survivor or survivors, of the stock, share or interest of the deceased in any corporation, partnership or business association of any kind, the person or persons making the contract of purchase shall be deemed to have, and are hereby declared to have, an insurable interest in the life or lives of the person or persons contracting to sell. (1941, c. 201; 1969, c. 751, s. 44.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 490.

§ 58-204.1. Insurable interest in life and physical ability of employee or agent.

An employer, whether a partnership, joint venture, business trust, mutual association, corporation, any other form of business organization, or one or more individuals, or any religious, educational, or charitable corporation, institution or body, has an insurable interest in and the right to insure the physical ability or the life, or both the physical ability and the life, of an employee for the benefit of such employer. Any principal shall have a life insurable interest in and the right to insure the physical ability or the life, or both the physical ability and the life, of an agent for the benefit of such principal. (1951, c. 283, s. 1; 1957, c. 1086.)

Legal Periodicals. — For brief comment on this section and §§ 58-204.2 through 58-204.4, see 29 N.C.L. Rev. 401.

§ 58-204.2. Insurable interest in life and physical ability of partner.

Any partner has an insurable interest in and the right to insure the physical ability or the life, or both the physical ability and the life, of any other partner or partners who are members of the same partnership for his benefit, either alone or jointly with another partner or partners of the same partnership. A partnership has a like insurable interest in and the right to insure the physical

ability or the life, or both the physical ability and the life, of one or more partners of the partnership. (1951, c. 283, s. 2.)

§ 58-204.3. Insurable interest in life of person covered by pension plan.

A trustee under a written document providing for a pension plan for payments of money or delivery of other benefits to be made to persons eligible to receive them under the terms and provisions of such written document shall be deemed to have and is hereby declared to have an insurable interest in the lives of any person or persons covered by the pension plan, to the extent that contracts or policies of insurance are in conformity with and in furtherance of the purposes of the pension plan. (1951, c. 283, s. 2½.)

CASE NOTES

Stated in Allgood v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

§ 58-204.4. Construction of §§ 58-204.1 to 58-204.3.

Sections 58-204.1 to 58-204.3 shall not be construed to limit or abridge any insurable interest or right to insure now existing at common law or by statute, and shall be construed liberally to sustain insurable interest, whether as a declaration of existing law or as an extension of or addition to existing law. (1951, c. 283, s. 3.)

§ 58-205. Rights of beneficiaries.

When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, is entitled to its proceeds against the creditors and representatives of the person effecting the insurance. The person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. A person may insure his or her own life for the sole use and benefit of his or her spouse, or children, or both, and upon his or her death the proceeds from the insurance shall be paid to or for the benefit of the spouse, or children, or both, or to a guardian, free from all claims of the representatives or creditors of the insured or his or her estate. Any insurance policy which insures the life of a person for the sole use and benefit of that person's spouse, or children, or both, shall not be subject to the claims of creditors of the insured during his or her lifetime, whether or not the policy reserves to the insured during his or her lifetime any or all rights provided for by the policy and whether or not the policy proceeds are payable to the estate of the insured in the event the beneficiary or beneficiaries predecease the insured. (Const., Art. X, s. 7; 1899, c. 54, s. 59; Rev., ss. 4771, 4772; C. S., s. 6464; 1977, c. 518, s. 1.)

Cross References. — As to freedom of life insurance for the benefit of one's spouse or children or both from the claims of creditors, see N.C. Const., Art. X, § 5. As to receipt and disbursement of insurance for minors and incapacitated adults, see § 7A-111. For provision depriving creditors of benefits of life insurance in favor of beneficiary other than the insured, except in cases of fraud, see § 58-206.

CASE NOTES

Section 58-206 is actually an amendment of this section. In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), decided prior to the 1977 amendment to this section, and commented on in 45 N.C.L. Rev. 696 (1967).

Section 58-206 supersedes this section where there are variations or conflicts. Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970), decided prior to the 1977 amendment to this section.

Change of Beneficiary Not Fraudulent. — A beneficiary in a policy of life insurance has only a contingent interest therein, and where the insured retains the right to change the beneficiary by the terms of the policy, he may do so; hence, where, upon the death of the beneficiary, the insured changed the beneficiary, in accordance with the terms of the policy, to a trustee for the use of certain creditors and heirs at law of the insured, the other creditors could not claim that the change in the beneficiary was void as being fraudulent as to them. Teague v. Pilot Life Ins. Co., 200 N.C. 450, 157 S.E. 421 (1931).

Where the insured in a policy of life insurance, payable at his death to his estate, procured a change of beneficiary in said policy in accordance with its provisions, by which his wife became the beneficiary, such change was not void as against creditors, even though at the date the change was made the insured was insolvent. Pearsall v. Bloodworth, 194 N.C. 628, 140 S.E. 303 (1927); Teague v. Pilot Life Ins. Co., 200 N.C. 450, 157 S.E. 421 (1931); Meadows Fertilizer Co. v. Godley, 204 N.C. 243, 167 S.E. 816 (1933).

Change of Beneficiary Given Effect. — Where a policy of life insurance reserves the right in the insured to change the beneficiary therein named, the named beneficiary has only a contingent interest therein, and the insured may change the beneficiary in accordance with the terms of the policy at any time; moreover, where the insured has done all that is possible under the circumstances to change the beneficiary in accordance with the terms of the policy, such change of beneficiary will be given effect under the principle that equity regards as done that which ought to have been done. Hence, where the insured's wife was thus made the beneficiary, the proceeds inured to her sole benefit, free from the claims of insured's creditors. Meadows Fertilizer Co. v. Godley, 204 N.C. 243, 167 S.E. 816 (1933).

Change of Beneficiary Not Effected. — Where deceased had expressed an intention to change the beneficiary in a policy of insurance on his life, but had taken no affirmative act to effect such change, the court's judgment that no change of beneficiary had been effected was upheld. Meadows Fertilizer Co. v. Godley, 204 N.C. 243, 167 S.E. 816 (1933).

When individual insured his life for the benefit of his wife and children, and at the time had no wife, but did have two children, one of whom died before him, it was held that upon his death the money due on the policy should be divided between the surviving child and the administrator of the dead child. The insertion of his "wife" as a beneficiary, when he had no wife living, was a nullity. Hooker v. Sugg, 102 N.C. 115, 8 S.E. 919 (1889).

Applied in Russell v. Owen, 203 N.C. 262, 165 S.E. 687 (1932).

Cited in Philadelphia Life Ins. Co. v. Crosland-Cullen Co., 234 F.2d 780 (4th Cir. 1956).

§ 58-205.1. Minors may enter into insurance or annuity contracts and have full rights, powers and privileges thereunder.

All minors in North Carolina of the age of 15 years and upwards shall have full power and authority to make contracts of insurance or annuity with any life insurance company authorized to do business in the State of North Carolina, either domestic or foreign, and to exercise all the powers, rights, and privileges of ownership conferred upon them under the terms of any and all such contracts applied for by and issued to them, and with full power to surrender, assign, modify, pledge, or change such contracts, and to receive any dividends thereon and generally to have the full power and authority in the premises that persons 18 years and upwards could and would have relative to any and all such contracts. (1945, c. 379; 1947, c. 721; 1971, c. 1231, s. 1.)

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 571 (1972).

CASE NOTES

Stated in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 58-205.2. Renunciation.

A beneficiary of a life insurance policy who did not possess the incidents of ownership under the policy at the time of death of the insured may renounce as provided in Chapter 31B of the General Statutes. (1975, c. 371, s. 5.)

§ 58-205.3. Interest payments on death benefits.

(a) Each insurer admitted to transact life insurance in this State which, without the written consent of the beneficiary, fails or refuses to pay the death proceeds or death benefits in accordance with the terms of any policy of life or accident insurance issued by it in this State within 30 days after receipt of satisfactory proof of loss because of the death, whether accidental or otherwise, of the insured shall pay interest, at a rate not less than the then current rate of interest on death proceeds left on deposit with the insurer computed from the date of the insured's death, on any moneys payable and unpaid after the expiration of such 30-day period.

(b) Within the meaning of this section, payment of proceeds or benefits shall be deemed to have been made on the date upon which a check, draft or other valid instrument equivalent to the payment of money was placed in the United States mails in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery of such instrument to the beneficiary.

(c) Nothing contained herein shall be construed to allow any insurer admitted to transact life insurance in this State to withhold payment of money payable under a life or accident insurance policy issued in this State to any beneficiary for a period longer than reasonably necessary to determine whether benefits are payable and thereafter to transmit such payment.

(d) This section shall not apply to policies of insurance issued prior to the effective date of this section to the extent that such policies contain specific provisions in conflict with this section. (1977, c. 395, s. 1.)

Editor's Note. — Session Laws 1977, c. 395, s. 2, provides that the act shall become effective 90 days after ratification. The act was ratified May 16, 1977.

§ 58-206. Creditors deprived of benefits of life insurance policies except in cases of fraud.

If a policy of insurance is effected by any person on his own life or on another life in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance or the executor or administrator of such insured or of the person effecting such insurance, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person: Provided, that subject to the statute of limitations, the amount of any premiums for said insurance paid with the intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all

liability thereon by payment of its proceeds in accordance with its terms unless, before such payment, the company shall have written notice by or in behalf of the creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed. (1931, c. 179, s. 1; 1947, c. 721.)

Cross References. — As to freedom of life insurance for the benefit of one's spouse or children or both from the claims of creditors, see N.C. Const., Art. X, § 5. As to the right of life insurance beneficiaries, see § 58-205.

CASE NOTES

Constitutionality. — This section exempts the cash surrender values of policies of life insurance in which the "wife and/or children" of the insured (bankrupt) are designated beneficiaries; and N.C. Const., Art. X, § 5, does not conflict with and nullify this section in those instances where the "wife and/or children" are designated beneficiaries, but on the contrary is in accord therewith. Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

North Carolina Const., Art. X, § 5, was adopted for the express purpose of protecting insurance for wives and children from creditors during the life of the insured. The intent of the General Assembly and of the electorate would be thwarted if § 5 were construed as providing a lesser benefit than that provided by this section for the "wife and/or children." Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

This section is actually an amendment of § 58-205. In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), decided prior to the 1977 amendment to § 58-205, and commented on in 45 N.C.L. Rev. 696 (1967).

This section supersedes § 58-205 where there are variations or conflicts. Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970), decided prior to the 1977 amendment to § 58-205.

Construction of Section. — The significance of this section is to be considered in the light of the general rule of statutory construction that where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject matter, they are to be understood in the same sense, unless by qualifying or explanatory addition the contrary intent of the legislature is made clear. Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

Meaning of "Proceeds" or "Proceeds and Avails". — The words "proceeds" or "proceeds and avails," when used in life insurance exemption statutes, comprehend the protection of cash surrender values and other values built up during the life of the policies, as well as the death benefits. Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

Exemption of Cash Surrender Value. — This section exempts the cash surrender values of policies of life insurance in which the "wife and/or children" of the insured (bankrupt) are the designated beneficiaries, notwithstanding insured's reservation of the right to change beneficiaries. Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970). But see, In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Wives and children of bankrupts are protected from claims of the bankrupt's creditors, both during his life and at his death, if life insurance policies are for their sole benefit. In re Wolfe, 249 F. supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Protection of Third-Party Beneficiaries. — The protection afforded by this section is not limited to any particular class of beneficiaries. It relates to a policy on the life of the insured payable to any third-party beneficiary. Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

This section cannot affect policies written before the effective date of the statute. Commissioner of Banks ex rel. Goldsboro Sav. & Trust Co. v. Yelverton, 204 N.C. 441, 168 S.E. 505 (1933).

Applied in First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

Cited in Meadows Fertilizer Co. v. Godley, 204 N.C. 243, 167 S.E. 816 (1933); Philadelphia Life Ins. Co. v. Crosland-Cullen Co., 234 F.2d 780 (4th Cir. 1956).

§ 58-207. Notice of nonpayment of premium required before forfeiture.

No life insurance corporation doing business in this State shall, within one year after the default in payment of any premium, installment, or interest, declare forfeited or lapsed any policy hereafter issued or renewed, except policies on which premiums are payable monthly or at shorter intervals and except group insurance contracts and term insurance contracts for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it shall be paid, and the person to whom the same is payable has been duly addressed and mailed, postage paid, to the person whose life is insured, or to the assignee or owner of the policy, or to the person designated in writing by such insured, assignee or owner, if notice of the assignment has been given to the corporation, at his or her last known post-office address in this State, by the corporation or by any officer thereof or person appointed by it to collect such premium, at least 15 and not more than 45 days prior to the day when the same is payable, as regards policies which do not contain a provision for grace or are not entitled to grace in the payment of premiums and at least five and not more than 45 days prior to the day when the same is payable as regards policies which do contain a provision for grace or are entitled to grace in the payment of premiums. The notice shall also state that unless such premium, interest, installment, or portion thereof then due shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as in the contract provided. If the payment demanded by such notice shall be made within its time limit therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy unless the same is instituted within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued. (1909, c. 884; C.S., s. 6465; 1929, c. 308, s. 1; 1931, c. 317; 1945, c. 379.)

CASE NOTES

When Policy Subject to Forfeiture. — The insurance company must give notice that the premiums are due and the policy is not subject to forfeiture until the statutory time after such notice is given. Aiken v. Atlantic Life Ins. Co., 173 N.C. 400, 92 S.E. 184 (1917).

Notice as Prerequisite to Forfeiture Unless Premiums Are Payable Monthly. — Notice that any premium or premiums are in default is a prerequisite to forfeiture of the policy under this section, except as to policies on which premiums are payable monthly. Wiles v. Nationwide Life Ins. Co., 334 F.2d 296 (4th Cir. 1964).

Notice as to Extension Notes Not Required. — Where there has been a default and forfeiture and the insured has furnished a health certificate and secured a reinstatement and an extension of time for payment, it is not necessary to again give the statutory notice of

the time when the extension notes will become due. Philadelphia Life Ins. Co. v. Hayworth, 296 F. 339 (4th Cir. 1924).

Notice of Next Premium Not Waiver of Forfeiture. — Where a policy of life insurance was forfeited for failure to pay at maturity a note given for extension of payment of premium, the mailing of notice of the next regular quarterly premium by the insurer in compliance with this section, which notice did not demand payment of the balance due on the extended premium, was not a waiver by the insurer of forfeiture. Sellers v. Life Ins. Co., 205 N.C. 355, 171 S.E. 328 (1933).

Insured Need Not Keep Tender Open. — After tender and failure of insurer to accept the tender, the insured does not have to keep the tender open. An application for reinstatement does not alter the insured's rights, if the policy has not been forfeited. Aiken v. Atlantic Life Ins. Co., 173 N.C. 400, 92 S.E. 184 (1917).

Action for Recovery of Premiums Held Barred. — In an action for the recovery of premiums paid on forfeited policies issued on the lives of relatives, where the evidence was to the effect that these policies were canceled for the nonpayment of premiums on March 19, 1936, and that summons was issued February 17, 1942, the action was barred by this section and § 1-52. Bynum v. Life Ins. Co., 222 N.C. 742, 24 S.E.2d 613 (1943).

Applicability of Section After Withdrawal of Old Policy and Issuance of New Policy. — Where an old policy which was issued before enactment of this section was withdrawn and a new policy was issued after such enactment, notice had to be given in accordance with the statute in order to have a legal forfeiture. Garland v. Jefferson Std. Life Ins. Co., 179 N.C. 67, 101 S.E. 616 (1919).

Cited in Felts v. Shenandoah Life Ins. Co., 221 N.C. 148, 19 S.E.2d 259 (1942); Abrams v. Metropolitan Life Ins. Co., 223 N.C. 500, 27 S.E.2d 148 (1943); Abrams v. Metropolitan Life Ins. Co., 224 N.C. 1, 29 S.E.2d 130 (1944).

§ 58-208. Minimum premium rates for assessment life insurance companies.

No assessment life insurance corporation, organization or association of any kind issuing policies or contracts upon the life of any resident of this State shall hereafter be organized or licensed by the Commissioner of Insurance unless such corporation, organization or association adopt premium rates based upon the attained age of the assured at the time of issuance of the contract and such rates shall not be less than those fixed by the American Experience Table of Mortality or any other recognized table of mortality approved by the Commissioner of Insurance. Nothing contained in this section shall be construed to affect burial associations regulated under G.S. 58-224 to 58-241, or railroad burial assocations. (1939, c. 161.)

Editor's Note. — Sections 58-224 to 58-241, referred to in this section, were rewritten by Session Laws 1975, c. 837, and have been recodified as § 58-241.6 et seq.

Legal Periodicals. — For comment on this section, see 17 N.C.L. Rev. 362.

§ 58-209. Distribution of surplus in mutual companies.

Every life insurance company doing business in this State upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof, may distribute the surplus annually, or once in two, three, four, or five years, as its directors determine. No payments shall be made to policyholders by way of dividends unless the company possesses admitted assets in the amount of such payments in excess of its capital and/or minimum required surplus and all other liabilities. (1903, c. 536, s. 10; Rev., s. 4776; C.S., s. 6466; 1945, c. 379.)

§ 58-210. "Group life insurance" defined.

No policy of group life insurance shall be delivered in this State unless it conforms to one of the following descriptions:

(1) A policy issued to an employer, or to the trustee of a fund established by an employer, which employer or trustee shall be deemed the policyholder, to insure employees of the employer for the benefit of persons other than the employer subject to the following requirements:

a. The employees eligible for insurance under the policy shall be all of the employees of the employer, or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term "employees" shall include the employees of one or more subsidiary corporations, and the employees, individual proprietors, and partners of one or more affiliated corporations, proprietors or partnerships if the business of the employer and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract, or otherwise. The policy may provide that the term "employees" shall include the individual proprietor or partners if the employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include retired employees. The term "employer" as used herein may be deemed to include any county, municipality, or the proper officers, as such, of any unincorporated municipality or any department, division, agency, instrumentality or subdivision of a county, unincorporated municipality or municipality. In all cases where counties, municipalities or unincorporated municipalities or any officer, agent, division, subdivision or agency of the same have heretofore entered into contracts and purchased group life insurance for their employees, such transactions, contracts and insurance and the purchase of the same is hereby approved, authorized and validated.

b. The premium for the policy shall be paid by the policyholder, either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured employees. A policy on which part of the premium is to be derived from funds contributed by the insured employees may be placed in force only if at least seventy-five percent (75%) of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured employees must insure all eligible employees, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

c. The policy must cover at least 10 employees at date of issue.

d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the employees or by the employer or trustee.

(2) A policy issued to a creditor, who shall be deemed the policyholder, to insure debtors of the creditor, subject to the following requirements:

a. The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable in installments, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness. The policy may provide that the term "debtors" shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated

corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract or otherwise.

b. The premium for the policy shall be paid by the policyholder, either from the creditor's funds, or from charges collected from the insured debtors, or from both. A policy on which part or all of the premium is to be derived from the collection from the insured debtors or identifiable charges not required of uninsured debtors shall not include, in the class or classes of debtors eligible for insurance, debtors under obligations outstanding at its date of issue without evidence of individual insurability unless at least seventy-five percent (75%) of the then-eligible debtors elect to pay the required charges. A policy on which no part of the premium is to be derived from the collection of such identifiable charges must insure all eligible debtors, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

c. The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than seventy-five percent (75%) of the new entrants become insured.

d, e. Repealed by Session Laws 1975, c. 660, s. 4.

(3) A policy issued to a labor union, which shall be deemed the policyholder, to insure members of such union for the benefit of persons other than the union or any of its officials, representatives or agents, subject to the following requirements:

a. The members eligible for insurance under the policy shall be all of the members of the union, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the union, or both.

b. The premium for the policy shall be paid by the policyholder, either wholly from the union's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance. A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least seventy-five percent (75%) of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

c. The policy must cover at least 25 members at date of issue.

d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the union.

(4) A policy issued to the trustee of a fund established by two or more employers in the same industry or kind of business or by two or more labor unions, which trustee shall be deemed the policyholder, to insure

employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following requirements:

a. The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to memberships in the unions, or to both. The policy may provide that the term "employees" shall include the individual proprietor or partners if an employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include the trustee or the employees of the trustee, or both, if their duties are principally connected with such trusteeship. The policy may provide that the term "employees" shall include retired employees.

b. The premium for the policy shall be paid by the trustee wholly from funds contributed by the participating employer or labor union, or partly from funds contributed by the participating employer or labor union and partly from funds contributed by the insured persons. In no event shall the funds contributed by the participating employer or labor union represent less than twenty-five percent (25%) of the total cost of the insurance with respect to the insured persons of a participating employer or labor union.

If none of the premium paid by the participating employer or labor union is to be derived from funds contributed by the insured persons specifically for the insurance, all eligible employees of that particular participating employer or labor union must be insured, or all except any as to whom evidence of insurability is not satisfactory to the insurer. Insurance may not be placed into effect for employees of a participating employer or labor union if less than twenty-five percent (25%) of the total cost is paid by the participating employer or labor union.

If part of the premium paid by the participating employer or labor union is to be derived from funds contributed by the insured persons specifically for their insurance, coverage may be placed in force on employees of a participating employer or on members of a participating labor union only if at least seventy-five percent (75%) and a minimum of five of the eligible persons in the unit subscribing to the trust, excluding any as to whom evidence of insurability is not satisfactory to the insurer, elect when enrolling to make the required contributions.

c. The policy must cover at least 100 persons at date of issue.

d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the insured persons or by the policyholder, employers, or unions.

(5) A policy issued to an association of persons having a common professional or business interest, which association shall be deemed the policyholder, to insure members of such association for the benefit of persons other than the association or any of its officials, representatives or agents, subject to the following requirements:

a. Such association shall have had an active existence for at least two years immediately preceding the purchase of such insurance, was formed for purposes other than procuring insurance and does not derive its funds principally from contributions of insured members toward the payment of premiums for the insurance.

b. The members eligible for insurance under the policy shall be all of the members of the association or all of any class or classes thereof

determined by conditions pertaining to their employment, or the membership in the association, or both. The policy may provide that the term "members" shall include the employees of members, if their duties are principally connected with the member's business or profession.

c. The premium for the policy shall be paid by the policyholder, either wholly from the association's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance, nor if the Commissioner finds that the rate of such contributions will exceed the maximum rate customarily charged employees insured under like group life insurance policies issued in accordance with the provisions of subdivision (1). A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least seventy-five percent (75%) of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

d. The policy must cover at least 25 members at date of issue.

e. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the association.

(6) Notwithstanding the provisions of this section, or any other provisions of law to the contrary, a policy may be issued to the employees of the State or any other political subdivision where the entire amount of premium therefor is paid by such employees. (1925, c. 58, s. 1; 1931, c. 328; 1943, c. 597, s. 1; 1947, c. 834; 1951, c. 800; 1955, c. 1280; 1957, c. 998; 1959, c. 287; 1965, c. 869; 1971, c. 516; 1973, c. 249; 1975, c. 660, s. 4; 1977, c. 192, ss. 1-4; c. 835.)

Legal Periodicals. — For comments on former section and amendments thereto, see 3 N.C.L. Rev. 145; 12 N.C.L. Rev. 167; 21 N.C.L. Rev. 355.

For comment on the 1947 amendment, see 25 N.C.L. Rev. 432.

CASE NOTES

Quoted in Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Stated in First Nat'l Bank v. Nationwide Ins. Co., 303 N.C. 203, 278 S.E.2d 507 (1981).

Cited in Clayton v. Prudential Ins. Co. of Am., 4 N.C. App. 43, 165 S.E.2d 763 (1969).

OPINIONS OF ATTORNEY GENERAL

As to inapplicability of statutory limit on amount of group life insurance, see opinion of Attorney General to Mr. A.C. Barefoot, Jr., Chairman, Teachers' and State Employees' Benefits Study Commission, 40 N.C.A.G. 631 (1970).

§ 58-211. Group life insurance standard provisions.

No policy of group life insurance shall be delivered in this State unless it contains in substance the following provisions, or provisions which in the opinion of the Commissioner are more favorable to the persons insured, or at least as favorable to the persons insured and more favorable to the policyholder, provided, however, (i) that subdivisions (6) to (10) inclusive shall not apply to policies issued to a creditor to insure debtors of such creditor; (ii) that the standard provisions required for individual life insurance policies shall not apply to group life insurance policies; and (iii) that if the group life insurance policy is on a plan of insurance other than the term plan, it shall contain a nonforfeiture provision or provisions which in the opinion of the Commissioner is or are equitable to the insured persons and to the policyholder, but nothing herein shall be construed to require that group life insurance policies contain the same nonforfeiture provisions as are required for individual life insurance policies:

(1) A provision that the policyholder is entitled to a grace period of 31 days for the payment of any premium due except the first, during which grace period the death benefit coverage shall continue in force, unless the policyholder shall have given the insurer written notice of discontinuance in advance of the date of discontinuance and in accordance with the terms of the policy. The policy may provide that the policyholder shall be liable to the insurer for the payment of a pro rata premium for the time the policy was in force during such grace period.

(2) A provision that the validity of the policy shall not be contested, except for nonpayment of premiums, after it has been in force for two years from its date of issue; and that no statement made by any person insured under the policy relating to his insurability shall be used in contesting the validity of the insurance with respect to which such statement was made after such insurance has been in force prior to the contest for a period of two years during such person's lifetime nor unless it is contained in a written instrument signed by him.

(3) A provision that a copy of the application, if any, of the policyholder shall be attached to the policy when issued, that all statements made by the policyholder or by the persons insured shall be deemed representations and not warranties, and that no statement made by any person insured shall be used in any contest unless a copy of the instrument containing the statement is or has been furnished to such person or to his beneficiary.

(4) A provision setting forth the conditions, if any, under which the insurer reserves the right to require a person eligible for insurance to furnish evidence of individual insurability satisfactory to the insurer as a condition to part or all of his coverage.

(5) A provision specifying an equitable adjustment of premiums or of benefits or of both to be made in the event the age of a person insured has been misstated, such provision to contain a clear statement of the method of adjustment to be used.

(6) A provision that any sum becoming due by reason of the death of the person insured shall be payable to the beneficiary designated by the person insured, subject to the provisions of the policy in the event there is no designated beneficiary as to all or any part of such sum living at the death of the person insured, and subject to any right reserved by the insurer in the policy and set forth in the certificate to pay at its option a part of such sum not exceeding two hundred fifty dollars ($250.00) to any person appearing to the insurer to be equitably entitled thereto by reason of having incurred funeral or

other expenses incident to the last illness or death of the person insured.

(7) A provision that the insurer will issue to the policyholder for delivery to each person insured an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom the insurance benefits are payable, and the rights and conditions set forth in (8), (9) and (10) following.

(8) A provision that if the insurance, or any portion of it, on a person covered under the policy ceases because of termination of employment or of membership in the class or classes eligible for coverage under the policy, such person shall be entitled to have issued to him by the insurer, without evidence of insurability, an individual policy of life insurance without disability or other supplementary benefits, provided application for the individual policy shall be made, and the first premium paid to the insurer, within 31 days after such termination, and provided further that,

a. The individual policy shall, at the option of such person, be on any one of the forms, except term insurance, then customarily issued by the insurer at the age and for the amount applied for;

b. The individual policy shall be in an amount not in excess of the amount of life insurance which ceases because of such termination, provided that any amount of insurance which shall have matured on or before the date of such termination as an endowment payable to the person insured, whether in one sum or in installments or in the form of an annuity, shall not, for the purposes of this provision, be included in the amount which is considered to cease because of such termination; and

c. The premium on the individual policy shall be at the insurer's then customary rate applicable to the form and amount of the individual policy, to the class of risk to which such person then belongs, and to his age attained on the effective date of the individual policy.

(9) A provision that if the group policy terminates or is amended so as to terminate the insurance of any class of insured persons, every person insured thereunder at the date of such termination whose insurance terminates and who has been so insured for at least five years prior to such termination date shall be entitled to have issued to him by the insurer an individual policy of life insurance, subject to the same conditions and limitations as are provided by (8) above, except that the group policy may provide that the amount of such individual policy shall not exceed the smaller of (i) the amount of the person's life insurance protection ceasing because of the termination or amendment of the group policy, less the amount of any life insurance for which he is or becomes eligible under any group policy issued or reinstated by the same or another insurer within 31 days after such termination, and (ii) two thousand dollars ($2,000).

(10) A provision that if a person insured under the group policy dies during the period within which he would have been entitled to have an individual policy issued to him in accordance with (8) or (9) above and before such an individual policy shall have become effective, the amount of life insurance which he would have been entitled to have issued to him under such individual policy shall be payable as a claim under the group policy, whether or not application for the individual policy or the payment of the first premium therefor has been made. (1925, c. 58, s. 2; 1943, c. 597, s. 2; 1947, c. 834.)

Legal Periodicals. — For comment on the 1943 amendment, see 21 N.C.L. Rev. 355.

For comment on the 1947 amendment, see 25 N.C.L. Rev. 435.

CASE NOTES

This section relates to a policy of life insurance delivered in this State. Clayton v. Prudential Ins. Co. of Am., 4 N.C. App. 43, 165 S.E.2d 763 (1969).

Grace Period Does Not Extend Period of Coverage. — The provision in this section that the policyholder of a group life insurance policy is entitled to a grace period of 31 days for the payment of any premium due except the first only extends the time in which a premium may be paid; it does not extend the period of coverage. Conner v. Occidental Life Ins. Co., 41 N.C. App. 610, 255 S.E.2d 420, cert. denied, 298 N.C. 295, 267 S.E.2d 658 (1979).

Where group life insurance policy had expired at the time of insured's death, and the policy contained no provisions for extension or renewal, no payment for any premium was or could have been due after that date and no extension of the period of coverage arose; although the insured died within 31 days of the expiration of the policy, the policy was not in effect on and after that date of expiration, notwithstanding the provisions of this section. Conner v. Occidental Life Ins. Co., 41 N.C. App. 610, 255 S.E.2d 420, cert. denied, 298 N.C. 295, 267 S.E.2d 658 (1979).

Applied in Haneline v. Turner White Casket Co., 238 N.C. 127, 76 S.E.2d 372 (1953).

Cited in Conger v. Travelers Ins. Co., 266 N.C. 496, 146 S.E.2d 462 (1966); Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969).

§ 58-211.1. Group annuity contracts defined; requirements.

Any policy or contract, except a joint, reversionary or survivorship annuity contract, whereby annuities are payable dependent upon the continuation of the lives of more than one person, shall be deemed a group annuity contract. The person, firm or corporation to whom or to which such contract is issued, as herein provided, shall be deemed the holder of such contract. The term "annuitant" as used herein, refers to any person upon whose continued life such annuity is dependent. No authorized insurer shall deliver or issue for delivery in this State any group annuity contract except upon a group of annuitants which conforms to the following: under a contract issued to an employer, or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, the stipulated payments on which shall be paid by the holder of such contract either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the employees covered by such contract, and providing a plan of retirement annuities under a plan which permits all of the employees of such employer or of any specified class or classes thereof to become annuitants. Any such group of employees may include retired employees, and may include officers and managers as employees, and may include the employees of subsidiary or affiliated corporations of a corporation employer, and may include the individual proprietors, partners and employees of affiliated individuals and firms controlled by the holders through stock ownership, contract or otherwise. (1947, c. 721.)

Legal Periodicals. — For comment on this section, see 25 N.C.L. Rev. 437.

§ 58-211.2. Employee life insurance defined.

Employee life insurance is hereby declared to be that plan of life insurance other than salary savings life insurance under which individual policies are issued to the employees of any employer where such policies are issued on the life of more than one employee at date of issue. Premiums for such policies shall be paid by the employer or the trustee of a fund established by the employer either wholly from the employer's funds, or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. (1947, c. 721; 1957, c. 1008.)

Legal Periodicals. — For comment on this section, see 25 N.C.L. Rev. 436.

§ 58-211.3. Assignment of interest in group policies and annuity contracts.

Any individual insured under a group insurance policy or group annuity contract shall have the right, unless expressly prohibited under the terms of the policy or contract of insurance, to assign to any other person his rights and benefits under the policy or contract, including, but not limited to the right to designate the beneficiary or beneficiaries and the right of conversion guaranteed by G.S. 58-211, and, subject to the provisions of the policy relating to assignments thereunder, any such assignment, made either before or after April 28, 1969, shall be valid for the purpose of vesting in the assignee all such rights and benefits so assigned. (1969, c. 319.)

§ 58-212. Voting power under policies of group life insurance.

In every group policy issued by a domestic life insurance company, the employer shall be deemed to be the policyholder for all purposes within the meaning of this Chapter, and, if entitled to vote at meetings of the company, shall be entitled to one vote thereat. (1925, c. 58, s. 3.)

§ 58-213. Exemption from execution.

No policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other person who may have a right thereunder, either before or after payment; but the proceeds thereof, when made payable to the estate of the employee insured, shall constitute a part of the estate of such employee available for the payment of debts. (1925, c. 58, s. 4; 1957, c. 1361.)

CASE NOTES

Applied in First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

§§ 58-213.1 to 58-213.5: Reserved for future codification purposes.

ARTICLE 22A.

Regulation of Life Insurance Solicitation.

§ 58-213.6. Purpose of Article.

The purpose of this Article is to require insurers to deliver to purchasers of life insurance, information which will improve the buyer's ability to select the most appropriate plan of life insurance for their needs, improve the buyer's understanding of the basic features of the policy which has been purchased or which is under consideration and to improve the ability of the buyer to evaluate the relative costs of similar plans of life insurance.

This Article does not prohibit an insurer to use additional material which is not in violation of this Chapter nor any other statute or regulation. (1979, c. 447.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-213.7. Scope of Article; exemptions.

(a) Except as hereafter exempted, this Article shall apply to any solicitation, negotiation or procurement of life insurance occurring within this State. This Article shall apply to any issuer of life insurance contract including fraternal benefit societies.

(b) Unless otherwise specifically included, this Article shall not apply to:

(1) Annuities,

(2) Credit life insurance,

(3) Group life insurance,

(4) Life insurance policies issued in connection with pension and welfare plans as defined by and which are subject to the federal Employee Retirement Income Security Act of 1974 (ERISA),

(5) Variable life insurance under which the death benefits and cash values vary in accordance with unit values of investments held in a separate account. (1979, c. 447.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-213.8. Definitions.

Unless the context of use indicates a different meaning, for the purposes of this Article, the following definitions shall apply:

(1) Buyer's Guide. — A Buyer's Guide is a document furnished pursuant to G.S. 58-213.9, which shall contain all the requirements of and be in substantial compliance with G.S. 58-213.11.

(2) Cash Dividend. — A Cash Dividend is the current illustrated dividend which can be applied toward payment of gross premium.

(3) Equivalent Level Annual Dividend. — The Equivalent Level Annual Dividend is calculated by applying the following steps:

a. Accumulate the annual cash dividends at five percent (5%) interest compounded annually to the end of the 10th and 20th policy years;
b. Divide each accumulation of paragraph a of this subdivision by an interest factor that converts it into one equivalent level annual amount that, if paid at the beginning of each year, would accrue to the values in paragraph a of this subdivision over the respective periods stipulated in paragraph a of this subdivision. If the period is 10 years, the factor is 13.207 and if the period is 20 years, the factor is 34.719.
c. Divide the results of paragraph b of this subdivision by the number of thousands of the Equivalent Level Death Benefit to arrive at the Equivalent Level Annual Dividend.

(4) Equivalent Level Death Benefit. — The Equivalent Level Death Benefit of a policy or term life insurance rider is an amount calculated as follows:
a. Accumulate the guaranteed amount payable upon death, regardless of the cause of death, at the beginning of each policy year for 10 and 20 years at five percent (5%) interest compounded annually to the end of the 10th and 20th policy years respectively;
b. Divide each accumulation of paragraph a of this subdivision by an interest factor that converts it into one equivalent level annual amount that, if paid at the beginning of each year, would accrue to the value in paragraph a of this subdivision over the respective periods stipulated in paragraph a of this subdivision. If the period is 10 years, the factor is 13.207 and if the period is 20 years, the factor is 34.719.

(5) Generic Name. — Generic Name means a short title which is descriptive of the premium and benefit patterns of a policy or a rider.

(6) Life Insurance Cost Indexes. —
a. Life Insurance Surrender Cost Index. The Life Insurance Surrender Cost Index is calculated by applying the following steps:
1. Determine the guaranteed cash surrender value, if any, available at the end of the 10th and 20th policy years;
2. For participating policies, add the terminal dividend payable upon surrender, if any, to the accumulation of the annual Cash Dividends at five percent (5%) interest compounded annually to the end of the period selected and add this sum to the amount determined in subdivision a;
3. Divide the result of subparagraph 2 (subparagraph 1 for guaranteed-cost policies) by an interest factor that converts it into an equivalent level annual that, if paid at the beginning of each year, would accrue to the value in subparagraph 2 (subparagraph 1 for guaranteed-cost policies) over the respective periods stipulated in subparagraph 1. If the period is 10 years, the factor is 13.207 and if the period is 20 years, the factor is 34.719;
4. Determine the equivalent level premium by accumulating each annual premium payable for the basic policy or rider at five percent (5%) interest compounded annually to the end of the period stipulated in subparagraph 1 and dividing the result by the respective factors stated in subparagraph 3 (this amount is the annual premium payable for a level premium plan);
5. Subtract the result of subparagraph 3 from subparagraph 4;
6. Divide the result of subparagraph 5 by the number of thousands of the Equivalent Level Death Benefit to arrive at the Life Insurance Surrender Cost Index.

b. Life Insurance Net Payment Cost Index. The Life Insurance Net Payment Cost Index is calculated in the same manner as the comparable Life Insurance Cost Index except that the cash surrender value and any terminal dividend are set at zero.

(7) Policy Summary. — Policy Summary means a written statement describing the elements of the policy including but not limited to:

a. A prominently placed title in at least 10-point boldface capital letters as follows: STATEMENT OF POLICY COST AND BENEFIT INFORMATION;

b. The name and address of the insurance agent, or, if no agent is involved, a statement of the procedure to be followed in order to receive responses to inquiries regarding the Policy Summary;

c. The full name and home office or administrative office address of the company in which the life insurance policy is to be or has been written;

d. The Generic Name of the basic policy and each rider;

e. The following amounts, where applicable, for the first five policy years and representative policy years thereafter sufficient to clearly illustrate the premium and benefit patterns, including, but not necessarily limited to, the years for which Life Insurance Cost Indexes are displayed and at least one age from 60 through 65 or maturity, whichever is earlier:

1. The annual premium for the basic policy;
2. The annual premium for each optional rider;
3. Guaranteed amount payable upon death, at the beginning of the policy year regardless of the cause of death other than suicide, or other specifically enumerated exclusions, which is provided by the basic policy and each optional rider, with benefits provided under the basic policy and each rider shown separately;
4. Total guaranteed cash surrender values at the end of the year with values shown separately for the basic policy and each rider;
5. Cash Dividends payable at the end of the year with values shown separately for the basic policy and each rider. (Dividends need not be displayed beyond the 20th policy year);
6. Guaranteed endowment amounts payable under the policy which are not included under guaranteed cash surrender values above.

f. The effective policy loan annual percentage interest rate, if the policy contains this provision, specifying whether this rate is applied in advance or in arrears. If the policy loan interest rate is variable, the Policy Summary includes the maximum annual percentage rate;

g. Life Insurance Cost Indexes for 10 and 20 years but in no case beyond the premium paying period. Separate indexes must be displayed for the basic policy and for each optional term life insurance rider. Such indexes need not be included for optional riders which are limited to benefits such as accidental death benefits, disability waiver of premium, preliminary term life insurance coverage of less than 12 months and guaranteed insurability benefits nor for basic policies or optional riders covering more than one life;

h. The Equivalent Level Annual Dividend, in the case of participating policies and participating optional term life insurance riders, under the same circumstances and for the same durations at which Life Insurance Cost Indexes are displayed;

i. A Policy Summary which includes dividends shall also include a statement that dividends are based on the company's current dividend scale and are not guaranteed in addition to a statement in close proximity to the Equivalent Level Annual Dividend as follows: An explanation of the intended use of the Equivalent Level Annual Dividend is included in the Life Insurance Buyer's Guide;

j. A statement in close proximity to the Life Insurance Cost Indexes as follows: An explanation of the intended use of these indexes is provided in the Life Insurance Buyer's Guide.

k. The date on which the Policy Summary is prepared.

The Policy Summary must consist of a separate document. All information required to be disclosed must be set out in such a manner as to not minimize or render any portion thereof obscure. Any amounts which remain level for two or more years of the policy may be represented by a single number if it is clearly indicated what amounts are applicable for each policy year. Amounts in subparagraph e of this paragraph shall be listed in total, not on a per thousand nor per unit basis. If more than one insured is covered under one policy or rider, guaranteed death benefits shall be displayed separately for each insured or for each class of insureds if death benefits do not differ within the class. Zero amounts shall be displayed as zero and shall not be displayed as a blank space. (1979, c. 447.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-213.9. Disclosure requirements.

(a) The insurer shall provide to all prospective purchasers a Buyer's Guide and a Policy Summary prior to accepting any applicant's initial premium deposit, unless the policy for which application is made contains an unconditional refund provision of at least 10 days or unless the Policy Summary contains such an unconditional refund offer, in which event the Buyer's Guide and Policy Summary must be delivered with the policy or prior to delivery of the policy.

(b) The insurer shall provide a Buyer's Guide and a Policy Summary to any prospective purchaser upon request.

(c) In the case of policies whose Equivalent Level Death Benefit does not exceed five thousand dollars ($5,000), the requirement for providing a Policy Summary will be satisfied by delivery of a written statement containing the information described in G.S. 58-213.8, paragraphs b, c, d, e1, e2, e3, f, g, j, and k. (1979, c. 447.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-213.10. General rules relating to solicitation.

(a) Each insurer subject to this Article shall maintain at its home office or principal office a complete file containing one copy of each document authorized by the insurer for use pursuant to this Article. Such file shall contain one copy of each authorized form for a period of three years following the date of its last authorized use.

(b) An agent shall inform the prospective purchaser, prior to commencing a life insurance sales presentation, that he is acting as a life insurance agent and inform the prospective purchaser of the full name of the insurance company which he is representing to the buyer. In sales situations in which an agent is not involved, the insurer shall identify its full name.

(c) Terms such as financial planner, investment advisor, financial consultant, or financial counseling shall not be used in such a way as to imply that the insurance agent is generally engaged in an advisory business in which compensation is unrelated to sales unless such is actually the case.

(d) Any reference to policy dividends must include a statement that dividends are not guaranteed.

(e) A system or presentation which does not recognize the time value of money through the use of appropriate interest adjustments shall not be used for comparing the cost of two or more life insurance policies. Such a system may be used for the purpose of demonstrating the cash-flow pattern of a policy if such presentation is accompanied by a statement disclosing that the presentation does not recognize that, because of interest, a dollar in the future has less value than a dollar today.

(f) A presentation of benefits shall not display guaranteed and nonguaranteed benefits as a single sum unless they are shown separately in close proximity thereto.

(g) A statement regarding the use of the Life Insurance Cost Indexes shall include an explanation to the effect that the indexes are useful only for the comparison of the relative costs of two or more similar policies.

(h) A Life Insurance Cost Index which reflects dividends or an Equivalent Level Annual Dividend shall be accompanied by a statement that it is based on the insurer's current dividend scale and is not guaranteed.

(i) For the purposes of this Article, the annual premium for a basic policy or rider, for which the insurer reserves the right to change the premium, shall be the maximum annual premium. (1979, c. 447.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-213.11. Adoption of Buyer's Guide; requirements.

Any insurer soliciting life insurance in this State on or after December 1, 1979, shall adopt and use a Buyer's Guide, and the adoption and use by an insurer of the Buyer's Guide promulgated by the National Association of Insurance Commissioners in the NAIC Model Life Insurance Solicitation Regulations shall be in compliance with the requirements of this Article. (1979, c. 447.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-213.12. Failure to comply.

The failure of an insurer to provide or deliver a Buyer's Guide, or a Policy Summary as provided in G.S. 58-213.9(a) and (b) shall constitute an omission which misrepresents the benefits, advantages, conditions or terms of an insurance policy within the meaning of G.S. 58-199 and Article 3A (Unfair Trade Practice Act) of this Chapter. (1979, c. 447.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§§ 58-213.13 to 58-213.17: Reserved for future codification purposes.

ARTICLE 22B.

Regulation of Interest Rates on Life Insurance Policy Loans.

§ 58-213.18. Purpose.

The purpose of this Article is to permit and set guidelines for life insurers to include in life insurance policies issued after the effective date of this Article a provision for periodic adjustment of policy loan interest rates. Nothing in this Article shall be construed to prohibit a life insurer from issuing a policy that contains only the provision specified in G.S. 58-213.20(a)(1) with respect to policy loan interest rates. (1981, c. 841, s. 1.)

Editor's Note. — Session Laws 1981, c. 841, s. 2, makes the act effective Sept. 1, 1981.

§ 58-213.19. Definitions.

For purposes of this Article the "Published Monthly Average" means:

(1) The Monthly Average of the Composite Yield on Seasoned Corporate Bonds as published by Moody's Investors Service, Inc., or any successor thereto; or

(2) In the event that the Monthly Average of the Composite Yield on Seasoned Corporate Bonds is no longer published, a substantially similar average, established by regulation issued by the Commissioner. (1981, c. 841, s. 1.)

§ 58-213.20. Maximum rate of interest on policy loans.

(a) Policies issued on or after September 1, 1981 shall provide for policy loan interest rates as follows:

(1) A provision permitting a maximum interest rate of not more than eight percent (8%) per annum; or

(2) A provision permitting an adjustable maximum interest rate established from time to time by the life insurer as permitted by law.

(b) The rate of interest on a policy loan made under subsection (a)(2) shall not exceed the higher of the following:

(1) The published monthly average for the calendar month ending two months before the date on which the rate is determined; or

(2) The rate used to compute the cash surrender values under the policy during the applicable period plus one percent (1%) per annum.

(c) If the maximum rate of interest is determined pursuant to subsection (a)(2), the policy shall contain a provision setting forth the frequency at which the rate is to be determined for that policy.

(d) The maximum rate for each policy must be determined at regular intervals at least once every 12 months, but not more frequently than once in any three-month period. At the intervals specified in the policy:

(1) The rate being charged may be increased whenever such increase as determined under subsection (b) would increase that rate by one-half percent (½%) or more per annum;

(2) The rate being charged must be reduced whenever such reduction as determined under subsection (b) would decrease that rate by one-half percent (½%) or more per annum.

(e) The life insurer shall:

(1) Notify the policyholder at the time a cash loan is made of the initial rate of interest on the loan;

(2) Notify the policyholder with respect to premium loans of the initial rate of interest on the loan as soon as it is reasonably practical to do so after making the initial loan. Notice need not be given to the policyholder when a further premium loan is added, except as provided in (3) below;

(3) Send to policyholders with loans reasonable advance notice of any increase in the rate; and

(4) Include in the notices required above the substance of the pertinent provisions of subsections (a) and (c).

(f) No policy shall terminate in a policy year as the sole result of change in the interest rate during that policy year, and the life insurer shall maintain coverage during that policy year until the time at which it would otherwise have terminated if there had been no change during that policy year.

(g) The substance of the pertinent provisions of subsections (a) and (c) shall be set forth in the policies to which they apply.

(h) For purposes of this section:

(1) The rate of interest on policy loans permitted under this section includes the interest rate charged on reinstatement of policy loans for the period during and after any lapse of a policy.

(2) The term "policy loan" includes any premium loan made under a policy to pay one or more premiums that were not paid to the life insurer as they fell due.

(3) The term "policyholder" includes the owner of the policy or the person designated to pay premiums as shown on the records of the life insurer.

(4) The term "policy" includes certificates issued by a fraternal benefit society and annuity contracts which provide for policy loans.

(i) No other provision of law shall apply to policy loan interest rates unless made specifically applicable to such rates. (1981, c. 841, s. 1.)

§ 58-213.21. Applicability to existing policies.

The provisions of this Article shall not apply to any insurance contract issued before September 1, 1981. (1981, c. 841, s. 1.)

Article 23.

Registered Policies.

§ 58-214. Deposits to secure registered policies.

Any life insurance company, incorporated under the laws of this State, may deposit with the Commissioner securities of the kind authorized for the investment of the funds of life insurance companies, which shall be legally transferred by it to him as Commissioner and his successors for the common benefit of all the holders of its "registered" policies and annuity bonds issued under the provisions of this Article; and these securities shall be held by him and his successors in office in trust for the purposes and objects specified herein.

All securities offered to the Commissioner for deposit under this section shall be received and held pursuant to regulations promulgated by the Commissioner. (1905, c. 504, s. 12; Rev., s. 4780; 1909, c. 920, ss. 1, 2; 1911, c. 140, s. 1; 1917, c. 191, s. 2; C.S., s. 6467; 1945, c. 379.)

Cross References. — As to investments in bonds guaranteed by the United States, see § 53-44. As to investments in bonds and notes secured by mortgages insured by the Secretary of Housing and Urban Development, etc., see § 53-45. As to investments in federal farm loan bonds, see § 53-60. As to investments in refunding bonds of North Carolina, see § 142-29.

§ 58-215. Additional deposits may be required.

Each company which has made deposits herein provided for shall make additional deposits from time to time, as the Commissioner of Insurance prescribes, in amounts of not less than five thousand dollars ($5,000) and of such securities as are described in the preceding section [G.S. 58-214], so that the admitted value of the securities deposited shall equal the net value of the registered policies and annuity bonds issued by the company, less such liens not exceeding such value as the company has against it. The Commissioner shall annually value or cause to be valued such policies and shall prepare an estimate based upon probable changes in the minimum amounts to be kept on deposit for each month of the ensuing year. (1905, c. 504, s. 15; Rev., s. 4781; 1909, c. 920, s. 3; 1911, c. 140, s. 2; 1917, c. 191, s. 3; C.S., s. 6468; 1945, c. 379.)

§ 58-216. Withdrawal of deposits.

Any such company whose deposits exceed the net value of all registered policies and annuity bonds it has in force, less such liens not exceeding such value as the company holds against them, may withdraw such excess or it may withdraw any of such securities at any time by depositing in their place others of equal value and of the character authorized by law; and as long as such company remains solvent and keeps up its deposits, as herein required, it may collect the interest and coupons on the securities deposited as they accrue; and any life insurance company may withdraw such securities by and with the consent of the policyholder only; and in case of such withdrawal, the certificate of registration in each case must be surrendered for cancellation, or a receipt from the policyholder, satisfactory to the Commissioner of Insurance, must be produced before such withdrawal of deposits shall be allowed. (1905, c. 504, s. 18; Rev., s. 4782; 1911, c. 134; C.S., s. 6469.)

§ 58-217: Repealed by Session Laws 1945, c. 379.

§ 58-218. Record of securities kept by Commissioner; deficit made good.

The Commissioner of Insurance shall keep a careful record of the securities deposited by each company, and when furnishing the annual certificates of value required in this Article, he may enter thereon the face and market value of the securities deposited by such company. If at any time it appears from such certificate or otherwise that the value of securities held on deposit is less than the net value of the registered policies and annuity bonds issued by such companies, it is not lawful for the Commissioner of Insurance to execute the certificate on any additional policies or annuity bonds of such company until it has made good the deficit. If any company fails or neglects to make such deposits for 60 days the Commissioner may suspend its license to do business

until such deposit be made. (1905, c. 504, s. 16; Rev., s. 4784; C.S., s. 6471; 1945, c. 379.)

§ 58-219. Registered policies certified.

After making the deposits provided for in this Article no company may issue a policy of insurance or endowment or an annuity bond known or designated as "registered" unless it has upon its face a certificate in the following words: "This policy or annuity bond is registered and secured by pledge of bonds, stocks, or securities deposited with this Department as provided by law," which certificate shall be signed by the Commissioner of Insurance and sealed with the seal of his office. Such policies and bonds shall be known as "registered" policies and annuity bonds, and a sample copy of such kind, class, and issue shall be kept in the office of the Commissioner of Insurance. All policies and bonds of each kind and class issued, and the copies thereof, filed in the office of the Commissioner of Insurance must have imprinted thereon some appropriate designating letter, combination of letters or terms identifying the special forms of contract, together with the year of adoption of such form, and whenever any change or modification is made in the form of contracts, policy, or bond, the designating letters or terms and year of adoption thereon shall be changed accordingly. (1905, c. 504, s. 13; Rev., s. 4785; C.S., s. 6472.)

§§ 58-220, 58-221: Repealed by Session Laws 1945, c. 379.

§ 58-222. Power of Commissioner in case of insolvency.

If at any time the affairs of a life insurance company which has deposited securities under the provisions of this Article, in the opinion of the Commissioner of Insurance, appear in such condition as to render the issuing of additional policies and annuity bonds by such company injurious to the public interest, the Commissioner of Insurance may take such proceedings against the company as are authorized by law to be taken against other insolvent companies, and said companies are in all respects subject to the provisions of law affecting other companies. (1905, c. 504, s. 20; Rev., s. 4788; C.S., s. 6475.)

§ 58-223. Fees for registering policies.

Every company making deposits under the provisions of this Article must pay to the Commissioner of Insurance for each certificate on registered policies or annuity bonds, including seal, a fee of fifty cents (50¢) for those exceeding ten thousand dollars ($10,000) in amount and twenty-five cents (25¢) for all under ten thousand dollars ($10,000) in amount, except policies for one hundred dollars ($100.00) and not exceeding five hundred dollars ($500.00) the fee shall be fifteen cents (15¢); for policies of one hundred dollars ($100.00) or less the fee shall be ten cents (10¢). (1905, c. 504, s. 21; Rev., s. 4789; C.S., s. 6476; 1945, c. 379.)

§ 58-223.1. Registration of policies.

After January 1, 1947, the Commissioner shall not register any new policies that are issued by any company, nor accept any deposits covering reserves on business thereafter written. (1945, c. 379.)

Article 24.

Mutual Burial Associations.

§§ 58-224 to 58-241.5: Recodified as §§ 58-241.6 to 58-241.31.

Editor's Note. — This Article was rewritten by Session Laws 1975, c. 837, effective July 1, 1975, and has been recodified as Article 24A, § 58-241.6 et seq.

Section 58-237.2 was repealed by Session Laws 1975, c. 607.

Article 24A.

Mutual Burial Associations.

§ 58-241.6. Mutual burial associations placed under supervision of Burial Association Commission; Commission to select Burial Association Administrator.

All mutual burial associations now organized in the State of North Carolina, and all mutual burial associations hereafter organized and operating within said State, shall be under the general supervision of the North Carolina Mutual Burial Association Commission. The number of members composing this Commission and the manner of electing or appointing such members shall be as set out in G.S. 58-241.7.

The Commission shall maintain and operate such office facilities and shall employ such investigative, accounting, legal, secretarial and clerical employees as may be necessary for the efficient administration of the mutual burial association laws and regulations adopted pursuant thereto. The chief executive officer and administrator of such office shall be known as the Burial Association Administrator, and the office shall be known as the office of the Burial Association Administrator. All expenses of such office facilities and personnel shall be paid from funds coming to the office of the burial association pursuant to this Article and other applicable law. The Administrator shall have all powers granted to the Burial Association Administrator by this Article, all powers which the North Carolina Mutual Burial Association Commission may lawfully grant to such Administrator and all powers necessary and incidental to the powers heretofore enumerated. The person heretofore appointed by the Governor of the State of North Carolina and serving as Burial Association Administrator on July 1, 1975, shall serve until the completion of the term for which such person was appointed. If the office of the Burial Association Administrator shall become vacant for any reason prior to the expiration of the term of the person presently holding the office, such vacancy shall be filled by the Governor of the State of North Carolina and the person thus appointed shall serve only for the remainder of the unexpired term. Thereafter, the Governor shall appoint the Burial Association Administrator upon recommendation of the Burial Association Commission. The salary of the person serving as Burial Association Administrator on July 1, 1975, and the salary of any person serving as Burial Association Administrator throughout the remainder of any term for which such present incumbent was appointed, shall be fixed by the Governor subject to the approval of the Advisory Budget Commission. Thereafter, the salary of the Burial Association Administrator shall be fixed by the North Carolina Mutual

Burial Association Commission subject to the approval of the Advisory Budget Commission. (1941, c. 130, ss. 2, 19; 1943, c. 170; 1957, c. 541, s. 4; 1975, c. 837; 1981, c. 884, s. 3.)

Editor's Note. — This Article is Article 24 of this Chapter as rewritten by Session Laws 1975, c. 837, effective July 1, 1975, and recodified. Where appropriate, the historical citations to the sections in the former Article have been added to corresponding sections in the Article as rewritten and recodified.

Effect of Amendments. — The 1981 amendment deleted the former last sentence, relating to the bond of the Burial Association Administrator.

§ 58-241.7. North Carolina Mutual Burial Association Commission; membership; election; duties.

The North Carolina Mutual Burial Association Commission shall be composed of five members chosen as follows:

(1) Each of the two members serving on the Commission on July 1, 1975, who was elected by the North Carolina Funeral Directors Association, the member serving on the Commission on July 1, 1975, who was elected by the Funeral Directors and Morticians Association of North Carolina and the member serving on the Commission on July 1, 1975, who was elected by the North Carolina Perpetual Care Cemetery Association shall serve until the completion of the term for which such member was elected and until the successor for such member is elected or appointed (as the case may be) and qualified.

(2) a. Repealed by Session Laws 1981, c. 989, s. 2.

b. A vacancy occurring on the Commission after December 31, 1976, because of the expiration of the term of a Commission member, (other than the Commission member appointed by the Governor, as hereinafter provided), shall be selected by the submission by the North Carolina Mutual Burial Association Commission of the names of two persons. Those names shall be submitted on a printed ballot to each burial association operator in the State and no burial association operator shall be entitled to more than one vote.

c. Repealed by Session Laws 1981, c. 989, s. 2.

d. A vacancy occurring on the Commission after December 31, 1976, because of the resignation, death or removal for cause of a member of the Commission (other than the Commission member appointed by the Governor as hereinafter provided), shall be filled within 90 days of the date of the occurrence of the vacancy by the selection of two names by the North Carolina Mutual Burial Association Commission and the submission of those names for voting on a printed ballot to each burial association operator in the State, and no burial association operator shall be entitled to more than one vote.

(3) Repealed by Session Laws 1981, c. 989, s. 2.

(4) Not more than three members of the Commission who shall have been elected or appointed thereto, as the case may be, in accordance with the provisions of subdivision (2) or subdivision (3) shall be of the same race.

(5) The member serving on the Commission on July 1, 1975, who was appointed by the Governor shall continue to serve until the completion of the term for which such member was appointed and until the successor for such member is appointed and qualified. This membership on the Commission shall continue to be filled by

appointment by the Governor and each such subsequent appointment shall be for a term of five years. The member appointed by the Governor shall be a citizen of the State of North Carolina. In the event that this position on the Commission should become vacant by resignation, death or otherwise, a successor to serve for the unexpired term shall be appointed by the Governor within 90 days of the date of the vacancy.

(6) Any member of the Commission elected or appointed, as the case may be, in accordance with the provisions of either subdivision (2), (3) or (4) shall serve to the end of the term for which such member was elected or appointed, as the case may be, and until such member's successor shall have been elected or appointed, as the case may be, and qualified.

(7) No member of the Commission shall be allowed to serve for two successive full terms, but this shall not prevent a member elected or appointed to complete an unexpired term, which unexpired term is less than a full five years, from being elected to one successive full five-year term.

(8) All members of the Commission before assuming the duties of their office shall take an oath for the faithful performance of their duties. (1967, c. 1197, s. 1; 1975, c. 837; 1981, c. 989, ss. 1-3.)

Effect of Amendments. — The 1981 amendment deleted paragraph a of subdivision (2), relating to vacancies occurring in the Commission prior to Jan. 1, 1977 because of the expiration of the term of a Commission member, paragraph c of subdivision (2), relating to vacancies occurring in Commission prior to Jan. 1, 1977 because of the resignation, death or removal for cause of a member of the Commission, and subdivision (3), which gave the Burial Association Administrator authority to fill vacancies where the North Carolina Burial Association fails to fill a vacancy. The amendment also rewrote paragraph b of subdivision (2) and paragraph d of subdivision (2).

§ 58-241.8. Duties of Commission; meetings; Burial Administrator; secretary.

It shall be the duty of the North Carolina Mutual Burial Association Commission to supervise, pursuant to this Article, all burial associations authorized by this Article to operate in North Carolina, to determine that such associations are operated in conformity with this Article and the rules and regulations adopted pursuant to this Article; to assist the Burial Association Administrator with prosecution of violations of this Article or rules and regulations adopted pursuant thereto; to counsel with and advise the Burial Association Administrator in the performance of his duties and to protect the interest of members of mutual burial associations.

The North Carolina Mutual Burial Association Commission, after a public hearing, may promulgate reasonable rules and regulations for the enforcement of this Article and in order to carry out the intent thereof. The Commission is authorized and directed to adopt specific rules and regulations to provide for the orderly transfer of a member's benefits in cash or merchandise and services from the funeral director sponsoring the member's association to the funeral establishment which furnishes a funeral service, or merchandise, or both, for the burial of the member, provided that any funeral establishment to which the member's benefits are transferred in accordance with such rules and regulations shall, if located in North Carolina, be a funeral establishment registered under the provisions of G.S. 90-210.17 or shall, if located in any other state, territory or foreign country, be a funeral establishment recognized by and operating in conformity with the laws of such other state, territory or

foreign country. One or more burial associations operating in North Carolina may merge into another burial association operating in North Carolina and two or more burial associations operating in North Carolina may consolidate into a new burial association provided that any such plan of merger or plan of consolidation shall be adopted and carried out in accordance with rules and regulations adopted by the Commission pursuant to this Article.

All rules and regulations heretofore adopted by the Burial Association Administrator in accordance with prior law and which have not been amended, rescinded, revoked or otherwise changed, or which have not been nullified or made inoperative or unenforceable because of any statute enacted after the adoption of any such rule, shall remain in full force and effect until amended, rescinded, revoked or otherwise changed by action of the Burial Association Commission as set out above, or until nullified or made inoperative or unenforceable because of statutory enactment or court decision.

The Commission shall elect its own chairman, who shall vote only when the Commission is evenly divided.

The Commission shall hold regular meetings at least twice each year, and more often if called by the chairman in Raleigh, or such place in North Carolina as the chairman may direct. Special meetings of the Commission may also be called in Raleigh or such other place in North Carolina as they may direct, by a majority of the Commission.

The Burial Association Administrator shall serve as secretary of the Commission and shall keep minutes of all regular and special meetings.

All regular or special meetings of the Commission, unless a majority of the members of the Commission vote otherwise, shall be open to the public. All regular meetings shall be advertised in at least three newspapers having intercounty circulation in North Carolina.

Members of the Commission shall receive, when attending such regular or special meetings such per diem, expense allowance and travel allowance as are allowed other commissions and boards of the State. The legal adviser to the Commission shall be entitled to actual expenses when attending regular or special meetings of the Commission held other than in Raleigh. All expenses of the Commission shall be paid from funds coming to the Administrator pursuant to this Article. (1967, c. 1197, s. 2; 1971, c. 1151; 1973, c. 1147, s. 1; 1975, c. 837.)

Editor's Note. — The Article containing § 90-210.17, referred to in this section, was rewritten by Session Laws 1975, c. 571, and recodified as § 90-210.18 et seq. For present provisions as to permits to operate funeral establishments, see § 90-210.25.

CASE NOTES

Modification Permitting Selection of Funeral Director by Decedent's Representatives. — Modification in statute and regulations which would permit the selection of a funeral director by representatives of decedent was a reasonable change and would seem to be within the general purpose for which the association was formed. Present-day society is so mobile that provisions which will facilitate transfer of benefits would appear to be in the public interest. Adair v. Orrell's Mut. Burial Ass'n, 19 N.C. App. 492, 199 S.E.2d 129 (1973), aff'd, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 2637, 41 L. Ed. 2d 231 (1974), decided under former § 58-224.2.

OPINIONS OF ATTORNEY GENERAL

As to conflict of former §§ 58-224.2 and 58-226, see Adair v. Orrell's Mut. Burial Ass'n, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974).

§ 58-241.9. Requirements as to rules and bylaws.

All burial associations now operating within the State of North Carolina, and all burial associations hereafter organized and operating within the State of North Carolina shall have and maintain rules and bylaws embodying the following:

Article 1. The name of this association shall be . . . . . ., which shall indicate that said association is a mutual burial association.

Article 2. The objects and purposes for which this association is formed and the purposes for which it has been organized, and the methods and plan of operation of this association shall be to provide a plan for each member of this association for the payment of one funeral benefit for each member, which benefit shall consist of a funeral in cash or merchandise and service, with no free embalming or free ambulance service included in such benefits. No other free service or any other thing free shall be held out, promised or furnished, in any case. Such funeral benefit shall be in the amount of one hundred dollars ($100.00) of cash or merchandise and service, without free embalming or free ambulance service, for persons of the age of 10 years and over, or in the amount of fifty dollars ($50.00) for persons under the age of 10 years; provided, however, that any member of this association of the age of 10 years or more may purchase a double benefit (for a total benefit of two hundred dollars ($200.00)), and provided further, however, that any member of this association under the age of 10 years may purchase a double benefit (for a total benefit of one hundred dollars ($100.00)) or a quadruple benefit (for a total benefit of two hundred dollars ($200.00)); however, any additional benefit (as set out herein) shall be based on the assessment rate, as provided in Article 6 of this section, at the attained age of applicant at the time the additional benefit takes effect. The purchase of an additional benefit shall not be available to any member who cannot fulfill the requirements as set forth in Article 3 of this section.

Provided, further, that mutual burial associations organized and operating pursuant to this Article may offer for sale to its members in good standing, funeral benefits payable only in cash in excess of two hundred dollars ($200.00), but those sales shall be subject to all applicable insurance laws of this State and shall in no manner be subject to the provisions of this Article or impair whatsoever funds heretofore or hereafter collected and held by that Association pursuant to this Article. All mutual burial association policies heretofore or hereafter sold in this State in an amount of two hundred dollars ($200.00) or less shall continue to be administered by the Burial Association Administrator and shall be subject to all provisions of this Article.

Article 3. Any person who has passed his or her first birthday, and who has not passed his or her sixty-fifth birthday, and who is in good health and not under treatment of any physician, nor confined in any institution for the treatment of mental or other disease, may become a member of this burial association by the payment by such person, or for such person, of a membership fee in accordance with the provisions of this Article and the first assessment due on the membership issued for such member in accordance with the provisions of Article 6 herein. The membership fee for any person joining prior to July 1, 1975, is twenty-five cents (25¢). The membership fee of any person joining after July 1, 1975, is twenty-five cents (25¢) for each one hundred dollars ($100.00) of benefits provided in such membership, with a minimum

membership fee of twenty-five cents (25¢). The payment of the membership fee, without the payment of the first quarterly assessment due on the membership, shall not authorize the issuance of a certificate of membership in this burial association, and a certificate of membership for such person shall not be issued until the first such assessment is paid. Any member of this association joining after July 1, 1975, and who shall thereafter purchase an increased benefit shall pay an additional membership fee in accordance with this Article so that the total membership fee paid by such person shall equal twenty-five [cents] (25¢) for each one hundred dollars ($100.00) of benefits in such member's membership; provided, that any member with a fifty-dollar ($50.00) benefit who increases his benefit from fifty dollars ($50.00) to one hundred dollars ($100.00) shall not be required to pay any additional membership fee. The payment of any additional membership fee, without the payment of the first additional assessment due for the increased benefit, shall not make such member eligible for any additional benefit, and such member shall not be eligible for any additional benefit until the first such additional assessment due for such additional benefit is paid. Notwithstanding the foregoing, the provisions of the last paragraph of Article 6, hereinafter set out, shall control the increase of benefits from fifty dollars ($50.00) to one hundred dollars ($100.00) for any member of this association joining under the age of 10 whose benefits in force upon such member attaining his or her tenth birthday are in the amount of fifty dollars ($50.00).

Applicant's birthday must be written in the application and subject to verification by any record the Burial Association Administrator may deem necessary to prove or establish a true date of the birth of any applicant.

Article 4. The annual meeting of the association shall be held at . . . . . (here insert the place, date and hour); each member shall have one vote at said annual meeting and 15 members of the association shall constitute a quorum. There shall be elected at the annual meeting of said association a board of directors of seven members, each of whom shall serve for a period of from one to five years as the membership may determine and until his or her successor shall have been elected and qualified. Any member of the board of directors who shall fail to maintain his or her membership, as provided in the rules and bylaws of said association, shall cease to be a member of the board of directors and a director shall be appointed by the president of said association for the unexpired term of such disqualified member. There shall be at least an annual meeting of the board of directors, and such meeting shall be held immediately following the annual meeting of the membership of the association. The directors of the association may, by a majority vote, hold other meetings of which notice shall be given to each member by mailing such notice five days before the meeting to be held. At the annual meetings of the directors of the association, the board of directors shall elect a president, a vice-president, and a secretary-treasurer. The president and vice-president shall be elected from among the directors, but the secretary-treasurer may be selected from the director membership or from the membership of the association, it being provided that it is not necessary that the secretary-treasurer shall be a member of the board of directors. Among other duties that the secretary-treasurer may perform, he shall be chargeable with keeping an accurate and faithful roll of the membership of this association at all times and he shall be chargeable with the duty of faithfully preserving and faithfully applying all moneys coming into his hands by virtue of his said office. The president, vice-president and secretary-treasurer shall constitute a board of control who shall direct the affairs of the association in accordance with these Articles and bylaws of the association, and subject to such modification as may be made or authorized by an act of the General Assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times

open to the inspection of the Burial Association Administrator or his duly constituted auditors or representatives. It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up-to-date so that the financial standing of the association may be readily ascertained by the Burial Association Administrator or any auditor or representative employed by him. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the Burial Association Administrator to take charge of the books of the association and do whatever work is necessary to bring the books up-to-date. The actual costs of said work may be charged the burial association and shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Whenever in the opinion of the Burial Association Administrator, it is necessary to audit the books of any burial association more than once in any calendar year, the Burial Association Commission shall have authority to assess such burial association the actual cost of any audit in excess of one per calendar year, provided that no more than one audit may be deemed necessary unless a discrepancy exists at the last regular audit. Such cost shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Every burial association shall file with the North Carolina Mutual Burial Association Commission an annual report of its financial condition on a form furnished to it by the North Carolina Burial Association Administrator. Such report shall be filed on or before February 15 of each calendar year and shall cover the complete financial condition of the burial association for the immediate preceding calendar year. The Burial Association Commission shall levy and collect a penalty of twenty-five dollars ($25.00) for each day after February 15 that the report called for herein is not filed. The Commission may, in its discretion, grant any reasonable extension of the above filing date without the penalty provided in this section. Such penalty shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association. Any secretary or secretary-treasurer who fails to file such financial report on or before February 15 of each calendar year or on or before the last day of any period of extension for the filing of such report granted by the Commission to the burial association of such secretary or secretary-treasurer shall be guilty of a misdemeanor and shall be punished by a fine of not in excess of one hundred dollars ($100.00) and imprisoned for not in excess of 30 days, or both fined and imprisoned. Each day after February 15, or the last day of any period of extension for the filing of the report granted by the Commission to the burial association of such secretary or secretary-treasurer, that said report is not filed by the secretary or secretary-treasurer of a burial association, shall constitute a separate offense.

Article 5. Upon the death of any officer, his successor shall be elected by the board of directors for the unexpired term. The president, vice-president and secretary-treasurer shall be elected for a term of from one to five years, and shall hold office until his successor is elected and qualified, subject to the power of the board of directors to remove any officer for good cause shown; provided, that any officer removed by the board of directors shall have the right of appeal to the membership of the association, such appeal to be heard at the next ensuing annual meeting of said membership.

Article 6. Each member shall be assessed according to the following schedule for the benefit indicated (or in multiples thereof for additional benefit) at the age of entry of the member.

ASSESSMENT RATE FOR AGE GROUPS:

First to tenth birthday ($50.00) benefit	five cents (5¢)
Tenth to thirtieth birthday ($100.00) benefit	ten cents (10¢)
Thirtieth to fiftieth birthday ($100.00) benefit	twenty cents (20¢)
Fiftieth to sixty-fifth birthday ($100.00) benefit	thirty cents (30¢)

(Ages shall be defined as having passed a certain birthday instead of nearest birthday.) Assessment shall always be made on the entire membership in good standing.

Any member joining under the age of 10 shall, upon attaining his or her tenth birthday, pay thereafter the assessment for a member age 10 as set out above.

Any member joining under the age of 10 whose benefits in force upon such member attaining his or her tenth birthday are in the amount of fifty dollars ($50.00) shall, if such member is in good standing upon attaining his or her tenth birthday, thereafter have benefits in force in the amount of one hundred dollars ($100.00) without the necessity of making application for such increased benefit. Assessments made thereafter for such member shall be the same as an assessment for a member age 10 as set out above. Such one-hundred-dollar ($100.00) benefit shall be in full force and effect for any such member in good standing immediately upon such member attaining his or her tenth birthday even though the increased assessment provided for herein shall not yet be due and payable, it being the intent of this Article that, notwithstanding any other provisions in these Articles, any member in good standing with a fifty-dollar ($50.00) benefit shall immediately upon attainment of his or her tenth birthday have a one-hundred dollar ($100.00) benefit in force whether or not the increased assessment is then due and payable by such member in accordance with the assessment period of this association.

Article 7. No benefit will be paid for natural death occurring within 30 days from the date of the certificate of membership, which certificate shall express the true date such person becomes a member of this association, and the certificate issued shall be in acknowledgment of membership in this association. Benefits will be paid for death caused by accidental means occurring any time after date of membership certificate. No benefits will be paid in case of suicidal death of any member within one year from the date of the membership certificate. No agent or other person shall have authority to issue membership certificates in the field, but such membership certificates shall be issued at the home office of the association by duly authorized officers: the president, vice-president or secretary, and a record thereof duly made.

Article 8. Any member failing to pay any assessment within 30 days after notice shall be in bad standing, and unless and until restored, shall not be entitled to benefits. Notice shall be presumed duly given when mailed, postage paid, to the last known address of such members: Provided, moreover, that notice to the head of a family shall be construed as notice to the entire membership of such family in said association. Any member or head of a family changing his or her address shall give notice to the secretary-treasurer in writing of such change, giving the old address as well as the new, and the head of a family notifying the secretary-treasurer of change in address shall list with the secretary in such notice all the members of his or her family having membership in said association. Any member in bad standing may, within 90 days after the date of an assessment notice, be reinstated to good standing by

the payment of all delinquent dues and assessments: Provided such person shall at the same time submit to the secretary-treasurer satisfactory evidence of good health, in writing, and no benefit will be paid for natural death occurring within 30 days after reinstatement. In case of death caused by accidental means, benefit will be in force immediately after reinstatement. Any person desiring to discontinue his membership for any reason shall communicate such desire to the secretary-treasurer immediately and surrender his or her certificate of membership. Any adult member who is the head of a family and who, with his family, has become in bad standing, shall furnish to the secretary-treasurer satisfactory evidence of the good health of each member desired to be reinstated in writing.

Article 9. The benefits herein provided are for the purpose of furnishing a funeral and burial benefit, in cash or merchandise and service, for a deceased member. The funeral and burial benefit, if furnished in merchandise and service, shall be in keeping with and similar to the merchandise and service sold and furnished at the same price by reputable funeral directors of this or other like communities.

Article 10. It is understood and stipulated that the benefits provided for shall be payable only to a funeral establishment which provides a funeral service for a deceased member and which, if located in North Carolina, is a funeral establishment registered under the provisions of G.S. 90-210.17 or which, if located in any other state, territory or foreign country, is a funeral establishment recognized by and operating in conformity with the laws of such other state, territory or foreign country. Upon the death of any member, it shall be the duty of the person or persons making the funeral arrangements for such deceased member to notify the secretary of the member's burial association of the death of such member. The person or persons making the funeral arrangements for such deceased member shall have 30 days from the date of the death of such member in which to make demand upon the burial association for the funeral benefits to which such member is entitled.

The benefits provided for are to be paid by the burial association to the funeral director providing such funeral and burial service either in cash or in merchandise and service as elected by the person or persons making the funeral arrangements for such deceased member. If the burial association shall fail, on demand, to provide the benefits to which the deceased member was entitled to the funeral establishment which provided the funeral service for the deceased member, then the benefits shall be paid in cash to the representative of the deceased member qualified under law to receive such benefits.

Article 11. Assessments shall be made as provided in [G.S. 58-241.24]. Whenever possible, assessments will be made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse.

Article 12. In the event the proceeds of the annual assessments imposed on the entire membership for one year, as provided in [G.S. 58-241.24], do not prove sufficient at any time to yield the benefit provided for in these bylaws, then the secretary-treasurer shall notify the North Carolina Burial Association Administrator who shall be authorized, unless the membership is increased to that point where such assessments are sufficient, to cause liquidation of said association, and may transfer all members in good standing to a like organization or association.

Article 13 (a). All legitimate operating expenses of the association shall be paid out of the assessments, but in no case shall the entire expenses exceed thirty percent (30%) of the total of the assessments collected and the investment income of the burial association in one calendar year.

(b) Each burial association shall establish and maintain a reserve account for the payment of member's benefits. On the thirty-first day of December following July 1, 1975, each burial association shall transfer to such burial association's reserve account established in accordance with this Article all

funds which such burial association is maintaining on that date in an account designated by such burial association as either a surplus account or a reserve account. Thereafter, beginning on January 1, 1976, each burial association shall place in such reserve account five percent (5%) of the assessments collected from and after that date and five percent (5%) of the investment income of the association earned from and after that date. These sums shall continue to be placed in the association's reserve account until the association's reserve account shall equal twenty-one dollars ($21.00) per member. Thereafter if the reserve account shall fall below twenty-one dollars ($21.00) per member, such sums shall again be deposited in the account until such time as the reserve account shall again be equal to twenty-one dollars ($21.00) per member. If the reserve account shall at any time exceed twenty-one dollars ($21.00) per member, amounts in excess of twenty-one dollars ($21.00) per member may be withdrawn from the reserve account.

Article 14. Special meetings of the association membership may be called by the secretary-treasurer when by him deemed necessary or advisable, and he shall call a meeting when petitioned to do so by sixty-six and two-thirds percent (66 $^2/_3$%) of the members of said association who are in good standing.

Article 15. The secretary-treasurer shall, upon satisfactory evidence that membership was granted to any person not qualified at the time of entry as provided under Article 3 of these bylaws, refund any amounts paid as assessment, and shall remove the name from the membership roll.

Article 16. Any member may pay any number of assessments in advance, in which case such member will not be further assessed until a like number of assessments shall have been levied against the remaining membership.

Article 17. No person may maintain active membership in two or more separate burial associations. Any person who is found to have membership in two or more separate burial associations shall forfeit all benefits and fees paid in all associations of which he is a member except in the association which he first joined and of which he is still then a member. A person is not a member of an association for purposes of this Article if he has discontinued his membership in such association or if such association has been placed in liquidation.

Article 18. Each year, before the annual meeting of the membership of this association, the association shall cause to be published in a newspaper of general circulation in the county in which such association has its principal place of business, or shall cause to be mailed to each member in good standing a statement showing total income collected, expenses paid and burial benefits provided for by such association during the next preceding year.

Article 19. These rules and bylaws shall not be modified, canceled or abridged by any association or other authority except by act of the General Assembly of North Carolina. (1941, c. 130, s. 4; 1943, c. 272, ss. 1, 2; 1945, c. 125, s. 1; 1947, c. 100, s. 1; 1949, c. 201, ss. 1, 2; 1953, c. 1201; 1955, c. 259, ss. 3, 4; 1967, c. 1197, s. 4; 1969, c. 1041, ss. 2, 3; 1973, c. 688; 1975, c. 837; 1977, c. 748, ss. 1, 2, 6; 1981, c. 989, s. 4.)

Editor's Note. — The bracketed references to § 58-241.24 in Articles 11 and 12 of this section as set out above have been substituted by the editors for obviously incorrect references to a nonexistent section in Session Laws 1975, c. 837.

The Article containing § 90-210.17, referred to in this section, was rewritten by Session Laws 1975, c. 571, and recodified as § 90-210.18 et seq. For present provisions as to permits to operate funeral establishments, see § 90-210.25.

Effect of Amendments. — The 1981 amendment added the fifth and sixth sentences in Article 2.

CASE NOTES

The General Assembly may reserve the right to amend bylaws and regulations of a mutual burial association which it created so as to bind the association and its members. Adair v. Orrell's Mut. Burial Ass'n, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

Members are bound by subsequent legislation making changes in the rules and bylaws of burial associations, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. Spearman v. United Mut. Burial Ass'n, 225 N.C. 185, 33 S.E.2d 895 (1945), decided under former § 58-226.

And Statutory Changes Subsequent to Issuance of Certificate Did Not Impair Contract. — Where the provisions of former § 58-226 and the certificate issued to the member by her burial association contained an express reservation of power by the General Assembly to modify, cancel, or abridge the rules and bylaws of the association, this was ample notice to both of the reservation of power by the General Assembly, and the statutory changes subsequent to the issuance of the certificate did not result in impairment of the contract in violation of Art. I, § 10, clause 1, of the United States Constitution. Adair v. Orrell's Mut. Burial Ass'n, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

Payment of Benefits to Funeral Director of Another Association Who Renders Services. — When funeral services are provided by a funeral director of any mutual burial association in good standing in North Carolina for a decedent who was a member of another such association, the benefits of the decedent are not forfeited, but are required to be paid in cash to the funeral director who actually renders the services. Adair v. Orrell's Mut. Burial Ass'n, 19 N.C. App. 492, 199 S.E.2d 129 (1973), aff'd, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

§ 58-241.10. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates.

Each burial association shall have for each funeral home sponsoring the said burial association not more than five agents or representatives soliciting members other than the secretary-treasurer and president, and before any agent or representative shall or may represent any burial association in North Carolina, he or she shall first apply to the Burial Association Administrator of North Carolina for a license, and the Burial Association Administrator shall have full power and authority to issue such license upon proof satisfactory to such Administrator that such person is capable of soliciting burial association memberships, is of good moral character and recommended by the association in behalf of which such membership solicitations are to be made. The Burial Association Administrator may reject the application of any person who does not meet the requirements as to capacity and moral fitness. The Burial Association Administrator may, upon proof satisfactory to him that said licensed agent has violated any section of this law, revoke said license. Upon the issuing of a license to solicit membership in any burial association, such person shall be required to pay in cash, at the time of issuing license to such applicant, to the Burial Association Administrator, the sum of five dollars ($5.00); moneys derived from this fee or charge, are to be and remain in the department or office of such Burial Association Administrator, for supervision of burial associations in this State, subject to withdrawal for expenses of supervision by authority of the Burial Association Administrator. It shall not be necessary that the president or secretary-treasurer of any burial association obtain a license for soliciting membership in the association of which such person is president or secretary-treasurer. Membership certificates shall not be issued by a solicitor in the field, but shall be reported to the office of the association and there issued and a record made of such issuance at the time

such certificate is so issued. (1941, c. 130, s. 5; 1945, c. 125, s. 2; 1947, c. 100, s. 2; 1949, c. 201, s. 3; 1975, c. 837.)

§ 58-241.11. Assessments against association for expenses of Burial Association Administrator.

In order to meet the expenses of the supervision of the burial associations, the North Carolina Mutual Burial Association Commission shall prepare an annual budget for the office of the Burial Association Administrator. This budget shall be submitted to and shall be subject to approval by the Advisory Budget Commission. Thereafter, the Burial Association Administrator shall assess each burial association one hundred dollars ($100.00) and shall prorate the remaining amount of this budget, over and above any other funds made available to him for this purpose, and assess each association on a pro rata basis in accordance with the number of members of each association. Each burial association shall remit to the Burial Association Administrator its pro rata part of the total assessment, which expense shall be included in the thirty per centum (30%) expense allowance as provided in Article 13 of [G.S. 58-241.9]. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within 30 days thereafter. If any association shall fail or refuse to pay such assessment within 30 days, the Burial Association Administrator is authorized to transfer all memberships and assets of every kind and description to the nearest association that is found by the Burial Association Administrator to be in good sound financial condition. (1941, c. 130, s. 6; 1943, c. 272, s. 3; 1945, c. 125, s. 3; 1947, c. 100, s. 3; 1949, c. 201, s. 4; 1951, c. 901, s. 1; 1955, c. 259, ss. 1, 2; 1967, c. 985, s. 1; 1969, c. 1006, s. 2; 1973, c. 1476, s. 1; 1975, c. 837; 1977, c. 748, s. 3; 1981, c. 989, s. 6.)

Editor's Note. — The bracketed reference to § 58-241.9 in this section as set out above has been substituted by the editors for an obviously incorrect reference in Session Laws 1975, c. 837, to the section codified herein as § 58-241.10.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "one hundred dollars ($100.00)" for "fifty dollars ($50.00)" in the third sentence.

§ 58-241.12. Unlawful to operate without written authority of Commission.

It shall be unlawful for any person, firm or corporation, association or organization to organize, operate, or in any way solicit members for a burial association, or for participation in any plan, scheme, or device similar to burial associations, without the written authority of the North Carolina Mutual Burial Association Commission, and any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred fifty dollars ($250.00) or imprisoned not less than 12 months, or both, in the discretion of the court; provided, however, the Burial Association Commission shall not withhold authority for the organization or operation of a bona fide burial association, meeting the requirements of this Article, unless it shall be found and established to the satisfaction of the Burial Association Commission that the person or persons applying for authority to organize and operate such bona fide burial association is disqualified or does not meet the requirements of this Article. (1941, c. 130, s. 7; 1975, c. 837.)

§ 58-241.13. Revocation of license.

In the event it is proven to the satisfaction of the Burial Association Administrator that any burial association is being operated not in conformity with any provision of this Article, then it shall become the duty of the Burial Association Administrator upon hearing to revoke the license of said burial association and transfer said burial association, its membership and all its assets of every kind and description to another burial association that is found by the Burial Association Administrator to be in good sound financial condition; provided, that if said burial association gives notice of appeal as provided for in [G.S. 58-241.22], then said burial association may continue to operate as before the revocation and until final adjudication. (1945, c. 125, s. 4; 1975, c. 837.)

Editor's Note. — The bracketed reference to § 58-241.22 in this section as set out above has been substituted by the editors for an obviously incorrect reference in Session Laws 1975, c. 837, to the section codified herein as § 58-241.23.

§ 58-241.14. Deposit or investment of funds of mutual burial associations.

Funds belonging to each mutual burial association over and above the amount determined by the Burial Association Administrator to be necessary for operating capital shall be invested in:

(1) Deposits in any bank or trust company in this State.
(2) Obligations of the United States of America.
(3) Obligations of any agency or instrumentality of the United States of America if the payment of interest and principal of such obligations is fully guaranteed by the United States of America.
(4) Obligations of the State of North Carolina.
(5) Bonds and notes of any North Carolina local government or public authority, subject to such restrictions as the Burial Association Commission may impose.
(6) Shares of or deposits in any savings and loan association organized under the laws of this State and shares of or deposits in any federal savings and loan association having its principal office in this State, provided that any such savings and loan association is insured by the United States of America or any agency thereof or by any mutual deposit guaranty association authorized by the Commissioner of Insurance of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes.
(7) Obligations of the Federal Intermediate Credit Banks, the Federal Home Loan Banks, the Federal National Mortgage Association, the Banks for Cooperatives, and the Federal Land Banks, maturing no later than 18 months after the date of purchase.

Violation of the provisions of this section shall, after hearing, be cause for revocation or suspension of license to operate a mutual burial association. (1957, c. 820, s. 1; 1975, c. 837.)

Editor's Note. — Article 7A of Chapter 54 referred to in this section, was repealed by Session Laws 1981, c. 282. See now Article 12 of Chapter 54B.

§ 58-241.15. Unclaimed funds of defunct burial association.

All unclaimed funds of any burial association that is no longer in operation shall be disposed of in accordance with Chapter 116B. (1969, c. 1083; 1975, c. 837; 1979, 2nd Sess., c. 1311, s. 7.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective January 1, 1981, rewrote this section.

§ 58-241.16. Penalty for failure to operate in substantial compliance with bylaws.

If any burial association or other organization or official thereof, or any person operates or allows to be operated a burial association on any plan, scheme or bylaws not in substantial compliance with the bylaws set forth in [G.S. 58-241.9], the Burial Association Administrator may revoke any authority or license granted for the operation of such burial association, and any person, firm or corporation or association convicted of the violation of this section shall be guilty of a misdemeanor and shall be fined not less than two hundred fifty dollars ($250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 8; 1975, c. 837.)

Editor's Note. — The bracketed reference to § 58-241.9 in this section as set out above has been substituted by the editors for an obviously incorrect reference in Session Laws 1975, c. 837, to the section codified herein as § 58-241.10.

§ 58-241.17. Penalty for wrongfully inducing person to change membership.

Any burial association official, agent or representative thereof or any person who shall use fraud or make any promise not part of the printed bylaws, or who shall offer any rebate, gratuity or refund to cause a member of one association to change membership to another association, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred fifty dollars ($250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 9; 1975, c. 837.)

§ 58-241.18. Penalty for making false and fraudulent entries.

Any person or burial association official who makes or allows to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the Burial Association Administrator or his deputy or agent, or any auditor authorized to examine the books of such association, under the supervision of the Burial Association Administrator, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred fifty dollars ($250.00), or imprisoned in the common jail for not less than 12 months, or both, in the discretion of the court. (1941, c. 130, s. 10; 1945, c. 125, s. 5; 1975, c. 837.)

§ 58-241.19. Accepting applications without collecting fee and first assessment.

Any burial association official, agent or representative, or any other person who shall accept any application for membership in any association without collecting the membership fee and first assessment due thereon from any such person making such an application for membership, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred fifty dollars ($250.00), or imprisoned not less than 12 months, or both, in the discretion of the court.

Any burial association official, agent or representative, or any other person who shall accept an application for an additional benefit from a member of a burial association without collecting the additional membership fee and the additional assessment due thereon from any such person making such an application for an additional benefit shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred fifty dollars ($250.00), or imprisoned not less than 12 months, or both, in the discretion of the court. (1941, c. 130, s. 11; 1975, c. 837.)

§ 58-241.20. Removal of secretary-treasurer for failure to maintain proper records.

Any burial association secretary-treasurer who fails to maintain records to the minimum standards required by the Burial Association Administrator shall be by such Administrator removed from office and another elected in his stead, such election to be immediate and by the board of directors of said burial association upon notice of such removal. (1941, c. 130, s. 12; 1975, c. 837.)

§ 58-241.21. Free services; failure to make proper assessments, etc., made a misdemeanor.

Any person or persons who offer free funeral services or free embalming, free ambulance service or any other thing free of charge, acting for any burial association, directly or indirectly, or who so acting shall in any way fail to assess for the amount needed to pay death losses and allowable expenses, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred fifty dollars ($250.00) or imprisoned for not less than 12 months, or both, in the discretion of the court. (1941, c. 130, s. 13; 1967, c. 1197, s. 5; 1975, c. 837.)

§ 58-241.22. Right of appeal upon revocation or suspension of license.

Upon the revocation or suspension of any license or authority by the North Carolina Burial Association Administrator, under any of the provisions of this Article, the said association or individual whose license or authority has been revoked or suspended shall have the right of appeal from the action of the Burial Association Administrator in revoking or suspending such license or authority to the Superior Court of Wake County or to the superior court of the county in which the said association or the said individual is domiciled or, upon agreement of the parties to the appeal, to any other superior court of the State. The association or individual appealing from the order of the Burial Association Administrator shall give notice of appeal in writing to the Burial Association Administrator, with a copy of such notice to the clerk of the superior court to which the appeal is taken, within 10 days of the date of notice of the order revoking or suspending the said license or authority and shall pay

such appeal fees to the clerk of superior court as are required by law. Within 30 days after receipt of the notice of appeal, the Burial Association Administrator shall file with the clerk of the superior court of the county in which the appeal is to be heard the decision of the Burial Association Administrator. Upon receipt of such decision, the clerk of superior court shall place the matter upon the civil issue docket of the superior court and the same shall be heard de novo. Pending such appeal, the burial association or individual whose license or authority has been suspended or revoked shall continue to operate or function as before the revocation or suspension and until final adjudication by the superior court. (1941, c. 130, s. 14; 1943, c. 272, s. 4; 1957, c. 820, s. 3; 1973, c. 108, s. 20; 1975, c. 837.)

§ 58-241.23. Bond of secretary or secretary-treasurer of burial associations.

The secretary or secretary-treasurer of each burial association shall, before entering upon the duties of his office, and for the faithful performance thereof, execute a bond payable to the Burial Association Administrator as trustee for the burial association in some bonding company licensed to do business in this State, to be approved by the Burial Association Administrator. Said bond shall be in an amount not less than one thousand dollars ($1,000), nor more than ten thousand dollars ($10,000), in the discretion of the Administrator, for those associations whose assets, as determined by the Administrator's audit, are ten thousand dollars ($10,000) or less. For those associations whose assets, as determined by the Administrator's audit, are in excess of ten thousand dollars ($10,000), said bond shall be in an amount of ten thousand dollars ($10,000) plus twenty-five per centum (25%) of all assets over ten thousand dollars ($10,000); provided, however, that the bond required by this section shall not in any event exceed fifty thousand dollars ($50,000). If any association operates a branch or subsidiary and the officers of both associations are the same, for purposes of this section, it shall be treated as one association. Any burial association, with the consent of the Burial Association Administrator, may give a bond secured by a deed of trust on real estate situated in North Carolina, in lieu of procuring said bond from a bonding company. The bond thus given shall not be acceptable in excess of the ad valorem tax value for the current year of the real estate securing said bond. The deed of trust shall be recorded in the county or counties wherein the land lies and shall be deposited with the Burial Association Administrator, name the Administrator as trustee for the burial association and must constitute a first lien on the property secured by the deed of trust. Said deed of trust shall contain a description of the encumbered property by metes and bounds together with evidence by title insurance policy or by certificate of an attorney-at-law, certifying that said trustor is the owner of a marketable fee simple title to such lands. (1941, c. 130, s. 15; 1943, c. 272, s. 5; 1967, c. 985, s. 2; 1975, c. 837.)

§ 58-241.24. Assessments.

Every burial association now or hereinafter organized shall make 12 assessments, or their equivalent, per year per member. The Burial Association Administrator shall order any association to make more than 12 assessments per year when, after notice and hearing, it shall appear to the Burial Association Administrator that the death loss of any association so requires in order to protect the interest of the members. (1943, c. 272, s. 6; 1969, c. 1041, s. 1; 1971, c. 650; 1975, c. 837.)

§ 58-241.25. Making false or fraudulent statement a misdemeanor.

Any officer or employee of any burial association authorized to do business under this Article, who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership or for the purpose of obtaining money or any benefit from any burial association transacting business under this Article, or who shall make any false financial statement to the Burial Association Administrator or to the Burial Association Commission or to the membership of the burial association of which such person is an officer or employee shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1943, c. 272, s. 6; 1975, c. 837.)

§ 58-241.26. Statewide organization of associations.

It shall be lawful for the several mutual burial associations of the State of North Carolina, in good standing, to organize and provide for a statewide organization of mutual burial associations, which organization shall be for the mutual and general suggestive control of mutual burial associations in the State of North Carolina. Such organization shall be known as the North Carolina Burial Association, Incorporated, and shall be composed of members who are lawfully operating burial associations in this State and who pay their dues to such association. (1941, c. 130, s. 16; 1975, c. 837.)

§ 58-241.27. Article deemed exclusive authority for organization, etc., of mutual burial associations.

This Article shall be deemed and held exclusive authority for the organization and operation of mutual burial associations within the State of North Carolina, and such associations shall not be subject to any other laws respecting insurance companies of any class. (1941, c. 130, s. 17; 1975, c. 837.)

§ 58-241.28. Operation of association in violation of law prohibited.

No person, firm or corporation shall operate as a burial association in this State unless incorporated under the laws of the State of North Carolina and unless such association shall be operated in compliance with all the provisions of this Article, and unless such association shall be licensed and approved by the North Carolina Mutual Burial Association Commission. (1941, c. 130, s. 18; 1975, c. 837.)

§ 58-241.29. Member in armed forces failing to pay assessments; reinstatement.

If a member of a burial association who is in the military or naval forces of the United States fails to pay any assessment, he shall be in bad standing, and unless and until restored, shall not be entitled to benefits. However, the said member shall be reinstated in the burial association upon application made by him at any time until 12 months after his discharge from the military or naval forces of the United States, notwithstanding his physical condition and without the payment of assessments which have become due during his service in the military or naval forces of the United States. Benefits will be in force immediately after such reinstatement. (1943, c. 732, s. 2; 1975, c. 837.)

§ 58-241.30. Hearing by Administrator of dispute over liability for funeral benefits; appeal.

In case of a disagreement between the representative of a deceased member of any burial association and such deceased member's burial association a hearing may be held by the Burial Association Administrator, on request of either party, to determine whether the association is liable for the benefits set forth in the policy issued to the said deceased member of said burial association. The Burial Association Administrator shall render a decision which shall have the same force and effect as judgments rendered by courts of competent jurisdiction in North Carolina. Either party may appeal from the decision of the Burial Association Administrator. Appeal shall be to the district court division of the General Court of Justice in the county in which the burial association is located. The procedure for appeal shall be the same as the appeal procedure set forth in Article 19 of Chapter 7A of the General Statutes of North Carolina regulating appeals from the magistrate to the district court. Upon appeal trial shall be de novo. (1947, c. 100, s. 5; 1975, c. 837.)

§ 58-241.31. Administrator authorized to subpoena witnesses, administer oaths and compel attendance at hearings.

For the purpose of holding hearings the Burial Association Administrator shall have power to subpoena witnesses, administer oaths, and compel attendance of witnesses and parties. (1957, c. 820, s. 2; 1975, c. 837.)

§ 58-241.32. Authority of Administrator to examine financial records.

The Burial Association Administrator shall have authority to examine all records relating to a burial association's financial condition wherever such records are located, including records maintained by any corporation, building and loan association, savings and loan association, credit union, or other legal entity organized and operating pursuant to the authority contained in Chapters 53 and 54 of the General Statutes. (1977, c. 748, s. 4.)

§ 58-241.33. Administrator authorized to freeze certain funds of Association.

Whenever in the opinion of the Burial Association Administrator he deems it necessary for the protection of the interest of members of a burial association, he shall have authority by written order to direct that the funds of any burial association on deposit in any institution organized and operating under Chapters 53 and 54 of the General Statutes be frozen and not paid out by such legal entity. Any legal entity freezing the funds of a burial association pursuant to the directive of the Burial Association Administrator shall not be liable to any burial association for freezing said account pursuant to the order of the Administrator. (1977, c. 748, s. 5.)

§ 58-241.34. Authority of foreign mutual burial association to purchase, merge or consolidate with North Carolina association.

Any mutual burial association or insurance company operating pursuant to the laws of any state of the United States other than North Carolina, shall have

the authority to purchase the assets of, to merge or consolidate with a North Carolina chartered mutual burial association provided the foreign mutual burial association or insurance company complies with all laws of North Carolina, including Chapter 58 of the General Statutes, if an insurance company, applicable to the purchase, merger or consolidation of corporations and provided that the purchasing, merging or consolidating foreign mutual burial association or insurance company complies with rules promulgated by the North Carolina Mutual Burial Association Commission to protect the interest of members of the North Carolina Burial Associations (the authority for that promulgation being given by this section) prior to the purchase, merger or consolidation of a North Carolina Mutual Burial Association. (1981, c. 989, s. 5.)

SUBCHAPTER V. AUTOMOBILE INSURANCE.

ARTICLE 25.

Regulation of Automobile Liability Insurance Rates.

§§ 58-242 to 58-245: Repealed Session Laws 1945, c. 381, s. 2.

§§ 58-246 to 58-248.8: Repealed by Session Laws 1977, c. 828, s. 1.

Cross References. — As to the North Carolina Rate Bureau, see § 58-124.17 et seq. As to the regulation of insurance rates, see § 58-131.34 et seq.

§ 58-248.9: Repealed by Session Laws 1975, c. 666, s. 2.

Cross References. — For present provisions as to filing and implementation of classification plans and rates for coverages on private passenger automobiles, see § 58-30.4.

§ 58-248.10: Repealed by Session Laws 1977, c. 828, s. 1.

Cross References. — As to the North Carolina Rate Bureau, see § 58-124.17 et seq. As to the regulation of insurance rates, see § 58-131.34 et seq.

§§ 58-248.11 to 58-248.25: Reserved for future codification purposes.

ARTICLE 25A.

North Carolina Motor Vehicle Reinsurance Facility.

§ 58-248.26. Definitions.

As used in this Article:

(1) "Cede" or "cession" means the act of transferring the risk of loss from the individual insurer to all insurers through the operation of the facility.

(2) "Commissioner" means the Commissioner of Insurance.

(3) "Company" means each member of the Facility.

(4) "Eligible risk" means a person who is a resident of this State who owns a motor vehicle registered or principally garaged in this State or who has a valid driver's license in this State or who is required to file proof of financial responsibility pursuant to Article 9A or 13 of the North Carolina Motor Vehicle Code in order to register his motor vehicle or obtain a driver's license in this State; or a nonresident of this State who owns a motor vehicle registered or principally garaged in this State, or the State and its agencies and cities, counties, towns and municipal corporations in this State and their agencies, provided, however, that no person shall be deemed an eligible risk if timely payment of premium is not tendered or if there is a valid unsatisfied judgment of record against such person for recovery of amounts due for motor vehicle insurance premiums and such person has not been discharged from paying said judgment, or if such person does not furnish the information necessary to effect insurance.

(5) "Facility" means the North Carolina Motor Vehicle Reinsurance Facility established pursuant to the provisions of this Article.

(6) "Motor vehicle" means any motor vehicle as defined under Article 9A of Chapter 20 of the General Statutes of North Carolina.

(7) "Motor vehicle insurance" means direct insurance against liability arising out of the ownership, operation, maintenance or use of a motor vehicle as defined in Article 9A of Chapter 20 of the General Statutes of North Carolina for bodily injury including death and property damage and includes medical payments and uninsured motorist coverages.

With respect to motor carriers who are subject to the financial responsibility requirements established under the Motor Carrier Act of 1980, the term, "motor vehicle insurance" includes coverage with respect to environmental restoration. As used in this subsection the term, "environmental restoration" means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release, or escape into or upon the land, atmosphere, water course, or body of water of any commodity transported by a motor carrier. Environmental restoration includes the cost of removal and the cost of necessary measures taken to minimize or mitigate damage or potential for damage to human health, the natural environment, fish, shellfish, and wildlife.

(8) "Person" means every natural person, firm, partnership, association, corporation or government or agency thereof.

(9) "Plan of operation" means the plan of operation approved pursuant to the provisions of this Article.

(10) Repealed by Session Laws 1977, c. 828, s. 10. (1973, c. 818, s. 1; 1977, c. 828, s. 10; 1981, c. 776, s. 1.)

Editor's Note. — Session Laws 1973, c. 818, s. 3, contains a severability clause.

Effect of Amendments. — The 1981 amendment added the second paragraph of subdivision (7).

Legal Periodicals. — For survey of 1977 law on insurance, see 56 N.C.L. Rev. 1084 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note discussing changes in automobile rate regulation and the role of the Insurance Commissioner in North Carolina, see 17 Wake Forest L. Rev. 822 (1981).

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980); State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980).

Cited in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-248.27. North Carolina Motor Vehicle Reinsurance Facility; creation; membership.

There is created a nonprofit unincorporated legal entity to be known as the North Carolina Reinsurance Facility consisting of all insurers licensed to write and engaged in writing within this State motor vehicle insurance or any component thereof. Every such insurer, as a prerequisite to further engaging in writing such insurance in this State, shall be a member of the Facility and shall be bound by the rules of operation thereof as provided for in this Article and as promulgated by the Board of Governors. No company may withdraw from membership in the Facility unless it ceases to write motor vehicle insurance in this State or ceases to be licensed to write such insurance. (1973, c. 818, s. 1.)

CASE NOTES

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-248.28. Obligations after termination of membership.

Any company whose membership in the Facility has been terminated by withdrawal shall, nevertheless, with respect to its business prior to midnight of the effective date of such termination continue to be governed by this Article. (1973, c. 818, s. 1.)

§ 58-248.29. Insolvency.

Any unsatisfied net liability to the Facility of any insolvent member shall be assumed by and apportioned among the remaining members in the Facility in the same manner in which assessments are apportioned by the Facility. The Facility shall have all rights allowed by law in behalf of the remaining members against the estate or funds of such insolvent for sums due the Facility in accordance with this Article. (1973, c. 818, s. 1; 1977, c. 828, s. 12.)

§ 58-248.30. Merger, consolidation or cession.

When a member has been merged or consolidated into another insurer, or has reinsured its entire motor vehicle liability insurance business in the State with another insurer, such company or its successor in interest shall remain liable for all obligations hereunder and such company and its successor in interest and the other insurers with which it has been merged or consolidated shall continue to participate in the Facility according to the rules of operation. (1973, c. 818, s. 1; 1977, c. 828, s. 13.)

§ 58-248.31. General obligations of insurers.

(a) Except as otherwise provided in this Article all insurers as a prerequisite to the further engaging in this State in the writing of motor vehicle insurance or any component thereof shall accept and insure any otherwise unacceptable applicant therefor who is an eligible risk if cession of the particular coverage and coverage limits applied for are permitted in the Facility. All such insurers shall equitably share the results of such otherwise unacceptable business through the Facility and shall be bound by the acts of their agents in accordance with the provisions of this Article. No insurer shall impose upon any of its agents, solely on account of ceded business received from such agents, any quota or matching requirement for any other insurance as a condition for further acceptance of ceded business from such agents.

(b) Each insurer will provide the same type of service to ceded business that it provides for its voluntary market. Records provided to agents and brokers will include an indication that the business is ceded. When an insurer cedes a policy or renewal thereof to the Facility and the Facility premium for such policy is higher than the premium that the insurer would normally charge for such policy if retained by the insurer, the policyholder will be informed that (i) his policy is ceded, (ii) the coverages are written at the Facility rate, which rate differential must be specified, (iii) the reason or reasons for the cession to the Facility, (iv) the specific reason or reasons for the cession to the Facility will be provided upon the written request of the policyholder to the insurer, and (v) the policyholder may seek insurance through other insurers who may elect not to cede his policy. If such policyholder obtains motor vehicle liability insurance through another insurer who elects not to cede his policy to the Facility and the policyholder cancels his ceded policy within 45 days of the effective date of such ceded policy, the earned premium for such ceded policy shall be calculated on the pro rata basis, except that the pro rata calculation shall not apply to a cancellation by any insurance premium finance company as provided in G.S. 58-60.

(c) Upon the written request of any eligible risk who has been notified pursuant to subsection (b) of this section that his motor vehicle insurance policy has been ceded to the Facility, the insurer ceding the insurance policy must provide in writing to that eligible risk the specific reason or reasons for the decision to cede that policy to the Facility. Proof of mailing of the written reason or reasons is sufficient proof of compliance with this obligation. With regard to any notice of cession or any written or oral communications specifying the reason or reasons for cession, there will be no liability on the part of, and no cause of action of any nature will arise against, (i) any insurer or its authorized representatives, agents, or employees, or (ii) any licensed agent, broker, or persons who furnish to the insurer information as to the reason or reasons for the cession, for any communications or statements made by them, unless the communications or statements are shown to have been made in bad faith with malice in fact. (1973, c. 818, s. 1; 1979, c. 732.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980); State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-248.32. General obligations of agents.

(a) Except as otherwise provided in this Article, no licensed agent of an insurer authorized to solicit and accept premiums for motor vehicle insurance or any component thereof by the company he represents shall refuse on behalf of said company to accept any application from an eligible risk for such insurance and to immediately bind the coverage applied for and for a period of not less than six months if cession of the particular coverage and coverage limits applied for are permitted in the Facility, provided the application is submitted during the agent's normal business hours, at his customary place of business and in accordance with the agent's customary practices and procedures. The commission paid on the insurance coverages provided in this Article shall not be less than the commission on insurance coverage written through the North Carolina Insurance Plan on May 1, 1973. The same commission shall apply uniformly statewide.

(b) It shall be the responsibility of the agent to write the coverage applied for at what he believes to be the appropriate rate level. If coverage is written at the Facility rate level and the company elects not to cede, the policy shall be rated at the voluntary rate level. Coverage written at the voluntary rate level which is not acceptable to the company must either be placed with another company or rated at the Facility rate level by the agent. (1973, c. 818, s. 1; 1977, c. 828, s. 11.)

CASE NOTES

Facility rates can be higher than those for the voluntary market if a higher facility rate is actuarially indicated. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-248.33. The Facility; functions; administration.

(a) The operation of the Facility shall assure the availability of motor vehicle insurance to any eligible risk and the Facility shall accept all placements made in accordance with this Article, the plan of operation adopted pursuant thereto, and any amendments to either.

(b) The Facility shall reinsure for each coverage available therein to the standard percentage of one hundred percent (100%) or lesser equitable percentage established in the plan of operation as follows:

(1) For the following coverages of motor vehicle insurance and in at least the following amounts of insurance:

a. Bodily injury liability: twenty-five thousand dollars ($25,000) each person, fifty thousand dollars ($50,000) each accident;

b. Property damage liability: ten thousand dollars ($10,000) each accident;

c. Medical payments: one thousand dollars ($1,000) each person; except that this coverage shall not be available for motorcycles;

d. Uninsured motorist: twenty-five thousand dollars ($25,000) each person; fifty thousand dollars ($50,000) each accident for bodily injury; five thousand dollars ($5,000) each accident property damage (one hundred dollars ($100.00) deductible);

e. Any other motor vehicle insurance limits in the amount required by any law or regulatory agency regulation for those motor carriers who furnish proof of insurance or file certificates of insurance with any regulatory agency in order to comply with the security or other financial responsibility requirements of the North Carolina Utilities Commission and the United States Interstate Commerce Commission or who are subject to financial responsibility requirements established under the Federal Motor Carrier Act of 1980.

(2) Additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors if there is a substantial public demand for a coverage or coverage limit of any component of motor vehicle insurance up to the following:

Bodily injury liability: one hundred thousand dollars ($100,000) each person, three hundred thousand dollars ($300,000) each accident;

Property damage liability: fifty thousand dollars ($50,000) each accident;

Medical payments: two thousand dollars ($2,000) each person;

Uninsured motorist: one hundred thousand dollars ($100,000) each person and each accident for bodily injury and five thousand dollars ($5,000) for property damage (one hundred dollars ($100.00) deductible).

(3) Whenever the additional ceding privileges are provided as in G.S. 58-248.33(b)(2) for any component of motor vehicle insurance, the same additional ceding privileges shall be available to "all other" types of risks subject to the rating jurisdiction of the North Carolina Automobile Rate Administrative Office.

(c) The Facility shall require each member to adjust losses for ceded business fairly and efficiently in the same manner as voluntary business losses are adjusted and to effect settlement where settlement is appropriate.

(d) The Facility shall be administered by a Board of Governors. The Board of Governors shall consist of nine members having one vote each from the classifications hereinafter enumerated plus the Commissioner who shall serve ex officio without vote. Each Facility insurance company member serving on the Board shall be represented by a senior officer of the company. Not more than one company in a group under the same ownership or management shall be represented on the Board at the same time. Five members of the Board shall be selected by the member insurers, which members shall be fairly representative of the industry. To insure representative member insurers, one each shall be selected from the following groups: the American Insurance Association (or its successors), the American Mutual Insurance Alliance (or its successors), the National Association of Independent Insurers (or its successors), all other stock insurers not affiliated with the above groups, and all other nonstock insurers not affiliated with the above groups. The Commissioner of Insurance shall appoint four members of the Board who shall be fire and casualty insurance agents licensed in this State and actively engaged in writing motor vehicle insurance in this State. The Commissioner shall select one agent from among a list of two nominees submitted by the Independent Insurance Agents of North Carolina, Inc., and one agent from among a list of two nominees submitted by the Carolinas Association of Mutual Insurance Agents, North Carolina Division. The initial term of office of said Board members shall be two years. Following completion of initial terms, successors to the members of the original Board of Governors shall be selected

to serve three years. All members of the Board of Governors shall serve until their successors are selected and qualified and the Commissioner may fill any vacancy on the Board from any of the aforementioned classifications until such vacancies are filled in accordance with the provisions of this Article.

(e) The Commissioner and member companies shall provide for a Board of Governors within 30 days after May 24, 1973. If any member seat on the initial Board of Governors is not filled in accordance with this Article within such time, then, in that event the Commissioner shall appoint natural persons from any of the classifications specified in subsection (d) of this section to serve the initial term on the Board of Governors. As soon as possible after its selection, the Commissioner shall call for the initial meeting of the Board. After the Board of Governors have been selected it shall then elect from its membership a chairman and shall then meet thereafter as often as the chairman shall require or at the request of three members of the Board of Governors. The chairman shall retain the right to vote on all issues. Five members of the Board of Governors shall constitute a quorum. The same member may not serve as chairman for more than two consecutive years.

(f) The Board of Governors shall have full power and administrative responsibility for the operation of the Facility. Such administrative responsibility shall include but not be limited to:

(1) Proper establishment and implementation of the Facility.

(2) Employment of a manager who shall be responsible for the continuous operation of the Facility and such other employees, officers and committees as it deems necessary.

(3) Provision for appropriate housing and equipment to assure the efficient operation of the Facility.

(4) Promulgation of reasonable rules and regulations for the administration and operation of the Facility and delegation to the manager of such authority as it deems necessary to insure the proper administration and operation thereof.

(g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:

(1) To sue and be sued in the name of the Facility. No judgment against the Facility shall create any direct liability in the individual member companies of the Facility.

(2) To receive and record cessions.

(3) To assess members on the basis of participation ratios established in the plan of operation to cover anticipated or incurred costs of operation and administration of the Facility at such intervals as are established in the plan of operation.

(4) To contract for goods and services from others to assure the efficient operation of the Facility.

(5) To hear and determine complaints of any company, agent or other interested party concerning the operation of the Facility.

(6) Upon the request of any licensed fire and casualty agent meeting any two of the standards set forth below as determined by the Commissioner of Insurance within 10 days of the receipt of the application, the Facility shall contract with one or more members within 20 days of receipt of the determination to appoint such licensed fire and casualty agent as designated agents in accordance with reasonable rules as are established by the plan of operation. Such standards shall be:

a. Whether the agent's evidence establishes that he has been conducting his business in a community for a period of at least one year;

b. Whether the agent's evidence establishes that he had a gross premium volume during the 13 months next preceding the date of his application of at least twenty thousand dollars ($20,000) from motor vehicle insurance;

c. Whether the agent's evidence establishes that the number of eligible risks served by him during the 13 months next preceding the date of his application was 200 or more;

d. Whether the agent's evidence establishes a growth in eligible risks served and premium volume during his years of service as an agent;

e. Whether the agent's evidence establishes that he made available to eligible risks premium financing or any other plan for deferred payment of premiums.

If no insurer is willing to contract with any such agent on terms acceptable to the Board, the Facility shall license such agents to write directly on behalf of the Facility. However, for this purpose, the Facility does not act as an insurer, but only as the statutory agent of all the members of the Facility which shall be bound on risks written by the Facility's appointed agent. Adequate provision shall be made by the Facility to assure that business produced by designated agents which would meet the underwriting criteria of the company shall be written at the voluntary rate and not at the Facility rate if higher. The Facility may contract with one or more servicing carriers and shall promulgate fair and reasonable underwriting procedures to require that business produced by Facility agents and written through said carriers shall be appropriately classified and rated. To this end, the same underwriting criteria for classification and rates used for its voluntary agents shall be used by the servicing carrier servicing such Facility agents in order to determine whether the voluntary rate or the Facility rate shall apply. All business produced by designated agents or Facility agents may be ceded to the Facility.

(7) To maintain all loss, expense, and premium data relative to all risks reinsured in the Facility, and to require each member to furnish such statistics relative to insurance reinsured by the Facility at such times and in such form and detail as may be required.

(8) To establish fair and reasonable procedures for the sharing among members of any loss on Facility business which cannot be recouped pursuant to G.S. 58-248.34(f) and other costs, charges, expenses, liabilities, income, property and other assets of the Facility and for assessing or distributing to members their appropriate shares. Such shares may be based on the member's premiums for voluntary business for the appropriate category of motor vehicle insurance or by any other fair and reasonable method.

(9) To receive or distribute all sums required by the operation of the Facility.

(10) To accept all risks submitted in accordance with this Article.

(11) To establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Facility will be handled fairly and efficiently.

(12) To adopt and enforce all rules and to do anything else where the Board is not elsewhere herein specifically empowered which is otherwise necessary to accomplish the purpose of the Facility and is not in conflict with the other provisions of this Article.

(h) Each member company shall authorize the Facility to audit that part of the company's business which is written subject to the Facility in a manner and time prescribed by the Board of Governors.

(i) The Board of Governors shall fix a date for an annual meeting and shall annually meet on that date. Twenty days' notice of such meeting shall be given in writing to all members of the Board of Governors.

(j) There shall be furnished to each member an annual report of the operation of the Facility in such form and detail as may be determined by the Board of Governors.

(k) Each member shall furnish statistics in connection with insurance subject to the Facility as may be required by the Facility. Such statistics shall be furnished at such time and in such form and detail as may be required but at least will include premiums charged, expenses and losses.

(l) The classifications, rules, rates, rating plans and policy forms used on motor vehicle insurance policies reinsured by the Facility may be made by the Facility or by any licensed or statutory rating organization or bureau on its behalf and shall be filed with the Commissioner. The Board of Governors shall establish a separate subclassification within the Facility for "clean risks" as herein defined. For the purpose of this Article, a "clean risk" shall be any owner of a motor vehicle classified as a private passenger non-fleet motor vehicle as defined under Article 13C of this Chapter if the owner and the principal operator and each licensed operator in the owner's household have two years' driving experience and if neither the owner nor any member of his household nor the principal operator had had any chargeable accident or any conviction for a moving traffic violation pursuant to the subclassification plan established by the provisions of G.S. 58-30.4, during the three-year period immediately preceding the date of application for motor vehicle insurance or the date of preparation for a renewal motor vehicle insurance policy. Such filings may incorporate by reference any other material on file with the Commissioner. Rates shall be neither excessive, inadequate nor unfairly discriminatory. If the Commissioner finds, after a hearing, that a rate is either excessive, inadequate or unfairly discriminatory, he shall issue an order specifying in what respect it is deficient and stating when, within a reasonable period thereafter, such rate shall be deemed no longer effective. Said order is subject to judicial review as set out in Article 2 of this Chapter. Pending judicial review of said order, the filed classification plan and the filed rates may be used, charged and collected in the same manner as set out in G.S. 58-131.42 of this Chapter. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order. All rates shall be on an actuarially sound basis and shall be calculated, insofar as is possible, to produce neither a profit nor a loss. However, the rates made by or on behalf of the Facility with respect to "clean risks", as defined above, shall not exceed the rates charged "clean risks" who are not reinsured in the Facility. The difference between the actual rate charged and the actuarially sound and self-supporting rates for "clean risks" reinsured in the Facility may be recouped in similar manner as assessments pursuant to G.S. 58-248.34(f). Rates shall not include any factor for underwriting profit on Facility business, but shall provide an allowance for contingencies. There shall be a strong presumption that the rates and premiums for the business of the Facility are neither unreasonable nor excessive.

(m) In addition to annual premiums, the rules of the Facility shall allow semiannual and quarterly premium terms. (1973, c. 818, s. 1; 1977, c. 710; c. 828, ss. 14-19; 1977, 2nd Sess., c. 1135; 1979, c. 676, ss. 1, 2; 1981, c. 776, ss. 2, 3.)

Effect of Amendments. — The 1981 amendment added at the end of paragraph (1)e of subsection (b) "all who are subject to financial responsibility requirements established under the Federal Motor Carrier Act of 1980" and deleted the former last paragraph of subdivision (2) of subsection (b), which read "Any other motor vehicle insurance required by law: in twice the amount of coverage limits required by law."

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Subdivision (g)(1) makes the Board of Governors of the Facility the public's representative, to the exclusion of all others, except where the facility act expressly provides otherwise. State Farm Mut. Auto Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

The Commissioner was not intended to be the representative of the public or to be deemed an aggrieved person so as to permit him to appeal pursuant to the provisions of § 58-9.3. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Thus the Commissioner is not expressly granted the power to appeal by this section. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Recoupment . Surcharges. — The legislature's concern that the Facility operate on a no profit-no loss basis, together with the statutory cap on rates, indicates that the legislature intended recoupment surcharges to be separate and apart from rates. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981), decided prior to the 1981 amendment to § 58-248.34(e).

Surcharges on automobile liability insurance coverages ceded to the North Carolina Reinsurance Facility to recoup past facility losses and on all automobile liability coverages to recoup anticipated losses on ceded "clean risks" do not constitute rates, and no filing with or approval by the Commissioner of Insurance is required by law with respect to the surcharges. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981), decided prior to 1981 amendment to § 58-248.34(e).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-248.34. Plan of operation.

(a) Within 60 days after the initial organizational meeting, the Facility shall submit to the Commissioner, for his approval, a proposed plan of operation, consistent with the provisions of this Article, which shall provide for economical, fair and nondiscriminating administration and for the prompt and efficient provision of motor vehicle insurance to eligible risks. Should no plan be submitted within the aforesaid 60-day period, then the Commissioner of Insurance shall formulate and place into effect a plan consistent with the provisions of this Article.

(b) The plan of operation, unless sooner approved in writing, shall be deemed to meet the requirements of the Article if it is not disapproved by order of the Commissioner within 30 days from the date of filing. Prior to the disapproval of all or any part of the proposed plan of operation the Commissioner shall notify the Facility in what respect the plan of operation fails to meet the specific requirements of this Article. The Facility shall, within 30 days thereafter, submit for his approval a revised plan of operation which meets the specific requirements of this Article. In the event the Facility fails to submit a revised plan of operation which meets the specific requirements of this Article within the aforesaid 30-day period, the Commissioner of Insurance shall enter an order accordingly and shall immediately thereafter formulate and place into effect a plan consistent with the provisions of this Article.

(c) Any revision of the proposed plan of operation or any subsequent amendments to an approved plan of operation shall be subject to approval or disapproval by the Commissioner in the manner herein provided in subsection (b) with respect to the initial plan of operation.

(d) Any order of the Commissioner with respect to the plan of operation or any revision or amendment thereof shall be subject to court review as provided in G.S. 58-9.3.

(e) Upon approval of the Commissioner of the plan so submitted or the promulgation of a plan deemed approved by the Commissioner, all insurance companies licensed to write motor vehicle insurance in this State or any component thereof as a prerequisite to further engaging in writing such insurance shall formally subscribe to and participate in the plan so approved.

The plan of operation shall provide for, among other matters, the establishment of necessary facilities, the management of the Facility, the preliminary assessment of all members for initial expenses necessary to commence operations, the assessment of members if necessary to defray losses and expenses, the distribution of gains to defray losses incurred since the effective date hereof and then to persons reinsured by the Facility, the recoupment of losses sustained by the Facility, which losses may be recouped by equitable pro rata assessment of member companies, the standard amount (one hundred percent (100%) or any equitable lesser amount) of coverage afforded on eligible risks which a member company may cede to the Facility, and the procedure by which reinsurance shall be accepted by the Facility; and shall further provide that:

(1) Members of the Board of Governors shall receive reimbursement from the Facility for their actual and necessary expenses incurred on Facility business, en route to perform Facility business, and while returning from Facility business plus a per diem allowance of twenty-five dollars ($25.00) a day which may be waived.

(2) In order to obtain a transfer of business to the Facility effective when the binder or policy or renewal thereof first becomes effective, the company must within 30 days of the binding or policy effective date notify the Facility of the identification of the insured, the coverage and limits afforded, classification data, and premium. The Facility shall accept risks at other times on receipt of necessary information, but such acceptance shall not be retroactive. The Facility shall accept renewal business after the member on underwriting review elects to again cede the business.

(f) The plan of operation shall provide that every member shall, following payment of any pro rata assessment, commence recoupment of that assessment by way of an identifiable surcharge on motor vehicle insurance policies issued by the member or through the Facility until the assessment has been recouped. Such surcharge shall be a percentage of premium adopted by the Board of Governors of the Facility. Provided, however, that recoupment of losses sustained by the Facility since September 1, 1977, with respect to nonfleet private passenger motor vehicles may be recouped only by surcharging policies (i) that are subject to the classification plan promulgated pursuant to G.S. 58-30.4 and (ii) to which one or more driving record points have been assigned pursuant to said plan. If the amount collected during the period of surcharge exceeds assessments paid by the member to the Facility, the member shall pay over the excess to the Facility on a date specified by the Board of Governors. If the amount collected during the period of surcharge is less than the assessments paid by the member to the Facility, the Facility shall pay the difference to the member. Except as hereinafter provided, the amount of recoupment shall not be considered or treated as a rate or premium for any purpose. The Board of Governors shall adopt and implement a plan for compensation of agents of Facility members when recoupment surcharges are imposed; such compensation shall not exceed the compensation or commission rate normally paid to the agent for the issuance or renewal of the automobile liability policy issued through the North Carolina Reinsurance Facility affected by such surcharge; provided, however, that the surcharge provided for in this section shall include an amount necessary to recover the amount of the assessment to member companies and the compensation paid by each member, pursuant to this section, to agents.

(g) The plan of operation shall provide that all investment income from the premium on business reinsured by the Facility shall be retained by or paid over to the Facility. In determining the cost of operation of the Facility, all investment income shall be taken into consideration.

(h) The plan of operation shall provide for audit of the annual statement of the Facility by independent auditor approved by the Legislative Services Commission. (1973, c. 818, s. 1; 1975, c. 19, s. 18; 1977, c. 828, ss. 20, 21; 1981, c. 590; c. 916, ss. 2, 3.)

Effect of Amendments. — The first 1981 amendment added to subsection (f) a paragraph identical to the last sentence of the subsection as rewritten by the second 1981 amendment.

The second 1981 amendment, effective Oct. 1, 1981, deleted "either through surcharging persons reinsured by the Facility or" following "which losses may be recouped" near the middle of the introductory language in the second paragraph of subsection (e), and, in subsection (f), substituted "shall" for "may" and deleted "or dollar amount per policy" following "premium" in the second sentence, rewrote the third sentence, substituted "on" for "at" preceding "a date" in the fourth sentence, added "Except as hereinafter provided," and inserted "a rate or" in the sixth sentence and added the last sentence. Session Laws 1981, c. 916, s. 4, provides: "The provisions of this act shall apply only to policies that are issued or renewed on or after the respective effective date of this act."

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Recoupment Surcharges. — The legislature's concern that the Facility operate on a no profit-no loss basis, together with the statutory cap on rates, indicates that the legislature intended recoupment surcharges to be separate and apart from rates. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981), decided prior to 1981 amendment to subsection (e).

Surcharges on automobile liability insurance coverages ceded to the North Carolina Reinsurance Facility to recoup past facility losses and on all automobile liability coverages to recoup anticipated losses on ceded "clean risks" do not constitute rates, and no filing with or approval by the Commissioner of Insurance is required by law with respect to the surcharges. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981), decided prior to 1981 amendment to subsection (e).

Stated in State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

§ 58-248.35. Procedure for cession provided in plan of operation.

Upon receipt by the company of a risk which it does not elect to retain, the company shall follow such procedures for ceding the risk as are established by the plan of operation. (1973, c. 818, s. 1; 1977, c. 828, s. 22.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980).

§ 58-248.36. Termination of insurance.

No member may terminate insurance to the extent that cession of a particular type of coverage and limits is available under the provisions of this Article except for the following reasons:

(1) Nonpayment of premium when due to the insurer or producing agent.

(2) The named insured has become a nonresident of this State and would not otherwise be entitled to insurance on submission of new application under this Article.

(3) A member company has terminated an agency contract for reasons other than the quality of the agent's insureds or the agent has terminated the contract and such agent represented the company in taking the original application for insurance.

(4) When the insurance contract has been cancelled pursuant to a power of attorney given a company licensed pursuant to the provisions of G.S. 58-56.

(5) The named insured, at the time of renewal, fails to meet the requirements contained in the corporate charter, articles of incorporation, and/or bylaws of the insurer, when the insurer is a company organized for the sole purpose of providing members of an organization with insurance policies in North Carolina. (1973, c. 818, s. 1; 1979, c. 497.)

58-248.37. Exemption from requirements of this Article of companies and their agents.

The Board of Governors may exempt a company and its agents from the requirements of this Article, insofar as new business is concerned. The Board may further exempt a company and its agents from the requirements of this Article regarding the selling and servicing a particular category of business, if the company is not qualified to service the business. (1973, c. 818, s. 1; 1977, c. 828, s. 23.)

§ 58-248.38. Physical damage insurance availability.

No physical damage insurer shall refuse to make physical damage coverage available to any applicant for the reason that such applicant has, or may acquire, auto liability insurance through the Facility plan as provided herein; further that no such insurer may levy a surcharge or increased rate for such physical damage coverage on the basis that such applicant has, or may acquire, auto liability insurance through the Facility plan as provided herein.

Any such insurer or representative thereof failing to comply with, or otherwise violating the provisions of this section, shall be punished as prescribed in G.S. 58-248.4 and 58-248.5. (1973, c. 818, s. 1.)

Editor's Note. — Sections 58-248.4 and 58-248.5, referred to in this section, were repealed by Session Laws 1977, c. 828. See now § 58-131.55.

§ 58-248.39. Hearings; review.

(a) Any applicant for a policy from any carrier, any person insured under such a policy, any member of the Facility and any agent duly licensed to write motor vehicle insurance, may request a formal hearing and ruling by the Board of Governors of the Facility on any alleged violation of or failure to comply with the plan of operation or the provisions of this Article or any alleged improper act or ruling of the Facility directly affecting him as to coverage or premium

or in the case of a member directly affecting its assessment, and in the case of an agent, any matter affecting his appointment to a carrier or his account therewith. The request for hearing must be made within 15 days after the date of the alleged violation or improper act or ruling. The hearing shall be held within 15 days after the receipt of the request. The hearing may be held by any panel of the Board of Governors consisting of not less than three members thereof, and the ruling of a majority of the panel shall be deemed to be the formal ruling of the Board, unless the full Board on its own motion shall modify or rescind the action of the panel.

(b) Any formal ruling by the Board of Governors may be appealed to the Commissioner by filing notice of appeal with the Facility and Commissioner within 30 days after issuance of the ruling.

(c) The Commissioner shall issue an order approving the action or decision, disapproving the action or decision, or directing the Board of Governors to reconsider the ruling.

(d) Any aggrieved person or organization, any member of the Facility or the Facility may request a public hearing and ruling by the Commissioner on the provisions of the plan of operation, rules, regulations or policy forms approved by the Commissioner. The request for hearing shall specify the matter or matters to be considered. The hearing shall be held within 30 days after receipt of the request. The Commissioner shall give public notice of the hearing and the matter or matters to be considered not less than 15 days in advance of the hearing date.

(e) In any hearing held pursuant to this section by the Board of Governors or the Commissioner, the Board or the Commissioner as the case may be, shall issue a ruling or order within 30 days after the close of the hearing.

(f) All rulings or orders of the Commissioner under this section shall be subject to judicial review as approved in G.S. 58-9.3. (1973, c. 818, s. 1.)

CASE NOTES

Cited in State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

§ 58-248.40. Termination of North Carolina Automobile Insurance Plan.

The Commissioner of Insurance is authorized and directed to terminate the North Carolina Automobile Insurance Plan established pursuant to G.S. 20-279.34 when it appears to his satisfaction that the Facility herein established is fully operational and when the policies issued under the prior plan have expired. (1973, c. 818, s. 2.)

CASE NOTES

Cited in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

ARTICLE 26.

Nature of Policies.

§ 58-249. Form, classification and rates to be approved by Commissioner of Insurance.

No policy of insurance against loss or damage from the sickness or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this State until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with, and the forms approved by, the Commissioner of Insurance. If the Commissioner shall notify, in writing, the company or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form. The action of the Commissioner in this regard shall be subject to review by any court of competent jurisdiction; but nothing in this Article shall be construed to give jurisdiction to any court not already having jurisdiction. (1911, c. 209, s. 1; 1913, c. 91, s. 1; C.S., s. 6477; 1945, c. 385.)

§ 58-250. Form of policy.

(a) No policy of accident and health insurance shall be delivered or issued for delivery to any person in this State unless:

(1) The entire money and other considerations therefor are expressed therein; and

(2) The time at which the insurance takes effect and terminates is expressed therein; and

(3) It purports to insure only one person, except that a policy may insure, originally or by subsequent amendment, upon the application of an adult member of a family who shall be deemed the policyholder, any two or more eligible members of that family, including husband, wife, dependent children or any children under a specified age which shall not exceed 19 years and any other persons dependent upon the policyholder; and

(4) The style, arrangement, and overall appearance of the policy, any endorsements, or attached papers give no undue prominence to any portion of the text. For the purpose of this subdivision, "text" includes all printed matter except the name and address of the insurer, the name or title of the policy, and captions and subcaptions.

(5) The exceptions and reductions of indemnity are set forth in the policy and, except those which are set forth in G.S. 58-251.1, are printed, at the insurer's option, either included with the benefit provision to which they apply, or under an appropriate caption such as "EXCEPTIONS," or "EXCEPTIONS AND REDUCTIONS," provided that if an exception or reduction specifically applies only to a particular benefit of the policy, a statement of such exception or reduction shall be included with the benefit provision to which it applies; and

(6) Each such form, including riders and endorsements, shall be identified by a form number in the lower left-hand corner of the first page thereof; and

(7) It contains no provision purporting to make any portion of the charter, rules, constitution, or bylaws of the insurer a part of the policy unless such portion is set forth in full in the policy, except in the case of the incorporation of, or reference to, a statement of rates or classification of risks, or short-rate table filed with the Commissioner.

(b) If any policy is issued by an insurer domiciled in this State for delivery to a person residing in another state, and if the official having responsibility for the administration of the insurance laws of such other state shall have advised the Commissioner that any such policy is not subject to approval or disapproval by such official, the Commissioner may by ruling require that such policy meet the standards set forth in subsection (a) of this section and in G.S. 58-251.1. (1913, c. 91, s. 2; C.S., s. 6478; 1945, c. 385; 1953, c. 1095, s. 1; 1979, c. 755, s. 8.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote subdivision (4) of subsection (a).

Session Laws 1979, c. 755, s. 20, contains a severability clause.

§ 58-250.1. Right to return policy and have premium refunded.

Every individual or family hospitalization policy, certificate, contract or plan issued for delivery in the State of North Carolina on and after July 1, 1961, must have printed thereon or attached thereto a notice stating substantially: "YOUR POLICY MAY NOT BE IN FORCE WHEN YOU HAVE A CLAIM! PLEASE READ! Your policy was issued based on the information entered in your application, a copy of which is attached to the policy. If, to the best of your knowledge and belief, there is any misstatement in your application or if any information concerning the medical history of any insured person has been omitted, you should advise the Company immediately regarding the incorrect or omitted information; otherwise, your policy may not be a valid contract. RIGHT TO RETURN POLICY WITHIN 10 DAYS. If for any reason you are not satisfied with your policy, you may return it to the Company within 10 days of the date you received it and the premium you paid will be promptly refunded." If a policyholder or certificate holder or purchaser of a contract or plan returns same pursuant to such notice, coverage under such policy, certificate, contract or plan shall become void immediately upon the mailing or delivery of the contract, certificate, policy or plan to the insurance company at its home or branch office or to the agent through whom it was purchased. Coverage shall exist under such policy, certificate, contract or plan within said 10-day period until said mailing or delivery of the contract. (1955, c. 850, s. 10; 1961, c. 962.)

Editor's Note. — Section 12 of the act which inserted this section made it applicable to hospital and medical service corporations under Chapter 57 to the same extent as to insurers under this Chapter.

§ 58-251: Repealed by Session Laws 1953, c. 1095, s. 2.

§ 58-251.1. Accident and health policy provisions.

(a) Required Provisions. — Except as provided in subsection (c) of this section each such policy delivered or issued for delivery to any person in this State shall contain the provisions specified in this subsection in the substance of the words that appear in this section. Such provisions shall be preceded individually by the caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision in the substance of the following language:

ENTIRE CONTRACT; CHANGES: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the insurer and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or waive any of its provisions.

(2) A provision in the substance of the following language:

TIME LIMIT ON CERTAIN DEFENSES:

a. After two years from the date of issue or reinstatement of this policy no misstatements except fraudulent misstatements made by the applicant in the application for such policy shall be used to void the policy or deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period.

The foregoing policy provisions may be used in its entirety only in major or catastrophe hospitalization policies and major medical policies each affording benefits of five thousand dollars ($5,000) or more for any one sickness or injury. Disability income policies affording benefits of one hundred dollars ($100.00) or more per month for not less than 12 months and franchise policies. Other policies to which this section applies must delete the words "except fraudulent misstatements."

(The foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial two-year period, nor to limit the application of G.S. 58-251.1(b), (1), (2), (3), (4) and (5) in the event of misstatement with respect to age or occupation or other insurance.)

(A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium:

1. Until at least age 50 or,
2. In the case of a policy issued after age 44, for at least five years from its date of issue, may contain in lieu of the foregoing the following provisions (from which the clause in parentheses may be omitted at the insurer's option) under the caption "INCONTESTABLE."

After this policy has been in force for a period of two years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application.)

b. No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

(3) A provision in the substance of the following language:

GRACE PERIOD: A grace period of . . . . . (insert a number not less than "7" for weekly premium policies, "10" for monthly premium policies and "31" for all other policies) days will be granted for the payment of each premium falling due after the first premium, during which grace period the policy shall continue in force.

(A policy which contains a cancellation provision may add, at the end of the above provision, subject to the right of the insurer to cancel in accordance with the cancellation provision hereof.

A policy in which the insurer reserves the right to refuse any renewal shall have, at the beginning of the above provision,

Unless not less than five days prior to the premium due date the insurer has delivered to the insured or has mailed to his last address as shown by the record of the insurer written notice of its intention not to renew this policy beyond the period for which the premium has been accepted.)

(4) A provision in the substance of the following language:

REINSTATEMENT: If any renewal premium be not paid within the time granted the insured for payment, a subsequent acceptance of premium by the insurer or by any agent duly authorized by the insurer to accept such premium, without requiring in connection therewith an application for reinstatement, shall reinstate the policy; provided, however, that if the insurer or such agent requires an application for reinstatement and issues a conditional receipt for the premium tendered, the policy will be reinstated upon approval of such application by the insurer, or, lacking such approval, upon the forty-fifth day following the date of such conditional receipt unless the insurer has previously notified the insured in writing of its disapproval of such application. The reinstated policy shall cover only loss resulting from such accidental injury as may be sustained after the date of reinstatement and loss due to such sickness as may begin more than 10 days after such date. In all other respects the insured and insurer shall have the same rights thereunder as they had under the policy immediately before the due date of the defaulted premium, subject to any provisions endorsed hereon or attached hereto in connection with the reinstatement. Any premium accepted in connection with a reinstatement shall be applied to a period for which premium has not been previously paid, but not to any period more than 60 days prior to the date of reinstatement.

(The last sentence of the above provision may be omitted from any policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.)

(5) A provision in the substance of the following language:

NOTICE OF CLAIM: Written notice of claim must be given to the insurer within 20 days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the insured or the beneficiary to the insurer at . . . . . (insert the location of such office as the insurer may designate for the purpose), or to any authorized agent of the insurer, with information sufficient to identify the insured, shall be deemed notice to the insurer.

(In a policy providing a loss-of-time benefit which may be payable for at least two years, an insurer may at its option insert the following between the first and second sentences of the above provision:

Subject to the qualifications set forth below, if the insured suffers loss of time on account of disability for which indemnity may be payable for at least two years, he shall, at least once in every six months after having given notice of claim, give to the insurer notice of continuance of said disability, except in the event of legal incapacity. The period of six months following any filing of proof by the insured or any payment by the insurer on account of such claim or any denial of liability in whole or in part by the insurer shall be excluded in applying this provision. Delay in the giving of such notice shall not impair the insured's right to any indemnity which would otherwise have accrued during the period of six months preceding the date on which such notice is actually given.)

(6) A provision in the substance of the following language:

CLAIM FORMS: The insurer, upon receipt of a notice of claim, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within 15 days after the giving of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, the character and the extent of the loss for which claim is made.

(7) A provision in the substance of the following language:

PROOFS OF LOSS: Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 90 days after the termination of the period for which the insurer is liable and in case of claim for any other loss within 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

(8) A provision in the substance of the following language:

TIME OF PAYMENT OF CLAIMS: Indemnities payable under this policy for any loss other than loss for which this policy provides any period payment will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid . . . . . (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.

(9) A provision in the substance of the following language:

PAYMENT OF CLAIMS: Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the insured. Any other accrued indemnities unpaid at the insured's death may, at the option of the insurer, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the insured.

(The following provisions, or either of them, may be included with the foregoing provision at the option of the insurer:

If any indemnity of this policy shall be payable to the estate of the insured, or to an insured or beneficiary who is a minor or otherwise not competent to give a valid release, the insurer may pay such

indemnity, up to an amount not exceeding $..... (insert an amount which shall not exceed one thousand dollars ($1,000)), to any relative by blood or connection by marriage of the insured or beneficiary who is deemed by the insurer to be equitably entitled thereto. Any payment made by the insurer in good faith pursuant to this provision shall fully discharge the insurer to the extent of such payment.

Subject to any written direction of the insured in the application or otherwise all or a portion of any indemnities provided by this policy on account of hospital, nursing, medical, or surgical services, may at the insurer's option and unless the insured requests otherwise in writing not later than the time of filing proofs of such loss, be paid directly to the hospital or person rendering such services; but it is not required that the service be rendered by a particular hospital or person.)

(10) A provision in the substance of the following language:

PHYSICAL EXAMINATIONS AND AUTOPSY: The insurer at its own expense shall have the right and opportunity to examine the person of the insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make an autopsy in case of death where it is not forbidden by law.

(11) A provision in the substance of the following language:

LEGAL ACTIONS: No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

(12) A provision in the substance of the following language:

CHANGE OF BENEFICIARY: Unless the insured makes an irrevocable designation of beneficiary, the right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

(The first clause of this provision, relating to the irrevocable designation of beneficiary, may be omitted at the insurer's option.)

(b) Other Provisions. — Except as provided in subsection (c) of this section, no such policy delivered or issued for delivery to any person in this State shall contain provisions respecting the matters set forth below unless such provisions are in the substance of the words that appear in this section. Any such provision contained in the policy shall be preceded individually by the appropriate caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision in the substance of the following language:

CHANGE OF OCCUPATION: If the insured be injured or contract sickness after having changed his occupation to one classified by the insurer as more hazardous than that stated in this policy or while doing for compensation anything pertaining to an occupation so classified, the insurer will pay only such portion of the indemnities provided in this policy as the premium paid would have purchased at the rates and within the limits fixed by the insurer for such more hazardous occupation. If the insured changes his occupation to one classified by the insurer as less hazardous than that stated in this policy, the insurer, upon receipt of proof of such change of occupation, will reduce the premium rate accordingly, and will return the excess pro rata unearned premium from the date of change of occupation or

from the policy anniversary date immediately preceding receipt of such proof, whichever is the more recent. In applying this provision, the classification of occupational risk and the premium rates shall be such as have been last filed by the insurer prior to the occurrence of the loss for which the insurer is liable or prior to date of proof of change in occupation with the state official having supervision of insurance in the state where the insured resided at the time this policy was issued; but if such filing was not required, then the classification of occupational risk and the premium rates shall be those last made effective by the insurer in such state prior to the occurrence of the loss or prior to the date of proof of change in occupation.

(2) A provision in the substance of the following language:

MISSTATEMENT OF AGE: If the age of the insured has been misstated, all amounts payable under this policy shall be such as the premium paid would have purchased at the correct age.

(3) A provision in the substance of the following language:

OTHER INSURANCE IN THIS INSURER: If an accident or health or accident and health policy or policies previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for . . . . (insert type of coverage or coverages) in excess of $. . . . . (insert maximum limit of indemnity or indemnities) the excess insurance shall be void and all premiums paid for such excess shall be returned to the insured or to his estate.

Or, in lieu thereof:

Insurance effective at any one time on the insured under a like policy or policies in this insurer is limited to the one such policy elected by the insured, his beneficiary or his estate, as the case may be, and the insurer will return all premiums paid for all other such policies.

(4) A provision in the substance of the following language:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages for the same loss of which this insurer had notice bears to the total like amounts under all valid coverages for such loss, and for the return of such portion of the premiums paid as shall exceed the pro rata portion for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis, the "like amount" of such other coverage shall be taken as the amount which the services rendered would have cost in the absence of such coverage.

(If the foregoing policy provision is included in a policy which also contains the next following policy provision there shall be added to the caption of the foregoing provision the phrase ". . . EXPENSE INCURRED BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and by hospital or medical service organizations, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such

definition such term shall not include group insurance, automobile medical payments insurance, or coverage provided by hospital or medical service organizations or by union welfare plans or employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provisions no third-party liability coverage shall be included as "other valid coverage.")

(5) A provision in the substance of the following language:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on other than an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability for such benefits under this policy shall be for such proportion of the indemnities otherwise provided hereunder for such loss as the like indemnities of which the insurer had notice (including the indemnities under this policy) bear to the total amount of all like indemnities for such loss, and for the return of such portion of the premium paid as shall exceed the pro rata portion for the indemnities thus determined.

(If the foregoing policy provision is included in a policy which also contains the next preceding policy provision there shall be added to the caption of the foregoing provision the phrase ". . . OTHER BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, or benefits provided by union welfare plans or by employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provision no third-party liability coverage shall be included as "other valid coverage.")

(6) A provision in the substance of the following language:

RELATION OF EARNINGS TO INSURANCE: If the total monthly amount of loss of time benefits promised for the same loss under all valid loss of time coverage upon the insured, whether payable on a weekly or monthly basis, shall exceed the monthly earnings of the insured at the time disability commenced or his average monthly earnings for the period of two years immediately preceding a disability for which claim is made, whichever is the greater, the insurer will be liable only for such proportionate amount of such benefits under this policy as the amount of such monthly earnings or such average monthly earnings of the insured bears to the total amount of monthly benefits for the same loss under all such coverage

upon the insured at the time such disability commences and for the return of such part of the premiums paid during such two years as shall exceed the pro rata amount of the premiums for the benefits actually paid hereunder; but this shall not operate to reduce the total monthly amount of benefits payable under all such coverage upon the insured below the sum of two hundred dollars ($200.00) or the sum of the monthly benefits specified in such coverages, whichever is the lesser, nor shall it operate to reduce benefits other than those payable for loss of time.

(The foregoing policy provision may be inserted only in a policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.

The insurer may, at its option, include in this provision a definition of "valid loss of time coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by governmental agencies or by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, or to any other coverage the inclusion of which may be approved by the Commissioner or any combination of such coverages. In the absence of such definition such term shall not include any coverage provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute), or benefits provided by union welfare plans or by employer or employee benefit organizations.)

(7) A provision in the substance of the following language:

UNPAID PREMIUM: Upon the payment of a claim under this policy, any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

(8) Repealed by Session Laws 1955, c. 886, s. 1.

(9) A provision in the substance of the following language:

CONFORMITY WITH STATE STATUTES: Any provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

(10) A provision in the substance of the following language:

ILLEGAL OCCUPATION: The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation.

(11) A provision in the substance of the following language:

INTOXICANTS AND NARCOTICS: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician.

(c) Inapplicable or Inconsistent Provisions. — If any provision of this section is in whole or in part inapplicable to or inconsistent with the coverage provided by a particular form of policy the insurer, with the approval of the Commissioner, shall omit from such policy any inapplicable provision or part of a provision, and shall modify any inconsistent provision or part of the provision in such manner as to make the provision as contained in the policy consistent with the coverage provided by the policy.

(d) Order of Certain Policy Provisions. — The provisions which are the subject of subsections (a) and (b) of this section, or any corresponding provisions

which are used in lieu thereof in accordance with such subsections, shall be printed in the consecutive order of the provisions in such subsections or, at the option of the insurer, any such provision may appear as a unit in any part of the policy, with other provisions to which it may be logically related, provided the resulting policy shall not be in whole or in part unintelligible, uncertain, ambiguous, abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued.

(e) Third-Party Ownership. — The word "insured," as used in this Subchapter shall not be construed as preventing a person other than the insured with a proper insurable interest from making application for and owning a policy covering the insured or from being entitled under such a policy to any indemnities, benefits and rights provided therein.

(f) Requirements of Other Jurisdictions.

(1) Any policy of a foreign or alien insurer, when delivered or issued for delivery to any person in this State, may contain any provision which is not less favorable to the insured or the beneficiary than the provisions of this Subchapter and which is prescribed or required by the law of the state under which the insurer is organized.

(2) Any policy of a domestic insurer may, when issued for delivery in any other state or country, contain any provision permitted or required by the laws of such other state or country.

(g) Filing Procedure. — The Commissioner may make such reasonable rules and regulations concerning the procedure for the filing or submission of policies subject to this Subchapter as are necessary, proper or advisable to the administration of this Subchapter. This provision shall not abridge any other authority granted the Commissioner by law. (1953, c. 1095, s. 2; 1955, c. 850, s. 8; c. 886, s. 1; 1961, c. 432; 1979, c. 755, ss. 9-12.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote the first sentence in the introductory paragraph in subsection (a) and substituted "A provision in the substance of the following language" for "A provision as follows" in the introductory language in subdivisions (1) through (12) of subsection (a). In subsection (b), the amendment rewrote the first sentence in the introductory paragraph and substituted "A provision in the substance of the following language" for "A provision as follows" in the introductory language in subdivisions (1) through (7) and (9) through (11).

Session Laws 1979, c. 755, s. 20, contains a severability clause.

Legal Periodicals. — For comment on the 1955 amendments, see 33 N.C.L. Rev. 555 (1955).

CASE NOTES

As to clause excluding from coverage death caused by intentional act of any person, see Patrick v. Pilot Life Ins. Co., 241 N.C. 614, 86 S.E.2d 201 (1955), citing former § 58-253(6).

Applied in Hooks v. Colonial Life & Accident Ins. Co., 43 N.C. App. 606, 259 S.E.2d 567 (1979).

Quoted in F & D Co. v. Aetna Ins. Co., — N.C. —, 287 S.E.2d 867 (1982).

§ 58-251.2. Renewability of individual and blanket hospitalization and accident and health insurance policies.

(a) Every individual or blanket family hospitalization policy and accident and health policy, other than noncancellable or nonrenewable policies but including group, blanket and franchise policies, as defined in this Chapter, covering less than 10 persons, issued in North Carolina after January 1, 1956, shall include in substance the following provision:

Renewability: This policy is renewable at the option of the policyholder unless sufficient notice of nonrenewal is given the policyholder in writing by the insurer.

Sufficient notice shall be, during the first year of any policy, or during the first year following any lapse and reinstatement, a period of 30 days prior to the premium due date. After one continuous year of coverage and acceptance of premium for any portion of the second or subsequent year sufficient notice shall be a number of full months most nearly equivalent to one fourth the number of months of continuous coverage from the first anniversary of the date of issue or reinstatement, to the date of mailing of such notice: Provided no period of required notice shall exceed two years.

The insurer upon a showing of inadequacy of the rates chargeable on such policies upon which notice of nonrenewal has been given, and a finding as to the same by the Commissioner of Insurance, may increase such rates with the approval of the Commissioner. Thereafter, such rates shall be applicable to all policies of the same type, the holders of which receive notice of nonrenewal. The policyholder thereafter must pay the increased rate in order to continue the policy in force. The requirements of this provision shall not apply to refusal of renewal because of change of occupation of the insured to one classified by the company as uninsurable nor to increase in rate due to change of occupation of the insured to a more hazardous occupation.

(b) No insurance company issuing individual or blanket family hospitalization or accident and health policies of insurance shall have the right to unilaterally restrict coverage, reduce benefits or increase rates upon any contract of hospitalization or accident and health insurance which is subject to the provisions of this section except as provided herein.

(c) Any hospitalization or accident and health policy reissued or renewed in the name of the insured during the grace period shall be construed to be a continuation of the policy first issued. (1955, c. 886, s. 2; 1957, c. 1085, s. 2; 1979, c. 755, s. 13.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, inserted "in substance" near the end of the introductory paragraph in subsection (a).

Session Laws 1979, c. 755, s. 20, contains a severability clause.

§ 58-251.3. Policy coverage to continue as to mentally retarded or physically handicapped children.

An individual or group accident and health insurance policy, hospital service policy, or medical service plan policy, delivered or issued for delivery in this State after July 1, 1969, which provides that coverage of a dependent child shall terminate upon attainment of the limiting age for dependent children specified in the policy or contract, shall also provide in substance that attainment of such limiting age shall not operate or terminate the coverage of such child while the child is and continues to be (i) incapable of self-sustaining employment by reason of mental retardation or physical handicap; and (ii) chiefly dependent upon the policyholder or subscriber for support and maintenance: Provided, proof of such incapacity and dependency is furnished to the insurer, hospital service plan corporation, or medical service plan corporation by the policyholder or subscriber within 31 days of the child's attainment of the limiting age and subsequently as may be required by the insurer or corporation, but not more frequently than annually after the child's attainment of the limiting age. (1969, c. 745, s. 1; 1971, c. 1126, s. 1.)

Editor's Note. — Session Laws 1969, c. 745, s. 2, and Session Laws 1971, c. 1126, s. 2, provide: "This act shall apply to medical service plan policies and hospital service plan policies issued under the provisions of Chapter 57 as fully as the same applies to accident and health policies issued under Chapter 58 of the General Statutes."

§ 58-251.4. Policies to cover newborn infants.

Every policy of insurance and every hospital service or medical service plan as defined in Chapter 57 of the General Statutes (regardless of whether any of such policies or plans shall be defined as individual, family, group, blanket, franchise, industrial or otherwise) which provides benefits on account of any sickness, illness, or disability of any minor child or which provides benefits on account of any medical treatment or service authorized or permitted to be furnished by a hospital under the laws of this State to any minor child shall provide such benefits for such occurrences beginning with the moment of birth of such child if such birth occurs while said policy or subscriber contract with such a plan is in force.

Benefits in such insurance policies or plans shall be the same for congenital defects or anomalies as are provided for most sicknesses or illnesses suffered by minor children which are covered by said policies or plans. Benefits for congenital defects or anomalies shall specifically include, but not be limited to, all necessary treatment and care needed by individuals born with cleft lip or cleft palate.

No policy or plan subscriber contract shall be approved by the Commissioner of Insurance pursuant to the provisions of this Article or the provisions of Chapter 57 of the General Statutes that does not comply with the provisions of this section.

The provisions of this section shall apply both to insurers governed by the provisions of Chapter 58 of the General Statutes and to corporations governed by the provisions of Chapter 57 of the General Statutes. (1973, c. 345, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1349.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Jan. 1, 1983, added the second sentence of the second paragraph.

CASE NOTES

Effect of Application for Policy after Birth. — Where a hospital, medical and surgical expense policy issued to a named insured was in effect when she gave birth to a son, and the insured applied after the birth of her son to have the coverage of the policy extended to the son, and the policy was thereafter endorsed to extend coverage to the son, and the premium increased to reflect this new coverage, the provisions of this section did not cause the policy to extend coverage to insured's son back to the moment of his birth, since this section applies only where there is a policy in effect at the birth of a child which provides coverage for the child. Norris v. Home Sec. Life Ins. Co., 42 N.C. App. 719, 257 S.E.2d 647 (1979).

§ 58-251.5. Insurers and others to afford coverage to mentally retarded and physically handicapped children.

(a) No insurance company licensed in this State pursuant to the provisions of this Chapter and no corporation governed by the provisions of Chapter 57 of the General Statutes of North Carolina shall refuse to issue or deliver any individual or group accident and health insurance policy of hospital or medical service plan policy in this State which it is currently issuing for delivery in this

State and which affords benefits or coverage for minor children of the applicant, by reason of the physical handicap or mental retardation of any minor children of the applicant; nor shall any such policy issued and delivered in this State carry a higher premium rate or charge or restrict or exclude coverage or benefits by reason of said mental retardation or physical handicap. Provided, however, such policy may exclude benefits, otherwise payable for disability, hospitalization, or medical or other therapeutic expense directly and solely attributable to such mental retardation or such physical handicap.

(b) The Commissioner of Insurance shall revoke the license of any insurer or any corporation governed by the provisions of Chapter 57 of the General Statutes of North Carolina if it fails to comply with the provisions of this section.

(c) The provisions of this section shall apply to corporations governed by the provisions of Chapter 57 of the General Statutes of North Carolina. (1973, c. 754, ss. 1, 2.)

§ 58-251.6. Insurers and others to afford coverage for active medical treatment in tax-supported institutions.

(a) Whenever any policy of insurance governed by this Chapter provides for benefits for charges of hospitals or physicians, the policy shall provide for payments of benefits for charges made for medical care rendered in or by duly licensed State tax-supported institutions, including charges for medical care of cerebral palsy, other orthopedic and crippling disabilities, mental and nervous diseases or disorders, mental retardation, alcoholism and drug or chemical dependency, and respiratory illness, on a basis no less favorable than the basis which would apply had the medical care been rendered in or by any other public or private institution or provider. The term "State tax-supported institutions" shall include community mental health centers and other health clinics which are certified as Medicaid providers.

(b) No policy shall exclude payment for charges of a duly licensed State tax-supported institution because of its being a specialty facility for one particular type of illness nor because it does not have an operating room and related equipment for the performance of surgery, but it is not required that benefits be payable for domiciliary or custodial care, rehabilitation, training, schooling, or occupational therapy.

(c) The restrictions and regulations of this section shall not apply to any policy which is individually underwritten or provided for a specific individual and the members of his family as a nongroup policy but shall apply to any group policy of insurance governed by this Chapter. (1975, c. 345, s. 1; 1981, c. 816, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "Whenever any policy of insurance governed by this Chapter provides for benefits for charges of hospitals or physicians, the policy shall provide for payments" for "No policy providing benefits for charges of hospitals or physicians shall be delivered, issued, executed or renewed in this State, or approved for issuance or renewal in this State by the Commissioner of Insurance, after May 21, 1975, unless such policy provides for the payment" at the beginning of the first sentence of subsection (a) and substituted "or" for "and" between "diseases" and "disorders" in that sentence. The amendment substituted "regulations" for "requirements" near the beginning of subsection (c) and substituted, at the end of subsection (c) "to any group policy of insurance governed by this Chapter" for "only to those group policies of insurance delivered, issued for delivery, reissued or renewed in this State on and after July 1, 1975."

§ 58-251.7. Policies to be issued to any person possessing the sickle cell trait or hemoglobin C trait.

No insurance company licensed in this State pursuant to the provisions of this Chapter shall refuse to issue or deliver any policy (regardless of whether any of such policies shall be defined as individual, family, group, blanket, franchise, industrial or otherwise) which is currently being issued for delivery in this State, and which affords benefits or coverage for any medical treatment or service authorized or permitted to be furnished by a hospital, clinic, family health plan, neighborhood health plan, health maintenance organization, physician, physician's assistant, nurse practitioner or any medical service facility or personnel by reason of the fact that the person to be insured possesses sickle cell trait or hemoglobin C trait, nor shall any such policy issued and delivered in this State carry a higher premium rate or charge by reason of the fact that the person to be insured possesses said trait. (1975, c. 599, s. 1.)

§ 58-252. Meaning of term "preexisting conditions" in certain policies.

At the time of issuing any new policy of individual or family hospitalization insurance or individual accident and health insurance to insureds over age 65, the term "preexisting conditions," or its equivalent in said policy shall include only conditions specifically eliminated by rider. (1955, c. 850, s. 5.)

Editor's Note. — Former § 58-252 was repealed by Session Laws 1953, c. 1095, § 3. The above section was designated § 58-252 by the 1955 act which inserted it. Section 12 of the 1955 act made this section applicable to hospital and medical service corporations under Chapter 57 to the same extent as to insurers under this Chapter.

§§ 58-253, 58-254: Repealed by Session Laws 1953, c. 1095, s. 3.

§ 58-254.1. Industrial sick benefit insurance defined.

Industrial sick benefit insurance is hereby defined as that form of insurance for which premiums are payable weekly and which provides for the payment of a weekly indemnity on account of sickness or accident in addition to a benefit in case of death. Such death benefit shall not exceed one hundred and fifty dollars ($150.00). There shall be a provision for the payment of weekly premium, eighty percent (80%) of which shall be allocated for the purchase of sick and accident coverages and twenty percent (20%) thereof for the purchase of death benefits. (1945, c. 385.)

§ 58-254.2. Industrial sick benefit insurance; provisions.

Policies issued under the industrial sick benefit plan shall contain the substance of provisions contained in G.S. 58-251.1 and in addition shall contain the following:

(1) A provision for grace for the payment of the additional premium or assessment or proportion thereof for such death benefits of not less than four weeks during which period the death benefit shall continue in force;

(2) A provision for incontestability of the death benefit coverage after not more than two years except for

a. Nonpayment of premiums, and

b. Misstatement of age;

(3) A provision that the death benefit is noncancellable by the company except for nonpayment of premium.

The Commissioner may approve any form of certificate to be issued under the industrial sick benefit plan which omits or modifies any of the provisions hereinbefore required, if he deems such omission or modification suitable for the character of such insurance and not unjust to the persons insured thereunder. (1945, c. 385; 1953, c. 1095, s. 4; 1979, c. 755, s. 14.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, inserted "the substance of" in the introductory paragraph.

Session Laws 1979, c. 755, s. 20, contains a severability clause.

§ 58-254.3. Blanket accident and health insurance defined.

(a) Any policy or contract of insurance against death or injury resulting from accident or from accidental means which insures a group of persons conforming to the requirements of one of the following subdivisions (1) to (7), inclusive, shall be deemed a blanket accident policy. Any policy or contract which insures a group of persons conforming to the requirements of one of the following subdivisions (3), (5), (6) or (7) against total or partial disability, excluding such disability from accident or from accidental means, shall be deemed a blanket health insurance policy. Any policy or contract of insurance which combines the coverage of blanket accident insurance and of blanket health insurance on such a group of persons shall be deemed a blanket accident and health insurance policy:

(1) Under a policy or contract issued to any railroad, steamship, motorbus or airplane carrier of passengers, which shall be deemed the policyholder, a group defined as all persons who may become such passengers may be insured against death or bodily injury either while, or as a result of, being such passengers.

(2) Under a policy or contract issued to an employer, or the trustee of a fund established by the employer, who shall be deemed the policyholder, covering any group of employees defined by reference to exceptional hazards incident to such employment, insuring such employee against death or bodily injury resulting while, or from, being exposed to such exceptional hazard.

(3) Under a policy or contract issued to a college, school or other institution of learning or to the head or principal thereof, who or which shall be deemed the policyholder.

(4) Under a policy or contract issued in the name of any volunteer fire department, which shall be deemed the policyholder, covering all of the members of such department.

(5) Under a policy or contract issued to and in the name of an incorporated or unincorporated association of persons having a common interest or calling, which association shall be deemed the policyholder, having not less than 25 members, and formed for purposes other than obtaining insurance, covering all of the members of such association.

(6) Under a policy or contract issued to the head of a family, who shall be deemed the policyholder, whereunder the benefits thereof shall provide for the payment by the insurer of amounts for expenses incurred by the policyholder on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children, or other persons chiefly dependent on him for support and maintenance.

(7) Under a policy or contract issued in the name of any municipal or county recreation commission or department which shall be deemed the policyholder.

(b) All benefits under any blanket accident, blanket health or blanket accident and health insurance policy shall be payable to the person insured, or to his designated beneficiary or beneficiaries, or to his estate, except that if the person insured be a minor, such benefits may be made payable to his parent, guardian, or other person actually supporting him, or to a person or persons chiefly dependent upon him for support and maintenance.

(c) Nothing contained in this section shall be deemed to affect the legal liability of policyholders for the death of or injury to, any such member of such group. (1945, c. 385; 1947, c. 721; 1953, c. 1095, s. 5; 1961, c. 603.)

Legal Periodicals. — For comment on the 1947 amendment, see 25 N.C.L. Rev. 437.

§ 58-254.4. Group accident and health insurance defined.

(a) Any policy or contract of insurance against death or injury resulting from accident or from accidental means which covers more than one person except blanket accident policies as defined in G.S. 58-254.3, shall be deemed a group accident insurance policy. Any policy or contract which insures against disablement, disease or sickness of the insured (excluding disablement which results from accident or from accidental means) and which covers more than one person, except blanket health insurance policies as defined in G.S. 58-254.3, shall be deemed a group health insurance policy or contract. Any policy or contract of insurance which combines the coverage of group accident insurance and of group health insurance shall be deemed a group accident and health insurance policy. No policy or contract of group accident, group health or group accident and health insurance, and no certificates thereunder, shall be delivered or issued for delivery in this State unless it conforms to the requirements of subsection (b).

(b) No policy or contract of group accident, group health or group accident and health insurance shall be delivered or issued for delivery in this State unless the group of persons thereby insured conforms to the requirements of the following paragraph:

Under a policy issued to an employer, principal, or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, or by a principal or two or more principals in the same industry or kind of business, which employer, principal, or trustee shall be deemed the policyholder, covering, except as hereinafter provided, only employees, or agents, of any class or classes thereof determined by conditions pertaining to employment, or agency, for amounts of insurance based upon some plan which will preclude individual selection. The premium may be paid by the employer, by the employer and the employees jointly, or by the employee; and where the relationship of principal and agent exists, the premium may be paid by the principal, by the principal and agents, jointly, or by the agents. If the premium is paid by the employer and the employees jointly, or by the principal and agents jointly, or by the employees, or by the agents, the group shall comprise not less than seventy-five percent (75%) of all persons eligible of any class or classes of employees, or agents, determined by conditions pertaining to the employment or agency.

(c) The term "employees" as used in this section shall be deemed to include, for the purposes of insurance hereunder, employees of a single employer, the officers, managers, and employees of the employer and of subsidiary or affiliated corporations of a corporation employer, and the individual

proprietors, partners, and employees of individuals and firms of which the business is controlled by the insured employer through stock ownership, contract or otherwise. The term "employer" as used herein may be deemed to include the State of North Carolina, any county, municipality or corporation, or the proper officers, as such, of any unincorporated municipality or any department or subdivision of the State, county, such corporation, or municipality determined by conditions pertaining to the employment.

(d) The term "agents" as used in this section shall be deemed to include, for the purposes of insurance hereunder, agents of a single principal who are under contract to devote all, or substantially all, of their time in rendering personal services for such principal, for a commission or other fixed or ascertainable compensation.

(e) The benefits payable under any policy or contract of group accident, group health and group accident and health insurance shall be payable to the employees, or agents, or to some beneficiary or beneficiaries designated by the employee or agent, other than the employer or principal, but if there is no designated beneficiary as to all or any part of the insurance at the death of the employee or agent, then the amount of insurance payable for which there is no designated beneficiary shall be payable to the estate of the employee or agent, except that the insurer may in such case, at its option, pay such insurance to any one or more of the following surviving relatives of the employee or agent: wife, husband, mother, father, child, or children, brothers or sisters; and except that payment of benefits for expenses incurred on account of hospitalization or medical or surgical aid, as provided in subsection (f), may be made by the insurer to the hospital or other person or persons furnishing such aid. Payment so made shall discharge the insurer's obligation with respect to the amount of insurance so paid.

(f) Any policy or contract of group accident, group health or group accident and health insurance may include provisions for the payment by the insurer of benefits to the employee or agent of the insured group, on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children, or other persons chiefly dependent upon him for support and maintenance.

(g) Any policy or contract or group accident, group health or group accident and health insurance may provide for readjustment of the rate of premium based on the experience thereunder at the end of the first year, or of any subsequent year of insurance thereunder, and such readjustment may be made retroactive only for such policy year. Any refund under any plan for readjustment of the rate of premium based on the experience under group policies and any dividend paid under such policies may be used to reduce the employer's or principal's contribution to group insurance for the employees of the employer, or the agents of the principal, and the excess over such contribution by the employer, or principal, shall be applied by the employer, or principal, for the sole benefit of the employees or agents.

(h) Nothing contained in this section shall be deemed applicable to any contract issued by any corporation defined in Chapter 57 of the General Statutes of North Carolina. (1945, c. 385; 1947, c. 721; 1951, c. 282; 1953, c. 1095, ss. 6, 7.)

Legal Periodicals. — For comment on the 1947 amendment, see 25 N.C.L. Rev. 437.

§ 58-254.5. Group or blanket accident and health insurance; approval of forms and filing of rates.

No policy or group or blanket accident, health or accident and health insurance shall be delivered or issued for delivery in this State unless the form of the policy contracts including the master policy contract, the individual certificates thereunder, the applications for the contract, and a schedule of the premium rates pertaining to such form or forms, have been filed with and the forms approved by the Commissioner. (1945, c. 385.)

§ 58-254.6. Definition of franchise accident and health insurance.

Accident and health insurance on a franchise plan is hereby declared to be that form of accident and health insurance issued to five or more employees of any corporation, copartnership or individual employer or any governmental corporation, agency or department thereof, or 10 or more members of any trade or professional association or of a labor union or of any other association where such association or union has a constitution or bylaws and is formed in good faith for purposes other than that of obtaining insurance, where such persons, with or without their dependents, are issued the same form of an individual policy varying only as to amounts and kinds of coverage applied for by such persons, under an arrangement whereby the premiums on such policies may be paid to the insurer periodically by the employer, with or without payroll deductions, or by the association for its members, or by some designated person acting on behalf of such employer or association. The provisions of this section shall not be construed so as to repeal G.S. 58-254.3 and 58-254.4 or any parts thereof. (1947, c. 721; 1961, c. 646.)

Legal Periodicals. — For brief comment on this section, see 25 N.C.L. Rev. 438.

§ 58-254.7. Approval by Commissioner of forms, classification and rates; hearing; exceptions.

No policy of insurance against loss or expense from the sickness, or from the bodily injury or death by accident of the insured shall be issued or delivered to any person in this State nor shall any application, rider or endorsement be used in connection therewith until a copy of the form thereof and of the classification of risks and the premium rates, or, in the case of cooperatives or assessment companies the estimated cost pertaining thereto, have been filed with the Commissioner of Insurance.

No such policy shall be issued, nor shall any application, rider or endorsement be used in connection therewith, until the expiration of 90 days after it has been so filed unless the Commissioner shall sooner give his written approval thereto.

The Commissioner may within 90 days after the filing of any such form, disapprove such form

(1) If the benefits provided therein are unreasonable in relation to the premium charged, or

(2) If it contains a provision or provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation of such policy.

If the Commissioner shall notify the insurer which has filed any such form that it does not comply with the provisions of this section or sections, it shall

be unlawful thereafter for such insurer to issue such form or use it in connection with any policy. In such notice the Commissioner shall specify the reasons for his disapproval and state that a hearing will be granted within 20 days after request in writing by the insurer.

The Commissioner may at any time, after a hearing of which not less than 20 days' written notice shall have been given to the insurer, withdraw his approval of any such form on any of the grounds stated in this section. It shall be unlawful for the insurer to issue such form or use it in connection with any policy after the effective date of such withdrawal of approval. The notice of any hearing called under this paragraph shall specify the matters to be considered at such hearing and any decision affirming disapproval or directing withdrawal of approval under this section shall be in writing and shall specify the reasons therefor: Provided, that the provisions of this section shall not apply to workmen's compensation insurance, accidental death or disability benefits issued supplementary to life insurance or annuity contracts, medical expense benefits under liability policies or to group accident and health insurance. (1951, c. 784; 1979, c. 755, s. 15.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "90 days" for "30 days" in the second paragraph and in the introductory language in the third paragraph.

Session Laws 1979, c. 755, s. 20, contains a severability clause.

Legal Periodicals. — For brief comment on this section, see 29 N.C.L. Rev. 398.

§ 58-254.8. Credit accident and health insurance.

Credit accident and health insurance is declared to be insurance against death or personal injury by accident or by any specified kind or kinds of accident, and insurance against sickness, ailment, or bodily injury of a debtor who may be indebted to any person, firm, or corporation extending credit to such debtor. The amount of credit accident and health insurance written shall not exceed the installment payment. (1953, c. 1096, s. 2; 1961, c. 1071.)

CASE NOTES

Legislative Intent. — The legislature intended to provide for uniformity of coverage by requiring that all policies of "credit accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

One Type of Insurance Defined by Section. — The phrase "against death or personal injury by accident" and the phrase "against sickness, ailment or bodily injury" are conjunctive and together define one type of insurance. Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

Coverage of Credit, Accident and Health Insurance Policies. — In an action to recover on a policy of credit life and disability insurance issued by defendant, where defendant alleged that no charge was made for life insurance but only for disability insurance and therefore that the death of plaintiff's decedent was not the event against which the policy insured, the trial court properly entered judgment for plaintiff, since all policies of "credit, accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

Applied in Community Bank v. McKenzie, 32 N.C. App. 68, 230 S.E.2d 788 (1977).

Cited in State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-254.9. Hospitalization insurance defined.

Hospitalization insurance is declared to be any form of accident and health insurance which provides indemnity or payment for expenses incurred due to or in connection with hospitalization of the insured, or his dependents. (1953, c. 1096, s. 3.)

Article 26A.

Joint Action to Insure Elderly.

§ 58-254.10. Definitions.

Wherever used in this Article, the following terms shall have the respective meanings hereinafter set forth or indicated, unless the context otherwise requires:

(1) "Association" means a voluntary unincorporated association formed for the sole purpose of enabling joint and cooperative action to provide accident and health insurance in accordance with this Article in this or any other State having legislation enabling the issuance of insurance of the type provided in this Article.

(2) "Insurer" means any insurance company which is authorized under this Chapter to transact accident and health insurance business in this State. (1963, c. 1125.)

Editor's Note. — In the 1963 act inserting this Article, the sections were numbered 58-255.1 to 58-255.6.

§ 58-254.11. Joint action to insure persons 65 years of age or over and their spouses permitted; associations of insurers; individual and group policies.

Notwithstanding any other provisions of this Chapter or any other law which may be inconsistent herewith, any insurer may join with one or more other insurers to plan, develop, underwrite, offer, sell and provide to or for any resident person of this State, or of another state if permitted by the laws of such other state, who is 65 years of age or over and to the spouse of such person, insurance against financial loss from accident or sickness, or both. Such insurance may also cover an employer's nonresident employees and nonresident retired employees 65 years of age or older and their spouses, provided such employees are regularly employed within this State or were so employed at the time of their retirement. Such insurance may be offered, issued and administered through an association of two or more insurers which association is formed for the purpose of offering, selling, issuing and administering such insurance, and may be in the form of a policy insuring a resident who is 65 years of age or older, and the spouse of such resident, if any, or in the form of a group policy insuring residents 65 years of age or older and the spouses of such residents, or in both forms. On such insurance each insurer shall be severally liable for a percentage of the risks determined under the articles of association of the association. The insurer members of such association may agree with respect to premium rates, policy provisions, commission rates and other matters within the scope of this Article. Notwithstanding the provisions of G.S. 58-44, any policy providing such insurance may be executed on behalf of the insurers or the association, as the

case may be, by a duly authorized person and need not be countersigned by a resident agent. (1963, c. 1125; 1965, c. 677.)

§ 58-254.12. Regional plans authorized.

If "over 65" accident and health insurance plans exist or hereafter come into existence in other states pursuant to legislative authority similar to that herein given, North Carolina insurers may jointly participate with insurers of such other states in forming a regional plan to carry out the purposes of this Article. Any association formed for the operation of a regional plan shall be exempt from the provisions of G.S. 58-36 and may engage in business in North Carolina through its insurer members only, without being separately licensed. (1963, c. 1125.)

§ 58-254.13. Forms and rate manuals subject to § 58-249; disapproval of rates.

The forms of the policies, applications, certificates or other evidence of insurance coverage and the rate manual showing rates, rules and classification of risks applicable thereto shall be subject to the applicable provisions of G.S. 58-249. The Commissioner may disapprove the premium rates for such insurance, or any class thereof, if he finds that such rates are by reasonable assumptions excessive in relation to the benefits provided. In determining whether such rates by reasonable assumptions are excessive in relation to the benefits provided, the Commissioner shall give due consideration to past and prospective claim experience on such insurance, or other comparable insurance, within and outside this State, and to fluctuations in such claim experience, to a reasonable risk charge, to contribution to surplus and contingency funds, to past and prospective expenses, both within and outside this State, and to all other relevant factors within and outside this State, including any differing operating methods of the insurers joining in the issue of such insurance. In the event of any such disapproval, the decision of the Commissioner shall be subject to review under G.S. 58-9.3. In exercising the powers conferred by this section, the Commissioner shall not be bound by any other requirements of this Chapter with respect to standard provisions required to be included in the forms of the policies, applications, certificates or other evidence of insurance coverage filed with the Commissioner. (1963, c. 1125.)

§ 58-254.14. Organization of associations of insurers; powers; annual statements; mutual insurers may participate.

An association formed for the purposes of this Article shall adopt articles of association for the organization, administration and regulation of its affairs, which articles of association and any amendments thereto shall be filed within 30 days of adoption of same with the Commissioner of Insurance. Such association may establish requirements for membership of insurers, hold title to property, incur expenses for advertising, soliciting and administering such insurance, including payment of salary or compensation to persons employed by it, enter into contracts, limit the liability of and among its members, and shall be subject to the provisions of G.S. 1-69.1.

Such association shall file annually with the Commissioner of Insurance, on such date and in such form as the Commissioner may prescribe, a statement with respect to its operations.

For the purpose of implementing joint action of insurers in furnishing accident and health insurance coverage to persons 65 years of age and older and their spouses, in accordance with the intent of this Article as expressed herein, insurers operating on a mutual plan, or on any other membership basis, may participate in such a plan, and the persons insured through the plan shall not be entitled to membership in any such insurer nor shall they be entitled to any dividend rights, voting rights, or any other rights peculiar to mutual insurance policyholders and participants in membership insurance plans. (1963, c. 1125.)

§ 58-254.15. No additional licensing required.

Accident and health insurance authorized by this Article and offered by or through an association formed for the purpose of this Article may be solicited and offered directly by such association, any insurer member of such association, and by or through any person authorized by the North Carolina Insurance Department to sell accident and health insurance in this State, without any additional license being required. (1963, c. 1125.)

§§ 58-254.16 to 58-254.18: Reserved for future codification purposes.

ARTICLE 26B.

North Carolina Health Care Excess Liability Fund.

§ 58-254.19. Findings of General Assembly; legislative intent.

The General Assembly finds that the cost of professional liability insurance has risen to levels which many health care providers find intolerable; and that the cost of one million dollars ($1,000,000) excess coverage is approximately twice this inflated cost of primary coverage of one hundred-three hundred thousand dollars ($100,000-$300,000); and that health care providers in North Carolina are unable to obtain excess liability insurance above one million dollars ($1,000,000); that said excess coverage has been made unavailable in the past by the withdrawal of the major health care liability insurer from the State, and there is no assurance that said excess coverage will continue to remain available; and that the ever increasing costs of health care, the inflationary economic trends in North Carolina and the nation, the acceleration of the frequency of claims against North Carolina's health care providers, and the increased risks commensurate with advanced health care treatments and procedures are mandating the necessity of the availability of liability insurance in excess of limits presently obtainable.

The General Assembly further finds that the inability of health care providers to obtain such insurance at reasonable rates is endangering the health of the people of this State, and threatens the curtailment of health care. The General Assembly finds and declares that the uninterrupted delivery of health care services is essential to the health and welfare of the citizens of North Carolina. The General Assembly further finds and declares that it is essential to the health and welfare of the citizens of North Carolina that all health care providers have excess health care liability insurance. It is declared to be the policy and intent of the General Assembly that a health care provider who participates in the plan set forth in this Article, maintains the designated amounts of professional liability protection, and contributes to the fund for the protection of his patients shall be deemed to have fulfilled the objectives of this public policy. (1975, 2nd Sess., c. 978, ss. 1, 2.)

Editor's Note. — Session Laws 1975, 2nd Sess., c. 978, s. 4, contains a severability clause.

§ 58-254.20. Definitions.

The following terms as used in this Article shall have the meanings hereinafter respectively ascribed to them:

(1) "Board" means the Board of Governors of the North Carolina Health Care Excess Liability Fund provided for in G.S. 58-254.23.

(2) "Commissioner" means the Commissioner of Insurance of the State of North Carolina.

(3) "Fund" means the North Carolina Health Care Excess Liability Fund provided for in G.S. 58-254.21.

(4) "Health care provider" means any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of, or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any person acting at the direction or under the supervision of a health care provider.

(5) "Manager" means the person appointed by the Board to administer the fund as provided for in G.S. 58-254.23. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.21. North Carolina Health Care Excess Liability Fund; creation; investment; coverage.

(a) Fund Created. — The North Carolina Health Care Excess Liability Fund is created to be collected and received by the Board for exclusive use for the purposes stated in this Article.

(b) Investment and Management. — All moneys which belong to the fund and are collected or received under this Article shall be held in trust, deposited in a segregated account, invested and reinvested by the Board in accordance with the reserve investment requirements of G.S. 58-79.1, and shall not become a part of the general fund of the State. All interest and revenues from moneys belonging to the fund shall inure solely to the benefit and use of the fund. The Board shall be authorized to withdraw funds from such account as amounts payable under G.S. 58-254.26 and other expenses become due and payable. No part of the revenues or assets of the fund shall inure to the benefit of or be distributable to the Board or any member thereof or any officer or employee of the Board, except for services rendered. All expenses and salaries connected with the administration and operation of the fund shall be paid out of the fund.

(c) Profits of the Fund. — The Board shall establish a surplus account which in the sound business judgment of the Board will be sufficient to meet the normal contingencies of its operations. All other profits shall be returned to the participating health care providers by adjustment of the assessments.

(d) Restrictions of Use by State. — No moneys, funds, reserves, investments and property, whether real or personal, acquired, administered, possessed or held by the fund, nor any profits earned by the fund, may be taken, used or appropriated by the State of North Carolina for any purpose whatsoever. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.22. Withdrawals; fidelity bond; fund accounting and audit.

(a) Moneys shall be withdrawn from the fund only upon vouchers approved and as authorized by the Board.

(b) Persons authorized to receive deposits, withdraw, issue vouchers or otherwise disburse any fund moneys shall post a blanket fidelity bond in an amount to be determined by the Board and reasonably sufficient to protect fund assets. The cost of such bond shall be paid from the fund.

(c) Annually, the Board shall furnish an audited financial report to the Commissioner, the State Auditor and to fund participants upon request. The report shall be prepared by an independent certified public accountant in accordance with accepted accounting procedures.

(d) The Board shall report annually to the General Assembly and the Governor on the financial condition of the fund and its statistical claims experience and may make recommendations as to any further legislative actions which may be needed to carry out the intent of this Article. All such reports shall be made freely available to the public. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.23. Board of Governors; creation; membership; terms; vacancies; powers and duties; manager of fund; immunity from liability of Board members, officers and employees.

(a) There is hereby created the Board of Governors of the North Carolina Health Care Excess Liability Fund with the power to:

(1) Adopt such rules and regulations as may be necessary for the interpretation and implementation of this Article.

(2) Employ such officers and employees as it deems necessary to carry out the provisions of this Article or to perform the duties and exercise the powers conferred upon it by law. The compensation for such officers and employees shall be fixed by the Board.

(3) Sue and be sued in all actions arising out of any act or omission in connection with the business or affairs of the fund.

(4) Enter into any contracts or obligations relating to the fund which are authorized or permitted by law, including, but not limited to, contracts for claims-management services such as the evaluation, negotiation, defense and settlement of medical malpractice claims against participating health care providers.

(5) Conduct all business affairs and perform all acts relating to the fund, whether or not specifically designated in this Article.

(b) The membership of and appointments to the Board shall be as follows:

(1) Two members to be appointed by the Lieutenant Governor from a list of two nominees per appointment submitted by the North Carolina Medical Society;

(2) Two members to be appointed by the Speaker of the House from a list of two nominees per appointment submitted by the North Carolina Hospital Association;

(3) One member to be appointed by the Governor from a list of two nominees submitted by the North Carolina Nurses' Association;

(4) One member to be appointed by the Governor from a list of two nominees submitted by the North Carolina Dental Society; and

(5) One member from a health care profession other than those enumerated in subdivisions (1) through (4) of this subsection to be appointed by the Governor.

(c) Members appointed pursuant to this section shall be residents of the State and shall serve terms of four years: Provided that the initial appointees shall serve terms as follows:

(1) Members appointed by the Governor shall serve initial terms of two, three and four years.

(2) Members appointed by the Lieutenant Governor shall serve initial terms of two and three years; and

(3) Members appointed by the Speaker of the House shall serve initial terms of two and four years.

(d) The Commissioner shall be an ex officio member of the Board. The Commissioner or his designee shall have a vote on all matters before the Board.

(e) Initial appointments to the Board shall be made within 30 days of May 13, 1976. The organizational meeting of the Board shall be held upon the call of the Commissioner and within 30 days after initial appointments are completed.

(f) Any appointment to fill a vacancy on the Board created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term. At the expiration of each member's term, the appointing authority shall reappoint or replace the member with a member from the same category. At its organizational meeting and on or after July 1 of each year thereafter, the Board shall designate by election one of its members as chairman. The Board shall also elect or appoint, and prescribe the duties of such other officers as the Board deems necessary or advisable, including a secretary and treasurer.

(g) Any appointing authority shall have the power to remove any member for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13. Compensation and allowances for members of the Board shall be as provided in G.S. 138-5. The Commission shall not receive said compensation and allowances.

(h) There shall be a manager of the fund who shall be appointed by the Board. The manager shall conduct the business affairs of the fund under the general direction of the Board. Before entering the duties of the office, the manager shall qualify by giving an official bond approved by the Board. The Board may delegate to the manager of the fund, under such rules and regulations and subject to such conditions as it from time to time prescribes, any power, function or duty conferred by law on the Board in connection with the administration, management and conduct of the business affairs of the fund. The manager may exercise such powers and functions and perform such duties with the same force and effect as the Board.

(i) There shall not be any personal liability on the part of any member of the Board, or any officer or employee of the fund, for, or on account of, any act performed or obligation entered into in an official capacity, when done in good faith, without intent to defraud, and in connection with the administration, management, or conduct of the fund or affairs relating thereto. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.24. Participation in the fund.

(a) When a health care provider has proved to the satisfaction of the Board that he is insured by an insurer licensed and approved by the Commissioner or under a self-insurance plan approved by the Board against legal liability for damages arising out of professional malpractice in the sums required under subsection (b) of this section, and if the health care provider has paid the current assessment required under G.S. 58-254.25, the health care provider shall be deemed to be a bona fide participant in the fund and shall become subject to the provisions of this Article and the rules and regulations of the Board. The financial responsibility requirements herein shall include an

obligation of the insurer or self-insurer to defend an action against the participating health care provider irrespective of payment or offer of payment of the limits provided by such insurer or self-insurer.

(b) The minimum amount of professional liability insurance or self-insurance required to be maintained by a participating health care provider shall be one hundred thousand dollars ($100,000) for each occurrence or claim made and one hundred thousand dollars ($100,000) aggregate for occurrences or claims made in any one year.

(c) If a health care provider participating in the fund has insurance or self-insurance coverage in excess of the amounts stated in subsection (b) of this section, the Board may grant an appropriate reduction of his assessment for the fund.

(d) The Board shall afford a participating health care provider the same type of coverage, occurrence or claims made, as is provided by his insurer or approved self-insurer in subsection (a) of this section. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.25. Assessment for the fund.

(a) A health care provider who wishes to participate in the fund and be subject to the provisions of this Article and the rules and regulations of the Board shall, in addition to complying with the provisions of G.S. 58-254.24, not later than the date or dates specified by the Board in each year, pay to the fund an assessment to be determined by the Board.

(b) Moneys received by the Board under subsection (a) of this section shall be handled in accordance with the provisions of G.S. 58-254.21 and 58-254.22.

(c) Any health care provider who carries a claims-made policy or is protected by an approved self-insurance plan and who discontinues participation in the fund may obtain full occurrence coverage from the Board by purchasing a reporting endorsement on the claims-made policy or self-insurance plan by payment of the assessment then required by the Board on the same basis as the insurer or self-insurer requires a reporting endorsement premium to be paid.

(d) The fund shall be subject to the premium tax law as stated in North Carolina G.S. 105-228.5. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.26. Payment of claims by the fund; claims management and services; personal liability for malpractice and amount of compensation not limited; actions against Board or fund.

(a) Any amount due from a judgment, arbitration award or Board-approved settlement which is in excess of a participating health care provider's insurance or self-insurance coverage required by G.S. 58-254.24 shall be paid from the fund in an amount not to exceed two million dollars ($2,000,000) for each occurrence or claim made and two million dollars ($2,000,000) aggregate for occurrences in or claims made in any one year. The purpose of this Article is to afford a participating health care provider with effective excess coverage of $2,000,000 per occurrence or claim made and $2,000,000 aggregate per annum.

(b) Payment of claims by the fund as provided in subsection (a) of this section shall only be made when the Board issues a voucher or other appropriate request after the Board receives either of the following:

(1) A certified copy of a final judgment or arbitration award against a participating health care provider.

(2) A certified copy of a Board-approved settlement between a participating health care provider and a claimant.

Any and all payments of claims from the fund on behalf of a participating health care provider shall inure to the benefit of said health care provider.

(c) A participating health care provider or his insurer or self-insurer or any claimant shall notify the Board of all claims made or reported or actions filed against said health care provider. Such notice shall be in writing, mailed to the Board within a reasonable time to provide the Board adequate preparation time to defend or negotiate said claim or action, and shall include the date of the alleged occurrence, the date of the making, reporting or filing of said claim or action, and the amount demanded, if declared, by the claimant. The Board shall not pay claims on behalf of or provide the services in subsection (d) of this section to any participating health care provider unless adequate notice to the Board has been provided.

(d) The Board may provide for claims management and services, including the legal defense of participating health care providers in actions filed against them and in settlement negotiations.

(e) Nothing in this Article shall be deemed or construed to:

(1) Limit the personal liability of any participating health care provider for malpractice arising out of the performance of or failure to perform professional services;

(2) Limit the amount of compensation from any final judgment, arbitration award or Board-approved settlement to any claimant injured as a result of said malpractice; or

(3) Permit the filing by any claimant of an action against the Board or fund except upon a final judgment obtained by the claimant against a participating health care provider or upon a Board-approved settlement agreement.

(f) The fund shall not be liable for awards for punitive damages against participating health care providers. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.27. Commencement of operations; effective date of coverage.

(a) The fund shall provide the excess coverage provided in this Article only for causes of action arising out of occurrences on or after the effective date of participation of a health care provider.

(b) The Board may provide coverage by the fund when, in the Board's discretion, the fund has sufficient moneys and a sufficient number of participation agreements. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.28. Acceptance of and compliance with Article and rules and regulations of the Board.

Compliance with the provisions of G.S. 58-254.24 and 58-254.25 shall constitute, on the part of a participating health care provider, a conclusive and unqualified acceptance of the provisions of this Article and the rules and regulations of the Board. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.29. Records.

Records held by the fund shall not be subject to the provision of Chapter 132 of the General Statutes pertaining to public records. (1975, 2nd Sess., c. 978, s. 3.)

§§ 58-254.30 to 58-254.34: Reserved for future codification purposes.

Article 26C.

Group Health Insurance Continuation and Conversion Privileges.

Part 1. Continuation.

§ 58-254.35. Definitions.

As used in this Article, the following terms have the meanings specified:

(1) "Group policy" means a group accident and health insurance policy issued by an insurance company and a group contract issued by a health service corporation or health maintenance organization or similar corporation or organization.

(2) "Individual policy" or "converted policy" means an individual health insurance policy issued by an insurance company or an individual health services contract issued by a health service corporation or health maintenance organization or similar corporation or organization.

(3) "Insurance" and "insured" refer to coverage under a group policy, individual policy or converted policy on a premium-paying basis, and do not include coverage provided by reason of a disability extension.

(4) "Insurer" means the entity issuing a group policy or an individual or converted policy.

(5) "Medicare" means Title XVIII of the United States Social Security Act as added by the Social Security Amendments of 1965 or as later amended or superseded.

(6) "Premium" includes any premium or other consideration payable for coverage under a group or individual policy.

(7) "Reasonable and customary" means the most frequently used level of charge made for the supplies or for a specific service in the geographic subarea in which such supplies or services are received, of like kind or by physicians, or other practitioners, with similar qualifications. (1981, c. 706, s. 1.)

Editor's Note. — Session Laws 1981, c. 706, s. 3, makes the act effective January 1, 1982. Session Laws 1981, c. 706, s. 2, provides, in part: "This act shall apply only to group policies delivered, issued for delivery, or amended on or after the effective date of this act."

§ 58-254.36. Continuation of group hospital, surgical, and major medical coverage after termination of employment or membership.

A group policy delivered or issued for delivery in this State which insures employees or members, other than the members and their dependents, if they have elected to include them, whose eligibility under the group policy does not extend to any employee(s) the insured may have for hospital, surgical or major medical insurance on an expense incurred or service basis under Chapters 57, 57B, and 58 of the General Statutes, other than for specific diseases or for accidental injuries only, shall provide that employees or members whose insurance for these types of coverage under the group policy would otherwise terminate because of termination of active employment or membership, or

termination of membership in the eligible class or classes under the policy, shall be entitled to continue their hospital, surgical, and medical insurance under that group policy, for themselves and their eligible dependents with respect to whom they were insured on the date of termination, subject to all of the group policy's terms and conditions applicable to those forms of insurance and to the conditions specified in this Part. Provided, the terms and conditions set forth in this Part are intended as minimum requirements and shall not be construed to impose additional or different requirements upon those group hospital, surgical, or major medical plans already in force, or hereafter placed into effect, that provide continuation benefits equal to or better than those required in this Part. (1981, c. 706, s. 1.)

§ 58-254.37. Eligibility.

Continuation shall only be available to an employee or member who has been continuously insured under the group policy, or for similar benefits under any other group policy that it replaced, during the period of three consecutive months immediately prior to the date of termination. (1981, c. 706, s. 1.)

§ 58-254.38. Exception.

Continuation shall not be available for any person who is or could be covered by any other arrangement of hospital, surgical, or medical coverage for individuals in a group, whether insured or uninsured, within 31 days immediately following the date of termination; or whose insurance terminated because he failed to pay any required contribution for the insurance. (1981, c. 706, s. 1.)

§ 58-254.39. Benefits not included.

Continuation is not required to include dental, vision care, or prescription drug benefits, or any other benefits provided under the group policy in addition to its hospital, surgical, or major medical benefits. (1981, c. 706, s. 1.)

§ 58-254.40. Notification to employee.

In addition to the notification requirement set forth in G.S. 58-254.43, notification may be included on insurance identification cards or may be given by the employer, orally or in writing as a part of the exit process from the employment. (1981, c. 706, s. 1.)

§ 58-254.41. Payment of premiums.

An employee or member electing continuation must pay to the group policyholder or his employer, in advance, the amount of contribution required by the policyholder or employer, but not more than the full group rate for the insurance applicable under the group policy on the due date of each payment. The employee or member may not be required to pay the amount of the contribution less often than monthly. In order to be eligible for continuation of coverage, the employee or member must make a written election of continuation, on a form furnished by the group policyholder, and pay the first contribution, in advance, to the policyholder or employer on or before the date on which employee's or member's insurance would otherwise terminate. (1981, c. 706, s. 1.)

§ 58-254.42. Termination of continuation.

Continuation of insurance under the group policy for any person shall terminate on the earliest of the following dates:

(1) The date three months after the date the employee's or member's insurance under the policy would otherwise have terminated because of termination of employment or membership;

(2) The date ending the period for which the employee or member last makes his required contribution, if he discontinues his contributions;

(3) The date the employee or member becomes or is eligible to become covered for similar benefits under any arrangement of coverage for individuals in a group, whether insured or uninsured;

(4) The date on which the group policy is terminated or, in the case of a multiple employer plan, the date his employer terminates participation under the group master policy. When this occurs the employee or member shall have the privilege described in G.S. 58-254.44 if the date of termination precedes that on which his actual continuation of insurance under that policy would have terminated. (1981, c. 706, s. 1.)

§ 58-254.43. Notification.

A notification of the continuation privilege shall be included in each individual certification of coverage. (1981, c. 706, s. 1.)

Part 2. Conversion.

§ 58-254.44. Right to obtain individual policy upon termination of group hospital, surgical or major medical coverage.

A group policy delivered or issued for delivery in this State that insures employees or members for hospital, surgical, or medical insurance on an expense incurred or service basis under General Statutes Chapters 57, 57B, and 58, other than for specific diseases or for accidental injuries only, shall provide that an employee or member whose insurance under the group policy has been terminated shall be entitled to have a converted policy issued to him by the insurer under whose group policy he was last insured, without evidence of insurability, subject to the terms and conditions specified in this Part. Provided, the terms and conditions set forth in this Part are intended as minimum requirements and shall not be construed to impose additional or different requirements upon those group hospital, surgical, or major medical plans already in force, or hereafter placed into effect, that provide conversion benefits equal to or better than those required in this Part. (1981, c. 706, s. 1.)

§ 58-254.45. Restrictions.

A converted policy shall not be available to an employee or member if termination of his insurance under the group policy occurred because:

(1) Of termination of employment or membership and either he was not entitled to continuation of group coverage under Part 1 of this Article or failed to elect such continuation;

(2) He failed to make timely payment of any required contribution for the cost of continuation of insurance;

(3) He had not been continuously covered under the group policy or for similar benefits under any other group policy that it replaced during

the period of three consecutive months immediately prior to termination of active employment ending with such termination;

(4) The group policy terminated or an employer's participation terminated, and the insurance is replaced by similar coverage under another group policy within 31 days of date of termination; or

(5) He failed to continue his insurance for the entire maximum period of three consecutive months following termination of active employment as provided for in Part 1 of this Article. (1981, c. 706, s. 1.)

§ 58-254.46. Time limit.

In order to be eligible for conversion, written application and the first premium payment for the converted policy must be made to the insurer not later than 31 days after the date of termination of insurance provided under Part 1 of this Article. The effective date of the converted policy shall be the day following the later of:

(1) The termination of insurance under the group policy when it is not replaced by one providing similar coverage within 31 days of the termination date of the immediately prior group plan; or

(2) The termination of the three months of continued coverage under the group policy or policies. (1981, c. 706, s. 1.)

§ 58-254.47. Premium.

(a) The premium for the converted policy shall be determined in accordance with the insurer's table of premium rates applicable to the age and class of risk to be covered under that policy and to the type and amount of insurance provided.

(b) All insurers licensed to do business in this State, who issue conversion policies under this Part, shall have the right to increase that element of the premium that applies to hospital room and board benefit increases provided for in G.S. 58-254.54(5) by an amount proportionate to the increase promulgated by the Commissioner. Such premium increases shall be filed with the Commissioner.

(c) All premium rates and adjustments to premium rates for converted policies shall be reasonable and must be filed with the Commissioner prior to use. A premium rate shall be deemed to be reasonable if it can be demonstrated by the insurer that the premium charged is expected to produce an incurred loss ratio to earned premiums of not less than sixty percent (60%) for all individual policies providing similar benefits offered and issued by the insurer. If an insurer experiences an incurred loss ratio of greater than eighty percent (80%) for all such policies, it shall be deemed reasonable for that insurer to increase premium rates to a level that will produce a prospective incurred loss ratio of no greater than eighty percent (80%), and the insurer shall file such new rates with the Commissioner: Provided, however, that such action may be taken by the insurer at intervals not more frequently than two years, the first of which shall be no earlier than January 1, 1984. (1981, c. 706, s. 1.)

§ 58-254.48. Coverage.

The converted policy shall cover the employee or member and his eligible dependents who were covered by the group policy on the date of termination of insurance. At the option of the insurer, a separate converted policy may be issued to cover any such eligible dependent. (1981, c. 706, s. 1.)

§ 58-254.49. Exclusions.

The insurer shall not be required to issue a converted policy covering any person if such person is or can be covered by Medicare. Furthermore, the insurer shall not be required to issue a converted policy covering any person if:

(1) a. Such person is covered for similar benefits by another hospital, surgical, medical or major medical expense insurance policy, or hospital or medical service subscriber contract or medical practice or other prepayment plan, or by any other plan or program;

b. Such person is or could be covered for similar benefits, whether or not covered for such benefits, under any arrangement of coverage for individuals in a group, whether insured or uninsured; or

c. Similar benefits are provided for or available to such person, whether or not covered for such benefits, by reason of any State or federal law; and

(2) The benefits under sources of the kind referred to in subdivision (1)a of this section for such person, or benefits provided or available under sources of the kind referred to in subdivisions (1)b and (1)c of this section for such person, together with the converted policy's benefits would result in overinsurance according to the insurer's standards for overinsurance. (1981, c. 706, s. 1.)

§ 58-254.50. Information.

A converted policy may provide that the insurer may at any time request information of the insured policyholder with respect to any person covered thereunder as to whether he is covered for the similar benefits described in G.S. 58-254.49(1)a or is or could be covered for the similar benefits described in G.S. 58-254.49(1)b and 58-254.49(1)c. The converted policy may provide that as of any premium due date the insurer may refuse to renew the policy or the coverage of any insured person for the following reasons only:

(1) Either those similar benefits for which such person is or could be covered, together with the converted policy's benefits, would result in overinsurance according to the insurer's standards for overinsurance, or the policyholder of the converted policy fails to provide the requested information;

(2) Fraud or material misrepresentation in applying for any benefits under the converted policy; or

(3) Eligibility of any insured person for coverage under Medicare, or under any other State or federal law providing benefits substantially similar to those provided by the converted policy. (1981, c. 706, s. 1.)

§ 58-254.51. Excess benefits.

An insurer shall not be required to issue a converted policy providing benefits in excess of the equivalent value of hospital, surgical, or major medical insurance under the group policy from which conversion is made. (1981, c. 706, s. 1.)

§ 58-254.52. Preexisting conditions.

The converted policy shall not exclude, as a preexisting condition, any condition covered by the group policy. However, the converted policy may provide for a reduction of its hospital, surgical or medical benefits by the amount of any such benefits payable under the group policy after the individual's insurance terminates thereunder. The converted policy may also

provide that during the first policy year the benefits payable under the converted policy, together with the benefits payable under the group policy, shall not exceed those that would have been payable had the individual's insurance under the group policy remained in force and effect. (1981, c. 706, s. 1.)

§ 58-254.53. Basic coverage plans.

(a) Subject to the provisions of this Article, if the group insurance policy from which conversion is made insures the employee or member for basic hospital and surgical expense insurance, the employee or member shall be entitled to obtain a converted policy providing, at his option, coverage on an expense incurred basis under any of the following plans:

(1) Plan A:

a. Hospital room and board daily expense benefits in a maximum dollar amount approximating the average semiprivate rate charged in the major metropolitan area of this State, for a maximum duration of 70 days;

b. Miscellaneous hospital expense benefits up to a maximum amount of 10 times the hospital room and board daily expense benefits; and

c. Surgical expense benefits according to a surgical procedures schedule consistent with those customarily offered by the insurer under group or individual health insurance policies and providing a maximum benefit of eight hundred dollars ($800.00).

(2) Plan B:

Identical to Plan A, except that (i) the maximum hospital room and board daily expense benefit is seventy-five percent (75%) of the corresponding Plan A maximum and (ii) the surgical schedule maximum is six hundred dollars ($600.00).

(3) Plan C:

Identical to Plan A, except that (i) the maximum hospital room and board daily expense benefit is fifty percent (50%) of the corresponding Plan A maximum and (ii) the surgical schedule maximum is four hundred dollars ($400.00).

(b) The maximum dollar amount for the maximum hospital room and board daily expense benefit of Plan A shall be determined by the Commissioner and may be redetermined by him from time to time as to converted policies issued subsequent to such redetermination. Such redetermination shall not be made more often than once in three years. The Plan A maximum, and the corresponding maximums in Plans B and C, shall be rounded to the nearest multiple ten dollars ($10.00), provided that rounding may be to the next higher or lower multiple of ten dollars ($10.00) if otherwise exactly midway between. (1981, c. 706, s. 1.)

§ 58-254.54. Major medical plans.

Subject to the provisions of this Article, if the group policy from which conversion is made insures the employee or member for major medical expense insurance, the employee or member shall be entitled to obtain a converted policy providing catastrophic or major medical coverage under a plan meeting the following requirements:

(1) A maximum benefit at least equal to either, at the option of the insurer,

a. A maximum payment per covered person for all covered medical expenses incurred during that person's lifetime, equal to the lesser of the maximum benefit provided under the group policy or one hundred thousand dollars ($100,000); or

b. A maximum payment for each unrelated injury or sickness, equal to the lesser of the maximum benefit provided under the group policy or one hundred thousand dollars ($100,000).

(2) Payment of benefits at the rate of eighty percent (80%) of covered medical expenses that are in excess of the deductible, until twenty percent (20%) of such expenses in a benefit period reaches one thousand dollars ($1,000), after which benefits will be paid at the rate of one hundred percent (100%) during the remainder of such benefit period. Payment of benefits for outpatient treatment of mental illness, if provided in the converted policy, may be at a lesser rate but not less than fifty percent (50%).

(3) A deductible for each benefit period which, at the option of the insurer, shall be (i) the sum of the benefits deductible and one hundred dollars ($100.00), or (ii) the corresponding deductible in the group policy. The term "benefits deductible," as used in this Part, means the value of any benefits provided on an expense incurred basis that are provided with respect to covered medical expenses by any other group or individual hospital, surgical, or medical insurance policy or medical practice or other prepayment plan, or any other plan, or program whether insured or uninsured, or by reason of any State or federal law and if, pursuant to G.S. 58-254.55, the converted policy provides both basic hospital or surgical coverage and major medical coverage, the value of such basic benefits.

If the maximum benefit is determined by subdivision (1)a of this section, the insurer may require that the deductible be satisfied during a period of not less than three months if the deductible is one hundred dollars ($100.00) or less, and not less than six months if the deductible exceeds one hundred dollars ($100.00).

(4) The benefit period shall be each calendar year when the maximum benefit is determined by subdivision (1)a of this section or 24 months when the maximum benefit is determined by subdivision (1)b of this section.

(5) The term "covered medical expenses," as used in this Part, shall include, in the case of hospital room and board charges, at a minimum the lesser of the dollar amount in G.S. 58-254.53(a)(1) and the average semiprivate room and board rate for the hospital in which the individual is confined, and at a minimum twice such amount for charges in an intensive care unit. Any surgical procedures schedule shall be consistent with those customarily offered by the insurer under group or individual health insurance policies and must provide at least a one thousand two hundred dollar ($1,200) maximum. (1981, c. 706, s. 1.)

§ 58-254.55. Alternative plans.

At the option of the insurer, such plans of benefits set forth in G.S. 58-254.53 and 58-254.54 may be provided under one policy. Instead of providing the plans of benefits set forth in G.S. 58-254.53 and 58-254.54, the insurer may elect to provide a policy of comprehensive medical expense benefits without first dollar coverage. Said policy shall conform to the requirements of G.S. 58-254.54; provided, however, that an insurer electing to provide such a policy shall make available the following deductible options: one hundred dollars ($100.00), five hundred dollars ($500.00), and one thousand dollars ($1,000). Alternatively, such a policy may provide for deductible options equal to the greater of the benefits deductible and the amount specified in the preceding sentence. (1981, c. 706, s. 1.)

§ 58-254.56. Insurer option.

The insurer may, at its option, offer alternative plans for group health conversion in addition to those required by this Part. Furthermore, if any insurer customarily offers individual policies on a service basis, that insurer may, in lieu of converted policies on an expense incurred basis, make available converted policies on a service basis which, in the opinion of the Commissioner satisfy the intent of this Part. (1981, c. 706, s. 1.)

§ 58-254.57. Other conversion provisions.

(a) If coverage would in any event have been continued under the group policy on an employee following his retirement prior to the time he is or could be covered by Medicare and provided he would have been eligible for continuation under the group policy as specified in G.S. 58-254.37, the employee or member may elect, in lieu of such continuation of group insurance, to have the same conversion rights as would apply had that insurance terminated at retirement.

(b) The converted policy may provide for reduction or termination of coverage of any person upon his eligibility for coverage under Medicare or under any other State or federal law providing for benefits similar to those provided by the converted policy.

(c) Subject to the conditions set forth in this subsection, the conversion privilege shall also be available (i) to the surviving spouse, if any, at the death of the employee or member, with respect to the spouse and any eligible children whose coverage under the group policy terminates by reason of such death, or if the group policy provides for continuation of dependents' coverage following the employee's or member's death, at the end of such continuation, or (ii) to the spouse of the employee or member upon termination of coverage of the spouse because the spouse becomes ineligible, while the employee or member remains insured under the group policy, with respect to the spouse and such children whose coverage under the group policy terminates at the same time, or (iii) to a child solely with respect to himself upon termination of his coverage by reason of ceasing to be an eligible family member under the group policy, if a conversion privilege is not otherwise provided above with respect to such termination.

(d) The insurer may elect to provide group insurance coverage in lieu of the issuance of a converted individual policy, notwithstanding the maximum period of group continuation specified in G.S. 58-254.42(1).

(e) A notification of the conversion privilege shall be included in each certificate of coverage.

(f) A converted policy which is delivered outside this State may be on a form which could be delivered in such other jurisdiction as a converted policy had the group policy been issued in that jurisdiction. (1981, c. 706, s. 1.)

§ 58-254.58. Article inapplicable to certain plans.

The provisions of this article shall not apply to hospital, surgical or major medical plans offered by employers on a self-insured basis. (1981, c. 706, s. 2.)

ARTICLE 27.

General Regulations.

§ 58-255: Repealed by Session Laws 1953, c. 1095, s. 8.

§ 58-256. Waiver by insurer.

The acknowledgment by any insurer of the receipt of notice given under any policy covered by this Subchapter, or the furnishing of forms for filing proofs of loss, or the acceptance of such proofs, or the investigation of any claim thereunder, shall not operate as a waiver of any of the rights of the insurer in defense of any claim arising under such policy. (1913, c. 91, s. 7; C.S., s. 6484.)

§ 58-257. Application.

(a) On and after January 1, 1956, each individual or family accident, health, hospitalization policy, certificate or service plan of hospitalization and medical and/or dental service corporations shall be issued only on application in writing signed by the insured or the head of the household or guardian. Each application shall also contain the certificate of the agent that he has truly and accurately recorded on the application the information supplied by the insured. Every policy subject to the provisions of this section shall contain as a part of such policy the original or a reproduction of the application required by this section. This section shall not apply to travel or dread disease policies or to policies issued pursuant to a group insurance conversion privilege. If any such policy delivered or issued for delivery to any person in this State shall be reinstated or renewed, and the insured or the beneficiary or assignee of such policy shall make written request to the insurer for a copy of the application, if any, for such reinstatement or renewal, the insurer shall within 15 days after the receipt of such request at his home office or any branch office of the insurer, deliver or mail to the person making such request, a copy of such application. If such copy shall not be so delivered or mailed, the insurer shall be precluded from introducing such application as evidence in any action or proceeding based upon or involving such policy or its reinstatement or renewal.

(b) No alteration of any written application for any such policy shall be made by any person other than the applicant without his written consent, except that insertions may be made by the insurer, for administrative purposes only, in such manner as to indicate clearly that such insertions are not to be ascribed to the applicant.

(c) The falsity of any statement in the application for any policy covered by this Subchapter may not bar the right to recover thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer. (1913, c. 91, s. 8; C.S., s. 6485; 1953, c. 1095, s. 9; 1955, c. 850, s. 6; 1961, c. 1149.)

Editor's Note. — Section 12 of the 1955 amendatory act made the act applicable to hospital and medical service corporations under Chapter 57 to the same extent as to insurers under this Chapter.

§ 58-257.1. Claim forms.

All forms used by policyholders, beneficiaries, hospitals and physicians to report information relative to the nature and extent of loss or disability for which claim is being made under any type of accident or health policy must conform to certain standard language approved by the Commissioner of Insurance. (1955, c. 850, s. 9.)

Editor's Note. — Section 12 of the act inserting this section, as amended by Session Laws 1955, c. 1261, made this section applicable to hospital and medical service corporations under Chapter 57 to the same extent as it applies to insurers under this Chapter.

§ 58-258. Conforming to statute.

(a) Other Policy Provisions. — No policy provision which is not subject to G.S. 58-251.1 shall make a policy, or any portion thereof, less favorable in any respect to the insured or the beneficiary than the provisions thereof which are subject to this Subchapter.

(b) Policy Conflicting with Subchapter. — A policy delivered or issued for delivery to any person in this State in violation of this Subchapter shall be held valid but shall be construed as provided in this Subchapter. When any provision in a policy subject to this Subchapter is in conflict with any provision of this Subchapter, the rights, duties and obligations of the insurer, the insured and the beneficiary shall be governed by the provisions of this Subchapter. (1913, c. 91, s. 9; C.S., s. 6486; 1953, c. 1095, s. 10.)

§ 58-259: Repealed by Session Laws 1953, c. 1095, s. 11.

§ 58-259.1. Age limit.

If any such policy contains a provision establishing, as an age limit or otherwise, a date after which the coverage provided by the policy will not be effective, and if such date falls within a period for which premium is accepted by the insurer or if the insurer accepts a premium after such date, the coverage provided by the policy will continue in force subject to any right of cancellation until the end of the period for which premium has been accepted. In the event the age of the insured has been misstated and if, according to the correct age of the insured, the coverage provided by the policy would not have become effective, or would have ceased prior to the acceptance of such premium or premiums, then the liability of the insurer shall be limited to the refund, upon request, of all premiums paid for the period not covered by the policy. (1953, c. 1095, s. 11.)

CASE NOTES

Misrepresentation as to Age. — Where a policy provides that in the event of misrepresentation as to age the contract will be adjusted so as to pay the amount actually due under the insured's correct age, it is generally held that this provision relates not to the efficacy of the contract, but to the benefits due, and is not affected by an incontestable clause. Wall v. Diamond State Life Ins. Co., 9 N.C. App. 231, 175 S.E.2d 602 (1970).

§ 58-259.2. Nurses' services.

No agency, institution or physician providing a service for which payment or reimbursement is required to be made under a policy governed by this Chapter shall be denied such payment or reimbursement on account of the fact that such services were rendered through a registered nurse acting under authority of rules and regulations adopted by the Board of Medical Examiners and the Board of Nursing pursuant to G.S. 90-6 and 90-162.

Nothing herein shall be construed to authorize contracting with or making payments directly to any nurse not otherwise permitted. (1973, c. 437.)

Editor's Note. — The article containing § 90-162, referred to in this section, was rewritten by Session Laws 1981, c. 360, and has been recodified. See now § 90-171.23.

§ 58-260. Discrimination forbidden; right to choose services of optometrist, podiatrist, dentist or chiropractor.

Discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of insurance covered by this Subchapter, or in the benefits payable thereon, or in any of the terms or conditions of such policy, or in any other manner whatsoever, is prohibited.

Whenever any policy of insurance governed by this Chapter provides for payment of or reimbursement for any service which is within the scope of practice of a duly licensed optometrist, or duly licensed podiatrist, or a duly licensed dentist, or duly licensed chiropractor, or duly licensed practicing psychologist, the insured or other persons entitled to benefits under such policy shall be entitled to payment of or reimbursement for such services, whether such services be performed by a duly licensed physician or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist or a duly licensed chiropractor, or a duly licensed practicing psychologist, notwithstanding any provision contained in such policy. Whenever any policy of insurance governed by this Chapter provides for certification of disability which is within the scope of practice of a duly licensed physician, or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist, or a duly licensed chiropractor, or a duly licensed practicing psychologist, the insured or other persons entitled to benefits under such policy shall be entitled to payment of or reimbursement for such disability whether such disability be certified by a duly licensed physician, or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist, or a duly licensed chiropractor, or a duly licensed practicing psychologist, notwithstanding any provisions contained in such policy. The policyholder, insured, or beneficiary shall have the right to choose the provider of such services notwithstanding any provision to the contrary in any other statute.

For the purposes of this section, a "duly licensed practicing psychologist" shall be defined to only include a psychologist who is duly licensed or certified in the State of North Carolina and has a doctorate degree in psychology and at least two years clinical experience in a recognized health setting, or has met the standards of the National Register of Health Providers in Psychology. (1913, c. 91, s. 11; C.S., s. 6488; 1965, c. 396, s. 2; c. 1169, s. 2; 1967, c. 690, s. 2; 1969, c. 679; 1973, c. 610; 1977, c. 601, ss. 2, 3½.)

Editor's Note. — Session Laws 1965, c. 396, s. 4, provides that it shall not be construed to equate optometrists with physicians except to the extent that each must be duly licensed.

Session Laws 1967, c. 690, s. 4, provides: "Nothing in this act shall be construed to equate podiatrists with physicians except to the extent that each must be duly licensed."

§ 58-260.1. Notice of nonpayment of premium required before forfeiture.

No insurance company doing business in this State and issuing health and/or accident insurance policies, other than contracts of group insurance or disability and/or accidental death benefits in connection with policies of life insurance, the premium for which is to be collected in weekly, monthly, or other periodical installments by authority of a payroll deduction order executed by the assured and delivered to such insurance company or the

assured's employer authorizing the deduction of such premium installments from the assured's salary or wages, shall, during the period for which such policy is issued, declare forfeited or lapsed any such policy hereafter issued or renewed until and unless a written or printed notice of the failure of the employer to remit said premium or installment thereof stating the amount or portion thereof due on such policy and to whom it must be paid, has been duly addressed and mailed to the person who is insured under such policy at least 15 days before said policy is canceled or lapsed. (1909, c. 884; C.S., s. 6465; 1929, c. 308, s. 1; 1931, c. 317; 1945, c. 379.)

Editor's Note. — Prior to the 1945 amendment this section was a part of § 58-207.

§ 58-260.2: Repealed by Session Laws 1975, c. 660, s. 4.

Cross References. — For present provisions as to premium rates for credit accident and health insurance, see §§ 58-348 to 58-350.

§ 58-261. Certain policies of insurance not affected.

(a) Nothing in this Subchapter shall apply to or affect any policy of liability or workmen's compensation insurance.

(b) Nothing in this Subchapter shall apply to or in any way affect contracts supplemental to contracts of life or endowment insurance where such supplemental contracts contain no provisions except such as operate to safeguard such insurance against lapse or to provide special benefits therefor in the event that the insured shall be totally, or totally and permanently disabled by reason of accidental bodily injury or by sickness, nor to contracts issued as supplements to life insurance contracts or contracts of endowment insurance, and intended to increase the amount insured by such life or endowment contracts in the event that the death or disability of the insured shall result from accidental bodily injuries: Provided, that no such supplemental contracts shall be issued or delivered to any person in this State unless and until a copy of the form thereof has been submitted to and approved by the Commissioner of Insurance under such reasonable rules and regulations as he shall make concerning the provisions in such contracts, and their submission to and approval by him.

(c) Nothing in this Subchapter shall apply to or in any way affect fraternal benefit societies.

(d) The provisions of this Subchapter contained in subdivision (5) of G.S. 58-250, and clauses (2), (3), (8), and (12) of G.S. 58-251 may be omitted from railroad ticket policies sold only at railroad stations or at railroad ticket offices by railroad employees. (1911, c. 209, s. 5; 1913, c. 91, s. 12; C.S., s. 6489; 1921, c. 136, s. 5; 1945, c. 385; 1947, c. 721.)

Editor's Note. — Section 58-251, referred to in subsection (d), was repealed by Session Laws 1953, c. 1095, s. 2.

§ 58-262. Punishment for violation.

Any company, association, society, or other insurer or any officer or agent thereof, which or who issues or delivers to any person in this State any policy in willful violation of the provisions of this Subchapter, shall be punished by a fine of not more than five hundred dollars ($500.00) for each offense, and the Commissioner of Insurance may revoke the license of any company, corporation, association, society, or other insurer of another state or country, or of the agent thereof, which or who willfully violates any provision of this Subchapter. (1911, c. 209, s. 6; 1913, c. 91, s. 13; C.S., s. 6490.)

CASE NOTES

Applicability of Former Rules of Evidence. — Former § 143-317(3) showed that former § 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the Insurance Law. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

ARTICLE 27A.

Health Insurance Advisory Board.

§ 58-262.1. Creation of Board.

There is hereby created the North Carolina Health Insurance Advisory Board. (1961, c. 1044, s. 1.)

State Government Reorganization. — The Health Insurance Advisory Board was transferred to the Department of Insurance by § 143A-77, enacted by Session Laws 1971, c. 864.

§ 58-262.2. Membership of Board; appointment; terms; Commissioner of Insurance ex officio member.

The membership of said Board shall consist of nine members to be appointed as follows:

(1) Five members of the Board shall be appointed from the public at large by the Governor of North Carolina, and four members of the Board shall be appointed from the insurance industry by the Governor of North Carolina upon the recommendation of the Commissioner of Insurance of North Carolina. All of the members of the Board so appointed shall be citizens and residents of the State of North Carolina.

(2) The term of office of the members of said Board shall be as follows: Three public members and two industry members shall be appointed for original two-year terms commencing September 15, 1967. Two public members and two industry members shall be appointed for original four-year terms commencing September 15, 1967; thereafter, all appointments shall be for terms of four years: Provided, however, each member may continue in office into the new term until his successor is appointed. No member shall by appointment or by continuance in office serve more than two consecutive four-year terms.

(3) The Commissioner of Insurance of the State of North Carolina shall be an ex officio member of said Board. (1961, c. 1044, s. 2; 1967, c. 634, s. 1.)

§ 58-262.3. Organization and other meetings; election of officers; adoption of rules; expenses and per diem paid from Department of Insurance appropriations.

(a) The Commissioner of Insurance shall call the initial meeting of the Board on or before October 1, 1961, for the purpose of organization of the Board. The Board at its initial meeting shall elect from its membership a chairman and such other officers as it may deem necessary.

(b) The Board shall adopt such rules as it may deem necessary for the discharge of its duties, not inconsistent with law.

(c) The Board may meet at such times and places as the Board may determine; provided, that the Board shall meet at least quarterly during each calendar year.

(d) The expenses and per diem of the Board shall be paid from the appropriation made to the North Carolina Department of Insurance and where funds are insufficient for this purpose, the Commissioner of Insurance shall request additional appropriations for this purpose from the Contingency and Emergency Fund. (1961, c. 1044, s. 3.)

§ 58-262.4. Review of analysis of complaints; calling company before Board to examine its operation and procedure; reprimanding, placing on probation or suspending license; study of health insurance industry and making recommendations.

The Board shall review an analysis of complaints prepared by the Department of Insurance relating to the health insurance industry at least quarterly during each calendar year.

The Board may call upon any company selling health insurance in the State of North Carolina to appear before the Board when in the opinion of the Board and the Commissioner of Insurance such company is not operating in the public interest, to the end that the Board and the Commissioner may examine their operations and procedures.

If in the opinion of the Board and the Commissioner of Insurance, any company is not operating in the public interest such company may be reprimanded, or placed on probation, or have its license suspended.

The Board shall also make such study of the health insurance industry as it deems necessary to insure better service to the public, and may recommend to the industry such procedures and changes resulting from each study, and the Board may recommend to the Governor of North Carolina for transmission to the General Assembly any legislation that the Board shall deem necessary. (1961, c. 1044, s. 4.)

§ 58-262.5. Immunity of Board and Commissioner of Insurance from civil suit or criminal prosecution.

The Board and the Commissioner of Insurance shall be immune from civil suit or criminal prosecution as a result of any findings, recommendations or action taken while performing their duties under this Article; provided, that any order or decision made by the Board and the Commissioner of Insurance shall be subject to the provisions of G.S. 58-9.3, and the Board shall be subject to said Article wherever said section shall refer to the Commissioner of Insurance as fully as if the said Board were referred to in said statute. (1961, c. 1044, s. 5.)

§ 58-262.6. Board may subpoena persons and records, administer oaths and take testimony.

The Board shall have the power to subpoena persons and records necessary to carry out its duties, and shall have the power to administer oaths and take testimony in the performance of its duties. (1961, c. 1044, s. 6.)

§ 58-262.7. Per diem and travel allowances of members.

The members of the Board shall receive as compensation the same per diem allowance given to members of other State commissions and boards while in the actual performance of their duties, and shall receive travel allowance upon the same basis as that given to employees of the State of North Carolina when travelling in the performance of their official duties. (1961, c. 1044, s. 7.)

§§ 58-262.8 to 58-262.12: Reserved for future codification purposes.

Article 27B.

Medicare Supplement Insurance Minimum Standards.

§ 58-262.13. Definitions.

Unless the context clearly indicates otherwise, the following words and phrases shall have the following meanings:

(1) "Applicant" means:
   a. In the case of an individual Medicare supplement policy or subscriber contract, the person who seeks to contract for insurance benefits; and
   b. In the case of a group Medicare supplement policy or subscriber contract, the proposed certificate holder.

(2) "Certificate" means, for the purposes of this Article, any certificate issued under a group Medicare supplement policy, which policy has been delivered or issued for delivery in this State.

(3) "Medicare" means the "Health Insurance for the Aged Act," Title XVIII of the Social Security Amendments of 1965, as then constituted or later amended.

(4) "Medicare supplement policy" means a group or individual policy of accident and sickness insurance or a subscriber contract of a hospital, medical, and/or dental service corporation organized under General Statutes Chapter 57, which policy or contract is advertised, marketed, or designed primarily as a supplement to reimbursements under

Medicare for the hospital, medical, and surgical expenses of persons eligible for Medicare by reason of age. Such term does not include:

a. A policy or contract of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations, or combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organizations, or

b. A policy or contract of any professional, trade or occupational association for its members or former or retired members, or combination thereof, if such association:

1. Is composed of individuals all of whom are actively engaged in the same profession, trade or occupation;
2. Has been maintained in good faith for purposes other than obtaining insurance; and
3. Has been in existence for at least two years prior to the date of its initial offering of such policy or plan to its members.

c. Individual policies or contracts issued pursuant to a conversion privilege under a policy or contract of group or individual insurance when such group or individual policy or contract includes provisions which are inconsistent with the requirements of this Article. (1981, c. 503, s. 1; c. 1127, s. 58.)

Editor's Note. — Session Laws 1981, c. 503, s. 2, makes the act effective July 1, 1982.

Effect of Amendments. — The 1981 amendment, in subdivision (4), substituted "General Statutes Chapter 57," for "Chapter 57 of the General Statutes," inserted "policy or contract" preceding "is advertised" and substituted "and" for "or" preceding "surgical expenses," all in the first sentence.

Session Laws 1981, c. 1127, s. 89, contains a severability clause.

§ 58-262.14. Standards for definitions in policies.

No insurance policy or subscriber contract may be advertised, solicited or issued for delivery in this State as a Medicare supplement policy unless that policy or subscriber contract contains definitions or terms which conform to the requirement of this section.

(1) "Accident," "Accidental Injury," or "Accidental Means" shall be defined to employ "result" language and shall not include words which establish an accidental means test or use words such as "external, violent, visible wounds" or similar words of description or characterization.

a. The definition shall not be more restrictive than the following: "Injury or injuries for which benefits are provided means accidental bodily injury sustained by the insured person which is the direct result of an accident, independent of disease or bodily infirmity or any other cause, and occurs while insurance coverage is in force."

b. Such definition may provide that injuries shall not include injuries for which benefits are provided under any workers' compensation, employer's liability or similar law, or injuries occurring while the insured person is engaged in any activity pertaining to any trade, business, employment, or occupation for wage or profit.

(2) "Benefit Period" or "Medicare Benefit Period" shall not be defined as more restrictive than as that defined in the Medicare program.

(3) "Convalescent Nursing Home," "Extended Care Facility," or "Skilled Nursing Facility" shall be defined in relation to its status, facilities and available services.

a. A definition of such home or facility shall not be more restrictive than one requiring that it:
   1. Be operated pursuant to law;
   2. Be approved for payment of Medicare benefits or be qualified to receive such approval, if so requested;
   3. Be primarily engaged in providing, in addition to room and board accommodations, skilled nursing care under the supervision of a duly licensed physician;
   4. Provide continuous 24 hours a day nursing service by or under the supervision of a registered graduate professional nurse (R.N.); and
   5. Maintains a daily medical record of each patient.

b. The definition of such home or facility may provide that such term shall not be inclusive of:
   1. Any home, facility or part thereof used primarily for rest;
   2. A home or facility for the aged or for the care of drug addicts or alcoholics; or
   3. A home or facility primarily used for the care and treatment of mental diseases or disorders, or custodial or educational care.

(4) "Hospital" may be defined in relation to its status, facilities and available services or to reflect its accreditation by the Joint Commission on Accreditation of Hospitals.

a. The definition of the term "hospital" shall not be more restrictive than one requiring that the hospital:
   1. Be an institution operated pursuant to law; and
   2. Be primarily and continuously engaged in providing or operating, either on its premises or in facilities available to the hospital on a prearranged basis and under the supervision of a staff of duly licensed physicians, medical, diagnostic and major surgical facilities for the medical care and treatment of sick or injured persons on an inpatient basis for which a charge is made; and
   3. Provide 24 hour nursing service by or under the supervision of registered graduate professional nurses (R.N.'s).

b. The definition of the term "hospital" may state that such term shall not be inclusive of:
   1. Convalescent homes, convalescent, rest, or nursing facilities; or
   2. Facilities primarily affording custodial, educational or rehabilitative care; or
   3. Facilities for the aged, drug addicts or alcoholics; or
   4. Any military or veterans' hospital or soldiers' home or any hospital contracted for or operated by any national government or agency thereof for the treatment of members or ex-members of the armed forces, except for services rendered on an emergency basis where a legal liability exists for charges made to the individual for such services.

(5) "Medicare" shall be defined in the policy. Medicare may be substantially defined as "The Health Insurance for the Aged Act, Title XVIII of the Social Security Amendments of 1965 as Then Constituted or Later Amended," or "Title I, Part I of Public Law 39-97, as Enacted by the Eighty-Ninth Congress of the United States of America and popularly known as the Health Insurance for the Aged Act," "as then constituted and any later amendments or substitutes thereof," or words of similar import.

(6) "Medicare Eligible Expenses" shall mean health care expenses of the kinds covered by Medicare, to the extent recognized as reasonable by Medicare. Payment of benefits by insurers for Medicare eligible expenses may be conditioned upon the same or less restrictive payment conditions, including determinations of medical necessity as are applicable to Medicare claims.

(7) "Mental or Nervous Disorders" shall not be defined more restrictively than a definition including neurosis, psychoneurosis, psychopathy, psychosis, or mental or emotional disease or disorder of any kind.

(8) "Nurses" may be defined so that the description of nurse is restricted to a type of nurse, such as registered graduate professional nurse (R.N.), a licensed practical nurse (L.P.N.), or a licensed vocational nurse (L.V.N.). If the words "nurse," "trained nurse" or "registered nurse" are used without specific instruction, then the use of these terms requires the insurer to recognize the services of any individual who qualified under the terminology in accordance with the applicable statutes or administrative rules of the licensing or registry board of the State.

(9) "Physician" may be defined by including words like "duly qualified physician" or "duly licensed physician." The use of these terms requires an insurer to recognize and to accept, to the extent of its obligation under the contract, all providers of medical care and treatment when the services are within the scope of the provider's licensed authority and are provided pursuant to applicable laws.

(10) "Sickness" shall not be defined to be more restrictive than the following: "Sickness means sickness or disease of an insured person which first manifests itself after the effective date of insurance and while the insurance is in force." The definition may be further modified to exclude sicknesses or diseases for which benefits are provided under any workers' compensation, occupational disease, employer's liability or similar law. (1981, c. 503, s. 1.)

§ 58-262.15. Prohibited policy provisions.

(a) No insurance policy or subscriber contract may be advertised, solicited or issued for delivery in this State as a Medicare supplement policy if that policy or subscriber contract limits or excludes coverage by type of illness, accident, treatment or medical condition, except as follows:

(1) Mental or emotional disorders, alcoholism and drug addiction;

(2) Illness, treatment or medical condition arising out of;

a. War or act of war (whether declared or undeclared); participation in a felony, riot or insurrections; service in the armed forces or units auxiliary thereto;

b. Suicide (sane or insane), attempted suicide or intentionally self-inflicted injury;

c. Aviation;

(3) Cosmetic surgery, except that "cosmetic surgery" shall not include reconstructive surgery when the service is incidental to or follows surgery resulting from trauma, infection or other diseases of the involved part;

(4) Treatment provided in a governmental hospital; benefits provided under Medicare or other governmental program (except Medicaid), any State or federal workers' compensation, employer's liability or occupational disease law, or any motor vehicle no-fault law; services rendered by employees of hospitals, laboratories or other institutions; services performed by a member of the covered person's immediate family and services for which no charge is normally made in the absence of insurance;

(5) Dental care or treatment;
(6) Eye glasses, hearing aids and examination for the prescription or fitting thereof;
(7) Rest cures, custodial care, transportation and routine physical examinations;
(8) Territorial limitations;

provided, however, Medicare supplement policies may not contain, when issued, limitations or exclusions of the type enumerated in subdivisions (7) or (8) of this subsection that are more restrictive than those of Medicare. Medicare supplement policies may exclude coverage for any expense to the extent of any benefit available to the insured under Medicare.

(b) Medicare supplement policy coverages for the following shall not be more restrictive than those of Medicare:

(1) Foot care in connection with corns, calluses, flat feet, fallen arches, weak feet, chronic foot strain, or symptomatic complaints of the feet;
(2) Care in connection with the detection and correction by manual or mechanical means of structural imbalance, distortion, or subluxation in the human body for purposes of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxation of, or in the vertebral column.

(c) No Medicare supplement policy may use waivers to exclude, limit, or reduce coverage or benefits for specifically named or described preexisting diseases or physical conditions. (1981, c. 503, s. 1.)

§ 58-262.16. Minimum benefit standards.

No insurance policy or subscriber contract may be advertised, solicited or issued for delivery in this State as a Medicare supplement policy which does not meet the following minimum standards. These are minimum standards and do not preclude the inclusion of other provisions or benefits which are not inconsistent with these standards.

(1) General Standards. — The following standards apply to Medicare supplement policies and are in addition to all other requirements of this Article.
   a. A Medicare supplement policy may not deny a claim for losses incurred more than six months from the effective date of coverage for a preexisting condition. The policy may not define a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six months before the effective date of coverage.
   b. A Medicare supplement policy may not indemnify against losses resulting from sickness on a different basis than losses resulting from accidents.
   c. A Medicare supplement policy shall provide that benefits designed to cover cost sharing amounts under Medicare will be changed automatically to coincide with any changes in the applicable Medicare deductible amount and copayment percentage factors. Premiums may be modified to correspond with such changes.
   d. A "noncancellable," "guaranteed renewable," or "noncancellable and guaranteed renewable" Medicare supplement policy shall not:
      1. Provide for termination of coverage of a spouse solely because of the occurrence of an event specified for termination of coverage of the insured, other than the nonpayment of premium, or

2. Be canceled or nonrenewed by the insurer solely on the grounds of deterioration of health; and

e. Termination of a Medicare supplement policy shall be without prejudice to any continuous loss which commenced while the policy was in force, but the extension of benefits beyond the period during which the policy was in force may be predicated upon the continuous total disability of the insured, limited to the duration of the policy benefit period, if any, or payment of the maximum benefits.

(2) Minimum Benefit Standards. —

a. Coverage of Part A Medicare eligible expenses for hospitalization to the extent not covered by Medicare from the sixty-first day through the ninetieth day in any Medicare benefit period;

b. Coverage of Part A Medicare eligible expenses incurred as daily hospital charges during use of Medicare's lifetime hospital inpatient reserve days;

c. Upon exhaustion of all Medicare hospital inpatient coverage including the lifetime reserve days, coverage of ninety percent (90%) of all Medicare Part A eligible expenses for hospitalization not covered by Medicare subject to a lifetime maximum benefit of an additional 365 days;

d. Coverage of twenty percent (20%) of the amount of Medicare eligible expenses under Part B regardless of hospital confinement, subject to a maximum calendar year out-of-pocket deductible of two hundred dollars ($200.00) of such expenses and to a maximum benefit of at least five thousand dollars ($5,000) per calendar year. (1981, c. 503, s. 1.)

§ 58-262.17. Loss ratio standards.

Medicare supplement policies shall be expected to return to policyholders in the form of aggregate benefits under the policy, as estimated for the entire period for which rates are computed to provide coverage, on the basis of incurred claims experience and earned premiums for such period and in accordance with accepted actuarial principles and practices:

(1) At least seventy-five percent (75%) of the aggregate amount of premiums collected in the case of group policies, and

(2) At least sixty percent (60%) of the aggregate amount of premiums collected in the case of individual policies.

For purposes of this section, Medicare supplement policies issued as a result of solicitations of individuals through the mail or mass media advertising, including both print and broadcast advertising, shall be treated as individual policies. (1981, c. 503, s. 1.)

§ 58-262.18. Disclosure standards.

(a) Outline of Coverage to Be Delivered to Applicant. — In order to provide for full and fair disclosure in the sale of Medicare supplement policies, no Medicare supplement policy shall be delivered or issued for delivery in this State and no certificate shall be delivered pursuant to a group Medicare supplement policy delivered or issued for delivery in this State unless an outline of coverage is delivered to the applicant at the time application is made.

(b) General Rules. —

(1) Medicare supplement policies shall include a renewal, continuation or nonrenewal provision. The language or specifications of that provision must be consistent with the type of contract to be issued. The provision shall be appropriately captioned, shall appear on the first page of the

policy, and shall clearly state the duration, where limited, of renewability and the duration of the term of coverage for which the policy is issued and for which it may be renewed.

(2) Except for riders or endorsements by which the insured effectuates a request made in writing by the insured or exercises a specifically reserved right under a Medicare supplement policy, all riders or endorsements added to a Medicare supplement policy after date of issue or at reinstatement or renewal which reduce or eliminate benefits or coverage in the policy shall require signed acceptance by the insured. After the date of policy issue, any rider or endorsement which increases benefits or coverage with a concomitant increase in premium during the policy term must be agreed to in writing signed by the insured, except if the increased benefits of coverage are required by law. Where a separate additional premium is charged for benefits provided in connection with riders or endorsements, such premium charge shall be set forth in the policy.

(3) A Medicare supplement policy which provides for the payment of benefits based on standards described as "usual and customary," "reasonable and customary" or words of similar import shall include a definition of these terms and an explanation of these terms in its accompanying outline of coverage.

(4) If a Medicare supplement policy contains any limitations with respect to preexisting conditions, the limitations must appear as a separate paragraph of the policy and be labeled as "Preexisting Condition Limitations."

(5) Medicare supplement policies or certificates, other than those issued pursuant to direct response solicitation, shall have a notice prominently printed on the first page of the policy or attached thereto stating in substance that the policyholder or certificate holder shall have the right to return the policy or certificate within 10 days of its delivery and to have the premium refunded if, after examination of the policy or certificate, the insured person is not satisfied for any reason, if the benefits have not been used. Medicare supplement policies or certificates issued pursuant to a direct response solicitation to persons eligible for Medicare by reason of age shall have a notice prominently printed on the first page or attached thereto stating in substance that the policyholder or certificate holder shall have the right to return the policy or certificate within 30 days of its delivery and to have the premium refunded if after examination the insured person is not satisfied for any reason.

(6) Insurers issuing accident and sickness policies, certificates or subscriber contracts which provide hospital or medical expense coverage on an expense incurred or indemnity basis, other than incidentally, to a person(s) eligible for Medicare by reason of age shall provide to all applicants a Medicare supplement "buyer's guide" in the form prescribed by the Commissioner. Delivery of the "buyer's guide" shall be made whether or not the policies, certificates or subscriber contracts are advertised, solicited or issued as Medicare supplement policies as defined in this regulation. Except in the case of direct response insurers, delivery of the "buyer's guide" shall be made to the applicant at the time of application and acknowledgment of receipt of the "buyer's guide" shall be obtained by the insurer. Direct response insurers shall deliver the "buyer's guide" to the applicant upon request but not later than at the time the policy is delivered.

(7) Except as otherwise provided in subsection (d) of this section, the terms "Medicare Supplement," "Medigap" and words of similar import shall not be used unless the policy is issued in compliance with G.S. 58-262.16.

(c) Outline of Coverage Requirements for Medicare Supplement Policies. —

(1) Insurers issuing Medicare supplement policies for delivery in this State shall provide an outline of coverage to all applicants at the time application is made and, except for direct response policies, shall obtain an acknowledgment of receipt of such outline from the applicant; and

(2) If a Medicare supplement policy or certificate is issued on a basis which would require revision of the outline of coverage delivered at the time of application, a substitute outline of coverage properly describing the policy or certificate actually issued must accompany such policy or certificate when it is delivered and contain the following statement, in no less than 12 point type, immediately above the company name:

"NOTICE: Read this outline of coverage carefully. It is not identical to the outline of coverage provided upon application and the coverage originally applied for has not been issued."

(3) The outline of coverage provided to applicants pursuant to subsections (1) or (2) shall be in the form prescribed below:

(COMPANY NAME)

OUTLINE OF MEDICARE

SUPPLEMENT COVERAGE

(1) Read Your Policy Carefully — This outline of coverage provides a very brief description of the important features of your policy. This is not the insurance contract and only the actual policy provisions will control. The policy itself sets forth in detail the rights and obligations of both you and your insurance company. It is, therefore, important that you READ YOUR POLICY CAREFULLY!

(2) Medicare Supplement Coverage — Policies of this category are designed to supplement Medicare by covering some hospital, medical, and surgical services which are partially covered by Medicare. Coverage is provided for hospital inpatient charges and some physician charges, subject to any deductibles and copayment provisions which may be in addition to those provided by Medicare, and subject to other limitations which may be set forth in the policy. The policy does not provide benefits for custodial care such as help in walking, getting in and out of bed, eating, dressing, bathing and taking medicine (delete if such coverage is provided).

(3) (a) (for agents:)

Neither (insert company's name) nor its agents are connected with Medicare.

(b) (for direct responses:) (insert company's name) is not connected with Medicare.

(4) (A brief summary of the major benefit gaps in Medicare Parts A & B with a parallel description of supplemental benefits, including dollar amounts, provided by the Medicare supplement coverage in the following order:)

SERVICE	*BENEFIT*	*PAYS*	*THIS POLICY PAYS*	*YOU PAY*
HOSPITALIZATION — semiprivate room and board, general nursing and miscellaneous hospital services and supplies.	First 60 days			
	61st to 90th day			

SERVICE	*BENEFIT*	*PAYS*	*THIS POLICY PAYS*	*YOU PAY*
Includes means, special care units, drugs, lab tests, diagnostic X-rays, medical supplies, operating and recovery room, anesthesia and rehabilitation services.	91st to 150th day			
	Beyond 150 days			
POSTHOSPITAL SKILLED NURSING CARE — In a facility approved by Medicare, you must have been in a hospital for at least three days and enter the facility within 14 days after hospital discharge	First 20 days			
	Additional 80 days			
	Beyond 100 days			
MEDICAL EXPENSE — Physician's services inpatient and outpatient medical services and supplies at a hospital, physical and speech therapy and ambulance.				

(5) (Statement that the policy does or does not cover the following:)
- (a) Private duty nursing;
- (b) Skilled nursing home care costs (beyond what is covered by Medicare);
- (c) Custodial nursing home care costs;
- (d) Intermediate nursing home care costs;
- (e) Home health care above number of visits covered by Medicare;
- (f) Physician charges (above Medicare's reasonable charge);
- (g) Drugs (other than prescription drugs furnished during a hospital or skilled nursing facility stay);
- (h) Care received outside of U.S.A.;
- (i) Dental care or dentures, checkups, routine immunizations, cosmetic surgery, routine foot care, examinations for the cost of eyeglasses or hearing aids.

(6) (A description of any policy provisions which exclude, eliminate, resist, reduce, limit, delay, or in any other manner operate to qualify

payments of the benefits described in (4) above, including conspicuous statements.)

(a) (That the chart summarizing Medicare benefits only briefly describes such benefits.)

(b) (That the Health Care Financing Administration or its Medicare publications should be consulted for further details and limitations.)

(7) (A description of policy provisions respecting renewability or continuation of coverage, including any reservation or rights to change premium.)

(8) (The amount of premium for this policy.)

(d) Notice Regarding Policies or Subscriber Contracts Which Are Not Medicare Supplement Policies. — Any accident and sickness insurance policy or subscriber contract, other than a Medicare supplement policy; disability income policy; basic, catastrophic, or major medical expense policy; single premium nonrenewable policy or policy identified in G.S. 58-262.13(4)b issued for delivery in this State to persons eligible for Medicare by reason of age shall notify insureds under the policy or subscriber contract that the policy or subscriber contract is not a Medicare supplement policy. This notice shall either be printed or attached to the first page of the outline of coverage delivered to insureds under the policy or subscriber contract, or if no outline of coverage is delivered, to the first page of the policy, certificate or subscriber contract delivered to insureds. This notice shall be in no less than 12 point type and shall contain the following language: "THIS (POLICY, CERTIFICATE OR SUBSCRIBER CONTRACT) IS NOT A MEDICARE SUPPLEMENT (POLICY OR CERTIFICATE). If you are eligible for Medicare review the Medicare Supplement Buyers Guide available from the company." (1981, c. 503, s. 1.)

§ 58-262.19. Requirements for replacement.

(a) Application forms shall include a question designed to elicit information as to whether a Medicare supplement policy or certificate is intended to replace any other accident and sickness policy or certificate presently in force. A supplementary application or other form to be signed by the applicant containing this question may be used.

(b) Upon determining that a sale will involve replacement, an insurer, other than a direct response insurer, or its agent, shall furnish the applicant, prior to issuance or delivery of the Medicare supplement policy or certificate, a notice regarding replacement of accident and sickness coverage. One copy of this notice shall be provided to the applicant and an additional copy signed by the applicant shall be retained by the insurer. A direct response insurer shall deliver to the applicant at the time of the issuance of the policy the notice regarding replacement of accident and sickness coverage. In no event, however, will a notice be required in the solicitation of "accident only" and "single premium nonrenewable" policies.

(c) The notice required by subsection (b) above for an insurer, other than a direct response insurer, shall be provided, in substantially the following form:

NOTICE TO APPLICANT REGARDING REPLACEMENT

OF ACCIDENT AND SICKNESS INSURANCE

According to (your application) (information you have furnished), you intend to lapse or otherwise terminate existing accident and sickness insurance and replace it with a policy to be issued by (Company Name) Insurance Company. Your new policy provides 10 days within which you may decide without cost whether you desire to keep the policy. For your own information and

protection, you should be aware of and seriously consider certain factors which may affect the insurance protection available to you under the new policy.

(1) Health conditions which you may presently have (preexisting conditions) may not be immediately or fully covered under the new policy. This could result in denial or delay of a claim for benefits under the new policy, whereas a similar claim might have been payable under your present policy.

(2) You may wish to secure the advice of your present insurer or its agent regarding the proposed replacement of your present policy. This is not only your right, but it is also in your best interest to make sure you understand all the relevant factors involved in replacing your present coverage.

(3) If, after due consideration, you still wish to terminate your present policy and replace it with new coverage, be certain to truthfully and completely answer all questions on the application concerning your medical/health history. Failure to include all material medical information on an application may provide a basis for the company to deny any future claims and to refund your premium as though your policy had never been in force. After the application has been completed and before you sign it, reread it carefully to be certain that all information has been properly recorded.

The above "Notice to Applicant" was delivered to me on:

. . . . . .
(Date)

. . . . . .
(Applicant's Signature)

(d) The notice required by subsection (b) above for a direct response shall be as follows:

NOTICE TO APPLICANT REGARDING REPLACEMENT
OF ACCIDENT AND SICKNESS INSURANCE

According to (your application) (information you have furnished), you intend to lapse or otherwise terminate existing accident and sickness insurance and replace it with the policy delivered herewith issued by (Company Name) Insurance Company. Your new policy provides 30 days within which you may decide without cost whether you desire to keep the policy. For your own information and protection, you should be aware of and seriously consider certain factors which may affect the insurance protection available to you under the new policy.

(1) Health conditions which you may presently have (preexisting conditions) may not be immediately or fully covered under the new policy. This could result in denial or delay of a claim for benefits under the new policy, whereas a similar claim might have been payable under your present policy.

(2) You may wish to secure the advice of your present insurer or its agent regarding the proposed replacement of your present policy. This is not only your right, but it is also in your best interest to make sure you understand all the relevant factors involved in replacing your present coverage.

(3) (To be included only if the application is attached to the policy.) If, after due consideration, you still wish to terminate your present policy and

replace it with new coverage, read the copy of the application attached to your new policy and be sure that all questions are answered fully and corrected. Omissions or misstatements in the application could cause an otherwise valid claim to be denied. Carefully check the application and write to (Company Name and Address) within 10 days if any information is not correct and complete, or if any past medical history has been left out of the application.

. . . . . .

(Company Name)

(1981, c. 503, s. 1.)

§ 58-262.20. Administrative procedure.

Regulations promulgated pursuant to G.S. 58-262.18(b)(6) shall be subject to the provisions of Chapter 150A of the General Statutes. (1981, c. 503, s. 1.)

SUBCHAPTER VII. FRATERNAL ORDERS AND SOCIETIES.

ARTICLE 28.

Fraternal Orders.

§ 58-263. General insurance law not applicable.

Nothing in the general insurance laws, except such as apply to fraternal orders or fraternal societies, shall be construed to extend to benevolent associations, incorporated under the laws of this State that only levy an assessment on the members to create a fund to pay the family of a deceased member and make no profit therefrom, and do not solicit business through agents. Such benevolent associations providing death benefits in excess of three hundred dollars ($300.00) to any one person, or disability benefits not exceeding three hundred dollars ($300.00) in any one year to any one person, or both, shall be known as "fraternal benefit societies"; and those providing benefits of three hundred dollars ($300.00) or less shall be known as "fraternal orders." (1899, c. 54, s. 87; 1901, c. 706, s. 2; Rev., s. 4794; 1913, c. 46; C.S., s. 6491.)

Cross References. — As to other assessment insurance, see § 58-105 et seq.

CASE NOTES

This section groups benevolent associations incorporated under the laws of this State into "fraternal benefit associations" and "fraternal orders." Gay v. Woodmen of the World, 179 N.C. 210, 102 S.E. 195 (1920).

Governance of Fraternal and Assessment Orders. — The enactment of this section makes it clear that fraternal and assessment orders shall be governed by their own rules and regulations as are authorized by the state of their origin. Hollingsworth v. Supreme Council of Royal Arcanum, 175 N.C. 615, 96 S.E. 81 (1918).

Applicability of § 58-30. — Section 58-30, providing that statements in an application for a policy of insurance shall be deemed representations which will not prevent a recovery on the policy unless material or fraudulent, is not applicable to a fraternal order as defined in § 58-264, but does apply to a fraternal benefit association incorporated

under the laws of another state. Gay v. Woodmen of the World, 179 N.C. 210, 102 S.E. 195 (1920).

§ 58-264. Fraternal orders defined.

Every incorporated association, order, or society doing business in this State on the lodge system, with ritualistic form of work and representative form of government, for the purpose of making provision for the payment of benefits of three hundred dollars ($300.00) or less in case of death, sickness, temporary or permanent physical disability, either as the result of disease, accident, or old age, formed and organized for the sole benefit of its members and their beneficiaries, and not for profit, is hereby declared to be a "fraternal order." Societies and orders which do not make insurance contracts or collect dues or assessments therefor, but simply pay burial or other benefits out of the treasury of their orders, and use their funds for the purpose of building homes or asylums for the purpose of caring for and educating orphan children and aged and infirm people in this State, shall not be considered as "fraternal orders" or "fraternal benefit societies" under this Subchapter; and such order or association paying death or disability benefits may also create, maintain, apply, or disburse among its membership a reserve or emergency fund as may be provided in its constitution or bylaws; but no profit or gain may be added to the payments made by a member. (1899, c. 54, s. 88; 1901, c. 706, s. 3; Rev., s. 4795; 1907, c. 936; 1913, c. 46; C.S., s. 6492.)

CASE NOTES

Cited in Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

§ 58-265. Funds derived from assessments and dues.

The fund from which the payment of benefits, as provided for in G.S. 58-264, shall be made, and the fund from which the expenses of such association, order or society shall be defrayed, shall be derived from assessments or dues collected from its members. Such societies or associations shall be governed by the laws of the state governing fraternal orders or societies, and are exempt from the provisions of all general insurance laws of this State, and no law hereafter passed shall apply to such societies unless fraternal orders or societies are designated therein. (1899, c. 54, s. 89; 1901, c. 706, s. 2; Rev., s. 4796; 1913, c. 46; C.S., s. 6493.)

CASE NOTES

Assessments Governed by Charter and Bylaws. — A fraternal society or association is governed by its own charter and bylaws and an assessment in accordance with its own laws is valid. Hollingsworth v. Supreme Council of Royal Arcanum, 175 N.C. 615, 96 S.E. 81 (1918).

Funds Held Not Subject to Attachment. — Where the constitution of a foreign fraternal insurance society provided for the creation of a fund to be raised from assessments upon its members for the benefit of widows and orphans of deceased members, any money paid to such fund was impressed with the qualities of a trust for the special purposes expressed, and such fund in the hands of a local collector, which he was bound to pay over to the society's treasurer, was not subject to an attachment by a creditor of the society. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

§ 58-266. Appointment of member as receiver or collector; appointee as agent for order or society; rights of members.

Assessments and dues referred to in G.S. 58-264 and 58-265 may be collected, receipted, and remitted by a member or officer of any local or subordinate lodge of any fraternal order or society when so appointed or designated by any grand, district, or subordinate lodge or officer, deputy, or representative of the same, there being no regular licensed agent or deputy of said grand lodge charged with said duties; but any person so collecting said dues or assessments shall be the agent or representative of such fraternal order or society, or any department thereof, and shall bind them by their acts in collecting and remitting said amounts so collected. Under no circumstances, regardless of any agreement, bylaws, contract, or notice, shall said officer or collector be the agent or representative of the individual member from whom any such collection is made; nor shall said member be responsible for the failure of such officer or collector to safely keep, handle, or remit said dues or assessments so collected, in accordance with the rules, regulations, or bylaws of said society; nor shall said member, regardless of any rules, regulations, or bylaws to the contrary, forfeit any rights under his certificate of membership in said fraternal benefit society by reason of any default or misconduct of any said officer or member so acting. (1921, c. 139; C.S., s. 6493(a).)

CASE NOTES

Waiver of Provisions of Certificate and Bylaws. — Where plaintiff's evidence showed that it had been the custom of defendant mutual benefit association's collecting agents to collect dues within 30 days after the due date, that defendant's home office knew of this custom, and that insured made payment of the dues for the preceding month within 30 days of the due date and died prior to the customary time for the collection of dues for the following month, it was held that the evidence was sufficient to be submitted to the jury on the question of defendant's waiver of the provisions of its certificate and bylaws, requiring a certificate of good health before reinstating a policy upon payment of premium after the due date, and upon the verdict of the jury plaintiff was entitled to judgment for the amount of the policy, less the dues for the month not paid. Shackelford v. Sovereign Camp of Woodmen of the World, 209 N.C. 633, 184 S.E. 691 (1936).

§ 58-267. Meetings of governing body; principal office.

Any such socieity or order incorporated and organized under the laws of this State may provide for the meeting of its supreme legislative or governing body in any other state, province, or territory wherein such society has subordinate lodges, and all business transacted at such meetings is as valid in all respects as if the meetings were held in this State; but the principal business office of such society shall always be kept in this State. (1899, c. 54, s. 91; Rev., s. 4797; 1913, c. 46; C.S., s. 6494; 1969, c. 1279.)

CASE NOTES

Quoted in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970).

§ 58-268. Conditions precedent to doing business.

Any such fraternal, beneficiary order, society, or association as defined by this Chapter, chartered and organized in this State or organized and doing business under the laws of any other state, district, province, or territory, having the qualifications required of domestic societies of like character, upon satisfying the Commissioner of Insurance that its business is proper and legitimate and so conducted, may be admitted to transact business in this State upon the same conditions as are prescribed by this Chapter for admitting and authorizing foreign insurance companies to do business in this State, except that such fraternal orders shall not be required to have the capital required of such insurance companies. Organizers or agents shall be licensed without requiring an examination. Provided, organizers or agents who are engaged in or intend to engage in the sale of individual policies of life insurance shall take the examination required of life insurance agents. Those organizers or agents licensed for the sale of insurance pursuant to G.S. 58-268 as of July 1, 1977, shall be exempt from examination. (1899, c. 54, s. 92; 1901, c. 706, s. 2; 1903, c. 438, s. 9; Rev., s. 4798; 1913, c. 46; C.S., s. 6495; 1959, c. 1190; 1977, c. 718.)

CASE NOTES

Cited in Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906); State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

§ 58-269. Certain lodge systems exempt.

The following beneficial orders or societies shall be exempt from the requirements of this Chapter, and shall not be required to pay any license tax or fees nor make any report to the Commissioner of Insurance, unless the assessments collected for death benefits by the supreme lodge amount to at least three hundred dollars ($300.00) in one year: beneficial fraternal orders, or societies incorporated under the laws of this State, which are conducted under the lodge system which have the supreme lodge or governing body located in this State, and which are so organized that the membership consists of members of subordinate lodges; that the subordinate lodges accept for membership only residents of the county in which such subordinate lodge is located; that each subordinate lodge issues certificates, makes assessments, and collects a fund to pay benefits to the widows and orphans of its own deceased members and their families each lodge independently of the others, for itself and independently of the supreme lodge; that each lodge controls the fund for this purpose; that in addition to the benefits paid by each subordinate lodge to its own members, the supreme lodge provides for an additional benefit for such of the members of the subordinate lodges as are qualified, at the option of the subordinate lodge members; that such organization is not conducted for profit, has no capital stock, and has been in operation for 10 years in this State.

The Commissioner of Insurance may require the chief or presiding officer, or the secretary, to file annually an affidavit that such organization is entitled to this exemption. (1911, c. 199; C.S., s. 6496.)

§ 58-270. Fraternal benefit society defined.

Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which

makes provision for the payment of benefits as hereafter prescribed in this Article, is declared to be a fraternal benefit society. (1913, c. 89, s. 1; C.S., s. 6497.)

CASE NOTES

Applied in Equitable Trust Co. v. Widows' Fund of Oasis & Omar Temples, 207 N.C. 534, 177 S.E. 799 (1935).

§ 58-271. Lodge system defined.

A society having a supreme governing or legislative body and subordinate lodges or branches, by whatever name known, into which members are elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches are required by the laws of such society to hold regular or stated meetings at least once in each month, is deemed to be operating on the lodge system. (1913, c. 89, s. 2; C.S., s. 6498.)

§ 58-272 . Representative form of government defined.

A society is deemed to have a representative form of government when it provides in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: Provided that the elective members constitute a majority in number and have not less than two thirds of the votes, nor less than the votes required to amend its constitution and laws; and provided further, that the meetings of the supreme or governing body, and the election of officers, representatives, or delegates, are held as often as once in four years. The members, officers, representatives, or delegates of a fraternal benefit society shall not vote by proxy. (1913, c. 89, s. 3; C.S., s. 6499.)

§ 58-273. Organization.

(a) Application. — Ten or more persons, citizens of the United States, and a majority of whom are citizens of this State, who desire to form a fraternal benefit society, as defined by this Article, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgement of deeds, articles of incorporation in which shall be stated:

(1) The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this State as to mislead the public or lead to confusion.

(2) The purpose for which it is formed — which shall not include more liberal powers than are granted by this Article: Provided, that any lawful social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society — and the mode in which its corporate powers are to be exercised.

(3) The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall

be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

(b) Papers and Bond Filed. — Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor, and circulars to be issued by such society, and a bond in the sum of five thousand dollars ($5,000), with sureties approved by the Commissioner of Insurance, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the Commissioner of Insurance, who may require such further information as he deems necessary.

(c) Preliminary License. — If the purposes of the society conform to the requirements of this Article, and all provisions of law have been complied with, the Commissioner of Insurance shall so certify to the Secretary of State and upon his issuing the articles of incorporation shall furnish the incorporators a preliminary license authorizing the society to solicit members as hereinafter provided.

(d) Completion of Organization. — Upon receipt of such license from the Commissioner of Insurance the society may solicit members for the purpose of completing its organization, and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least 500 lives for at least one thousand dollars ($1,000) each, or the largest amount written on any one person, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established 10 subordinate lodges or branches into which said 500 applicants have been initiated; nor until there has been submitted to the Commissioner of Insurance under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, according to mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies; nor until it shall be shown to the Commissioner of Insurance by the sworn statement of the treasurer, or corresponding officer of such society, that at least 500 applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars ($1,000) of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars ($2,500). Such advanced payments shall be credited to the mortuary or disability fund on account of such applicants, and no part thereof may be used for expenses, but such payments shall be held in trust and returned to the applicants if the organization is not completed within one year as hereinafter provided.

(e) License Issued. — The Commissioner of Insurance may make such examination and require such further information as he deems advisable, and, upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate or license to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate.

(f) One-Year Limit. — No preliminary certificate or license granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the Commissioner of Insurance, upon cause shown unless the 500 applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of such preliminary certificate, or at the expiration of such extended period, unless the society shall have completed its organization and commenced business as herein provided.

(g) Discontinuance. — When any domestic society shall have discontinued business for the period of one year, or has less than 400 members, its charter shall become null and void. (1913, c. 89, s. 11; C. S., s. 6500; 1981, c. 834, s. 1.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted, near the end of the second sentence of subsection (d) "according to mortality, morbidity and interest standards permitted by the laws of this State for use by life insurance companies" for "when valued for death benefits 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 at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by tables based upon reliable experience, with interest assumption not higher than four percent (4%) per annum."

§ 58-274. Constitution and bylaws.

Each society shall have power to make a constitution and bylaws 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; it shall have the power to change or amend such constitution and bylaws, and it shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. (1913, c. 89, s. 11; C.S., s. 6501.)

§ 58-275. Amendments to constitution and bylaws.

Every society transacting business under this Article shall file with the Commissioner of Insurance a duly certified copy of all amendments of or additions to its constitution and laws within 90 days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. (1913, c. 89, s. 19; C.S., s. 6502.)

CASE NOTES

Failure to File Copy of Amendments. — As to suspension of member where copy of amendments not filed, see Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917), appeal dismissed, 249 U.S. 583, 39 S. Ct. 287, 63 L. Ed. 787 (1919).

§ 58-276. Waiver of the provisions of the laws.

The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every

member thereof, and on all beneficiaries of members. (1913, c. 89, s. 17; C.S., s. 6503.)

CASE NOTES

For case distinguishing between waiver by local agents, prohibited by this section, and a custom of dealing established over a period of years to the knowledge of the home office, see Shackelford v. Sovereign Camp of Woodmen of the World, 209 N.C. 633, 184 S.E. 691 (1936).

§ 58-277. Place of meeting; location of office.

Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this State; but its principal office shall be located in this State. (1913, c. 89, s. 15; C.S., s. 6504.)

§ 58-278. No personal liability for benefits.

Officers and members of the supreme, grand, or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society; but the same shall be payable only out of the funds of such society and in the manner provided by its laws. (1913, c. 89, s. 16; C.S., s. 6505.)

§ 58-279. Qualifications for membership.

Any society may admit to beneficial membership any person not less than 16 and not more than 60 years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society: Provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. (1913, c. 89, s. 6; C.S., s. 6506.)

CASE NOTES

Construction of Word "Year". — The word "year" in this section should be construed as a calendar year, as set forth in § 12-3(3). The word "year" in a funeral benefit association bylaw relative to membership in the association should be likewise construed. Green v. Patriotic Order of Sons of Am., 242 N.C. 78, 87 S.E.2d 14 (1955).

§ 58-280. Benefits.

(a) Every society transacting business under this Article 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, and for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits: Provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under 70 years. Such society shall have the

power to give a member, when permanently disabled or on attaining the age of 70, all or such portion of the face value of his certificate as the laws of the society may provide; but nothing contained in this Article 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 the death or disability of the member occurring within the term for which the benefit certificate 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 four percent (4%) per annum; but 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.

(b) Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American Experience Table and four percent (4%) interest, or by such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies, may grant to its members extended and paid-up protection, or such withdrawal equities as its constitution and laws may provide; but such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (1913, c. 89, s. 4; C.S., s. 6507; 1981, c. 834; s. 2.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, inserted "or by such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies" in subsection (b).

§ 58-281. Beneficiaries.

The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member, or, with the consent of the society, any charitable institution maintained by the society; and if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of the member. Any society may, by its laws, limit the scope of beneficiaries within the above classes.

Provided, however, that any member or insured named in any contract or certificate of insurance issued by any beneficial fraternal order, lodge, society, or other insurance association, who has neither lawful spouse nor offspring, shall have the right, without regard to the amount payable thereunder, to have the death benefit provided for in any such contract or certificate of insurance made payable, or to have the named beneficiary changed, to the estate of such member or insured, or to his or her executors or administrators, and to make a testamentary disposition of the proceeds thereof, or to have such death benefit made payable, or to have the named beneficiary changed, to a trustee to be named by such member or insured, and to impress the proceeds in the hands of such trustee with a trust, the terms and provisions of the charter, rules, bylaws and regulations of any such beneficial fraternal order, lodge, society, or other insurance association, to the contrary notwithstanding:

Provided further, that in case a husband or wife is designated as beneficiary and subsequently becomes absolutely divorced from the member or insured, such divorce shall automatically annul the designation. (1913, c. 89, s. 5; C.S., s. 6508; 1931, c. 161; 1937, c. 178.)

Legal Periodicals. — For comment on the effects of the 1937 amendment adding the second paragraph, see 15 N.C.L. Rev. 357.

CASE NOTES

A contract in the form of a life insurance policy with a mutual benefit society, which contract stipulates that insured agrees that the society is a fraternal benefit society as defined by § 58-270, is a fraternal benefit contract, not an insurance policy, and is governed by this section. Equitable Trust Co. v. Widows' Fund of Oasis & Omar Temples, 207 N.C. 534, 177 S.E. 799 (1935).

Meaning of "Legal Dependent". — Legal dependent means something more than one who is deriving support from another. It imports one who has the right to invoke the aid of the law to require support. And the status of a wife living with her husband as being his legal dependent, entitled in law to his support, is recognized by our statutes. National Council, Junior Order United Am. Mechanics v. Tate, 212 N.C. 305, 193 S.E. 397, 113 A.L.R. 1514 (1937).

This section expressly grants to the insurer the right to circumscribe the statutory permissive class. Having the right to circumscribe such class, the insurer of course has the right to make its limitation absolute, or it can fix a permissive class of beneficiaries. Widows Fund of Sudan Temple v. Umphlett, 246 N.C. 555, 99 S.E.2d 791 (1957).

Effect of Attempt to Name Beneficiary Not Qualified to Take. — This section defines the class who may be beneficiaries in a certificate issued by a fraternal benefit society. An attempt to name a beneficiary outside of the class therein limited confers no right on the person so designated. Widows Fund of Sudan Temple v. Umphlett, 246 N.C. 555, 99 S.E.2d 791 (1957).

Where assured named wife as beneficiary and afterwards substituted the name of another, disqualified to take under the statute, such attempted change was not a revocation of the provisions of the policy first issued and left it in force. Andrews v. Most Worshipful Grand Lodge Free & Accepted Order of Masons, 189 N.C. 697, 128 S.E. 4 (1925).

Annulment of Beneficiary Designation by Absolute Divorce. — Although the legislature has provided in this section that absolute divorce automatically annuls the designation of a husband or wife as beneficiary in a policy issued by a fraternal order or society, policies of that type are sui generis. There is no similar provision applicable to insurance policies generally. DeVane v. Travelers Ins. Co., 8 N.C. App. 247, 174 S.E.2d 146 (1970).

Bigamous Wife's Right to Recover. — A fraternal assessment benefit association having a representative form of government may, by its contract and constitution, confine the beneficiaries to certain blood relatives, wife, affianced wife, persons dependent upon the member, etc., in conformity with the laws of the state wherein it has its head organization; and where such beneficiary sues upon a policy, claiming as the wife of the deceased member, and it appears that in fact the marriage was bigamous, she may not recover, though the certificate states she was his wife. Applebaum v. Order of United Com. Travelers of Am., 171 N.C. 435, 88 S.E. 722 (1916).

Nature of Right of Beneficiary. — Within the restrictions of this section, the beneficiary may be changed by the mere will of the member and without the beneficiary's consent. In such case, the right of the beneficiary is not property, but a mere expectancy, dependent on the will of the member to whom the certificate is issued. For this reason the beneficiary's interest in the certificate and contract evidenced thereby differs totally from the interest of a beneficiary named in an ordinary life insurance policy containing no provision for the designation of a new beneficiary. Pollick v. Household of Hardy, 150 N.C. 211, 63 S.E. 940 (1909).

The right of the insured to change the beneficiary is declared and guaranteed by this section. Hence, anyone named as beneficiary has, during the life of the insured, no vested right in the certificate. It is a mere expectancy. Widows Fund of Sudan Temple v. Umphlett, 246 N.C. 555, 99 S.E.2d 791 (1957).

Insured's Brother Held Entitled to Proceeds to Exclusion of Insured's Wife's Nephew. — Where insured's wife was named beneficiary, and after her death insured's brother, who became the beneficiary under the terms of the certificate as insured's nearest blood relation, kept the certificate in force until the death of the insured a short time thereafter,

it was held that under the terms of the certificate the insured's brother was entitled to the proceeds thereof, to the exclusion of the wife's nephew who claimed under the will of the wife, the payment of dues or premiums alone being insufficient to create a lien against the certificate, or the proceeds thereof, and the wife at no time having any vested interest as the named beneficiary which she could bequeath by will. Sorrell v. Sovereign Camp, Woodmen of the World, 209 N.C. 226, 183 S.E. 400 (1936).

Trustee as Beneficiary. — Prior to the 1937 amendment, an incorporated trust company, authorized by a trust agreement to collect the proceeds of life insurance policies on the life of the trustor upon his death, could not be named beneficiary in a fraternal benefit contract on the trustor's life. Equitable Trust Co. v. Widows' Fund of Oasis & Omar Temples, 207 N.C. 534, 177 S.E. 799 (1935).

§ 58-282. Benefit certificates.

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 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. Any changes, additions, or amendments to the 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 member 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. (1913, c. 89, s. 7; C.S., s. 6509.)

CASE NOTES

Alteration of Constitution or Bylaws Impairing Vested Rights. — A general consent of a policyholder in an assessment fraternal benefit society that the society may thereafter alter or amend its constitution or bylaws does not authorize the society to make such changes therein as will impair the vested right of its members and policyholders arising under their contract of insurance with the society. Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917), appeal dismissed, 249 U.S. 583, 39 S. Ct. 287, 63 L. Ed. 787 (1919).

Where a fraternal benefit society has issued a policy to a member, and has changed its plan of business so as to impair the vested rights of the insured under his contract, and refuses to accept the proper premium, and declares the policy void, the insured may maintain his action to recover of the insurer the principal sum of money he has paid on his policy, and simple interest thereon. Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917), appeal dismissed, 249 U.S. 583, 39 S. Ct. 287, 63 L. Ed. 787 (1919).

Suspension of Members Where Changes in Bylaws Not Filed. — Where a fraternal benefit insurance society is required to file a certified copy of changes made in its constitution and bylaws with the Insurance Commissioner within 90 days (see § 58-275) and fails to do so, it may not, while thus in default, suspend a member for noncompliance therewith. Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917), appeal dismissed, 249 U.S. 583, 39 S. Ct. 287, 63 L. Ed. 787 (1919).

Proof of Forfeiture of Benefits. — A stipulation in an endowment policy in a fraternal order requiring the member to be in good standing at the time of his death must be construed in reference to provisions in the charter and bylaws of the order, that the member can only be suspended for failure to pay his dues for six months of which notice shall be given him; and an order of suspension made in his absence will not have the effect of suspending him from benefits when there is no evidence that he had failed to pay his dues for the stated period or that notice had been given in accordance with the constitution and bylaws. Lyons v. Grand Lodge of Knights of Pythias, 172 N.C. 408, 90 S.E. 423 (1916).

Burden of Showing Nonpayment of Dues. — In an action upon a life insurance certificate in a fraternal order, the burden of proof is upon

the defendant to show nonpayment of dues or other matters to avoid the certificate, when the certificate has been put in evidence and the death has been shown. Wilkie v. National Council, J.O.U.A.M., 147 N.C. 637, 61 S.E. 580 (1908); Harris v. National Council, J.O.U.A.M., 168 N.C. 357, 84 S.E. 405 (1915).

False Representations of Insured. — Where an insurance policy in a fraternal order was issued in violation of certain restrictions contained in its constitution and bylaws, and there was evidence tending to show that this fact was known at the time to the applicant, and the policy was issued by reason of false and material statements on the part of the applicant, the order was not estopped, as a conclusion of law, from resisting payment of the policy because of the fact that its agent also knew that the applicant's statements were false. Robinson v. Brotherhood of Locomotive Firemen, 170 N.C. 545, 87 S.E. 537 (1916).

Waiver of Defects in Policy. — A policy in the insurance department of a fraternal order cannot be recovered on when issued by a local agent contrary to its rules and regulations as contained in its constitution and bylaws, unless the defect has been waived by the order or it is in some way estopped from insisting on the forfeiture. Robinson v. Brotherhood of Locomotive Firemen, 170 N.C. 545, 87 S.E. 537 (1916).

§ 58-283. Benefits not subject to debts.

No money or other benefit, charity or relief or aid to be paid provided, or rendered by any such society or association for the relief of employees including railroad and other relief associations shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment. (1913, c. 89, s. 18; C.S., s. 6510; 1925, c. 83.)

§ 58-284. Certificates of insurance to members.

Any fraternal benefit society authorized to do business in this State which shall accumulate and maintain the reserves, on all certificates hereafter issued, required by the American Experience Table of Mortality, with Craig's or Buttolph's Extension thereof, or the Standard Industrial Table of Mortality, with an interest assumption of not more than three and one-half per centum (3½%) per annum, or the American Men Ultimate Table of Mortality, with Bowerman's Extension thereof, with an interest assumption of not more than three and one-half per centum (3½%) per annum, or some higher standard or upon such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies, may accept members in such manner and upon such showing of eligibility, and issue to its members such forms of certificates in such amounts and payable to such beneficiaries as may be authorized by the society. The provisions of this section shall apply to children under 16 years of age of members of such society.

This section shall not affect or apply to any organization or society which limit their membership to persons engaged in one or more hazardous occupations in the same or similar lines of business, or in any way affect or repeal any law that now applies to such organizations or societies. (1941, c. 74; 1981, c. 834, s. 3.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, inserted "or upon such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies" in the first sentence and deleted at the end of the first sentence "and such society may issue benefit certificates of insurance to any such members in an amount or amounts not exceeding five thousand dollars ($5,000) on the aggregate without medical examination, upon health and character information satisfactory to the society."

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 491.

§ 58-285. Funds provided.

(a) 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 (b) of G.S. 58-280. 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 said funds. But 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 percent (4%) 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 percent (4%) per annum; provided, however, that any society may value its certificates in accordance with such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies.

(b) Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. (1913, c. 89, s. 8; C.S., s. 6511; 1981, c. 834, s. 4.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the proviso to the last sentence of subsection (a).

§ 58-286. Investment of funds.

Every society shall invest its funds only in securities permitted by the laws of this State for the investment of the assets of life insurance companies: Provided, that any foreign society permitted or seeking to do business in this State, which invests its funds in accordance with the laws of the state in which it is incorporated where it has such laws, shall be held to meet the requirements of this Article for the investment of funds. (1913, c. 89, s. 9; C.S., s. 6512.)

Cross References. — As to investment in bonds guaranteed by the United States, see § 53-44. As to investment in bonds or notes secured by mortgages insured by the Secretary of Housing and Urban Development, see § 53-45. As to investments in federal farm loan bonds, see § 53-60. As to investment in refunding bonds of North Carolina, see § 142-29.

§ 58-287. Application of funds.

Every provision of the laws of the society for payment by its members, 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 said funds shall be used for expenses. (1913, c. 89, s. 10; C.S., s. 6513.)

§ 58-288. Powers of existing societies retained; reincorporation.

Any society now engaged in transacting business in this State may exercise all of the rights conferred by this Article, and all the rights, powers, and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this Article, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided by law. (1913, c. 89, s. 12; C.S., s. 6514.)

§ 58-289. Mergers and transfers.

No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and is filed with the Commissioner of Insurance of this State, together with a sworn statement of the financial condition of each of the societies, by its president and secretary or corresponding officers, and a certificate duly verified under oath of said officers of each of the contracting societies that such merger or transfer has been approved by a vote of two thirds of the members of the supreme legislative or governing body of each of the societies.

Upon the submission of such contract, financial statements, and certificates, the Commissioner of Insurance shall examine the same, and if he shall find such financial statements to be correct and the contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of the societies, he shall approve the merger or transfer, issue his certificate to that effect, and thereupon the contract of merger or transfer shall be of full force and effect.

In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the Commissioner of Insurance. (1913, c. 89, s. 13; C.S., s. 6515.)

Editor's Note. — Session Laws 1949, c. 1080, s. 4, provides: "All laws and clauses of laws, and in particular the provisions of G.S. 58-289, in conflict with this act are repealed to the extent of such conflict." See §§ 58-303 through 58-304.1.

§ 58-290. Accident societies may be licensed.

Any fraternal benefit society heretofore organized and incorporated, and operating within the definition set forth in this Article, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this Article, and shall have all the privileges and be subject to all the provisions and regulations of this Article, except the provisions requiring medical examinations, valuations of benefit certificates, and that the certificate shall specify the amount of benefits. (1913, c. 89, s. 27; C.S., s. 6517.)

§ 58-291. Certain societies not included.

Nothing contained in this Article shall be construed to affect or apply to societies which limit their membership to any one hazardous occupation, nor to an association of local lodges of a society now doing business in this State which provides death benefits not exceeding five hundred dollars ($500.00) to any one person, provided, that the Commissioner of Insurance, upon investigation, may, in his discretion, authorize the payment of death benefits not exceeding two thousand dollars ($2,000) to any one person, or disability benefits not exceeding three hundred dollars ($300.00) in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this State, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars ($100.00), or for disability benefits of more than one hundred and fifty dollars ($150.00) to any one person in any one year. The Commissioner of Insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this Article. (1913, c. 89, s. 26; C.S., s. 6518; 1925, c. 70, s. 2; 1967, c. 977; 1977, c. 128.)

CASE NOTES

Service on Resident Secretary Held Valid. — Personal service on resident secretary of fraternal insurance association allowed to do business in the State without a license under this section and § 58-15 and former § 58-251 held valid service on the association in action on policy. Winchester v. Grand Lodge of Bhd. of R.R. Trainmen, 203 N.C. 735, 167 S.E. 49 (1932).

§ 58-292. Reports to Commissioner of Insurance.

(a) Annual Report. — Every society transacting business in this State shall annually, on or before the first day of March, file with the Commissioner of Insurance, in such form as he may require, a statement, under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the Commissioner may deem necessary to a proper exhibit of its business and plan of working. The Commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

(b) Valuation of Certificates. — In addition to the annual report herein required, each society shall annually report to the Commissioner a valuation of its certificates in force on December 31, last preceding, excluding those issued within the year for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and the net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

(c) Valuation Ascertained. — Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the Commissioner within 90 days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or, at the option of the society, any higher table; or, at its option, it may use a table based upon the society's own experience of at least 20 years and covering not less than 100,000 lives with interest assumption not more than four per centum (4%) per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society: Provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required; notwithstanding the foregoing a society may value its certificates in accordance with such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies.

(d) Test of Solvency. — The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

(e) Report Mailed to Members. — A report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June 1 of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper, and the issue containing the same mailed to each beneficiary member of the society. (1913, c. 89, s. 20; C.S., s. 6519; 1981, c. 834, s. 5.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added at the end of subsection (c) "notwithstanding the foregoing a society may value its certificates in accordance with such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies."

§ 58-293. Additional or increased rates.

The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws, additional, increased, or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five percent (5%) per annum. (1913, c. 89, s. 20; C.S., s. 6520.)

§ 58-294. Provisions to insure future security.

If the valuation of the certificates, as hereinbefore provided, on December 31, 1917, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of efficiency as shown in the valuation as of December 31, 1917. If at any succeeding triennial valuation such society does not show at least the same condition, the Commissioner shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the Commissioner may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of this Article, or in the case of a foreign society, its license may be canceled in the manner provided in this Article.

Any such society, shown by any triennial valuation, subsequent to December 31, 1917, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December 31, 1917, or thereafter, as to all new members admitted, to be subject, so far as stated rates of contributions are concerned, to the provisions of this Article, applicable in the organization of new societies: Provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the new members may be placed in a separate class and their certificates valued as an independent society in respect of contributions and funds. (1913, c. 89, s. 20(a); C.S., s. 6521.)

§ 58-295. Valuation on accumulation basis; tabular basis.

In lieu of the requirements of the two preceding sections [G.S. 58-293 and 58-294], any society accepting in its laws the provisions of this section may value its certificates on a basis herein designated "accumulation basis," by crediting each member with the net amount contributed for each year, and with interest at approximately the net rate earned and by charging him with his shares of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this State, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death, less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried forward from the first valuation hereunder against any member of any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contribution especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated, or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by the law of this State shall be valued on such basis, herein designated the "Tabular Basis": Provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis.

Whenever, in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions or by an increase in the number of assessments applied to the society as a whole or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws.

If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this State and adopted by the society shall be filed by the society with each annual report, and also be furnished to each member before July 1 of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis.

For this purpose individual bookkeeping accounts for each member shall not be required, and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis 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 the 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. (1913, c. 89, s. 20(b); C.S., 6522.)

§ 58-296. Examination of domestic societies.

The Commissioner of Insurance, or any person he may appoint, shall have power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as a witness under oath and examine its officers, agents, and employees or other persons in relation to the affairs, transactions, and condition of the society.

The expense of such examination shall be paid by the society examined upon statement furnished by the Commissioner of Insurance, and the examination shall be made at least once in three years. (1913, c. 89, s. 21; C.S., s. 6523.)

§ 58-297. Proceedings for dissolution.

When after examination the Commissioner of Insurance is satisfied that any domestic society has failed to comply with any provision of this Article, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than 400 (or shall determine to discontinue business), the Commissioner of Insurance may

present the facts relating thereto to the Attorney General who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, it shall be enjoined from carrying on any further business, and a receiver shall be appointed to take possession of its books, papers, moneys, and other assets and immediately, under the direction of the court, proceed to close its affairs and distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the Attorney General against any such society until after notice has been duly served on its chief executive officers and a reasonable opportunity given to it, on a date to be named in the notice, to show cause why such proceedings should not be commenced. (1913, c. 89, s. 21; C.S., s. 6524.)

§ 58-298. Proceedings only by Attorney General.

No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this State unless the same is made by the Attorney General. (1913, c. 89, s. 22; C.S., s. 6525.)

§ 58-299. Examination of foreign societies.

The Commissioner of Insurance or any person whom he may appoint may examine any foreign society transacting or applying for admission to transact business in this State. The Commissioner may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees and other persons in relation to the affairs, transactions, and condition of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province, or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the Commissioner of Insurance.

If any such society or its officers refuse to submit to such examination or to comply with the provisions of the section relative thereto, its authority to write new business in this State shall be suspended or license refused until satisfactory evidence is furnished the Commissioner relating to its condition and affairs, and during such suspension the society shall not write new business in this State. (1913, c. 89, s. 23; C.S., s. 6526.)

§ 58-300. No adverse publications.

Pending, during, or after an examination or investigation of any such society, either domestic or foreign, the Commissioner of Insurance shall make public no financial statement, report, or finding, nor shall he knowingly permit to become public any financial statement, report, or finding affecting the status, standing, or rights of any such society, until a copy thereof has been served upon the society, at its home office, nor until the society has been afforded a reasonable opportunity to answer any such financial statement, report, or finding, and to make such showing in connection therewith as it may desire. (1913, c. 89, s. 24; C.S., s. 6527.)

§ 58-301. Revocation of license.

When the Commissioner of Insurance on investigation is satisfied that any foreign society transacting business under this Article has exceeded its powers, or has failed to comply with any provisions of this Article, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require the society, on a date named, to show cause why its license should not be revoked. If on the date named in the notice such objections have not been removed to the satisfaction of the Commissioner, or the society does not present good and sufficient reasons why its authority to transact business in this State should not at that time be revoked, he may revoke the authority to continue business in this State. All decisions and findings of the Commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in this Article. (1913, c. 89, s. 25; C.S., s. 6528.)

§ 58-302. Criminal offenses.

Any person, officer, member, or examining physician of any society authorized to do business under this Article who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this Article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or imprisoned in the county jail for not less than 30 days nor more than one year, or both, in the discretion of the court.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this State, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided to do business as herein defined in this State, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty ($50.00) nor more than two hundred dollars ($200.00).

Any society, or any officer, agent, or employee thereof, neglecting or refusing to comply with, or violating, any of the provisions of this Article, the penalty for which neglect, refusal, or violation is not specified in this section, shall be fined not exceeding two hundred dollars ($200.00) upon conviction thereof. (1913, c. 89, s. 28; C.S., s. 6529.)

Cross References. — As to penalties for using funds of insurance companies for political purposes, see § 163-270.

§ 58-303. Merger, consolidation or reinsurance of fraternal risks with licensed life insurance companies or with other fraternal orders or benefit societies.

No fraternal order or society organized under the laws of this State to do the business of life, accident, or health insurance shall consolidate or merge with any other fraternal order or society, or with a life insurance company, or reinsure its risks, or any part thereof with any other fraternal order or society, or with a life insurance company, or assume or reinsure the whole or any portion of the risks of any other fraternal order or society, except with a fraternal order or society, or a life insurance company, licensed to transact

business in North Carolina and subject to the provisions of G.S. 58-304. (1921, c. 60, s. 1; C.S., s. 6529(a); 1949, c. 1080, s. 1.)

Editor's Note. — Session Laws 1949, c. 1080, s. 4, provides: "All laws and clauses of laws, and in particular the provisions of G.S. 58-289, in conflict with this act are repealed to the extent of such conflict."

§ 58-304. Contracts approved by boards of directors or governing bodies of parties to same; approval by Commissioner of Insurance.

When any fraternal order or society shall propose to consolidate or merge its business or to enter into a contract of reinsurance with any other fraternal order or society or with a life insurance company, or to assume or reinsure the whole or any portion of the risks of any other fraternal order or society, the proposed contract in writing setting forth the terms and conditions of the proposed consolidation, merger, or reinsurance shall be submitted to the boards of directors or to the governing bodies of each of said parties to said contract at a meeting called for that purpose by notice given in writing 10 days prior thereto, and if approved by a majority vote of the said boards of directors, or governing bodies, said contract as so approved shall be submitted to the Commissioner of Insurance of this State for his approval, and the parties to said contract shall at the same time submit a sworn statement showing their financial condition as of the thirty-first day of December next preceding the date of such contract. Provided, that the Commissioner of Insurance may, within his discretion, require such financial statement to be submitted as of the last day of the month next preceding the date of such contract. The Commissioner of Insurance shall thereupon consider such contract of consolidation, merger, or reinsurance, and if satisfied that the interests of the certificate and policyholders of each of the parties are properly protected and that the contract will be in the public interest, and that such contract is just and equitable to the certificate and policyholders of each of the parties, and that no reasonable objection exists thereto, he shall approve said contract as submitted. In case the parties corporate to such contract shall have been incorporated in separate states, or territories, such contract shall be submitted as herein provided to the commissioner of insurance of each of such incorporating states, or territories, to be considered and approved separately by each of said commissioners of insurance. If the Commissioner of Insurance approves such contract of consolidation, merger, or reinsurance, he shall issue a certificate to that effect, and thereupon the said contract of consolidation, merger, or reinsurance shall be in full force and effect. In case such contract is not approved it shall be inoperative, and the fact of the submission and its contents shall not be disclosed by the Commissioner of Insurance. (1921, c. 60, s. 2; C.S., s. 6529(b); 1949, c. 1080, s. 2.)

§ 58-304.1. Application of §§ 58-155.1 to 58-155.35, inclusive.

The provisions of G.S. 58-155.1 to 58-155.35, inclusive, shall apply, where pertinent, to all fraternal orders and societies doing business in this State. (1949, c. 1080, s. 3.)

§ 58-305. Expenses; compensation to officers or employees of contracting parties and State employees.

All necessary and actual expenses and compensation incident to the proceedings provided in this law shall be paid as provided by such contract of consolidation, merger, or reinsurance: Provided, however, that no brokerage or commission shall be included in such expenses and compensation or shall be paid to any person by either of the parties to any such contract in connection with the negotiation therefor or execution thereof, nor shall any compensation be paid to any officer or employee of either of the parties to such contract for directly or indirectly aiding in effecting such contract of consolidation, merger, or reinsurance. An itemized statement of all such expenses shall be filed with the Commissioner of Insurance, subject to approval, and when approved the same shall be binding on the parties thereto. Except as fully expressed in the contract of consolidation, merger or reinsurance, or itemized statement of expenses, as approved by the Commissioner of Insurance, or commissioners, as the case may be, no compensation shall be paid to any person or persons, and no officer or employee of the State shall receive any compensation, directly or indirectly, for in any manner aiding, promoting, or assisting any such consolidation, merger, or reinsurance. (1921, c. 60, s. 3; C.S., s. 6529(c).)

§ 58-306. Violation of law a felony.

Any person violating the provisions of G.S. 58-303, 58-304, 58-305 shall be guilty of a felony, and upon conviction shall be liable to a fine of not more than five thousand dollars ($5,000), or to imprisonment for not more than five years, or to both fine and imprisonment. (1921, c. 60, s. 4; C.S., s. 6529(d).)

§ 58-307. Appointment of Commissioner of Insurance as process agent.

Every foreign fraternal benefit society except labor organizations which limit their admission to membership to persons engaged in one or more hazardous occupations in the same or similar lines of business now transacting business in this State shall, within 30 days after the passage of this section, and every such society hereafter applying for admission shall, before being licensed, appoint in writing the Commissioner of Insurance and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against which is served upon such attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this State. Copies of such appointment, certified by said Commissioner of Insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall be made in duplicate upon the Commissioner of Insurance, or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon said society. When legal service against any such society is served upon said Commissioner of Insurance he shall forthwith forward by registered mail one of the duplicate copies, prepaid and directed to its secretary or corresponding officer. No such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than 30 days from the date of mailing the copy of such service to such society. Legal process shall not be served upon any such society except in the manner provided therein. As a condition precedent to a valid service of process and to the duty of the Commissioner in the premises,

the plaintiff shall pay to the Commissioner of Insurance at the time of service the sum of one dollar ($1.00), which the plaintiff shall recover as taxable costs if he prevails in his action. (1939, c. 130.)

Cross References. — As to other ways in which a foreign insurance company may be served with a copy of process, see §§ 55-143, 55-144 and 55-146.

Article 29.

Whole Family Protection.

§ 58-308. Insurance on children.

Any fraternal order or fraternal benefit society authorized to do business in this State and operating on the lodge plan may provide in its constitution and bylaws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of one and 16 years at next birthday, for whose support and maintenance a member of such society is responsible. The society may at its option organize and operate branches for such children and membership in local lodges, and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively, as follows: one year, twenty dollars ($20.00); two years, fifty dollars ($50.00); three years, seventy-five dollars ($75.00); four years, one hundred dollars ($100.00); five years, one hundred twenty-five dollars ($125.00); six years, one hundred fifty dollars ($150.00); seven years, two hundred dollars ($200.00); eight years, two hundred fifty dollars ($250.00); nine years, three hundred dollars ($300.00); 10 years, four hundred dollars ($400.00); 11 years, five hundred dollars ($500.00); 12 years, six hundred dollars ($600.00); 13 years, seven hundred dollars ($700.00); 14 years, eight hundred dollars ($800.00); 15 years, nine hundred dollars ($900.00); 16 years, one thousand dollars ($1,000).

Provided, any fraternal benefit society which shall accumulate and maintain the reserves required by such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies, may accept members at such ages, and children under 16 years of age, in such manner and upon such showing of eligibility, and issue to its members, and children under 16 years of age, such forms of certificates, payable to such beneficiaries, and for such amounts, as its constitution and laws may provide. Children under 16 years of age shall have no voice or vote. (1917, c. 239, s. 1; C.S., s. 6530; 1931, c. 38; 1937, c. 208; 1981, c. 834, s. 6.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "by such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies" for "by a table of mortality not lower than the American Experience Table of Mortality, with an interest assumption of not more than four percent (4%)" in the first sentence of the second paragraph.

§ 58-309. Medical examination; certificates and contributions.

No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall any such benefit certificate be issued

unless the society shall simultaneously put in force at least 500 such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by such certificate falls below 500. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Mortality Table" or the "English Life Table Number Six," and a rate of interest not greater than four percent (4%) per annum, upon a higher standard or upon such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies; but contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the bylaws; and extra contributions shall be made if the reserves hereafter provided for become impaired. (1917, c. 239, s. 2; C.S., s. 6531; 1981, c. 834, s. 7.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "upon a higher standard or upon such mortality, morbidity, and interest standards permitted by the laws of this State for use by life insurance companies" for "or upon a higher standard" near the middle of the second sentence.

§ 58-310. Reserve fund; exchange of certificates.

Any society entering into such insurance agreements shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in G.S. 58-309, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized. A society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society: Provided, that such surrender will not reduce the number of lives insured in the branch below 500; and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. (1917, c. 239, s. 3; C.S., s. 6532.)

§ 58-311. Separation of funds.

An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the Commissioner of Insurance by any society availing itself of the provisions hereof. The separation of assets, funds, and liabilities required hereby shall not be terminated, rescinded, or modified, nor shall the funds be diverted for any use other than as specified in the preceding section [G.S. 58-310], as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger, or other change in the condition or the status of the society. (1917, c. 239, s. 4; C.S., s. 6533.)

§ 58-312. Payments to expense or general fund.

Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society, as its constitution and bylaws may provide. (1917, c. 239, s. 5; C.S., s. 6534.)

§ 58-313. Continuation of certificates.

In the event of the termination of membership in the society by the person responsible for the support of any child on whose account a certificate may have been issued as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child who shall assume the payment of the required contributions. (1917, c. 239, s. 6; C.S., s. 6535.)

Article 30.

General Provisions for Societies.

§ 58-314. Appointment of trustees to hold property.

The lodges of Masons, Odd Fellows, Knights of Pythias, camps of Woodmen of the World, councils of the Junior Order of United American Mechanics, orders of the Elks, Young Men's Christian Associations, Young Women's Christian Associations, societies for the care of orphans and indigent children, societies for the rescue of fallen women, and any other benevolent or fraternal orders and societies, may appoint from time to time suitable persons trustees of their bodies or societies, in such manner as they deem proper, which trustees, and their successors, shall have power to receive, purchase, take, and hold property, real and personal, in trust for such society or body. The trustees shall have power, when instructed so to do by resolution adopted by the society or body which they represent, to mortgage or sell and convey in fee simple any real or personal property owned by the society or body; and the conveyances so made by the trustees shall be effective to pass the property in fee simple to the purchaser or to the mortgagee or trustee for the purposes in such conveyance or mortgage expressed. If there shall be no trustee, then any real or personal property which could be held by such trustees shall vest in and be held by such charitable, benevolent, religious, or fraternal orders and societies, respectively, according to such intent. (1907, c. 22; 1915, cc. 149, 186; C.S., s. 6536; 1923, c. 257.)

CASE NOTES

Injunction Against Sale of Lodge Property by Wrongfully Suspended Members. — Where a local lodge existed under the constitution and bylaws of the supreme lodge, which required written notice to be given to its members before suspension, and certain members were suspended without such notice being given, a resolution passed at a subsequent meeting of the local lodge authorizing a sale of its property by trustees was invalid, and the sale would be enjoined at the suit of such wrongfully suspended members. Tyler v. Howell, 192 N.C. 433, 135 S.E. 133 (1926).

§ 58-315. Unauthorized wearing of badges, etc.

Any person who fraudulently and willfully wears the badge or button of any secret or fraternal organization or society, either in the identical form or in such near resemblance thereto as to be colorable imitation thereof, or who fraudulently and willfully uses the name of any such order or organization, the titles of its officers, or its insignia, ritual, or ceremonies, unless entitled to wear or use the same under the constitution and bylaws, rules and regulations of such secret or fraternal organization or society, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of fifty dollars ($50.00) or imprisonment for 30 days, in the discretion of the court. (1907, c. 968; 1911, c. 37; 1915, c. 252; C.S., s. 6537.)

Article 31.

Nonprofit Life Benefit Association.

§§ 58-316 to 58-340: Repealed by Session Laws 1945, c. 379.

SUBCHAPTER VIII. CREDIT LIFE INSURANCE AND CREDIT ACCIDENT AND HEALTH INSURANCE.

Article 32.

Regulation of Credit Life Insurance, Credit Accident and Health Insurance and Credit Property Insurance.

§ 58-341. Application of Article.

All credit life insurance and all credit accident and health insurance as defined herein and written in connection with direct loans, consumer credit installment sale contracts of whatever term permitted by G.S. 25A-33 or other credit transactions shall be subject to the provisions of this Article, except credit insurance written in connection with direct loans of more than 10 years' duration. The provisions of this Article shall be controlling as to such insurance and no other provisions of this Chapter shall be applicable unless otherwise specifically provided; nor shall such insurance be subject to the provisions of this Article where the issuance of such insurance is an isolated transaction on the part of the insurer not related to an agreement or a plan for insuring debtors of the creditor.

This Article may be cited as "The North Carolina Act for the Regulation of Credit Life Insurance and Credit Accident and Health Insurance." (1975, c. 660, s. 1.)

Editor's Note. — Session Laws 1975, c. 660, s. 3, contains a severability clause.

CASE NOTES

Applied in Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

§ 58-342. Definitions.

As used in this Article, unless the context requires otherwise, the following words or terms shall have the meanings herein ascribed to them, respectively:

(1) "Commissioner" means the Commissioner of Insurance;

(2) "Credit accident and health insurance" means insurance on a debtor to provide indemnity for payments becoming due on a specific loan or other credit transaction as defined in G.S. 58-254.8;

(3) "Credit life insurance" means insurance on the life of a debtor pursuant to or in connection with a specific loan or other credit transaction as defined in G.S. 58-195.2;

(4) "Credit life insurance agent" means an agent of an insurance company licensed in this State who is authorized to solicit, negotiate or effect credit life insurance or accident and health insurance, or both, but only to the extent as is authorized and limited in this Article;

(5) "Creditor" means the lender of money or vendor or lessor of goods, services, property, rights or privileges, for which payment is arranged through a credit transaction or any successor to the right, title or interest of any such lender, vendor, or lessor, and an affiliate, associate or subsidiary of any of them or any director, officer or employee of any of them or any other person in any way associated with any of them;

(6) "Debtor" means a borrower of money or a purchaser or lessee of goods, services, property, rights or privileges for which payment is arranged through a credit transaction;

(7) "Indebtedness" means the total amount payable for the term of the loan by debtor to creditor in connection with a loan or other credit transaction, including principal, interest, allowable charges, and any premiums authorized hereunder;

(8) "Joint life coverage" means credit life insurance covering two or more lives, the entire amount of insurance being payable upon the death of the first insured debtor to die. (1975, c. 660, s. 1.)

CASE NOTES

Coverage of Credit Accident and Health Insurance. — The legislature intended to provide for uniformity of coverage by requiring that all policies of "credit accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

In an action to recover on a policy of credit life and disability insurance issued by defendant, where defendant alleged that no charge was made for life insurance but only for disability insurance and therefore that the death of plaintiff's decedent was not the event against which the policy insured, the trial court properly entered judgment for plaintiff, since all policies of "credit, accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

§ 58-343. Forms of insurance which are authorized.

Credit life insurance and credit accident and health insurance shall be issued only in the following forms:

(1) Individual policies of life insurance issued to debtors on the term plan;

(2) Individual policies of accident and health insurance issued to debtors on a term plan or disability benefit provisions in individual policies of credit life insurance;

(3) Group policies of life insurance issued to creditors providing insurance upon the lives of debtors on the term plan;

(4) Group policies of accident and health insurance issued to creditors on a term plan insuring debtors or disability benefit provisions in group credit life insurance policies to provide such coverage. (1975, c. 660, s. 1.)

CASE NOTES

Applied in Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

§ 58-344. Amount.

(a) Credit Life Insurance. —

(1) Except as provided in G.S. 53-189(a) for transactions of 60 months or less in duration, the initial amount of credit life insurance shall not exceed the total amount repayable under the contract of indebtedness and, where an indebtedness is repayable in substantially equal installments, the amount of insurance shall at no time exceed the greater of the actual or scheduled amount of indebtedness. For transactions of more than 60 months in duration, the initial amount of credit life insurance shall not exceed the total amount repayable under the contract of indebtedness less unearned finance charges and, where an indebtedness is repayable in substantially equal installments, the amount of insurance shall at no time exceed the greater of the actual or scheduled amount of indebtedness less unearned finance charges; provided, however, that additional coverage not exceeding four months of accrued interest on successive net balances may be provided to cover any delinquency in payments.

(2) Notwithstanding the provisions of the above subdivision, insurance on seasonal credit line commitments (such as may be found in agricultural credit transactions) not exceeding one year in duration may be written up to the amount of the loan commitment, whether or not the full amount of the commitment has been advanced by the creditor, on a nondecreasing or level term plan.

(3) Notwithstanding the provisions of subdivision (a)(1) of this or any other section, insurance on education credit transaction commitments may be written for the amount of such commitment whether or not the full amount of the commitment has been advanced by the creditor.

(b) Credit Accident and Health Insurance. — The total amount of indemnity payable by credit accident and health insurance in the event of disability, as defined in the policy, shall not exceed the indebtedness; and the amount of each monthly benefit shall not exceed the indebtedness divided by the number of months in the term of the loan. A daily benefit equal in amount to one thirtieth of the scheduled monthly payment is permissible. (1975, c. 660, s. 1; 1981, c. 759, s. 1.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, rewrote subdivision (1) of subsection (a).

Session Laws 1981, c. 759, s. 11, provides: "This act shall become effective October 1, 1981. All credit life and credit accident and health insurance policies delivered or issued for delivery on or after the effective date of this act shall conform to the provisions of this act. With regard to existing group credit insurance policies, the rates and forms shall be amended to conform to the requirements of this act, or be terminated, not later than the anniversary of the date of issue of the contract next following the effective date of this act."

§ 58-345. Term; termination prior to scheduled maturity.

The term of any credit life insurance or credit accident and health insurance shall, subject to acceptance by the insurer, commence on the date when the debtor becomes obligated to the creditor, except that, where a group policy provides coverage with respect to existing obligations, the insurance on a debtor with respect to such indebtedness shall commence on the effective date of the policy. The term of such insurance shall not extend more than 15 days beyond the maturity date of the indebtedness or final installment thereof. If the indebtedness is discharged due to prepayment, the insurance in force shall be terminated unless otherwise requested by the insured in writing. If the indebtedness is discharged due to renewal or refinancing prior to such maturity date, the insurance in force shall be terminated before any new insurance may be issued in connection with the renewed or refinanced indebtedness. In all cases of termination prior to scheduled maturity, a refund shall be paid or credited as provided in G.S. 58-351. (1975, c. 660, s. 1.)

§ 58-346. Insurance to be evidenced by individual policy; notice of proposed insurance or certificate; required and prohibited provisions; when debtor to receive copy.

(a) All individual credit life insurance and credit accident and health insurance sold shall be evidenced by an individual policy. All group insurance sold where any part of the premium is paid by the debtors or by the creditors from identifiable charges collected from the insured debtors shall be evidenced by a certificate of insurance.

(b) Each individual policy or certificate of credit life insurance, and/or credit accident and health insurance shall set forth the name and home-office address of the insurer, the identity of the insured debtor by name or otherwise, the premium or amount of payment, if any, by the debtor separately for credit life insurance and credit accident and health insurance if not disclosed in other documents furnished to the debtor, a description of the coverage including the amount and term thereof, and any exceptions, limitations or restrictions, and shall state that the benefits shall be paid to the creditor to reduce or extinguish the unpaid indebtedness, and wherever the amount of insurance may exceed the unpaid indebtedness, that any such excess shall be payable to a beneficiary other than the creditor named by the debtor, or to his estate.

(c) No individual policy of credit life insurance or credit accident and health insurance and no group policy of credit life insurance or credit accident and health insurance shall be delivered or issued for delivery in this State unless each contains in substance all of the following provisions:

(1) In each policy there shall be a provision that the policy, or the policy and application therefor, if any, or if a copy of the application is endorsed upon or attached to the policy when issued, shall constitute the entire insurance contract between the parties, and that all statements made by the creditor or by the individual debtors shall, in

the absence of fraud, be deemed representations and not warranties.

(2) In each such policy there shall be a provision that the validity of the policy shall not be contested, except for nonpayment of premiums, after it has been in force for two years from its date of issue; and that no statement made by any person insured under the policy relating to his insurability shall be used in contesting the validity of the insurance with respect to which such statement was made after such insurance has been in force on such insured for a period of two years during such person's lifetime, and prior to the date on which the claim thereunder arose. Provided, however, that unless the insured writes his own age on the form and signs a statement that he has done so, there shall be no denial of claims grounded on the debtor's age. Provided further, if the indebtedness is paid by renewal or refinancing prior to the scheduled maturity date, the effective date of the coverage with respect to any policy provision shall be deemed to be the first date on which the debtor became insured under the policy covering the original prior indebtedness that was renewed or refinanced, at least to the extent of the amount and term of the coverage outstanding at the time of renewal and refinancing of the debt.

(3) In each such policy there shall be a provision that when a claim for the death or disability of the insured arises thereunder, settlement shall be made upon receipt of due proof of such death or such disability.

(4) On the face of each such policy there shall be placed a title which shall briefly and accurately describe the nature and form of the policy.

(5) Each such policy, including rider and endorsement, shall be identified by a form number in the lower left-hand corner of the first page thereof, and no restriction, condition or provision in or endorsed on such policy shall be valid unless such provision or condition is printed in type as large as eight-point type.

(6) In each such policy there shall be a provision that the insured debtor shall have the right to rescind the insurance policy or certificate of insurance upon giving written notice to the insurer within 15 days from the date the insured debtor received such policy or certificate.

(d) No individual policy of credit life insurance or credit accident and health insurance [and] no group policy of credit life insurance or credit accident and health insurance shall be delivered or issued for delivery in this State if it contains any provision:

(1) Limiting the time within which any action at law or in equity may be commenced to less than three years after the cause of action accrues; or

(2) To the effect that the agent soliciting the insurance is the agent of the person insured under the policy, or making the acts or representations of such agent binding upon the person so insured under the policy.

(e) If said individual policy or certificate of group insurance is not delivered to the debtor at the time the indebtedness is incurred or mailed to the debtor within 30 days thereafter, a written notification must be furnished to the debtor within the 30-day period, which notification shall set forth the following:

(1) The name and home-office address of the insurer;

(2) The identity of the debtor, by name or otherwise;

(3) The premium or identifiable charge to the debtor, if any, separately in connection with credit life insurance and credit accident and health insurance;

(4) The amount and term of the coverage provided, if possible, otherwise a clear description of the means of determining the amount and time of expiry;

(5) A brief description of the coverage provided;
(6) A statement that, if the insurance is declined by the insurer or otherwise does not become effective, any premium or identifiable charge will be refunded or credited to the debtor; and
(7) A statement that, upon acceptance by the insurer, the insurance coverage provided shall become effective as specified in G.S. 58-345.

Any portion of the information required in said notification may be furnished by other documents, if copies of such documents are attached to said notification. If an insurance policy or certificate of insurance is not delivered to the insured debtor at the time the indebtedness is incurred, he shall be furnished at the time the indebtedness is incurred written notice that he shall have the right to rescind the insurance policy or certificate of insurance upon giving written notice to the insurer within 15 days from the date the insured debtor receives such policy or certificate. (1975, c. 660, s. 1; 1981, c. 759, s. 3.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the second sentence to subdivision (2) of subsection (c).

Session Laws 1981, c. 759, s. 11, provides: "This act shall become effective October 1, 1981. All credit life and credit accident and health insurance policies delivered or issued for delivery on or after the effective date of this act shall conform to the provisions of this act. With regard to existing group credit insurance policies, the rates and forms shall be amended to conform to the requirements of this act, or be terminated, not later than the anniversary of the date of issue of the contract next following the effective date of this act."

§ 58-347. Forms to be filed with Commissioner; approval or disapproval by Commissioner.

(a) All forms of policies, certificates of insurance, notices of proposed insurance, endorsements and riders intended for use in this State shall be filed with the Commissioner.

(b) The Commissioner shall, within 90 days after the filing of any such policies, certificates of insurance, notices of proposed insurance, endorsements and riders, disapprove any such form if it contains provisions which are contrary to, or not in accordance with, any provision of this Article, Article 33 of this Chapter, or of any rule or regulation promulgated thereunder. Unless disapproved in writing within such 90 days, a form shall be deemed approved.

(c) If the Commissioner notifies the insurer that the form is disapproved, it is unlawful thereafter for such insurer to issue or use such form for a period of 60 days, or until the Commissioner has issued a final order after hearing, whichever is earlier. In such notice, the Commissioner shall specify the reason for his disapproval and state that a hearing will be granted within 20 days after request in writing by the insurer. No such policy, certificate of insurance, notice of proposed insurance, endorsement or rider shall be issued or used until the expiration of 30 days after it has been so filed, unless the Commissioner shall give his prior written approval thereto.

(d) The Commissioner may, at any time after a hearing held not less than 20 days after written notice to the insurer, withdraw his approval of any such form on any ground set forth in subsection (b) above. The written notice of such hearing shall state the reason for the proposed withdrawal.

(e) No insurer shall issue such forms or use them after the effective date of such withdrawal. (1975, c. 660, s. 1; 1979, c. 755, s. 16.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "90 days" for "30 days" in the first and second sentences of subsection (b) and added the reference to Article 33 of this Chapter near the end of the first sentence of subsection (b).

Session Laws 1979, c. 755, s. 20, contains a severability clause.

§ 58-348. General premium rate standard.

(a) Benefits provided by credit life and credit accident and health insurance written under this Article shall be reasonable in relation to the premium charge. This requirement is satisfied if the premium rates to be charged are no greater than those premium rates set forth in G.S. 58-349 and 58-350 of this Article for benefits as described in those sections. The amount charged to a debtor for any credit life or credit accident and health insurance shall not exceed the premiums charged by the insurer, as computed at the time the charge to the debtor is determined.

(b) The premium or cost of credit life or disability insurance, when written by or through any lender or other creditor, its affiliate, associate or subsidiary shall not be deemed as interest or charges or consideration or an amount in excess of permitted charges in connection with the loan or credit transaction and any gain or advantage to any lender or other creditor, its affiliate, associate or subsidiary, arising out of the premium or commission or dividend from the sale or provision of such insurance shall not be deemed a violation of any other law, general or special, civil or criminal, of this State, or of any rule, regulation or order issued by any regulatory authority of this State.

(c) If premiums are to be determined according to the age of the insured debtor or by age brackets, an insurer may determine premium rates on a basis actuarially consistent with the rates provided in G.S. 58-348, but such rates shall be filed with and approved by the Commissioner. (1975, c. 660, s. 1.)

§ 58-349. Credit life insurance rate standards.

(a) The premium rate standards set forth below are applicable to plans of credit life insurance with or without requirements for evidence of insurability:

(1) Which contain no exclusions or no exclusions other than suicide; and

(2) Which contain no age restrictions, or only age restrictions not making ineligible for the coverage

a. Debtors under 65 at the time the indebtedness is incurred; or

b. Debtors who will not have attained age 66 on the maturity date of the indebtedness.

(b) Rates for use with forms which are more restrictive in any material respect shall reflect such variations in the form or lower rates to the extent that a significant difference in claim cost can reasonably be anticipated unless the insurer demonstrates that such lower rate is not appropriate.

(c) If premiums are payable in one sum in advance, for decreasing term life insurance on indebtedness repayable in substantially equal monthly installments, a premium not exceeding eighty cents (80¢) per one hundred dollars ($100.00) of initial insured indebtedness per year is authorized.

(d) The premium rate of joint life insurance coverage shall not exceed one and two-thirds ($1\ ^2/_3$) the permitted single life rate.

(e) For level term life insurance, a premium rate of one dollar and fifty cents ($1.50) per one hundred dollars ($100.00) per year is authorized.

(f) For policies for which monthly premiums are charged on a basis of the then-outstanding balances, a monthly premium per one thousand dollars ($1,000) of outstanding balances is authorized, based on the following formula:

$$Op_n = \frac{20 \quad SP_n}{n + 1}$$

where SP_n = Single premium rate per one hundred dollars ($100.00) of initial insured indebtedness repayable in n equal monthly installments.

Op_n = Monthly outstanding balance premium rate per one thousand dollars ($1,000).

n = Original repayment period, in months.

(g) For credit life insurance on a basis other than the foregoing, premiums charged shall be actuarially equivalent. (1975, c. 660, s. 1.)

§ 58-350. Credit accident and health insurance rate standards.

(a) The rate standards set forth below shall be applicable for contracts which contain a provision excluding or denying claim for disability resulting from preexisting illness, disease or physical condition, for which the debtor received medical advice, consultation, or treatment within the six-month period immediately preceding the effective date of the debtor's coverage and if said disability occurs within the six-month period immediately following such date, but contain no other provision which excludes or restricts liability in the event of disability caused in a certain specified manner, except that they may contain provisions excluding or restricting coverage in the event of pregnancy; intentionally self-inflicted injuries; sickness resulting from intoxication, addiction to alcohol or narcotics, or from the use thereof unless administered on the advice of a physician; flight in nonscheduled aircraft; war; military service; and may contain the same age restrictions as those mentioned for credit life insurance in G.S. 58-349. Provided, if the indebtedness is paid by renewal or refinancing prior to the scheduled maturity date, the effective date of the coverage with respect to any policy provision shall be deemed to be the first date on which the debtor became insured under the policy covering the original prior indebtedness that was renewed or refinanced, at least to the extent of the amount and term of the coverage outstanding at the time of renewal and refinancing of the debt.

(b) A policy of credit accident and health insurance shall include a definition of "disability" providing that during the first 12 months of disability the insured shall be unable to perform the duties of his occupation at the time the disability occurred (or his previous occupation if the person is unemployed or retired at the time the disability occurs), and thereafter the duties of any occupation for which the insured is reasonably fitted by education, training, or experience.

(c) Any policy to which the rates below apply may require the debtor to be gainfully employed on the effective date of the insurance. Provided, however, that unless the insured writes the name of his employer on the application and signs a statement that he is employed, there shall be no denial of claims grounded on the insured's failure to be employed on the effective date of the insurance.

(d) If premiums are payable in one sum in advance for the entire duration of the indebtedness, for insurance with a preexisting exclusion as defined above, the following premiums are authorized:

Single Premium Rates Per $100 of Initial Insured Indebtedness

No. of Months in which Indebtedness is Repayable	*Nonretroactive Benefits*		*Retroactive Benefits*		
	14-Day Wait	*30-Day Wait*	*7-Day Wait*	*14-Day Wait*	*30-Day Wait*
12	$1.65	$1.10	$3.00	$2.42	$1.65
24	2.20	1.65	4.00	3.30	2.20
36	2.75	2.20	5.00	4.18	2.75
48	3.30	2.75	6.00	5.06	3.30
60	3.85	3.30	7.00	5.94	3.85
72	4.40	3.85		6.82	4.40

No. of Months in which Indebtedness is Repayable	*Nonretroactive Benefits*			*Retroactive Benefits*	
	14-Day Wait	*30-Day Wait*	*7-Day Wait*	*14-Day Wait*	*30-Day Wait*
84	$4.95	$4.40		$7.70	$4.95
96	5.50	4.95		8.58	5.50
108	6.05	5.50		9.46	6.05
120	6.60	6.05		10.34	6.60

For terms other than the above, premiums shall be prorated.

(e) For policies for which monthly premiums are charged on a basis of the then-outstanding balances, a monthly premium per one thousand dollars ($1,000) of outstanding balances is authorized, based on the following formula:

$$Op_n = \frac{20 \quad SP_n}{n + 1}$$

where SP_n = Single premium rate per one hundred dollars ($100.00) of initial indebtedness repayable in n equal monthly installments.

Op_n = Monthly outstanding balance premium rate per one thousand dollars ($1,000).

n = Original repayment period, in months.

(f) Premium rate standards for other benefit plans and for indebtedness repayable in installments other than as indicated above shall be actuarially consistent with the above rate standards. (1975, c. 660, s. 1; 1981, c. 759, ss. 2, 4-6, 9.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "the same age restrictions as" for "age restrictions similar to" near the end of the first sentence of subsection (a), added the second sentence of subsection (a), rewrote subsection (b), which formerly prohibited a definition of disability any more restrictively than the inability of the insured to perform his occupation or any occupation for which he is qualified by education, training or experience, and added the second sentence of subsection (c). The amendment also revised the table of single premium rates in subsection (d) and added at the end of subsection (d) "For terms other than the above, premium shall be prorated." The provision amending subsection (d) purported to amend "G.S. 350(d)," but § 58-350(d) was plainly intended.

Session Laws 1981, c. 759, s. 11, provides: "This act shall become effective October 1, 1981. All credit life and credit accident and health insurance policies delivered or issued for delivery on or after the effective date of this act shall conform to the provisions of this act. With regard to existing group credit insurance policies, the rates and forms shall be amended to conform to the requirements of this act, or be terminated, not later than the anniversary of the date of issue of the contract next following the effective date of this act."

§ 58-351. Premium refunds or credits.

(a) Each individual policy or group certificate shall provide that in the event of termination of the insurance prior to the scheduled maturity date of indebtedness, any refund of an amount paid by the debtor for insurance shall be paid or credited promptly to the person entitled thereto.

(b) The refund of premiums for decreasing term credit life insurance in transactions of 60 months duration or less and the refund of premiums for single interest credit property insurance shall be equal to the amount computed by the sum of digits formula commonly known as the "Rule of 78." The refund of premiums for decreasing term credit life insurance in transactions of more than 60 months duration shall be equal to the premium that would be charged for the remaining term and amount of coverage in the policy. The refund of premiums for level term credit life insurance and dual interest credit property insurance shall be equal to the pro rata unearned gross premiums.

(c) The refund of premiums in the case of credit accident and health insurance shall be equal to one-half the amount computed by the sum-of-digits formula commonly known as the "Rule of 78" plus one-half the amount of the pro rata unearned gross premium.

In lieu thereof the refund may be computed by the "Pure Premium" method. The refund is computed from the schedule of credit accident and health premiums and is equal to the premium from that schedule which would be charged for such insurance in the amount of the total remaining benefits for the remaining term of the indebtedness outstanding on the date of termination.

(d) No refund need be made if the amount thereof is less than one dollar ($1.00).

(e) If a creditor requires a debtor to make any payment for credit life insurance or credit accident and health insurance and an individual policy or group certificate of insurance is not issued, the creditor shall immediately give written notice to such debtor and shall promptly make an appropriate credit to the account. (1975, c. 660, s. 1; 1981, c. 759, s. 8.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, rewrote subsections (b) and (c).

Session Laws 1981, c. 759, s. 11, provides: "This act shall become effective October 1, 1981. All credit life and credit accident and health insurance policies delivered or issued for delivery on or after the effective date of this act shall conform to the provisions of this act. With regard to existing group credit insurance policies, the rates and form shall be amended to conform to the requirements of this act, or be terminated, not later than the anniversary of the date of issue of the contract next following the effective date of this act."

§ 58-352. Issuance of policies.

All policies of credit life insurance and credit accident and health insurance shall be delivered or issued for delivery in this State only by an insurer authorized to do an insurance business therein, and shall be issued only through holders of licenses or authorizations issued by the Commissioner. The enrollment of debtors under a group policy issued to a creditor and authorized under this Article shall not constitute the issuance of a policy of insurance. (1975, c. 660, s. 1.)

§ 58-353. Claims.

(a) All claims shall be promptly reported to the insurer or its designated claim representative, and the insurer shall maintain adequate claim files. All claims shall be settled as soon as possible and in accordance with the terms of the insurance contract.

(b) All claims shall be paid either by draft drawn upon the insurer or by check of the insurer or be paid by such other specified method upon the direction of the beneficiary who is entitled thereto pursuant to the policy provisions.

(c) No plan or arrangement shall be used whereby any person, firm or corporation other than the insurer or its designated claim representative shall be authorized to settle or adjust claims. The creditor shall not be designated as claim representative for the insurer in adjusting claims; provided, that a group policyholder may, by arrangement with the group insurer, draw drafts or checks in payment of claims due to the group policyholder subject to audit and review by the insurer. (1975, c. 660, s. 1.)

§ 58-354. Existing insurance; choice of insurer.

When credit life insurance or credit accident and health insurance is required for any indebtedness, the debtor shall, upon request to the creditor, have the option of furnishing the required amount of insurance through existing policies of insurance owned or controlled by him or of procuring and furnishing the required coverage through any insurer authorized to transact an insurance business within this State. (1975, c. 660, s. 1.)

§ 58-355. Enforcement.

The Commissioner may, after notice and hearing, issue rules and regulations necessary for the implementation of this Article. Whenever the Commissioner finds that there has been a violation of this Article or any rules or regulations issued pursuant thereto, and after written notice thereof and hearing given to the insurer or other person authorized or licensed by the Commissioner, he shall set forth the details of his findings together with an order for compliance by a specified date. Such order shall be binding on the insurer and other person authorized or licensed by the Commissioner on the date specified unless sooner withdrawn by the Commissioner or a stay thereof has been ordered by a court of competent jurisdiction. The provisions of G.S. 58-345, 58-346, 58-347, 58-348, 58-349, 58-350, and 58-351 shall not be operative until 90 days after June 18, 1975, and the Commissioner in his discretion may extend by not more than an additional 90 days the initial period within which the provisions of said sections shall not be operative. (1975, c. 660, s. 1.)

§ 58-356. Judicial review.

Any party to the proceeding affected by an order of the Commissioner shall be entitled to judicial review by following the procedure set forth in G.S. 58-9.3 to 58-9.6. (1975, c. 660, s. 1.)

§ 58-357. Penalties.

In addition to any other penalty provided by law, any person, firm or corporation which willfully violates an order of the Commissioner after it has become final, and while such order is in effect, shall, upon proof thereof to the satisfaction of the court, forfeit and pay to the State of North Carolina a sum not to exceed two hundred fifty dollars ($250.00) which may be recovered in a civil action, except that if such violation is found to be willful, the amount of such penalty shall be a sum not to exceed one thousand dollars ($1,000). The Commissioner, in his discretion, may revoke or suspend the license or certificate of authority of the person, firm or corporation guilty of such willful violation. Such order for suspension or revocation shall be upon notice and hearing, and shall be subject to judicial review as provided in G.S. 58-356. Any creditor who requires credit life insurance or credit accident and health insurance, or both, in excess of the amounts set forth in G.S. 58-344 or who violates the provisions of G.S. 58-354 shall be guilty of a misdemeanor, the penalty for which shall be a fine of five hundred dollars ($500.00) for each such occurrence or violation. (1975, c. 660, s. 1.)

§ 58-358. Reinsurance.

Any insurance company writing credit life or credit accident and health insurance subject to the provisions of this Article may reinsure its liability under any or all of such insurance with any domestic or foreign life insurance company; provided, that in the event such reinsurance is with a company not authorized to do business within this State and such company does not meet

the statutory requirements for admission, the direct writing company shall, notwithstanding such reinsurance, maintain all of the reserves required by the Commissioner of such line of business as if such reinsurance contract or treaty had not been entered into and shall continue primarily responsible for such insurance. (1975, c. 660, s. 1.)

§ 58-359. Credit property insurance.

(a) As used in this Article, the term "single interest credit property" insurance means insurance of the personal household property of the debtor against loss, with the creditor as sole beneficiary; and the term "dual credit property" insurance means insurance of personal household property of the debtor, with the creditor as primary beneficiary and the debtor as beneficiary of proceeds not paid to the creditor. For the purpose of this Article, "personal household property" means household furniture, furnishings and appliances designed for household use and not used by the debtor in a business trade or profession.

(b) Premium rates charged shall not exceed one dollar ($1.00) per year per one hundred dollars ($100.00) of insured value for single interest credit property insurance and shall not exceed one dollar and fifty cents ($1.50) per year per one hundred dollars ($100.00) of insured value for dual interest credit property insurance. The insured value shall not exceed the lesser of the value of the property or the amount of the initial indebtedness.

The Department shall collect data on credit property insurance written in North Carolina, including but not limited to: the amount of coverage written, direct premiums, earned premiums, dividends and retrospective rate credits paid, direct losses paid, direct losses incurred, commissions paid, loss ratios and policy provisions. (1981, c. 759, s. 7.)

§§ 58-360 to 58-363: Reserved for future codification purposes.

SUBCHAPTER IX. READABLE INSURANCE POLICIES.

ARTICLE 33.

Readable Insurance Policies.

§ 58-364. Title.

This Article is known and may be cited as the "Readable Insurance Policies Act." (1979, c. 755, s. 1.)

Editor's Note. — Session Laws 1979, c. 755, s. 20, contains a severability clause.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-365. Purpose.

The purpose of this Article is to provide that insurance policies and contracts be readable by a person of average intelligence, experience, and education. All insurers are required by this Article to use policy and contract forms and, where applicable, benefit booklets that are written in simple and commonly used language, that are logically and clearly arranged, and that are printed in a legible format. (1979, c. 755, s. 1.)

§ 58-366. Scope of application.

(a) Except as provided in subsection (b) of this section, the provisions of this Article apply to the policies and contracts of direct insurance that are described in G.S. 58-371(a).

(b) Nothing in this Article applies to:

(1) Any policy that is a security subject to federal jurisdiction;

(2) Any group policy covering a group of 1,000 or more lives at date of issue, other than a group credit life insurance policy, nor any group policy delivered or issued for delivery outside of this State; however, this does not exempt any certificate issued pursuant to a group policy delivered or issued for delivery in this State;

(3) Any group annuity contract that serves as a funding vehicle for pension, profit-sharing, or deferred compensation plans;

(4) Any form used in connection with, as a conversion from, as an addition to, or in exchange pursuant to a contractual provision for, a policy delivered or issued for delivery on a form approved or permitted to be issued prior to the dates such forms must be approved under this Article;

(5) The renewal of a policy delivered or issued for delivery prior to the date such policy must be approved under this Article; nor

(6) Insurers who issue benefit booklets on group and nongroup bases for the policies described in G.S. 58-371(a)(2). In such cases, the provisions of this Article apply to the benefit booklets furnished to the persons insured.

(7) Insurance on farm buildings (other than farm dwellings and their appurtenant structures); farm personal property; travel or camper trailers designed to be pulled by private passenger motor vehicles unless insured under policies covering nonfleet private passenger motor vehicles; residential real and personal property insured in multiple line insurance policies covering business activities as the primary insurable interest; and marine, general liability, burglary and theft, glass, and animal collision insurance except when such coverages are written as an integral part of a multiple line insurance policy for which there is an indivisible premium.

(c) No other provision of the General Statutes setting language simplification standards shall apply to any policy forms covered by this Article.

(d) Any non-English language policy delivered or issued for delivery in this State shall be deemed to be in compliance with this Article if the insurer certifies that such policy is translated from an English language policy which does comply with this Article. (1979, c. 755, s. 1; 1981, c. 888, s. 6.)

Effect of Amendments. — The 1981 amendment added subdivision (7) to subsection (b).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-367. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

(1) "Benefit booklet" means any written explanation of insurance coverages or benefits issued by an insurer and which is supplemental to and not a part of an insurance policy or contract.

(2) "Commissioner" means the Commissioner of Insurance.

(3) "Flesch scale analysis readability score" means a measurement of the ease of readability of an insurance policy or contract made pursuant to the procedures described in G.S. 58-371.

(4) "Insurance policy or contract" or "policy" means an agreement as defined by G.S. 58-3.
(5) "Insurer" means every person entering insurance policies or contracts as a principal, as described in G.S. 58-2(2) [G.S. 58-2(3)].
(6) "Person" means any individual, corporation, partnership, association, business trust, or voluntary organization. (1979, c. 755, s. 1.)

Editor's Note. — It appears that the reference in subdivision (5) of this section as enacted by Session Laws 1979, c. 755 to § 58-2(2) should be to § 58-2(3). The correct reference has been inserted in brackets.

§ 58-368. Format requirements.

(a) All insurance policies and contracts covered by G.S. 58-371 must be printed in a typeface at least as large as 10 point modern type, one point leaded, be written in a logical and clear order and form, and contain the following items:
(1) On the cover, first, or insert page of the policy a statement that the policy is a legal contract between the policy owner and the insurer and the statement, printed in larger or other contrasting type or color, "Read your policy carefully";
(2) An index of the major provisions of the policy, which may include the following items:
a. The person or persons insured by the policy;
b. The applicable events, occurrences, conditions, losses, or damages covered by the policy;
c. The limitations or conditions on the coverage of the policy;
d. Definitional sections of the policy;
e. Provisions governing the procedure for filing a claim under the policy;
f. Provisions governing cancellation, renewal, or amendment of the policy by either the insurer or the policyholder;
g. Any options under the policy; and
h. Provisions governing the insurer's duties and powers in the event that suit is filed against the insured.
(b) In determining whether or not a policy is written in a logical and clear order and form the Commissioner must consider the following factors:
(1) The extent to which sections or provisions are set off and clearly identified by titles, headings, or margin notations;
(2) The use of a more readable format, such as narrative or outline forms;
(3) Margin size and the amount and use of space to separate sections of the policy; and
(4) Contrast and legibility of the colors of the ink and paper and the use of contrasting titles or headings for sections. (1979, c. 755, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-369. Flesch scale analysis readability score; procedures.

(a) A Flesch scale analysis readability score will be measured as provided in this section.
(b) For policies containing 10,000 words or less of text, the entire policy must be analyzed. For policies containing more than 10,000 words, the readability

of two 200-word samples per page may be analyzed in lieu of the entire policy. The samples must be separated by at least 20 printed lines. For the purposes of this subsection a word will be counted as five printed characters or spaces between characters.

(c) The number of words and sentences in the text must be counted and the total number of words divided by the total number of sentences. The figure obtained must be multiplied by a factor of 1.015. The total number of syllables must be counted and divided by the total number of words. The figure obtained must be multiplied by a factor of 84.6. The sum of the figures computed under this subsection subtracted from 206.835 equals the Flesch scale analysis readability score for the policy.

(d) For the purposes of subsection (c) of this section the following procedures must be used:

(1) A contraction, hyphenated word, or numbers and letters, when separated by spaces, will be counted as one word;

(2) A unit of words ending with a period, semicolon, or colon, but excluding headings and captions, will be counted as a sentence; and

(3) A syllable means a unit of spoken language consisting of one or more letters of a word as divided by an accepted dictionary. Where the dictionary shows two or more equally acceptable pronunciations of a word, the pronunciation containing fewer syllables may be used.

(e) The term "text" as used in this section includes all printed matter except the following:

(1) The name and address of the insurer; the name, number or title of the policy; the table of contents or index; captions and subcaptions; specification pages, schedules or tables; and

(2) Any policy language that is drafted to conform to the requirements of any law, regulation, or agency interpretation of any state or the federal government; any policy language required by any collectively bargained agreement; any medical terminology; and any words that are defined in the policy: Provided, however, that the insurer submits with his filing under G.S. 58-370 a certified document identifying the language or terminology that is entitled to be excepted by this subdivision. (1979, c. 755, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-370. Filing requirements; duties of the Commissioner.

(a) No insurer may make, issue, amend, or renew any insurance policy or contract after the dates specified in G.S. 58-371 for the applicable type of insurance unless the policy is in compliance with the provisions of G.S. 58-368 and G.S. 58-369 and unless the policy is filed with the Commissioner for his approval. The policy will be deemed approved 90 days after filing unless disapproved within the 90-day period. The Commissioner may not unreasonably withhold his approval. Any disapproval must be delivered to the insurer in writing and must state the grounds for disapproval. Any policy filed with the Commissioner must be accompanied by a certified Flesch scale readability analysis and test score and by the insurer's certification that the policy is, in the insurer's judgment, readable based on the factors specified in G.S. 58-368 and G.S. 58-369.

(b) The Commissioner must disapprove any policy covered by subsection (a) of this section if he finds that:

(1) It is not accompanied by a certified Flesch scale analysis readability score of 50 or more.
(2) It is not accompanied by the insurer's certification that the policy is, in the judgment of the insurer, readable under the standards of this Article; or
(3) It does not comply with the format requirements of G.S. 58-368. (1979, c. 755, s. 1; 1979, 2nd Sess., c. 1161, s. 2.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 58-371. Application to policies; dates; duties of the Commissioner.

(a) The filing requirements of G.S. 58-370 apply as follows:
(1) As described in Article 12B of this Chapter, to all policies of private passenger nonfleet motor vehicle insurance, to all policies of insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof and valuable interest therein, and other insurance coverages written in connection with the sale of such property insurance except as excluded in G.S. 58-366(b)(7), that are made, issued, amended, or renewed after March 1, 1981; and
(2) To all policies of life insurance as described in Article 22 of this Chapter, to all benefit certificates issued by fraternal orders and societies as described in Subchapter VII of this Chapter, to all policies of accident and health insurance as described in Subchapter VI of this Chapter, to all subscribers' contracts of hospital, medical, and dental service corporations as described in General Statutes Chapter 57, and to all health maintenance organization evidences of coverage as described in General Statutes Chapter 57A, that are made, issued, amended, or renewed after July 1, 1983.

(b) The Commissioner must make the following reports to the Legislative Research Commission and the General Assembly:
(1) On or before March 31, 1980, a report detailing and evaluating the efforts made by the Commissioner and insurers to implement the provisions of subdivision (a)(1) of this section, and particularly examining the feasibility and practicality of requiring accident and health and life insurance policies to comply with the provisions of this Article and in the time prescribed;
(2) On or before March 31, 1981, a report detailing and evaluating:
a. The operation of and the extent of compliance with the provisions of this Article;
b. The efforts made by the Commissioner and insurers to implement the provisions of subdivision (a)(2) of this section; and
(3) The Commissioner's recommendations regarding the extension of the application of the provisions of this Article to other lines and types of insurance and his reason therefor. (1979, c. 755, s. 1; 1979, 2nd Sess., c. 1161, s. 3; 1981, c. 888, s. 7.)

Editor's Note. — Chapter 57A, referred to in this section, was rewritten by Session Laws 1979, c. 876, and has been recodified as Chapter 57B.

Effect of Amendments. — The 1981 amendment inserted "except as excluded in G.S. 58-366(b)(7)" near the end of subdivision (1) of subsection (a).

§ 58-372. Construction.

(a) The provisions of this Article will not operate to relieve any insurer from any provision of law regulating the contents or provisions of insurance policies or contracts nor operate to reduce an insured's or beneficiary's rights or protection granted under any statute or provision of law.

(b) The provisions of this Article shall not be construed to mandate, require, or allow alteration of the legal effect of any provision of any insurance policy or contract.

(c) In any action brought by a policyholder or claimant arising out of a policy approved pursuant to this Article, the policyholder or claimant may base such an action on either or both (i) the substantive language prescribed by such other statute or provision of law or (ii) the wording of the approved policy. (1979, c. 755, s. 1.)

§§ 58-373 to 58-379: Reserved for future codification purposes.

Article 34.

Insurance Information and Privacy Protection Act.

§ 58-380. Short title.

This Article may be cited as the Insurance Information and Privacy Protection Act. (1981, c. 846, s. 1.)

Editor's Note. — Session Laws 1981, c. 846, s. 4, makes the act effective July 1, 1982.

§ 58-381. Purpose.

The purpose of this Article is to establish standards for the collection, use, and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents, or insurance-support organizations; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance information practices, including the need to minimize intrusiveness; to establish a regulatory mechanism to enable natural persons to ascertain what information is being or has been collected about them in connection with insurance transactions and to have access to such information for the purpose of verifying or disputing its accuracy; to limit the disclosure of information collected in connection with insurance transactions; and to enable insurance applicants and policyholders to obtain the reasons for any adverse underwriting decision. (1981, c. 846, s. 1.)

§ 58-382. Scope.

(a) The obligations imposed by this Article shall apply to those insurance institutions, agents, or insurance-support organizations that, on or after July 1, 1982:

(1) In the case of life or accident and health insurance:

a. Collect, receive, or maintain information in connection with insurance transactions that pertains to natural persons who are residents of this State; or

b. Engage in insurance transactions with applicants, individuals, or policyholders who are residents of this State; and

(2) In the case of property or casualty insurance:
a. Collect, receive, or maintain information in connection with insurance transactions involving policies, contracts, or certificates of insurance delivered, issued for delivery, or renewed in this State; or
b. Engage in insurance transactions involving policies, contracts, or certificates of insurance delivered, issued for delivery, or renewed in this State.

(b) The rights granted by this Article shall extend to:
(1) In the case of life or accident and health insurance, the following persons who are residents of this State:
a. Natural persons who are the subject of information collected, received, or maintained in connection with insurance transactions; and
b. Applicants, individuals, or policyholders who engage in or seek to engage in insurance transactions;
(2) In the case of property or casualty insurance, the following persons:
a. Natural persons who are the subject of information collected, received, or maintained in connection with insurance transactions involving policies, contracts, or certificates of insurance delivered, issued for delivery, or renewed in this State; and
b. Applicants, individuals, or policyholders who engage in or seek to engage in insurance transactions involving policies, contracts, or certificates of insurance delivered, issued for delivery, or renewed in this State.

(c) For purposes of this section, a person shall be considered a resident of this State if the person's last known mailing address, as shown in the records of the insurance institution, agent, or insurance-support organization, is located in this State.

(d) Notwithstanding subsections (a) and (b) of this section, this Article shall not apply to information collected from the public records of a governmental authority and maintained by an insurance institution or its representatives for the purpose of insuring the title to real property located in this State. (1981, c. 846, s. 1.)

§ 58-383. Definitions.

As used in this Article:
(1) "Adverse underwriting decision" means:
a. Any of the following actions with respect to insurance transactions involving insurance coverage that is individually underwritten:
1. A declination of insurance coverage;
2. A termination of insurance coverage;
3. Failure of an agent to apply for insurance coverage with a specific insurance institution that an agent represents and that is requested by an applicant;
4. In the case of a property or casualty insurance coverage:
I. Placement by an insurance institution or agent of a risk with a residual market mechanism or an unauthorized insurer, or
II. The charging of a higher rate on the basis of information that differs from that which the applicant or policyholder furnished; or
5. In the case of a life or accident and health insurance coverage, an offer to insure at higher than standard rates.
b. Notwithstanding subdivision (1)a of this section, the following actions shall not be considered adverse underwriting decisions,

but the insurance institution or agent responsible for their occurrence shall nevertheless provide the applicant or policyholder with the specific reason or reasons for their occurrence:

1. The termination of an individual policy form on a class or statewide basis;
2. A declination of insurance coverage solely because such coverage is not available on a class or statewide basis; or
3. The rescission of a policy.

(2) "Affiliate" or "affiliated" means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with another person.

(3) "Agent" shall have the meanings as set forth in G.S. 58-39.4 and shall include surplus lines brokers, salesmen, or representatives of a medical, surgical, hospital, dental, or optometric service plan, and salesmen or representatives of a health maintenance organization.

(4) "Applicant" means any person who seeks to contract for insurance coverage other than a person seeking group insurance that is not individually underwritten.

(5) "Consumer report" means any written, oral, or other communication of information bearing on a natural person's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used in connection with an insurance transaction.

(6) "Consumer reporting agency" means any person who:

a. Regularly engages, in whole or in part, in the practice of assembling or preparing consumer reports for a monetary fee;
b. Obtains information primarily from sources other than insurance institutions; and
c. Furnishes consumer reports to other persons.

(7) "Control," including the terms "controlled by" or "under common control with," means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person.

(8) "Declination of insurance coverage" means a denial, in whole or in part, by an insurance institution or agent of requested insurance coverage.

(9) "Individual" means any natural person who:

a. In the case of property or casualty insurance, is a past, present, or proposed named insured or certificate holder;
b. In the case of life or accident and health insurance, is a past, present, or proposed principal insured or certificate holder;
c. Is a past, present or proposed policy owner;
d. Is a past or present applicant;
e. Is a past or present claimant; or
f. Derived, derives, or is proposed to derive insurance coverage under an insurance policy or certificate subject to this Article.

(10) "Institutional source" means any person or governmental entity that provides information about an individual to an agent, insurance institution, or insurance-support organization, other than:

a. An agent;
b. The individual who is the subject of the information; or
c. A natural person acting in a personal capacity rather than in a business or professional capacity.

(11) "Insurance institution" means any corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyd's insurer, fraternal benefit society, or other person engaged in the business of insurance, including health maintenance organizations and medical, surgical, hospital, dental, and optometric service plans, governed by Chapters 57 and 57B. "Insurance institution" shall not include agents or insurance-support organizations.

(12) "Insurance-support organization" means any person who regularly engages, in whole or in part, in the practice of assembling or collecting information about natural persons for the primary purpose of providing the information to an insurance institution or agent for insurance transactions, including: (i) the furnishing of consumer reports or investigative consumer reports to an insurance institution or agent for use in connection with an insurance transaction; or (ii) the collection of personal information from insurance institutions, agents, or other insurance-support organizations for the purpose of detecting or preventing fraud, material misrepresentation, or material nondisclosure in connection with insurance underwriting or insurance claim activity; provided, however, the following persons shall not be considered "insurance-support organizations" for purposes of this Article: agents, governmental institutions, insurance institutions, medical-care institutions, and medical professionals.

(13) "Insurance transaction" means any transaction involving insurance primarily for personal, family, or household needs rather than business or professional needs that entails:

a. The determination of an individual's eligibility for an insurance coverage, benefit, or payment; or

b. The servicing of an insurance application, policy, contract, or certificate.

(14) "Investigative consumer report" means a consumer report or portion thereof in which information about a natural person's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with the person's neighbors, friends, associates, acquaintances, or others who may have knowledge concerning such items of information.

(15) "Life insurance" includes annuities.

(16) "Medical-care institution" means any facility or institution that is licensed to provide health care services to natural persons, including but not limited to, hospitals, skilled nursing facilities, home-health agencies, medical clinics, rehabilitation agencies, public health agencies, or health-maintenance organizations.

(17) "Medical professional" means any person licensed or certified to provide health care services to natural persons, including but not limited to, a physician, dentist, nurse, chiropractor, optometrist, physical or occupational therapist, psychiatric social worker, clinical dietitian, clinical psychologist, pharmacist, or speech therapist.

(18) "Medical-record information" means personal information that:

a. Relates to an individual's physical or mental condition, medical history, or medical treatment; and

b. Is obtained from a medical professional or medical-care institution, from the individual, or from the individual's spouse, parent, or legal guardian.

(19) "Personal information" means any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health, or any other personal characteristics. "Personal information" includes

an individual's name and address and medical-record information, but does not include privileged information.

(20) "Policyholder" means any person who:
a. In the case of individual property or casualty insurance, is a present named insured;
b. In the case of individual life or accident and health insurance, is a present policy owner; or
c. In the case of group insurance that is individually underwritten, is a present group certificate holder.

(21) "Pretext interview" means an interview whereby a person, in an attempt to obtain information about a natural person, performs one or more of the following acts:
a. Pretends to be someone he is not;
b. Pretends to represent a person he is not in fact representing;
c. Misrepresents the true purpose of the interview; or
d. Refuses to identify himself upon request.

(22) "Privileged information" means any individually identifiable information that (i) relates to a claim for insurance benefits or a civil or criminal proceeding involving an individual, and (ii) is collected in connection with or in reasonable anticipation of a claim for insurance benefits or civil or criminal proceeding involving an individual: Provided, however, information otherwise meeting the requirements of this subsection shall nevertheless be considered personal information under this Article if it is disclosed in violation of G.S. 58-394.

(23) "Residual market mechanism" means any reinsurance facility, joint underwriting association, assigned risk plan, or other similar plan established under the laws of this State.

(24) "Termination of insurance coverage" or "termination of an insurance policy" means either a cancellation or nonrenewal of an insurance policy, in whole or in part, for any reason other than the failure to pay a premium as required by the policy.

(25) "Unauthorized insurer" means an insurance institution that has not been granted a license by the Commissioner to transact the business of insurance in this State. (1981, c. 846, s. 1.)

§ 58-384. Pretext interviews.

No insurance institution, agent, or insurance-support organization shall use or authorize the use of pretext interviews to obtain information in connection with an insurance transaction: Provided, however, a pretext interview may be undertaken to obtain information from a person or institution that does not have a generally or statutorily recognized privileged relationship with the person about whom the information relates for the purpose of investigating a claim where, based upon specific information available for review by the Commissioner, there is a reasonable basis for suspecting criminal activity, fraud, material misrepresentation, or material nondisclosure in connection with the claim. (1981, c. 846, s. 1.)

§ 58-385. Notice of insurance information practices.

(a) An insurance institution or agent shall provide a notice of information practices to all applicants or policyholders in connection with insurance transactions as provided in this section:

(1) In the case of an application for insurance a notice shall be provided no later than:
a. At the time of the delivery of the insurance policy or certificate when personal information is collected only from the applicant or from public records; or

b. At the time the collection of personal information is initiated when personal information is collected from a source other than the applicant or public records;

(2) In the case of a policy renewal, a notice shall be provided no later than the policy renewal date, except that no notice shall be required in connection with a policy renewal if:

a. Personal information is collected only from the policyholder or from public records; or

b. A notice meeting the requirements of this section has been given within the previous 24 months; or

(3) In the case of a policy reinstatement or change in insurance benefits, a notice shall be provided no later than the time a request for a policy reinstatement or change in insurance benefits is received by the insurance institution, except that no notice shall be required if personal information is collected only from the policyholder or from public records.

(b) The notice required by subsection (a) of this section shall be in writing and shall state:

(1) Whether personal information may be collected from persons other than the individual or individuals proposed for coverage;

(2) The types of personal information that may be collected and the types of sources and investigative techniques that may be used to collect such information;

(3) The types of disclosures identified in subsections (2), (3), (4), (5), (6), (9), (11), (12), and (14) of G.S. 58-394 and the circumstances under which such disclosures may be made without prior authorization: Provided, however, only those circumstances need be described that occur with such frequency as to indicate a general business practice;

(4) A description of the rights established under G.S. 58-389 and 58-390 and the manner in which such rights may be exercised; and

(5) That information obtained from a report prepared by an insurance-support organization may be retained by the insurance-support organization and disclosed to other persons.

(c) In lieu of the notice prescribed in subsection (b) of this section, the insurance institution or agent may provide an abbreviated notice informing the applicant or policyholder that:

(1) Personal information may be collected from persons other than the individual or individuals proposed for coverage;

(2) Such information, as well as other personal or privileged information subsequently collected by the insurance institution or agent, in certain circumstances, may be disclosed to third parties without authorization;

(3) A right of access and correction exists with respect to all personal information collected; and

(4) The notice prescribed in subsection (b) of this section will be furnished to the applicant or policyholder upon request.

(d) The obligations imposed by this section upon an insurance institution or agent may be satisfied by another insurance institution or agent authorized to act on its behalf. (1981, c. 846, s. 1.)

§ 58-386. Marketing and research surveys.

An insurance institution or agent shall clearly specify those questions designed to obtain information solely for marketing or research purposes from an individual in connection with an insurance transaction. (1981, c. 846, s. 1.)

§ 58-387. Content of disclosure authorization forms.

Notwithstanding any other provision of law of this State, no insurance institution, agent, or insurance-support organization shall utilize as its disclosure authorization form in connection with insurance transactions involving insurance policies or contracts issued after July 1, 1982, a form or statement that authorizes the disclosure of personal or privileged information about an individual to the insurance institution, agent, or insurance-support organization unless the form or statement:

(1) Complies with the provisions of Article 33 of this Chapter;
(2) Is dated;
(3) Specifies the types of persons authorized to disclose information about the individual;
(4) Specifies the nature of the information authorized to be disclosed;
(5) Names the insurance institution or agent and identifies by generic reference representatives of the insurance institution to whom the individual is authorizing information to be disclosed;
(6) Specifies the purposes for which the information is collected;
(7) Specifies the length of time such authorization shall remain valid, which shall be no longer than:
    a. In the case of authorizations signed for the purpose of collecting information in connection with an application for an insurance policy, a policy reinstatement, or a request for change in policy benefits:
        1. Thirty months from the date the authorization is signed if the application or request involves life, health, or disability insurance; or
        2. One year from the date the authorization is signed if the application or request involves property or casualty insurance;
    b. In the case of authorizations signed for the purpose of collecting information in connection with a claim for benefits under an insurance policy:
        1. The term of coverage of the policy if the claim is for a health insurance benefit; or
        2. The duration of the claim if the claim is not for a health insurance benefit; and
(8) Advises the individual or a person authorized to act on behalf of the individual that the individual or the individual's authorized representative is entitled to receive a copy of the authorization form. (1981, c. 846, s. 1; c. 1127, s. 56.)

Effect of Amendments. — The 1981 amendment substituted "July 1, 1982" for "January 1, 1982" in the introductory paragraph.

Session Laws 1981, c. 1127, s. 89, contains a severability clause.

§ 58-388. Investigative consumer reports.

(a) No insurance institution, agent, or insurance-support organization may prepare or request an investigative consumer report about an individual in connection with an insurance transaction involving an application for insurance, a policy renewal, a policy reinstatement, or a change in insurance benefits unless the insurance institution or agent informs the individual:

(1) That he may request to be interviewed in connection with the preparation of the investigative consumer report; and
(2) That upon a request pursuant to G.S. 58-389, he is entitled to receive a copy of the investigative consumer report.

(b) If an investigative consumer report is to be prepared by an insurance institution or agent, the insurance institution or agent shall institute reasonable procedures to conduct a personal interview requested by an individual.

(c) If an investigative consumer report is to be prepared by an insurance-support organization, the insurance institution or agent desiring such report shall inform the insurance-support organization whether a personal interview has been requested by the individual. The insurance-support organization shall institute reasonable procedures to conduct such interviews, if requested. (1981, c. 846, s. 1.)

§ 58-389. Access to recorded personal information.

(a) If any individual, after proper identification, submits a written request to an insurance institution, agent, or insurance-support organization for access to recorded personal information about the individual that is reasonably described by the individual and reasonably locatable and retrievable by the insurance institution, agent, or insurance-support organization, the insurance institution, agent, or insurance-support organization shall within 30 business days from the date such request is received:

(1) Inform the individual of the nature and substance of such recorded personal information in writing, by telephone, or by other oral communication, whichever the insurance institution, agent, or insurance-support organization prefers;

(2) Permit the individual to see and copy, in person, such recorded personal information pertaining to him or to obtain a copy of such recorded personal information by mail, whichever the individual prefers, unless such recorded personal information is in coded form, in which case an accurate translation in plain language shall be provided in writing;

(3) Disclose to the individual the identity, if recorded, of those persons to whom the insurance institution, agent, or insurance-support organization has disclosed such personal information within two years prior to such request, and if the identity is not recorded, the names of those insurance institutions, agents, insurance-support organizations or other persons to whom such information is normally disclosed; and

(4) Provide the individual with a summary of the procedures by which he may request correction, amendment, or deletion of recorded personal information.

(b) Any personal information provided pursuant to subsection (a) of this section shall identify the source of the information if such source is an institutional source.

(c) Medical-record information supplied by a medical-care institution or medical professional and requested under subsection (a) of this section together with the identity of the medical professional or medical-care institution that provided such information, shall be supplied either directly to the individual or to a medical professional designated by the individual and licensed to provide medical care with respect to the condition to which the information relates, whichever the insurance institution, agent, or insurance-support organization prefers. If it elects to disclose the information to a medical professional designated by the individual, the insurance institution, agent, or insurance-support organization shall notify the individual, at the time of the disclosure, that it has provided the information to the medical professional.

(d) Except for personal information provided under G.S. 58-391, an insurance institution, agent, or insurance-support organization may charge a reasonable fee to cover the costs incurred in providing a copy of recorded personal information to individuals.

(e) The obligations imposed by this section upon an insurance institution or agent may be satisfied by another insurance institution or agent authorized to act on its behalf. With respect to the copying and disclosure of recorded personal information pursuant to a request under subsection (a) of this section, an insurance institution, agent, or insurance-support organization may make arrangements with an insurance-support organization or a consumer reporting agency to copy and disclose recorded personal information on its behalf.

(f) The rights granted to individuals in this section shall extend to all natural persons to the extent information about them is collected and maintained by an insurance institution, agent, or insurance-support organization in connection with an insurance transaction. The rights granted to all natural persons by this subsection shall not extend to information about them that relates to and is collected in connection with or in reasonable anticipation of a claim or civil or criminal proceeding involving them.

(g) For purposes of this section, the term, "insurance-support organization" does not include the term, "consumer reporting agency." (1981, c. 846, s. 1.)

§ 58-390. Correction, amendment, or deletion of recorded personal information.

(a) Within 30 business days from the date of receipt of a written request from an individual to correct, amend, or delete any recorded personal information about the individual within its possession, an insurance institution, agent, or insurance-support organization shall either:

(1) Correct, amend, or delete the portion of the recorded personal information in dispute; or

(2) Notify the individual of:

a. Its refusal to make such correction, amendment, or deletion;

b. The reasons for the refusal; and

c. The individual's right to file a statement as provided in subsection (c) of this section.

(b) If the insurance institution, agent, or insurance-support organization corrects, amends, or deletes recorded personal information in accordance with subdivision (a)(1) of this section, the insurance institution, agent, or insurance-support organization shall so notify the individual in writing and furnish the correction, amendment, or fact of deletion to:

(1) Any person specifically designated by the individual who, within the preceding two years, may have received such recorded personal information;

(2) Any insurance-support organization whose primary source of personal information is insurance institutions if the insurance-support organization has systematically received such recorded personal information from the insurance institution within the preceding seven years. The correction, amendment, or fact of deletion need not be furnished if the insurance-support organization no longer maintains recorded personal information about the individual; and

(3) Any insurance-support organization that furnished the personal information that has been corrected, amended, or deleted.

(c) Whenever an individual disagrees with an insurance institution's, agent's, or insurance-support organization's refusal to correct, amend, or delete recorded personal information, the individual shall be permitted to file with the insurance institution, agent, or insurance-support organization:

(1) A concise statement setting forth what the individual thinks is the correct, relevant, or fair information; and

(2) A concise statement of the reasons why the individual disagrees with the insurance institution's, agent's, or insurance-support organiza-

tion's refusal to correct, amend, or delete recorded personal information.

(d) In the event an individual files either statement as described in subsection (c) of this section, the insurance institution, agent, or support organization shall:

(1) File the statement with the disputed personal information and provide a means by which anyone reviewing the disputed personal information will be made aware of the individual's statement and have access to it; and

(2) In any subsequent disclosure by the insurance institution, agent, or support organization of the recorded personal information that is the subject of disagreement, clearly identify the matter or matters in dispute and provide the individual's statement along with the recorded personal information being disclosed; and

(3) Furnish the statement to the persons and in the manner specified in subsection (b) of this section.

(e) The rights granted to individuals in this section shall extend to all natural persons to the extent information about them is collected and maintained by an insurance institution, agent, or insurance-support organization in connection with an insurance transaction. The rights granted to all natural persons by this subsection shall not extend to information about them that relates to and is collected in connection with or in reasonable anticipation of a claim or civil or criminal proceeding involving them.

(f) For purposes of this section, the term, "insurance-support organization" does not include the term, "consumer reporting agency." (1981, c. 846, s. 1.)

Editor's Note. — In subsection (a) of the section as set out above, "from" has been substituted for "form" following "request" to correct an obvious error in the 1981 act.

§ 58-391. Reasons for adverse underwriting decisions.

(a) In the event of an adverse underwriting decision, the insurance institution or agent responsible for the decision shall give a written notice in a form approved by the Commissioner that:

(1) Either provides the applicant, policyholder, or individual proposed for coverage with the specific reason or reasons for the adverse underwriting decision in writing or advises such person that upon written request he may receive the specific reason or reasons in writing; and

(2) Provides the applicant, policyholder, or individual proposed for coverage with a summary of the rights established under subsection (b) of this section and G.S. 58-389 and 58-390.

(b) Upon receipt of a written request within 90 business days from the date of the mailing of notice or other communication of an adverse underwriting decision to an applicant, policyholder or individual proposed for coverage, the insurance institution or agent shall furnish to such person within 21 business days from the date of receipt of such written request:

(1) The specific reason or reasons for the adverse underwriting decision, in writing, if such information was not initially furnished in writing pursuant to subdivision (a)(1) of this section;

(2) The specific items of personal and privileged information that support those reasons: Provided, however:

a. The insurance institution or agent shall not be required to furnish specific items of privileged information if it has a reasonable suspicion, based upon specific information available for review by the Commissioner, that the applicant, policyholder, or individual

proposed for coverage has engaged in criminal activity, fraud, material misrepresentation, or material nondisclosure, and

b. Specific items of medical-record information supplied by a medical-care institution or medical professional shall be disclosed either directly to the individual about whom the information relates or to the medical professional designated by the individual and licensed to provide medical care with respect to the condition to which the information relates, whichever the insurance institution or agent prefers; and

(3) The names and addresses of the institutional sources that supplied the specific items of information given pursuant to subdivision (b)(2) of this section: Provided, however, the identity of any medical professional or medical-care institution shall be disclosed either directly to the individual or to the designated medical professional, whichever the insurance institution or agent prefers.

(c) The obligations imposed by this section upon an insurance institution or agent may be satisfied by another insurance institution or agent authorized to act on its behalf.

(d) When an adverse underwriting decision results solely from an oral request or inquiry, the explanation of reasons and summary of rights required by this section may be given orally. (1981, c. 846, s. 1.)

§ 58-392. Information concerning previous adverse underwriting decisions.

No insurance institution, agent, or insurance-support organization may seek information in connection with an insurance transaction concerning: (i) any previous adverse underwriting decision experienced by an individual; or (ii) any previous insurance coverage obtained by an individual through a residual market mechanism, unless such inquiry also requests the reasons for any previous adverse underwriting decision or the reasons why insurance coverage was previously obtained through a residual market mechanism. (1981, c. 846, s. 1.)

§ 58-393. Previous adverse underwriting decisions.

No insurance institution or agent may base an adverse underwriting decision in whole or in part:

(1) On the fact of a previous adverse underwriting decision or on the fact that an individual previously obtained insurance coverage through a residual market mechanism: Provided, however, an insurance institution or agent may base an adverse underwriting decision on further information obtained from an insurance institution or agent responsible for a previous adverse underwriting decision;

(2) On personal information received from an insurance-support organization whose primary source of information is insurance institutions: Provided, however, an insurance institution or agent may base an adverse underwriting decision on further personal information obtained as the result of information received from such insurance-support organization. (1981, c. 846, s. 1.)

§ 58-394. Disclosure limitations and conditions.

An insurance institution, agent, or insurance-support organization shall not disclose any personal or privileged information about an individual collected or received in connection with an insurance transaction unless the disclosure is:

(1) With the written authorization of the individual, provided:
   a. If such authorization is submitted by another insurance institution, agent, or insurance-support organization, the authorization meets the requirements of G.S. 58-387; or
   b. If such authorization is submitted by a person other than an insurance institution, agent, or insurance-support organization, the authorization is:
      1. Dated;
      2. Signed by the individual; and
      3. Obtained one year or less prior to the date a disclosure is sought pursuant to this paragraph; or

(2) To a person other than an insurance institution, agent, or insurance-support organization, provided such disclosure is reasonably necessary:
   a. To enable such person to perform a business, professional, or insurance function for the disclosing insurance institution, agent, or insurance-support organization and such person agrees not to disclose the information further without the individual's written authorization unless the further disclosure:
      1. Would otherwise be permitted by this section if made by an insurance institution, agent, or insurance-support organization; or
      2. Is reasonably necessary for such person to perform its function for the disclosing insurance institution, agent, or insurance-support organization; or
   b. To enable such person to provide information to the disclosing insurance institution, agent, or insurance-support organization for the purpose of:
      1. Determining an individual's eligibility for an insurance benefit or payment; or
      2. Detecting or preventing criminal activity, fraud, material misrepresentation, or material nondisclosure in connection with an insurance transaction; or

(3) To an insurance institution, agent, insurance-support organization, or self-insurer, provided the information disclosed is limited to that which is reasonably necessary:
   a. To detect or prevent criminal activity, fraud, material misrepresentation, or material nondisclosure in connection with insurance transactions; or
   b. For either the disclosing or receiving insurance institution, agent, or insurance-support organization to perform its function in connection with an insurance transaction involving the individual; or

(4) To a medical-care institution or medical professional for the purpose of (i) verifying insurance coverage or benefits, (ii) informing an individual of a medical problem of which the individual may not be aware, or (iii) conducting an operations or services audit, provided only such information is disclosed as is reasonably necessary to accomplish the foregoing purposes; or

(5) To an insurance regulatory authority; or

(6) To a law-enforcement or other government authority:
   a. To protect the interests of the insurance institution, agent, or insurance-support organization in preventing or prosecuting the perpetration of fraud upon it; or
   b. If the insurance institution, agent, or insurance-support organization reasonably believes that illegal activities have been conducted by the individual; or

(7) Otherwise permitted or required by law; or
(8) In response to a facially valid administrative or judicial order, including a search warrant or subpoena; or
(9) Made for the purpose of conducting actuarial or research studies, provided:
a. No individual may be identified in any actuarial or research report;
b. Materials allowing the individual to be identified are returned or destroyed as soon as they are no longer needed; and
c. The actuarial or research organization agrees not to disclose the information unless the disclosure would otherwise be permitted by this section if made by an insurance institution, agent, or insurance-support organization; or
(10) To a party or a representative of a party to a proposed or consummated sale, transfer, merger, or consolidation of all or part of the business of the insurance institution, agent, or insurance-support organization, provided:
a. Prior to the consummation of the sale, transfer, merger, or consolidation only such information is disclosed as is reasonably necessary to enable the recipient to make business decisions about the purchase, transfer, merger, or consolidation, and
b. The recipient agrees not to disclose the information unless the disclosure would otherwise be permitted by this section if made by an insurance institution, agent or insurance-support organization; or
(11) To a person whose only use of such information will be in connection with the marketing of a product or service, provided:
a. No medical-record information, privileged information, or personal information relating to an individual's character, personal habits, mode of living, or general reputation is disclosed, and no classification derived from such information is disclosed;
b. The individual has been given an opportunity to indicate that he does not want personal information disclosed for marketing purposes and has given no indication that such individual does not want the information disclosed; and
c. The person receiving such information agrees not to use it except in connection with the marketing of a product or service; or
(12) To an affiliate whose only use of the information will be in connection with an audit of the insurance institution or agent or the marketing of an insurance product or service, provided the affiliate agrees not to disclose the information for any other purpose or to unaffiliated persons; or
(13) By a consumer reporting agency, provided the disclosure is to a person other than an insurance institution or agent; or
(14) To a group policyholder for the purpose of reporting claims experience or conducting an audit of the insurance institution's or agent's operations or services, provided the information disclosed is reasonably necessary for the group policyholder to conduct the review or audit; or
(15) To a professional peer review organization for the purpose of reviewing the service or conduct of a medical-care institution or medical professional; or
(16) To a governmental authority for the purpose of determining the individual's eligibility for health benefits for which the governmental authority may be liable; or
(17) To a certificate holder or policyholder for the purpose of providing information regarding the status of an insurance transaction;
(18) To a lienholder, mortgagee, assignee, lessor, or other person shown on the records of an insurance institution or agent as having a legal or

beneficial interest in a policy of insurance; provided that the information disclosed is limited to that which is reasonably necessary to permit such person to protect its interest in such policy. (1981, c. 846, s. 1.)

§ 58-395. Powers of the Commissioner.

(a) The Commissioner shall have the power to examine and investigate into the affairs of every insurance institution or agent doing business in this State to determine whether the insurance institution or agent has been or is engaged in any conduct in violation of this Article.

(b) The Commissioner shall have the power to examine and investigate the affairs of every insurance-support organization that acts on behalf of an insurance institution or agent and that either (i) transacts business in this State, or (ii) transacts business outside this State and has an effect on a person residing in this State in order to determine whether such insurance-support organization has been or is engaged in any conduct in violation of this Article. (1981, c. 846, s. 1.)

§ 58-396. Hearings and procedures.

(a) Whenever the Commissioner has reason to believe that an insurance institution, agent, or insurance-support organization has been or is engaged in conduct in this State that violates this Article, or whenever the Commissioner has reason to believe that an insurance-support organization has been or is engaged in conduct outside this State that has an effect on a person residing in this State and that violates this Article, the Commissioner may issue and serve upon such insurance institution, agent, or insurance-support organization a statement of charges and notice of hearing to be held at a time and place fixed in the notice. The date for such hearing shall be not less than 10 days after the date of service.

(b) At the time and place fixed for such hearing the insurance institution, agent, or insurance-support organization charged shall have an opportunity to answer the charges against it and present evidence on its behalf. Upon good cause shown, the Commissioner shall permit any adversely affected person to intervene, appear, and be heard at such hearing by counsel or in person. (1981, c. 846, s. 1.)

§ 58-397. Service of process; insurance-support organizations.

For the purpose of this Article, an insurance-support organization transacting business outside this State that has an effect on a person residing in this State shall be deemed to have appointed the Commissioner to accept service of process on its behalf, provided the Commissioner causes a copy of such service to be mailed forthwith by registered mail to the insurance-support organization at its last known principal place of business. The Commissioner shall file an affidavit of compliance with the requirements of this section with the other papers in the proceeding giving rise to such service. (1981, c. 846, s. 1.)

§ 58-398. Cease and desist orders.

If, after a hearing pursuant to G.S. 58-396, the Commissioner determines that the insurance institution, agent, or insurance-support organization charged has engaged in conduct or practices in violation of this Article, he may issue an order requiring such insurance institution, agent, or insur-

ance-support organization to cease and desist from the conduct or practices constituting a violation of this Article. (1981, c. 846, s. 1.)

§ 58-399. Penalties.

(a) In any case where a hearing pursuant to G.S. 58-396 results in the findings of a knowing violation of this Article, the Commissioner, in addition to the issuance of a cease and desist order as prescribed in G.S. 58-398, may apply to a court of competent jurisdiction for an order directing payment of a monetary penalty of not more than five hundred dollars ($500.00) for each violation but not to exceed ten thousand dollars ($10,000) in the aggregate for multiple violations.

(b) Any person who violates a cease and desist order of the Commissioner under G.S. 58-398, after notice and hearing and upon order of the court, may be subject to one or more of the following penalties, at the discretion of the court:

(1) A monetary fine of not more than ten thousand dollars ($10,000) for each violation; or

(2) A monetary fine of not more than fifty thousand dollars ($50,000) if the court finds that violations have occurred with such frequency as to constitute a general business practice; or

(3) Suspension or revocation of an insurance institution's or agent's license. (1981, c. 846, s. 1.)

§ 58-400. Appeal of right.

From any final order of the Commissioner issued pursuant to the provisions of this Article there shall be an appeal as provided in G.S. 58-9.3. (1981, c. 846, s. 1.)

§ 58-401. Individual remedies.

(a) If any insurance institution, agent, or insurance-support organization fails to comply with G.S. 58-389, 58-390, or 58-391 with respect to the rights granted under those sections, any person whose rights are violated may apply to the superior court in the county in which such person resides for appropriate equitable relief.

(b) An insurance institution, agent, or insurance-support organization that discloses information in violation of G.S. 58-394 shall be liable for damages sustained by the individual to whom the information relates. No individual, however, shall be entitled to a monetary award that exceeds the actual damages sustained by the individual as a result of a violation of G.S. 58-394.

(c) In any action brought pursuant to this section, the court may award the cost of the action and reasonable attorney's fees to the prevailing party.

(d) An action under this section must be brought within two years from the date the alleged violation is or should have been discovered.

(e) Except as specifically provided in this section, there shall be no remedy or recovery available to individuals for any occurrence that constitutes a violation of any provision of this Article. (1981, c. 846, s. 1.)

§ 58-402. Immunity.

No cause of action in the nature of defamation, invasion of privacy, or negligence shall arise against any person for disclosing personal or privileged information in accordance with this Article, nor shall such a cause of action arise against any person for furnishing personal or privileged information to an insurance institution, agent, or insurance-support organization: Provided,

however, this section shall provide no immunity for disclosing or furnishing false information with malice or willful intent to injure any person. (1981, c. 846, s. 1.)

§ 58-403. Obtaining information under false pretenses.

Any person who knowingly and willfully obtains information about an individual from an insurance institution, agent, or insurance-support organization under false pretenses shall be fined not more than ten thousand dollars ($10,000) or imprisoned for more than one year, or both. (1981, c. 846, s. 1.)

§ 58-404. Rights.

The rights granted under G.S. 58-389, 58-390, and 58-394 shall take effect on July 1, 1982, regardless of the date of the collection or receipt of the information that is the subject of such sections. (1981, c. 846, s. 1; c. 1127, s. 56.)

Effect of Amendments. — The 1981 amendment substituted "July 1, 1982" for "January 1, 1982."

Session Laws 1981, c. 1127, s. 89, contains a severability clause.

Chapter 59.

Partnership.

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ARTICLE 1.

Uniform Limited Partnership Act.

§ 59-1. Limited partnership defined.

A limited partnership is a partnership formed by two or more individuals, partnerships, corporations or other associations under the provisions of G.S. 59-2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. (1941, c. 251, s. 1; 1979, c. 97, s. 1.)

Legal Periodicals. — For comment on this article, see 19 N.C.L. Rev. 503.

For a discussion of partnerships as legal vehicles for historic preservation, see 12 Wake Forest L. Rev. 9 (1976).

§ 59-2. Formation.

(a) Two or more persons desiring to form a limited partnership shall

(1) Sign and swear to a certificate, which shall state

a. The name of the partnership,

b. The character of the business,

c. The location of the principal place of business,

d. The name and place of residence of each member; general and limited partners being respectively designated,

e. The term for which the partnership is to exist,

f. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

g. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

h. The time, if agreed upon, when the contribution of each limited partner is to be returned,

i. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

j. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

k. The right, if given, of the partners to admit additional limited partners,

l. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

m. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

n. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(2) File for record the certificate in the office of the register of deeds of the county where the principal place of business is located according to the statement in such certificate.

(b) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of subsection (a). (1941, c. 251, s. 2; 1953, c. 1190, s. 4; 1967, c. 823, s. 26.)

Editor's Note. — Session Laws 1967, c. 823, which amended this section, provides, in s. 34: "It is the intent of this act to establish the office of the register of deeds as the filing office for all of the corporate and related documents now required to be filed with the clerk of the superior court and to transfer all of the duties relating thereto from the clerk of the superior court to the register of deeds. To this end, all relevant sections of the General Statutes of North Carolina not specifically amended by sections 1 through 33 of this act are hereby amended to the same effect."

Legal Periodicals. — For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 429 (1953).

CASE NOTES

Partnership Held General in Absence of Compliance with Section. — Where, in an action to recover a partnership debt, the evidence failed to show either actual or substantial compliance by defendants with the provisions of this section, pertaining to formation of a limited partnership which would relieve them of liability as general partners in the partnership in question, the trial court was correct in giving the jury peremptory instructions in favor of the plaintiff on the issues of general partnership. Atlanta Stove Works, Inc. v. Keel, 255 N.C. 421, 121 S.E.2d 607 (1961).

§ 59-3. Business which may be carried on.

A limited partnership may carry on any business which a partnership without limited partners may carry on. (1941, c. 251, s. 3.)

§ 59-4. Character of limited partner's contribution.

The contributions of a limited partner may be cash or other property, but not services. (1941, c. 251, s. 4.)

§ 59-5. A name not to contain surname of limited partner; exceptions.

(a) The surname of a limited partner shall not appear in the partnership name, unless

(1) It is also the surname of a general partner, or

(2) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(b) A limited partner whose name appears in a partnership name contrary to the provisions of subsection (a) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. (1941, c. 251, s. 5.)

§ 59-6. Liability for false statements in certificate.

If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false

(1) At the time he signed the certificate, or

(2) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in G.S. 59-25, subsection (c). (1941, c. 251, s. 6.)

§ 59-7. Limited partner not liable to creditors.

A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. (1941, c. 251, s. 7.)

Cross References. — As to nature of liability of general partner, see § 59-45.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1081 (1981).

§ 59-8. Admission of additional limited partners.

After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of G.S. 59-25. (1941, c. 251, s. 8.)

§ 59-9. Rights, powers and liabilities of a general partner.

A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(1) Do any act in contravention of the certificate,

(2) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(3) Confess a judgment against the partnership,

(4) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(5) Admit a person as a general partner,

(6) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(7) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate. (1941, c. 251, s. 9.)

§ 59-10. Rights of a limited partner.

(a) A limited partner shall have the same rights as a general partner to

(1) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,

(2) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(3) Have dissolution and winding up by decree of court.

(b) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in G.S. 59-15 and 59-16. (1941, c. 251, s. 10.)

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1081 (1981).

CASE NOTES

No Right to Bring Suit on Behalf on Partnership. — This section, allowing limited partners the right to a "dissolution and winding up," does not include bringing a lawsuit on behalf of the limited partnership. Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355, cert. denied, 300 N.C. 371, 267 S.E.2d 673 (1980).

Where plaintiff limited partners were suing for damages to their interest in partnership, based on the negligence of the defendants, there was no necessity that they be allowed to sue on behalf of the limited partnership. Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355, cert. denied, 300 N.C. 371, 267 S.E.2d 673 (1980).

§ 59-11. Status of person erroneously believing himself a limited partner.

A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income. (1941, c. 251, s. 11.)

§ 59-12. One person both general and limited partner.

(a) A person may be a general partner and a limited partner in the same partnership at the same time.

(b) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner. (1941, c. 251, s. 12.)

§ 59-13. Loans and other business transactions with limited partner.

(a) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim

(1) Receive or hold as collateral security any partnership property, or

(2) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(b) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of subsection (a) is a fraud on the creditors of the partnership. (1941, c. 251, s. 13.)

§ 59-14. Relation of limited partners inter se.

Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing. (1941, c. 251, s. 14.)

§ 59-15. Compensation of limited partner.

A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. (1941, c. 251, s. 15.)

§ 59-16. Withdrawal or reduction of limited partner's contribution.

(a) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(1) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(2) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of subsection (b), and

(3) The certificate is canceled or so amended as to set forth the withdrawal or reduction.

(b) Subject to the provisions of subsection (a) a limited partner may rightfully demand the return of his contribution

(1) On the dissolution of a partnership, or

(2) When the date specified in the certificate for its return has arrived, or

(3) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(c) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(d) A limited partner may have the partnership dissolved and its affairs wound up when

(1) He rightfully but unsuccessfully demands the return of his contribution, or

(2) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by subdivision (a)(1) and the limited partner would otherwise be entitled to the return of his contribution. (1941, c. 251, s. 16.)

§ 59-17. Liability of limited partner to partnership.

(a) A limited partner is liable to the partnership

(1) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(2) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the condition stated in the certificate.

(b) A limited partner holds as trustee for the partnership

(1) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(2) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(c) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(d) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return. (1941, c. 251, s. 17.)

§ 59-18. Nature of limited partner's interest in the partnership.

A limited partner's interest in the partnership is personal property. (1941, c. 251, s. 18.)

§ 59-19. Assignment of limited partner's interest.

(a) A limited partner's interest is assignable.

(b) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(c) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(d) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(e) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with G.S. 59-25.

(f) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(g) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under G.S. 59-6 and 59-17. (1941, c. 251, s. 19; 1971, c. 1093, s. 10.)

Cross References. — As to assignment of general partner's interest, see § 59-57.

§ 59-20. Effect of retirement, death or insanity of a general partner.

The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(1) Under a right so to do stated in the certificate, or

(2) With the consent of all members. (1941, c. 251, s. 20.)

§ 59-21. Death of limited partner.

(a) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(b) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner. (1941, c. 251, s. 21.)

§ 59-22. Rights of creditors of limited partner.

(a) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(b) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(c) The remedies conferred by subsection (a) shall not be deemed exclusive of others which may exist.

(d) Nothing in this Article shall be held to deprive a limited partner of his statutory exemption. (1941, c. 251, s. 22.)

§ 59-23. Distribution of assets.

(a) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(1) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,

(2) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(3) Those to limited partners in respect to the capital of their contributions,

(4) Those to general partners other than for capital and profits,
(5) Those to general partners in respect to profits,
(6) Those to general partners in respect to capital.

(b) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims. (1941, c. 251, s. 23.)

§ 59-24. When certificate shall be canceled or amended.

(a) The certificate shall be canceled when the partnership is dissolved or all limited partners cease to be such.

(b) A certificate shall be amended when

(1) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,
(2) A person is substituted as a limited partner,
(3) An additional limited partner is admitted,
(4) A person is admitted as a general partner,
(5) A general partner retires, dies or becomes insane, and the business is continued under G.S. 59-20,
(6) There is a change in the character of the business of the partnership,
(7) There is a false or erroneous statement in the certificate,
(8) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,
(9) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or
(10) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them. (1941, c. 251, s. 24.)

§ 59-25. Requirements for amendment and for cancellation of certificate.

(a) The writing to amend a certificate shall

(1) Conform to the requirements of G.S. 59-2, subdivision (a)(1) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and
(2) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(b) The writing to cancel a certificate shall be signed by all members.

(c) A person desiring the cancellation or amendment of a certificate, if any person designated in subsections (a) and (b) as a person who must execute the writing refuses to do so, may petition the superior court to direct a cancellation or amendment thereof.

(d) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the register of deeds in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(e) A certificate is amended or canceled when there is filed for record in the office of the register of deeds where the certificate is recorded

(1) A writing in accordance with the provisions of subsection (a) or (b) or
(2) A certified copy of the order of court in accordance with the provisions of subsection (d).

(f) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this Article. (1941, c. 251, s. 25; 1967, c. 823, s. 27.)

Editor's Note. — Session Laws 1967, c. 823, which amended this section, provides, in s. 34: "It is the intent of this act to to establish the office of the register of deeds as the filing office for all of the corporate and related documents now required to be filed with the clerk of the superior court and to transfer all of the duties relating thereto from the clerk of the superior court to the register of deeds. To this end, all relevant sections of the General Statutes of North Carolina not specifically amended by sections 1 through 33 of this act are hereby amended to the same effect."

§ 59-26. Parties to actions.

A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership. (1941, c. 251, s. 26.)

CASE NOTES

Where plaintiff limited partners were suing for damages to their interest in a partnership, based on the negligence of the defendant, there was no necessity that they be allowed to sue on behalf of the limited partnership. Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355, cert. denied, 300 N.C. 371, 267 S.E.2d 673 (1980).

Applied in C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnerships, 375 F. Supp. 446 (M.D.N.C. 1974).

§ 59-27. Name of Article.

This Article may be cited as the Uniform Limited Partnership Act. (1941, c. 251, s. 27.)

§ 59-28. Rules of construction.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Article.

(b) This Article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(c) This Article shall not be so construed as to impair the obligations of any contract existing when the Article goes into effect, nor to affect any action on proceedings begun or right accrued before this Article takes effect. (1941, c. 251, s. 28.)

§ 59-29. Rules for cases not provided for in this Article.

In any case not provided for in this Article the rules of law and equity, including the law merchant, shall govern. (1941, c. 251, s. 29.)

§ 59-30. Provisions for existing limited partnerships.

(a) A limited partnership formed under any statute of this State prior to March 15, 1941, may become a limited partnership under this article by complying with the provisions of G.S. 59-2; provided the certificate sets forth

(1) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(2) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(b) A limited partnership formed under any statute of this State prior to the adoption of this Article, until or unless it becomes a limited partnership under this Article, shall continue to be governed by the provisions of existing law, except that such partnership shall not be renewed unless so provided in the original agreement. (1941, c. 251, s. 30.)

Editor's Note. — Section 31 of the act from which this Article was codified repealed §§ 3258-3276 of the Consolidated Statutes, as amended, except insofar as said sections affected limited partnerships existing on March 15, 1941, when the act became effective.

Article 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-31. Name of Article.

This Article may be cited as Uniform Partnership Act. (1941, c. 374, s. 1.)

Legal Periodicals. — For comment, see 19 N.C.L. Rev. 499.

For note on partnerships in bankruptcy, see 31 N.C.L. Rev. 457 (1953).

For a discussion of partnerships as legal vehicles for historic preservation, see 12 Wake Forest L. Rev. 9 (1976).

For a note on the presumption of a wife's gratuitous services, see 16 Wake Forest L. Rev. 235 (1980).

CASE NOTES

Cited in Klein v. Greenberg, 461 F. Supp. 653 (M.D.N.C. 1978).

§ 59-32. Definition of terms.

In this Article:

(1) "Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any State insolvent act.

(2) "Business" includes every trade, occupation, or profession.

(3) "Conveyance" includes every assignment, lease, mortgage, or encumbrance.

(4) "Court" includes every court and judge having jurisdiction in the case.

(5) "Person" includes individuals, partnerships, corporations, and other associations.

(6) "Real property" includes land and any interest or estate in land. (1941, c. 374, s. 2.)

§ 59-33. Interpretation of knowledge and notice.

(a) A person has "knowledge" of a fact within the meaning of this Article not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.

(b) A person has "notice" of a fact within the meaning of this Article when the person who claims the benefit of the notice:

(1) States the fact to such person, or

(2) Delivers through the mail, or by other means of communication a written statement of the fact to such person or to a proper person at his place of business or residence. (1941, c. 374, s. 3.)

§ 59-34. Rules of construction.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Article.

(b) The law of estoppel shall apply under this Article.

(c) The law of agency shall apply under this Article.

(d) This Article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(e) This Article shall not be construed so as to impair the obligations of any contract existing when the Article goes into effect, nor to affect any action or proceedings begun or right accrued before this Article takes effect. (1941, c. 374, s. 4.)

CASE NOTES

Applied in Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).

§ 59-35. Rules for cases not provided for in this Article.

In any case not provided for in this Article the rules of law and equity, including the law merchant, shall govern. (1941, c. 374, s. 5.)

Part 2. Nature of a Partnership.

§ 59-36. Partnership defined.

(a) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(b) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this Article, unless such association would have been a partnership in this State prior to the adoption of this Article; but this Article shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith. (1941, c. 374, s. 6.)

Cross References. — As to limited partnerships, see §§ 59-1 to 59-30.

CASE NOTES

"Profit" Relates to Purpose of Business. — There was no merit to defendant's contention that since he and his associates never achieved a "profit" in their business dealings, there could be no partnership, since the word "profit," as it is used in subsection (a) of this section, relates to the purpose of the business, not to whether the business actually produced a net gain. Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

To make a partnership, two or more persons should combine their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits and losses in equal or specified proportions, constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Co-ownership of the business is an indispensable requisite for a partnership, under this section, and where this element is lacking there can be no partnership. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

A partnership is a contractual relation and may be informally created, and its existence may be proved by acts and declarations of the parties. Whiteside v. Rooks, 197 F. Supp. 313 (W.D.N.C. 1961).

A partnership may be formed by an oral agreement. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

A partnership agreement may be inferred without a written or oral contract if the conduct of the parties toward each other is such that such an inference is justified. Williams v. Biscuitville, Inc., 40 N.C. App. 405, 253 S.E.2d 18, cert. denied, 297 N.C. 457, 256 S.E.2d 810 (1979).

A partnership is a partnership at will unless some agreement to the contrary can be proved. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

Quoted in Peirson v. American Hdwe. Mut. Ins. Co., 248 N.C. 215, 102 S.E.2d 800 (1958).

Cited in Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949).

§ 59-37. Rules for determining the existence of a partnership.

In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by G.S. 59-46 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
   a. As a debt by installments or otherwise,
   b. As wages of an employee or rent to a landlord,
   c. As an annuity to a widow or representative of a deceased partner,
   d. As interest on a loan, though the amount of payment vary with the profits of the business,
   e. As the consideration for the sale of a goodwill of a business or other property by installments or otherwise. (1941, c. 374, s. 7.)

Cross References. — For provision that a lessor and lessee are not partners, see § 42-1.

CASE NOTES

A partnership agreement may be inferred without a written or oral contract if the conduct of the parties toward each other is such that such an inference is justified. Williams v. Biscuitville, Inc., 40 N.C. App. 405, 253 S.E.2d 18, cert. denied, 297 N.C. 457, 256 S.E.2d 810 (1979).

Agreement to Share Profits Does Not Necessarily Create Partnership. — While an agreement to share profits, as such, is one of the tests of a partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertaining the compensation, does not create a partnership. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Sale or Lease of Property to Partnership. — Where a tractor was either sold by an individual to a partnership for "ten hundred dollars," payable one hundred dollars per week, or was leased to the partnership on a rental basis of one hundred dollars per week, even though it appeared that the money paid for the tractor was money received from the partnership business, no inference arose therefrom that the individual was a partner in the business. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Instruction as to Statutory Rules. — The trial court's instructions on the law applicable to the formation of partnerships were inadequate where the court did not give the jury the benefit of the applicable statutory rules for determining the existence of a partnership that are set out in this section. Hardesty v. Ferrell, 44 N.C. App. 354, 260 S.E.2d 925 (1979).

Applied in Eggleston v. Eggleston, 228 N.C. 668, 47 S.E.2d 243 (1948); McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

Quoted in Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

§ 59-38. Partnership property.

(a) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(b) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(c) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(d) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears. (1941, c. 374, s. 8.)

CASE NOTES

Cited in Simmons v. Quick Stop Food Mart, Inc., 56 N.C. App. 105, 286 S.E.2d 807 (1982).

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business.

(a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(b) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(c) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(1) Assign the partnership property in trust for creditors, or on the assignee's promise to pay the debts of the partnership,

(2) Dispose of the goodwill of the business,

(3) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(4) Confess a judgment,

(5) Submit a partnership claim or liability to arbitration or reference.

(d) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction. (1941, c. 374, s. 9.)

CASE NOTES

Privity to Contract. — It is fundamental that all partners are agents of each other, that a contract entered into by the agent is a contract entered into by the principal, and that all partners are liable on any contract executed by a single partner in the name of the partnership; and if a partner may be used for nonpayment or other breach of the contract, he certainly is privy to the contract. Barnes v. Campbell Chain Co., 47 N.C. App. 488, 267 S.E.2d 388 (1980).

Liability on Contract Signed for Partnership by Unauthorized Partner. — Where a contract, apparently made for the purpose of carrying on partnership business, is executed in the partnership name by a partner, the partnership is liable for a breach thereof, even if the partner was not authorized to so contract, unless the other parties to the contract had notice of the lack of authority. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Attempt by Partner to Relieve Himself of Liability by Notice to Third Person. — Where there is a general partnership of two persons, without restrictions on the authority of either partner to act within the scope of the partnership business, one of the partners cannot, by notice to a third person that he would not be personally liable for goods thereafter sold to the partnership in the ordinary course of the partnership business, relieve himself of liability for such goods thereafter ordered by the other partner while the partnership is a going concern under this section and §§ 59-45 and 59-48 of the Uniform Partnership Act. National Biscuit Co. v. Stroud, 249 N.C. 467, 106 S.E.2d 692 (1959).

Service of Summons on One Partner. — Under the Uniform Partnership Act it is not necessary that all members of an alleged partnership should be served with summons. A partnership is represented by the partner who is served, and as to him a judgment in the action in which he is served would be binding on him individually, and as to the partnership property. But as to a partner not served with summons, the judgment would not be binding on him individually. Nevertheless, even after judgment such partner could be brought in and made a party. The court may, before or after judgment, direct the bringing in of new parties to the end that substantial justice may be done. See § 1A-1, Rules 19 and 22. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949).

Stated in Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Cited in Pappas v. Crist, 223 N.C. 265, 25 S.E.2d 850 (1943).

§ 59-39.1. Act, admission or acknowledgment by partner.

After a cause of action has accrued on any obligation of a partnership, any act, admission or acknowledgment by any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners which removes the bar of the statute of limitations or causes the statutes to begin running anew with respect to the partner doing such act or making such admission or acknowledgment has a like effect with respect to all of the partners and with respect to partnership liability, but when any partner is not so acting and does not have the authority of his copartners, any act, admission or acknowledgment by such partner which removes the bar of the statute of limitations or causes the statute to begin running anew has such effect only as

to the partner doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against any partner who has not authorized or ratified the same nor against the partnership. (1953, c. 1076, s. 2.)

Legal Periodicals. — For brief comment on this section, see 31 N.C.L. Rev. 397 (1953).

§ 59-40. Conveyance of real property of the partnership.

(a) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of subsection (a) of G.S. 59-39, or unless such property has been conveyed by the grantee or a person claiming through such grantee to holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(b) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of subsection (a) of G.S. 59-39.

(c) Where title to real property is in the name of one or more, but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of subsection (a) of G.S. 59-39, unless the purchaser or his assignee, is a holder for value, without knowledge.

(d) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of subsection (a) of G.S. 59-39.

(e) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. (1941, c. 374, s. 10; 1959, c. 1161, s. 3.)

CASE NOTES

Stated in Simmons v. Quick Stop Food Mart, Inc., 56 N.C. App. 105, 286 S.E.2d 807 (1982).

§ 59-41. Partnership bound by admission of partner.

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Article is evidence against the partnership. (1941, c. 374, s. 11.)

Cross References. — As to admission after the statute of limitations has run, see §§ 1-27 and 59-39.1.

§ 59-42. Partnership charged with knowledge of or notice to partner.

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. (1941, c. 374, s. 12.)

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1081 (1981).

CASE NOTES

Applied in Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355 (1980).

§ 59-43. Partnership bound by partner's wrongful act.

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. (1941, c. 374, s. 13.)

CASE NOTES

Where one partner is sued individually for a tort committed by him in the course of the partnership business, a judgment would be binding upon him individually, and as to the partnership property, but not as against the other partner individually, though the court even after judgment may direct that such other partner be brought in and made a party. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949). See also § 59-45 and notes thereunder.

Malicious prosecution is not within the ordinary course of business of a law partnership. Jackson v. Jackson, 20 N.C. App. 406, 201 S.E.2d 722 (1974).

Advising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, but taking such action maliciously and without probable cause is quite a different matter. A partner who gave such advice was either conducting himself lawfully and ethically in his relationship with his client, in which event neither he nor any of his partners would have any liability, or he was conducting himself maliciously and unlawfully and would not be acting in the ordinary course of the partnership business. Whatever may be the eventual determination of the conduct, it is evident that his partners, who did not authorize, participate in, or even know about such conduct, would not be held responsible for any injury the conduct may have caused. Jackson v. Jackson, 20 N.C. App. 406, 201 S.E.2d 722 (1974).

Action against Individual Partners for Violation of Federal False Claims Act. — In an action by the federal government to recover from individual partners for alleged violation of the False Claims Act, this section did not impose liability upon one of the partners for a false claim filed by the other, since the action was against the individual partners and not against the partnership. United States v. Toepleman, 141 F. Supp. 677 (E.D.N.C. 1956), aff'd in part and rev'd in part sub nom. United States v. McNinch, 242 F.2d 359 (4th Cir. 1957), aff'd in part and rev'd in part, 356 U.S. 595, 78 S. Ct. 950, 2 L. Ed. 2d 1001 (1958).

Stated in Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Cited in Keith v. Wilder, 241 N.C. 672, 86 S.E.2d 444 (1955).

§ 59-44. Partnership bound by partner's breach of trust.

The partnership is bound to make good the loss:

(1) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(2) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. (1941, c. 374, s. 14.)

§ 59-45. Nature of partner's liability.

All partners are jointly and severally liable for the acts and obligations of the partnership. (1941, c. 374, s. 15; 1953, c. 881.)

Cross References. — As to procedure in action against partners, see §§ 1-72 and 1-113. As to liability of limited partner, see §§ 59-6 and 59-7.

CASE NOTES

Section States Common Law. — The common-law rule of joint and several liability of partners for a tort committed by one of the members of the partnership is incorporated in the Uniform Partnership Act, embraced in this Article. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949); Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Each partner is jointly and severally liable for a tort committed by one partner in the course of the partnership business, and the injured person may sue all members of the partnership or any one of them at his election. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949); Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952). See note to § 59-43.

Privity to Contract. — It is fundamental that all partners are agents of each other, that a contract entered into by the agent is a contract entered into by the principal, and that all partners are liable on any contract executed by a single partner in the name of the partnership; and if a partner may be sued for nonpayment or other breach of the contract, he certainly is privy to the contract. Barnes v. Campbell Chain Co., 47 N.C. App. 488, 267 S.E.2d 388 (1980).

Quoted in Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963); Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

§ 59-46. Partner by estoppel.

(a) When a person, by words spoken or written, by conduct, or by contract, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(1) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(2) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(b) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same

extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation. (1941, c. 374, s. 16; 1975, c. 732.)

CASE NOTES

Nature of Liability. — This section provides for a form of liability more akin to that of apparent authority than to estoppel. Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).

The essentials of equitable estoppel or estoppel in pais are a representation, either by words or conduct, made to another, who reasonably believing the representation to be true, relies upon it, with the result that he changes his position to his detriment. Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).

It is essential that the party estopped shall have made a representation by words or acts and that someone shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction. Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).

Evidence that son was authorized to write checks on father's corporate account did not constitute, in the absence of other fundamental requisites, a partnership in fact. And in the absence of representations made by the defendant personally to third-party creditors and of any expression of consent on the part of the defendant to his son that the son could represent him to be a partner, there was no evidentiary support for plaintiff's contention that representations were made in a public manner, so that under these circumstances, the evidence was not sufficient to warrant submitting the case to the jury upon the theory of partnership by estoppel. H-K Corp. v. Chance, 25 N.C. App. 61, 212 S.E.2d 34 (1975).

§ 59-47. Liability of incoming partner.

A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. (1941, c. 374, s. 17.)

Part 4. Relations of Partners to One Another.

§ 59-48. Rules determining rights and duties of partners.

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(2) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(3) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(4) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(5) All partners have equal rights in the management and conduct of the partnership business.
(6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.
(7) No person can become a member of a partnership without the consent of all the partners.
(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. (1941, c. 374, s. 18.)

Cross References. — As to rights and liabilities of limited partners, see §§ 59-10 to 59-17.

CASE NOTES

"Milk base" owned by defendant and used by dairy partnership was a "contribution" to the partnership property as contemplated by subdivision (1) of this section. Halsey v. Choate, 27 N.C. App. 49, 217 S.E.2d 740, cert. denied, 288 N.C. 730, 220 S.E.2d 350 (1975).

§ 59-49. Partnership books.

The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them. (1941, c. 374, s. 19.)

§ 59-50. Duty of partners to render information.

Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability. (1941, c. 374, s. 20.)

§ 59-51. Partner accountable as a fiduciary.

(a) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.
(b) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. (1941, c. 374, s. 21.)

Cross References. — As to criminal liability for appropriation of partnership funds by partner, see §§ 14-97 and 14-98.

CASE NOTES

When one partner wrongfully takes partnership funds and uses them to buy or improve property, his copartners may charge the property with a constructive trust in favor of the partnership to the extent of the partnership funds used in its purchase or improvement. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

§ 59-52. Right to an account.

Any partner shall have the right to a formal account as to partnership affairs:

(1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,
(2) If the right exists under the terms of any agreement,
(3) As provided by G.S. 59-51,
(4) Whenever other circumstances render it just and reasonable. (1941, c. 374, s. 22.)

CASE NOTES

Equitable jurisdiction is practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm's affairs between the copartners themselves. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1954).

Cause of Action for Accounting Stated. — Allegations of a partner that the other partner had usurped complete control and exclusive possession of the books, records and entire assets of the partnership and was squandering its earnings and assets, and had refused, after demand, to account to plaintiff for any share of the profits or earnings of the business, were held to state a cause of action for an accounting between the partners. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1954).

Cited in Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

§ 59-53. Continuation of partnership beyond fixed term.

(a) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(b) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership. (1941, c. 374, s. 23.)

Part 5. Property Rights of a Partner.

§ 59-54. Extent of property rights of a partner.

The property rights of a partner are:

(1) His right in specific partnership property,
(2) His interest in the partnership, and
(3) His right to participate in the management. (1941, c. 374, s. 24.)

CASE NOTES

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-55. Nature of a partner's right in specific partnership property.

(a) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(b) The incidents of this tenancy are such that:

(1) A partner, subject to the provisions of this Article and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(2) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(3) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(4) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner, or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(5) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. (1941, c. 374, s. 25.)

Cross References. — As to survivor in joint tenancy for partnership purposes, see § 41-2.

Legal Periodicals. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

CASE NOTES

Assignment by one partner of all his rights in the partnership to a stranger does not affect the rights of the other partner who is not a party to such assignment, and such assignment cannot transfer title to partnership property. Smithfield Oil Co. v. Furlonge, 257 N.C. 388, 126 S.E.2d 167 (1962).

Applied in Prentzas v. Prentzas, 260 N.C. 101, 113 S.E.2d 678 (1963).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-56. Nature of partner's interest in the partnership.

A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property. (1941, c. 374, s. 26.)

CASE NOTES

The interest of partners in the partnership is personal property, even though part of the partnership assets is real estate. Hence, upon the death of the partners, their respective personal representatives were properly made parties to prosecute and defend an action for an accounting and proper application of partnership property on behalf of their intestates. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-57. Assignment of partner's interest.

(a) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(b) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners. (1941, c. 374, s. 27.)

Cross References. — As to assignment of a limited partner's interest, see § 59-19.

§ 59-58. Partner's interest subject to charging order.

(a) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(b) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(1) With separate property, by any one or more of the partners, or

(2) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(c) Nothing in this Article shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. (1941, c. 374, s. 28.)

Cross References. — As to right of creditors of limited partner, see § 59-22.

Part 6. Dissolution and Winding Up.

§ 59-59. Dissolution defined.

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business. (1941, c. 374, s. 29.)

CASE NOTES

Applied in H-K Corp. v. Chance, 25 N.C. App. 61, 212 S.E.2d 34 (1975).

§ 59-60. Partnership not terminated by dissolution.

On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. (1941, c. 374, s. 30.)

CASE NOTES

Continuance of Lease as Partnership Affair. — Where legal title to the property remains in a dissolved partnership, a lease under which one party is named tenant continues as a partnership affair. The partnership affairs thereby are incomplete, and the partnership, though dissolved, has not yet "terminated." Simmons v. Quick Stop Food Mart, Inc., 56 N.C. App. 105, 286 S.E.2d 807 (1982).

Stated in Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

§ 59-61. Causes of dissolution.

Dissolution is caused:

(1) Without violation of the agreement between the partners,
   a. By the termination of the definite term or particular undertaking specified in the agreement,
   b. By the express will of any partner when no definite term or particular undertaking is specified,
   c. By the express will of all partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specific term or particular undertaking,
   d. By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;
(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;
(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;
(4) By the death of any partner, unless the partnership agreement provides otherwise;
(5) By the bankruptcy of any partner or the partnership;
(6) By decree of court under G.S. 59-62. (1941, c. 374, s. 31; 1943, c. 384.)

CASE NOTES

The death of a partner ordinarily dissolves the partnership as of that date. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950); Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955). See also, Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904); Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

Absent Agreement to the Contrary. — In the absence of an express agreement to the contrary, every partnership is dissolved by the death of one of the partners. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Distinction between Partnership for Indefinite Period and One for Specified Term as Concerns Dissolution. — According to the majority view, the only difference, so far as concerns the rights of dissolution by one partner, between a partnership for an indefinite period and one for a specified term, is that in the case of a partnership for a definite term a dissolution before the expiration of the stipulated time is a breach of agreement which subjects such partner to a claim for damages for breach of contract if the dissolution is not justified, whereas the dissolution of a partnership at will affords the other partner no ground for complaint; in either case, the action of one partner actually dissolves the partnership. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 564 (1968).

The significance of a partnership being one at will, i.e., without any definite term or undertaking to be accomplished, is that the termination by the election of a partner is not a breach of contract. Having the legal right to terminate, it would seem that there is no liability for its exercise whatever the motive, and whatever may be the injurious consequences to copartners who have neglected to protect themselves by an agreement to continue for a definite term. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

Applied in Langdon v. Hurdle, 17 N.C. App. 530, 195 S.E.2d 72 (1973).

§ 59-62. Dissolution by decree of court.

(a) On application by or for a partner the court shall decree a dissolution whenever:

(1) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(2) A partner becomes in any other way incapable of performing his part of the partnership contract,

(3) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(4) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(5) The business of the partnership can only be carried on at a loss,

(6) Other circumstances render a dissolution equitable.

(b) On the application of the purchaser of a partner's interest under G.S. 59-57 and 59-58:

(1) After the termination of the specified term or particular undertaking,

(2) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued. (1941, c. 374, s. 32.)

CASE NOTES

Allegations Held Sufficient Predicate for Dissolution. — Where a complaint alleged the existence of a partnership and a conspiracy to deprive plaintiff partner of possession and control of the partnership assets pursuant to which defendant partner had transferred all the partnership property to defendant transferee, and sought a settlement and an accounting of the partnership affairs, the allegations were a sufficient predicate for the dissolution of the partnership, entitling plaintiff to an accounting and proper application of all the partnership property. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

§ 59-63. General effect of dissolution on authority of partner.

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,
   a. When the dissolution is not by the act, bankruptcy or death of a partner; or
   b. When the dissolution is by such act, bankruptcy or death of a partner, in cases where G.S. 59-64 so requires,
(2) With respect to persons not partners, as declared in G.S. 59-65. (1941, c. 374, s. 33.)

§ 59-64. Right of partner to contribution from copartners after dissolution.

Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(1) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or
(2) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy. (1941, c. 374, s. 34.)

§ 59-65. Power of partner to bind partnership to third persons after dissolution; publication of notice of dissolution.

(a) After dissolution a partner can bind the partnership except as provided in subsection (c)

(1) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;
(2) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction
   a. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or
   b. Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been published at least once a week for four successive weeks in some newspaper qualified for legal advertising in each county in which the partnership business was regularly carried on, or if no such newspaper is published in the county, posted for 30 days at the courthouse and three other public places in the county.

(b) The liability of a partner under subdivision (a)(2) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(1) Unknown as a partner to the person with whom the contract is made; and
(2) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(c) The partnership is in no case bound by any act of a partner after dissolution

(1) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or
(2) Where the partner has become bankrupt; or
(3) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who
a. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or
b. Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in subdivision (a)(2)b.

(d) Nothing in this section shall affect the liability under G.S. 59-46 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business. (1941, c. 374, s. 35; 1951, c. 381, s. 1.)

Legal Periodicals. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 409.

§ 59-66. Effect of dissolution on partner's existing liability.

(a) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(b) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(c) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(d) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts. (1941, c. 374, s. 36.)

CASE NOTES

Absent an agreement under § 59-48(1), each partner must contribute towards the losses sustained by the partnership according to his share of the profits. Longley Supply Co. v. Styron, 26 N.C. App. 55, 214 S.E.2d 777 (1975).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-67. Right to wind up.

Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. (1941, c. 374, s. 37.)

§ 59-68. Rights of partners to application of partnership property.

(a) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under G.S. 59-66, subsection (b), he shall receive in cash only the net amount due him from the partnership.

(b) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(1) Each partner who has not caused dissolution wrongfully shall have:
   a. All the rights specified in subsection (a) of this section, and
   b. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(2) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (b)(1)b of this section, and in like manner indemnify him against all present or future partnership liabilities.

(3) A partner who has caused the dissolution wrongfully shall have:
   a. If the business is not continued under the provisions of subdivision (b)(2) all the rights of a partner under subsection (a), subject to clause (b)(1)b, of this section,
   b. If the business is continued under subdivision (b)(2) of this section, the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the goodwill of the business shall not be considered. (1941, c. 374, s. 38.)

CASE NOTES

Under the principle of marshaling of assets, each partner has the right to have the partnership property applied to the payment or security of partnership debts, in order to relieve him from personal liability. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1945).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-69. Rights where partnership is dissolved for fraud or misrepresentation.

Where partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(1) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(2) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(3) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. (1941, c. 374, s. 39.)

CASE NOTES

Assertion of Lien on Partnership Assets Based on Claim of Fraud. — While it is well settled that each partner has the right to insist that partnership assets be applied in payment of partnership debts, the right is not, in fact, a lien as such, because it is equally well settled that a partner has no individual ownership in any specific assets of the firm. The right, lien, quasi-lien or whatever else it may be called does not exist for any practical purpose until the affairs of the partnership have to be wound up or the share of a partner has to be ascertained. Such a lien based on fraud does not come into existence until actual dissolution occurs. Wolfe v. Hewes, 41 N.C. App. 88, 254 S.E.2d 204 (1979).

§ 59-70. Rules for distribution.

In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(1) The assets of the partnership are
   a. The partnership property,
   b. The contributions of the partners necessary for the payment of all the liabilities specified in subdivision (2) of this section.

(2) The liabilities of the partnership shall rank in order of payment, as follows:
   a. Those owing to creditors other than partners,
   b. Those owing to partners other than for capital and profits,
   c. Those owing to partners in respect of capital,
   d. Those owing to partners in respect of profits.

(3) The assets shall be applied in the order of their declaration in subdivision (1) of this section to the satisfaction of the liabilities.

(4) The partners shall contribute, as provided by G.S. 59-48, subdivision (1) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(5) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in subdivision (4) of this section.

(6) Any partner or his legal representative shall have the right to enforce the contributions specified in subdivision (4) of this section, to the

extent of the amount which he has paid in excess of his share of the liability.

(7) The individual property of a deceased partner shall be liable for the contributions specified in subdivision (4) of this section.

(8) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(9) Where a partner has become bankrupt or his estate is insolvent the claims against the separate property shall rank in the following order:

a. Those owing to separate creditors,

b. Those owing to partnership creditors,

c. Those owing to partners by way of contribution. (1941, c. 374, s. 40.)

Cross References. — As to distribution of assets of limited partnership, see § 59-23.

Legal Periodicals. — For note on marshaling of assets, see 36 N.C.L. Rev. 229 (1958).

CASE NOTES

Determination of Liabilities in Receivership Proceedings. — When a partner seeks a dissolution of a partnership and, with the consent of the other partners, a receiver is appointed to take possession of partnership assets for distribution to the parties entitled thereto, the law contemplates a judicial determination of the liabilities of the partnership. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

No Distribution to Partners Until Such Determination Made. — Until the liabilities of the partnership have been determined, there can be no distribution to the partners. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

When Judgment Recoverable against Individual Partners. — Where the partnership assets are insufficient to discharge the partnership obligations, claimant may, in the proceedings in which a receiver was appointed, have judgment against the individual partners for the balance of his claim. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Applied in Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-71. Liability of persons continuing the business in certain cases.

(a) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(b) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(c) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in subsections (a) and (b) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(d) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(e) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of G.S. 59-68, subdivision (b)(2), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(f) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(g) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of the partnership property only.

(h) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(i) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(j) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership. (1941, c. 374, s. 41.)

§ 59-72. Rights of retiring partner or estate of deceased partner when the business is continued.

When any partner retires or dies, and the business is continued under any of the conditions set forth in G.S. 59-71, subsections (a), (b), (c), (e), (f), or G.S. 59-68, subdivision (b)(2), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by G.S. 59-71, subsection (h). (1941, c. 374, s. 42.)

§ 59-73. Accrual of actions.

The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary. (1941, c. 374, s. 43.)

CASE NOTES

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

ARTICLE 3.

Surviving Partners.

§ 59-74. Surviving partner to give bond.

Upon the death of any member of a partnership, the surviving partner shall, within 30 days, execute before the clerk of the superior court of the county where the partnership business was conducted, a bond payable to the State of North Carolina, with sufficient surety conditioned upon the faithful performance of his duties in the settlement of the partnership affairs. The amount of such bond shall be fixed by the clerk of the court; and the settlement of the estate and the liability of the bond shall be the same as under the law governing administrators and their bonds. (1915, c. 227, ss. 1, 2, 3; C.S., s. 3277.)

Cross References. — As to death of partner working dissolution of partnership, see § 59-61.

CASE NOTES

The purpose of this section is limited to the protection of those who are interested in the property or estate administered by the surviving partner, who is required to account to them and pay over their interest in case there is a surplus after paying the partnership debts. It is a trust relationship in which only they have a legal interest. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

Coverage of Bond. — The bond required of surviving partners by this section is primarily for the protection of those interested in the deceased partner's interest in the surplus after the partnership has been wound up; such bond has no retroactive effect, and does not become liable for any maladministration prior to its filing. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

The giving of a bond cannot be regarded as a condition precedent to the maintenance of an action by a surviving partner, for § 59-75 provides an alternative remedy upon failure of the surviving partner to give bond. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

Objection that surviving partner has not filed bond is not available to debtor of the estate. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

Applied in Reel v. Boyd, 198 N.C. 214, 151 S.E. 192 (1930).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-75. Effect of failure to give bond.

Upon the failure of the surviving partner to execute the bond provided for in G.S. 59-74, the clerk of the superior court shall, upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership, who shall be governed by the same law governing an administrator of a deceased person. (1915, c. 227, s. 4; C.S., s. 3278.)

Cross Reference. — As to administration of decedent's estates, see Chapter 28A.

CASE NOTES

Quoted in Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948); In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-76. Surviving partner and personal representative to make inventory.

When a member of any partnership dies the surviving partner, within 60 days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner. (1901, c. 640; Rev., s. 2540; C.S., s. 3279.)

Cross References. — As to joint tenancy in partnership property, see § 41-2.

CASE NOTES

Upon the death of a partner, his interest in the partnership property vests in the surviving partner for administration in winding up the partnership, and the surviving partner stands as a trustee charged with the duty of faithful management and accounting to those entitled to the deceased partner's interest after the settlement of the debts of the partnership. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

The surviving partner has the duty of closing up the partnership affairs, the reduction of personal property to cash and the settlement of partnership affairs, and title to the personal property vests at once in the surviving partner and not in the personal representative of the deceased partner. Sherrod v. Mayo, 156 N.C. 144, 72 S.E. 216 (1911).

Assets Impressed with Trust. — The death of a partner, in the absence of any stipulation in the articles of partnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

It is the right and duty of a surviving partner to close up the affairs of the firm. He has the right, therefore, to receive and to collect the debts and assets of the partnership, and to apply the same toward payment of the debts and liabilities of the firm. Weisel v. Cobb, 114 N.C. 22, 18 S.E. 943 (1894); Hodgin v. Bank, 128 N.C. 110, 38 S.E. 294 (1901).

After the dissolution of a firm by the death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interest of all persons interested. Calvert v. Miller, 94 N.C. 600 (1886).

Creation of New Debts. — A surviving partner has no right to create or contract new debts binding upon the partnership, except to the extent of purchasing new material and making new debts so far as may be necessary to work up unfinished material and sell the same. Howell, Orr & Co. v. Boyd Mfg. Co., 116 N.C. 806, 22 S.E. 5 (1895).

Power to Renew or Endorse Note. — A surviving partner has no power after dissolution to renew or endorse a firm note in the name of the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

A surviving partner who, more than two years after dissolution of the firm, endorsed a note in the firm name for the renewal of outstanding notes similarly endorsed, was individually liable on such endorsement, though it did not bind the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

Injunction When There Is Danger of Misapplication of Funds. — In case of danger of misapplication of partnership funds by the surviving partner, the court would certainly, in behalf of the representatives of a deceased partner, interfere and restrain by injunction the surviving partner from such acts, or grant other proper relief; and there is no reason why it should not interfere in behalf of a creditor in such a case. Hodgin v. Bank, 128 N.C. 110, 38 S.E. 294 (1901).

Surviving Partner Held Agent of Executor. — Where one of the members of a firm was constituted its general managing agent by the articles of partnership, and upon the death of one partner his executor consented to a continuance of the business, it was held that the manager became the agent of the executor as well as of the other surviving member, and a demand and refusal to account were necessary to terminate the agency and put the statute of limitations in operation. Patterson v. Lilly, 90 N.C. 82 (1884).

Arrangement between Distributees and Legatees Held a Partnership. — An arrangement between distributees and legatees to permit their property, with the consent and cooperation of the representatives of the deceased partners, to remain in common and to be used for their joint benefit, adopting the name of the old firm, constituted a partnership. Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

Surviving partner of insolvent firm is not entitled to have personal property exemptions paid out of partnership assets. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Representative of a deceased partner cannot be sued while there is a surviving partner. Burgwin v. Hostler (2nd Sec.), 1 N.C. 75 (1799).

Competency of Testimony of Surviving Partner. — In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, was not competent as against the executor of the deceased partner or against the firm. Charlotte Oil & Fertilizer Co. v. Rippy, 124 N.C. 643, 32 S.E. 980 (1899); Moore v. Palmer, 132 N.C. 969, 44 S.E. 673 (1903).

A surviving partner, who assigned partnership property of an insolvent firm to pay his own debts pro rata with those of the firm, could not be allowed to testify that he did not thereby intend to defraud the firm creditors. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

Cited in Bank v. Hodgin, 129 N.C. 247, 39 S.E. 959 (1901).

§ 59-77. When personal representative may take inventory; receiver.

If the surviving partner neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of G.S. 59-76. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law. (1901, c. 640, s. 2; Rev., s. 2541; C.S., s. 3280.)

CASE NOTES

Jurisdiction to Appoint Receiver. — While the clerk of the superior court has no jurisdiction to appoint a receiver for a partnership under this section when the surviving partners have failed or refused to file the inventory required by § 59-76, the superior court on appeal from an order of the clerk in the proceeding does acquire jurisdiction to appoint such receiver. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Appointment of Receiver When Assignee of Surviving Partner Holds for Indefinite Term. — Where an assignment was made by a surviving partner of an insolvent firm, and the assignee was empowered to continue the business for an indefinite term, a receiver could be appointed to administer the partnership fund among the creditors, even though the deed of assignment was not set aside. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Where the surviving partner of a firm was appointed receiver of the firm, he could not maintain an action against one who, as surety for the accommodation of the deceased partner, endorsed the latter's note, which was discounted by the firm, if it appeared that the assets of the partnership were sufficient to pay its debts and leave a surplus against the deceased partner's share, of which the note could be charged. Patton v. Carr, 117 N.C. 176, 23 S.E. 182 (1895).

Duty of Assignee to Charge Interest. — Where the surviving partner of a firm conveyed

the assets to an assignee to settle the estate, it was the duty of the assignee, notwithstanding a contrary custom existing in the town where the business had been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of the partnership, and he was liable to the surviving partner for his failure to do so. Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896), rehearing denied, 122 N.C. 67, 30 S.E. 312 (1898).

Liability of Assignee for Interest. — The assignee of a surviving partner is chargeable with interest on partnership moneys kept by him after 12 months from the time he assumed the trust until he disbursed it. Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-78. Notice to creditors.

Every surviving partner, within 30 days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within six months from the date of first publication of such notice. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the surviving partner the notice shall be published in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. (1901, c. 640, s. 3; Rev., s. 2542; C.S., s. 3281; 1951, c. 381, s. 2; 1973, c. 1410, ss. 1, 2.)

CASE NOTES

Where a dissolution of a firm occurs by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

§ 59-79. Debts paid pro rata; liens.

All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership. (1901, c. 640, s. 4; Rev., s. 2543; C.S., s. 3282.)

CASE NOTES

Debts Created by Surviving Partner. — While a surviving partner cannot enter into contracts or create liabilities which will bind the estate of his deceased partner, yet he is not bound to sacrifice the interests of the firm, and if he contracts debts, bona fide, for the interest of the common property, he may pay them out of the common fund. Calvert v. Miller, 94 N.C. 600 (1886).

Payment of Creditors Advancing Funds to Market Product. — Where a surviving partner has purchased materials and contracted new debts to complete unfinished products and placed the finished article on the market, the creditors advancing the necessary funds are entitled to payment out of the assets of the partnership. Howell, Orr & Co. v. Boyd Mfg. Co., 116 N.C. 806, 22 S.E. 5 (1895).

Prior Encumbrance of Surviving Partner. — The claims of a surviving partner upon the proceeds of sale of the deceased partner's half of the real estate, a mill property, to reimburse him to the amount of half the expenditures incurred in the conduct of the joint business and improvements put upon the property, constituted a prior encumbrance and had to be paid, to the postponement of creditors of the deceased partner. Mendenhall v. Benbow, 84 N.C. 646 (1881).

Suit against Accommodation Endorser by Note. — A note executed by a member of a partnership to a third party who, as surety for the accommodation of the maker, endorsed it and received no benefit from it, could not be subject of an action at law against the endorser by the firm, nor in case of the death of the maker of the note could the surviving partner maintain an action on the note against the accommodation endorsers unless the firm was insolvent. Patton v. Carr, 117 N.C. 176, 23 S.E. 182 (1895).

Assignment Held Fraudulent as to Creditors. — An assignment by a surviving partner of an insolvent firm for an indefinite term, the assignee to have the right to employ servants and to replenish the stock, and out of the proceeds to pay the firm debts, as well as the individual debts of the survivor pro rata, was fraudulent as against creditors. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Bank Not Entitled to Apply Survivor's Deposit to Debts of Firm. — When a bank knew that the plaintiff was the only surviving partner of a firm, and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution, without the consent of the depositor. Hodgin v. People's Nat'l Bank, 125 N.C. 503, 34 S.E. 709 (1899).

Personal Debt as Set-off. — In an action brought by a surviving partner for a debt, a debt due from him may be pleaded as a set-off. Hogg's Ex'rs v. Ashe, 2 N.C. 471 (1797).

A defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was that the debt, being for the board of his partner, should be paid out of the assets of the store in which the plaintiff and the defendant were partners. Norment v. Johnston, 32 N.C. 89 (1849).

§ 59-80. Effect of failure to present claim in six months.

In an action brought on a claim which was not presented within six months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner. (1901, c. 640, s. 5; Rev., s. 2544; C.S., s. 3283; 1973, c. 1410, s. 3.)

§ 59-81. Procedure for purchase by surviving partner.

(a) Appraisal of Property. — The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out under oath a full and complete inventory and appraisement of the entire assets of the partnership, including real estate if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner; they shall also deliver a copy to the executor or administrator, and file a copy with the clerk of the court.

(b) Surviving Partner May Purchase. — The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of such deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets.

(c) Surviving Partner to Give Bond. — In case the surviving partner shall avail himself of the privilege of purchasing such interest as provided for in this section, he shall give bond to the executor or administrator with surety for the

payment of the debts and liabilities of the partnership, and for the performance of all contracts for which the partnership is liable.

(d) Sale of Real Estate. — In case of such sale of the real estate belonging to the partnership, the title to the real estate so purchased shall not pass until the sale thereof has been reported to and confirmed by the clerk of the superior court of the county in which the partnership was located, in a special proceeding to which the widow and heirs at law or devisees of the deceased partner are duly made parties. (1901, c. 640, s. 6; Rev., s. 2545; 1911, c. 12; C.S., s. 3284.)

CASE NOTES

Cited in Lewis v. Boling, 42 N.C. App. 597, 257 S.E.2d 486 (1979).

§ 59-82. Surviving partner to account and settle.

In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within six months from the date of the first publication of notice to creditors, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court. (1901, c. 640, s. 7; Rev., s. 2546; C.S., s. 3285; 1947, c. 781; 1957, c. 783, s. 6; 1973, c. 1410, s. 4.)

CASE NOTES

There can be no division of partnership property until all the accounts have been taken and the clear interest of each partner ascertained. Baird v. Baird, 21 N.C. 524 (1837); Mendenhall v. Benbow, 84 N.C. 646 (1881).

Presumption of Equal Interest. — In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business. State ex rel. Worthy v. Brower, 93 N.C. 344 (1885).

If an agreement for a common or special partnership appears to have existed between parties for the purchase of property, with intent to sell the same for the profit of the parties, and no express agreement be proved adjusting the division or share of the profits, the law extends the concern to all the goods purchased by either of the parties; and the parties are entitled to share the profits, without regard to the payments or advances made by either for the purpose of effecting the purchase, if there can be no contract as to the amount of the advances to be made by them respectively. Taylor v. Taylor & Justice, 6 N.C. 70 (1811).

Note Arising Out of Partnership Business. — In stating an account between an executor and the surviving partner of the testator, it is not error to charge the surviving partner with the value of a note due the testator of the plaintiff individually, if such note arose from or grew out of the business of the partnership business. Royster v. Johnson, 73 N.C. 474 (1875).

Surviving Partner to Make Settlement with Personal Representative of Deceased Partner. — The deceased partner's interest being personal property, this section requires the surviving partner to make settlement with the personal representative of the deceased partner; and there is placed upon the personal representative of the deceased partner the duty to require that a true accounting be made either by the surviving partner or by a receiver under court supervision. Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

Right of Personal Representative to Sue for Accounting. — The right to sue for an accounting of the partnership assets and affairs upon the death of one of the partners vests exclusively in the personal representative of the deceased partner. Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

Compensation of Surviving Partner. — Within the limitation of this section, a surviving partner is entitled to reasonable compensation for his services in settling up the partnership business. Royster v. Johnson, 73 N.C. 474 (1875).

For case upholding two and one-half percent commissions on receipts and disbursements, see Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896), rehearing dismissed, 122 N.C. 67, 30 S.E. 312 (1898).

Liability of Surviving Partner for Loss. — Where the surviving partner has acted in good faith in a fiduciary character he is not chargeable with loss. Thompson v. Rogers, 69 N.C. 357 (1873).

Cited in Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

§ 59-83. Accounting compelled.

In case any surviving partner fails to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators. (1901, c. 640, s. 8; Rev., s. 2547; C.S., s. 3286.)

§ 59-84. Settlement otherwise provided for.

When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in this Chapter, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with the provisions of such articles of partnership or of such will. (1901, c. 640, s. 6; Rev., s. 2545; C.S., s. 3287.)

CASE NOTES

Applied in Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

§ 59-84.1. Partnership to comply with "assumed name" statute.

Every partnership other than a limited partnership shall comply with, and be subject to, the provisions of Articles 14 and 15 of Chapter 66 of the General Statutes in all cases in which the same are applicable. (1951, c. 381, s. 9.)

Article 4.

Business under Assumed Name Regulated.

§§ 59-85 to 59-88: Transferred to §§ 66-68 to 66-71 by Session Laws 1951, c. 381, s. 7.

§ 59-89: Transferred to § 66-72 by Session Laws 1951, c. 381, s. 8.

Chapter 60.

Railroads and Other Carriers.

Sec.

60-1 to 60-81. [Repealed.]
60-82 to 60-87. [Transferred.]
60-88 to 60-146. [Repealed.]

§§ 60-1 to 60-81: Repealed by Session Laws 1963, c. 1165, s. 1.

Editor's Note. — Session Laws 1963, c. 1165, amended, revised and rewrote Chapters 56, 60 and 62 of the General Statutes and recodified them as a new Chapter 62 and a new Chapter 74A.

§§ 60-82 to 60-87: Transferred to §§ 74A-1 to 74A-6 by Session Laws 1963, c. 1165, s. 2.

§§ 60-88 to 60-146: Repealed by Session Laws 1963, c. 1165, s. 1.

Chapter 61.

Religious Societies.

Sec.
61-1. Trustees may be appointed and removed.
61-2. Trustees may hold property.
61-3. Title to lands vested in trustees, or in societies.
61-4. Trustees may convey property.
61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.
61-6. House on vacant land vests title.
61-7. Governing body of assembly authorized to adopt traffic regulations.

§ 61-1. Trustees may be appointed and removed.

The conference, synod, convention or other ecclesiastical body representing any church or religious denomination within the State, as also the religious societies and congregations within the State, may from time to time and at any time appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise. (1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76; R.C., c. 97; Code, ss. 3667, 3668; Rev., ss. 2670, 2671; C.S., s. 3568.)

CASE NOTES

This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N.C. 126, 31 S.E. 383 (1898); Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

This section recognizes that religious bodies must act through and appoint trustees. Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Society Entitled to Remove Trustee Who Is Faithless to Trust. — Under the provisions of this section, a religious society may remove a trustee of church property who proves faithless to his trust, and may fill any vacancy thus created. Nash v. Sutton, 117 N.C. 231, 23 S.E. 178 (1895).

Faithlessness is not required, however, and a religious society may remove trustees at will. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Effect of Church Regulations. — A church has authority to appoint a "suitable number" of its own trustees for the purpose of acquiring and holding church property, and remove them at will; and where the discipline of the denomination with which a church is affiliated has provided a note to be given for the trial of "offenses," this regulation refers to infractions of church discipline and does not apply to the election or removal of trustees. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Right of Competent Trustee to Maintain Action for Removal of Trustees, etc. — A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. Nash v. Sutton, 109 N.C. 550, 14 S.E. 77 (1891).

Right of Member to Sue. — In the absence of a competent trustee and a governing body authorized to appoint trustees, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest. Nash v. Sutton, 109 N.C. 550, 14 S.E. 77 (1891).

Cited in Bridges v. Pleasants, 39 N.C. 26 (1845); King v. Richardson, 136 F.2d 849 (4th Cir. 1943); Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

§ 61-2. Trustees may hold property.

The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matters relating thereto. They shall be accountable to the churches, denominations, societies and congregations for the use and management of such property, and shall surrender it to any person authorized to demand it. (1796, c. 457, ss. 1, 3; 1844, c. 47; 1848, c. 76; R.C., c. 97; Code, ss. 3667, 3668; Rev., ss. 2670, 2671; C.S., s. 3569.)

Cross References. — As to trusts and trustees generally, see § 36A-1 et seq.

CASE NOTES

This section applies only to property held for religious purposes. Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

No General Capacity of Acquisition. — Religious societies or their trustees have no general capacity of acquisition; they can only take for the use of the society. And by a conveyance to trustees, for purposes forbidden by the policy of the law, nothing passes. Trustees of Quaker Soc'y of Contentnea v. Dickenson, 12 N.C. 189 (1827).

Right of Church to Use Property. — A church of the congregational system having elected certain trustees to supesede several trustees theretofore elected holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees who were removed or from its conference. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

A communion service of a church is not liable to seizure and sale under an execution by a pastor for salary due him. Lord v. Hardie, 82 N.C. 241 (1880).

An individual member of a religious society has an equitable interest in the property held by the society. Nash v. Sutton, 117 N.C. 231, 23 S.E. 178 (1895).

Trusts for Special Purposes. — There is nothing in this section which precludes trustees of a certain North Carolina church from accepting trusts for special purposes; and, even if there were, a trust for a special purpose would not fail because they were named as trustees, but equity would appoint other trustees to administer it in application of the maxim that a trust will not be allowed to fail for lack of a trustee. King v. Richardson, 136 F.2d 894 (4th Cir. 1943).

The trustees of a church are merely agents and have no property interest as against the governing body of the church. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Congregation taking possession of a church cannot contest validity of a mortgage given by the trustees for the purchase money on the ground that it was ultra vires. Rountree v. Blount, 129 N.C. 25, 39 S.E. 631 (1901).

Right of Trustees to Enforce Bequest. — Where a testator provided for building a fence around a certain chapel cemetery, the trustees of the chapel were the proper parties to require the executor to perform this provision. Cabe v. Vanhook, 127 N.C. 424, 37 S.E. 464 (1900).

Recovery of Property by Trustees. — The title to church property is vested in the trustees individually and they may recover at law, though in the writ and declaration they style themselves "trustees." Walker v. Fawcett, 29 N.C. 44 (1846).

Title Not in Controversy in Contest between Trustees. — In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owner, the title does not come in controversy. Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

Right of Original Trustees to Sue though Not Legally Appointed. — Where a conveyance was made to three persons for a certain tract of land, as trustees for a church, a suit of trespass could be brought by them against the wrongdoers, even though they may not have been appointed trustees according to law. Walker v. Fawcett, 29 N.C. 44 (1846).

It is only when a suit is brought by persons who claim as "successors" that a question arises as to whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the

character of "successors" to the former, and thereby vest in them the title to the property which is necessary to support an action. Walker v. Fawcett, 29 N.C. 44 (1846).

Trustees Not Entitled to Recover for Physical Suffering of Pastor, His Family or Congregation. — In a suit by the trustees of a church against a railroad company for the improper use of its terminal or depot at or near the manse of the church, no recovery could be had for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation. Taylor v. Seaboard Air Line Ry., 145 N.C. 400, 59 S.E. 129 (1907).

Liability of Trustees for Material Ordered for Church. — The trustees of a church would be liable for material ordered by one of their number and used in building the church, even though the order was not authorized. Tull v. Trustees of M.E. Church, S., 75 N.C. 424 (1876).

The building committee of a church is not liable for injuries received by a workman. Wilson v. Clark, 110 N.C. 364, 14 S.E. 962 (1892).

Member of Quasi Corporation Is Engaged in Joint Enterprise. — One of the material differences between a church or denomination, religious society or congregation (a quasi corporation) in North Carolina and a real corporation organized or existing pursuant to statutory law is that a member of such a quasi corporation is engaged in a joint enterprise and may not recover damages sustained through the tortious conduct of another member thereof from the quasi corporation. Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667, cert. denied, 281 N.C. 756, 191 S.E.2d 354 (1972).

And May Not Recover for Negligence of Agent, Employee or Another Member. — This section does not authorize a member of a church or denomination, religious society or congregation (a quasi corporation) to recover of the quasi corporation for the negligence of an agent, employee or another member thereof. Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667, cert. denied, 281 N.C. 756, 191 S.E.2d 354 (1972).

Applied in Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Cited in Bridges v. Pleasants, 39 N.C. 26 (1845).

§ 61-3. Title to lands vested in trustees, or in societies.

All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the State for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively, according to such intent. (1776, c. 107; 1796, c. 457, s. 4; R.C., c. 97, s. 1; Code, s. 3665; Rev., s. 2672; C.S., s. 3570.)

CASE NOTES

This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N.C. 126, 31 S.E. 383 (1898).

Words "shall be and remain forever to the use and occupancy of that church . . ." do not create an exemption for church property from execution.

These words have to be considered in the context of the time they were written and of wordage required by ancient English law and custom to create a fee simple estate. Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Sale of Property under Execution. — There being no provision in our Constitution exempting church property from execution,

unless exempted by statute, said property is subject to sale under execution. Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Title by Adverse Possession. — A church holding real property for a hundred years, and using it for religious purposes, acquires a fee simple title by adverse possession, independent of the validity of its deed. Gold v. Cozart, 173 N.C. 612, 92 S.E. 600 (1917).

A bequest for a religious charity must be to some definite purpose, and to some body or association of persons having a legal existence and with capacity to take. There is no provision for donations to be employed in any general system of diffusing the knowledge of Christianity throughout the earth. Bridges v. Pleasants, 39 N.C. 26 (1845).

Bequest to Build Church Where Amount Insufficient. — A provision in a will that a church is to be built from certain funds will not fail because there is not a sufficient amount of the funds to build a church as large as directed by the testator. Paine v. Forney, 128 N.C. 237, 38 S.E. 885 (1901).

Specific Trust Must Be Imperative. — A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control the management and disposition of the property, unless this is the clear intent of the grantor expressed in language which should be construed as imperative. Hayes v. Franklin, 141 N.C. 599, 54 S.E. 432 (1906).

No Trust Created. — The recital in a deed conveying land to the vestry and wardens of a church that it was made "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated" created no trust, and the grantee could convey a perfect title. St. James v. Bagley, 138 N.C. 384, 50 S.E. 841 (1905).

Trustees May Hold Property as against Majority of Members. — Where land is conveyed to the officers and trustees of the nondenominational religious organization for the purposes of the organization, its officers and trustees have title to the property in trust and are entitled to hold it for the use and occupancy of the organization as against members of the organization, even though they are in the large majority, who seek possession of the property for use and occupancy by a denominational church. Wheeless v. Barrett, 229 N.C. 282, 49 S.E.2d 629 (1948).

Rights of Majority of Congregation Withdrawing from Denomination. — A conveyance of land to trustees for the erection of a church to belong to a denomination gives the title in trust for the use of the denomination, and therefore members of the congregation of the church so erected who withdraw affiliation from the denomination, even though they be a majority of the congregation, are not entitled to the control and use of the property as against the denomination, irrespective of whether the particular church is congregational or connectional. Western N. Carolina Conference v. Tally, 229 N.C. 1, 47 S.E.2d 467 (1948).

Where a diocese receiving a devise of land was afterwards divided into two dioceses, the land becomes the property of both and not that of the diocese in which the land happens to be and in which the testator resided. Trustees of Diocese of E. Carolina v. Trustees of Diocese of N. Carolina, 102 N.C. 442, 9 S.E. 310 (1889).

As to the rights of an individual member of a congregation under the congregational system, see North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

For discussion of the connectional system, see Simmons v. Allison, 118 N.C. 763, 24 S.E. 716, rehearing dismissed, 118 N.C. 761, 24 S.E. 740 (1896); Tilley v. Ellis, 119 N.C. 233, 26 S.E. 29 (1896); State ex rel. Kerr v. Hicks, 154 N.C. 265, 70 S.E. 468 (1911); Gold v. Cozart, 173 N.C. 612, 92 S.E. 600 (1917).

Applied in Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Cited in YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

§ 61-4. Trustees may convey property.

The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made, shall be effective to pass the land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property. (1855, c. 384; 1889, c. 484; Rev., s. 2673; C.S., s. 3571.)

CASE NOTES

Sale to Promote Testator's Purpose. — Where a testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," the trustees might sell the property if the purpose declared would be promoted thereby, or the court might order a sale under its general equity power. Grace Church v. Ange, 161 N.C. 314, 77 S.E. 239 (1912).

Lease of Part of Property. — Where land was conveyed to a church for the purpose of maintaining a church for worship, the court would not restrain the officers of the church from leasing a small portion of the lot for erecting a store. Hayes v. Franklin, 141 N.C. 599, 54 S.E. 432 (1906).

Applied in Immanuel Baptist Tabernacle Church of Apostolic Faith v. Southern Emmanuel Tabernacle Church, Apostolic Faith, 27 N.C. App. 127, 218 S.E.2d 223 (1975).

Cited in Bond v. Town of Tarboro, 217 N.C. 289, 7 S.E.2d 617, 127 A.L.R. 695 (1940); Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

§ 61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.

Whenever the laws, rules, or ecclesiastic polity of any church or religious sect, society or denomination, commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by gift, purchase or otherwise, and to hold, improve, mortgage, sell and convey the property, real or personal, of any such church or religious sect, society or denomination, for the purposes, in the manner and otherwise as authorized and permitted by its laws, rules or ecclesiastic polity; and in the event of the transfer, removal, resignation or death of any such bishop, minister or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon appointment or election, and pending appointment or election of such successor, such title and rights shall be vested in such person or persons as shall be designated by the laws, rules or ecclesiastic polity of such church or religious sect, society or denomination.

All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 24, 1939, to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who, at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church, religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid; and all transfers of title and rights with respect to property, prior to March 24, 1939, from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church, or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

This section shall not affect vested rights, or repeal any of the provisions of G.S. 61-1 to 61-4, or of G.S. 36-21 to 36-23. (1939, c. 177.)

Editor's Note. — Sections 36-21 to 36-23, referred to in this section, were repealed by Session Laws 1977, c. 502. See now §§ 36A-49 to 36A-51.

§ 61-6. House on vacant land vests title.

All houses and edifices erected for public religious worship on vacant lands, or on lands of the State not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established. (1778, c. 132, s. 6; R.C., c. 97, s. 2; Code, s. 3666; Rev., s. 2674; C.S., s. 3572.)

CASE NOTES

Purpose of Section. — This section was enacted in 1778 for purpose of covering those cases where church houses had been built on unused or unappropriated land to which no one had title. Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Sale of Property under Execution. — There being no provision in our Constitution exempting church property from execution, unless exempted by statute, said property is subject to sale under execution. Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

§ 61-7. Governing body of assembly authorized to adopt traffic regulations.

(a) The governing body of any religious organization or assembly may by appropriate resolution establish rules and regulations with respect to the use of the streets, roads, alleys, driveways, and parking lots on the grounds or premises owned or under the exclusive control of such organization, and it shall be unlawful for any person to park a motor vehicle or other vehicle on the streets, roads or on the premises of a religious assembly where parking has been prohibited by the religious assembly by the erection of "No Parking" signs at each space on the street, road or on the premises where parking is prohibited. Each space in which parking is prohibited shall be clearly designated as such by a sign no smaller than 24 inches by 24 inches. All rules and regulations adopted pursuant to the authority of this section shall be recorded in the proceedings of said governing body and copies thereof shall be filed in the office of the Secretary of State of North Carolina.

(b) It shall be unlawful for any person to park a motor vehicle or other vehicle in a parking space on the streets, roads, or premises of a religious assembly where the parking space has been designated by the religious assembly as being limited to a named individual or to a person holding a named position with the assembly; provided, that such private parking space or private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance to the parking lot, if within a parking lot, and provided further that the private parking spaces within the lot or the private parking spaces on the streets, roads or on the premises of the religious assembly be clearly marked by signs setting forth the name of each individual for whom the space is reserved or the name of the position held with the assembly for which space is reserved.

(c) It shall be unlawful for any person to park a motor vehicle or other vehicle on the streets or roads of a religious assembly, except where parking is expressly designated, so as to interfere with, or obstruct the free flow of vehicular traffic on the streets or roads within the assembly grounds.

(d) It shall be unlawful for any person to park a motor vehicle or other vehicle at the entrance to any driveway on the grounds of a religious assembly so as to block the driveway.

(e) Any vehicle parked in violation of subsections (a), (b), (c), or (d) may be removed by the assembly, or its agents, or its employees to a place of storage and the registered owner of such motor vehicle shall become liable for removal and storage charges. The assembly, nor any party acting under the directions of the assembly, shall be held to answer any civil or criminal action to any owner, lienholder, or other person legally entitled to the possession of any motor vehicle removed from such parking space or parking lot pursuant to subsections (a), (b), (c), or (d) except where such motor vehicle is willfully, maliciously or negligently damaged in the removal from the aforesaid space to place of storage.

(f) A "religious assembly" is defined as being a corporation or association formed for the purpose of providing a resort community for religious and recreational purposes and where the streets and roads are solely maintained by the religious assembly without governmental funds. (1977, c. 398, s. 1.)

Chapter 62.

Public Utilities.

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ARTICLE 1.

General Provisions.

§ 62-1. Short title.

This Chapter shall be known and may be cited as the Public Utilities Act. (1963, c. 1165, s. 1.)

Editor's Note. — Session Laws 1963, c. 1165, amends, revises and rewrites Chapters 56, 60, and 62 of the General Statutes and recodifies them as a new Chapter 62 and a new Chapter 74A.

Session Laws 1975, c. 243, ss. 1 and 11, provide:

"Section 1. This act shall not terminate the preexisting commission or appointments thereto, or any certificates, permits, orders, rules or regulations issued by it or any other action taken by it, unless and until revoked by it, nor affect in any manner the existing franchise, territories, tariffs, rates, contracts, service regulations and other obligations and rights of public utilities, unless and until altered or modified by or in accordance with the provisions of Chapter 62 of the General Statutes."

"Sec. 11. Except as herein amended, the provisions of Chapter 62 of the General Statutes of North Carolina shall remain in full force and effect. To the extent that other laws or clauses of laws are in conflict with the provisions of this act, such laws and clauses are, to that extent, hereby repealed."

Legal Periodicals. — For case law survey on public utilities, see 41 N.C.L. Rev. 498 (1963).

CASE NOTES

Editor's Note. — Cases construing provisions of former Chapter 62 have been placed in the annotations under appropriate sections of the new Chapters.

Scope of Authority of Utilities Commission. — The Utilities Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by this Chapter, and the Commission may not, by its order, require or authorize a rule or practice by a public utility company which is forbidden by statute, or authorize such company to refuse to perform a duty imposed upon it by statute, unless this Chapter has conferred such authority upon the Commission. State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Applied in S & R Auto & Truck Serv., Inc. v. City of Charlotte, 268 N.C. 374, 150 S.E.2d 743 (1966).

Cited in North Carolina Util. Comm'n v.

United States, 253 F. Supp. 930 (E.D.N.C. 1966); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

§ 62-2. Declaration of policy.

Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

(1) To provide fair regulation of public utilities in the interest of the public;

(2) To promote the inherent advantage of regulated public utilities;

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities; and to that end to authorize fixing of rates in such a manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the rate-making process for the investment of public utilities in plant under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development; and

(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply.

To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission. (1963, c. 1165, s. 1; 1975, c. 877, s. 2; 1977, c. 691, s. 1.)

Legal Periodicals. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

CASE NOTES

Rate Scheme Held Unconstitutional Burden on United States. — The state regulatory scheme by which the Utilities Commission sets rates for franchised carriers to charge the U.S. Army in transportation of household goods violates the national procurement policy and is an unconstitutional burden on the United States in the exercise of its constitutional powers. United States v. North Carolina Util. Comm'n, 352 F. Supp. 274 (E.D.N.C. 1972).

Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in § 62-133. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The primary purpose of this Chapter is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment, but is to assure the public of adequate service at a reasonable charge. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

The provisions of this Chapter, such as § 62-133, designed to assure the utility of adequate revenues, are in the nature of corollaries to the basic proposition that the public is entitled to adequate service at reasonable rates and safeguards against administrative action which would violate constitutional protections by confiscation of the utility's property. Without such assurance, the owners of capital would not invest it in the utility's bonds or stock and the utility could not provide the plant necessary for the rendering of adequate service. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

This section declares the policy of the State, which it is the purpose of this Chapter to put into effect. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The purpose of the Public Utilities Act is to put the policies enumerated in this section into effect. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

The entire Chapter is a single, integrated plan. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

This section does not require the Utilities Commission to adopt a rule of the Interstate Commerce Commission; the Commission must make its own independent investigations, determinations and findings of fact based upon the evidence presented to it. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612, cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Only Unfair or Destructive Competition Condemned. — There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Transportation of passengers by motor carriers for compensation is a business affected with a public interest. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

All who ship goods with common carriers are required to be treated equally with respect to the same category of service. State ex rel. Utilities Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838, rev'd on other grounds, 302 N.C. 14, 273 S.E.2d 232 (1980).

Interconnection with Competitor Cannot Be Required. — There is no provision in this Chapter which requires, or authorizes the Commission to require, a utility, with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Contractual obligation to provide water service to a recreational subdivision, as well as the actual delivery thereof, directly affect a utility's ability to function as a utility. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationshp to the utility providing water service. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Jurisdiction over Rates and Service of Duke Power Company. — The Utilities Commission has general and supervisory jurisdiction over the retail electric rates and service of

Duke Power Company pursuant to this Chapter. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

North Carolina rates may not be structured by external system usage. Such action is outside the intended scope of the Commission's authority under this section. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Recovery of Reasonable Cost of Approved Gas Exploration Projects. — The Commission, in ordering that the reasonable costs of approved exploration projects were to be recoverable through tracking rate increases, acted within its acknowledged duty and authority to compel adequate and efficient utility service to the citizens of this State, where it was clear from the Commission's findings that, without additional gas supplies, the gas utilities would be unable to render adequate service to their customers, that exploration programs were the most feasible means for obtaining these additional supplies, and that the utilities were unable, through traditional methods of financing, to fund sufficient exploration projects to obtain these supplies. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Applied in State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975); State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975).

Quoted in State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Cited in State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982); State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

§ 62-3. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Broker," with regard to motor carriers of passengers, means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which as principal or agent engages in the business of selling or offering for sale any transportation of passengers by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisements, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(2) "Certificate" means a certificate of public convenience and necessity issued by the Commission pursuant to the provisions of this Chapter to a public utility.

(3) "Certified mail" means such mail only when a return receipt is requested.

(4) "Charter party," with regard to motor carriers, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.

(5) "Commission" means the North Carolina Utilities Commission.

(6) "Common carrier" means any person which holds itself out to the general public to engage in transportation of persons or property for compensation, including transportation by train, bus, truck, boat or other conveyance, except as exempted in G.S. 62-260.

(7) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of persons or property or any class or classes thereof for compensation, whether over regular or irregular routes, except as exempted in G.S. 62-260.

(8) "Contract carrier by motor vehicle" means any person which, under an individual contract or agreement with another person and with such

additional persons as may be approved by the Utilities Commission, engages in the transportation other than the transportation referred to in subdivision (7) of this section, by motor vehicle of persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260.

(9) "Contract carrier" means any person which under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation of persons or property for compensation, except as exempted in G.S. 62-260.

(10) "Foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country.

(11) "Franchise" means the grant of authority by the Commission to any person to engage in business as a public utility or contract carrier, whether or not exclusive or shared with others or restricted as to terms and conditions and whether described by area or territory or not, and includes certificates and permits, and all other forms of licenses or orders and decisions granting such authority.

(12) "Highway" means any road or street in this State used by the public or dedicated or appropriated to public use.

(13) "Industrial plant" means any plant, mill, or factory engaged in the business of manufacturing.

(14) "Interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state.

(15) "Intrastate commerce" means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in interstate or foreign commerce, and includes all transportation within this State for compensation in interstate or foreign commerce which has been exempted by Congress from federal regulation.

(16) "Intrastate operations" means the transportation of persons or property for compensation in intrastate commerce.

(17) "Motor carrier" means both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(18) "Motor vehicle" means any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State.

(19) "Municipality" means any incorporated community, whether designated in its charter as a city, town, or village.

(20) "Permit" means a permit issued by the Commission pursuant to the provisions of this Chapter to a contract carrier by motor vehicle.

(21) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof.

(22) "Private carrier" means any person not included in the definitions of common carrier or contract carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of property for compensation.

(23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation.
2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 10 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 10 residential building lots shall be a public utility at the time of such planning or holding out to serve such 10 or more building lots, without regard to the number of actual customers connected;
3. Transporting persons or property by street, suburban or interurban bus or railways for the public for compensation;
4. Transporting persons or property by railways or motor vehicles, or any other form of transportation or express service for the public for compensation, except motor carriers exempted in G.S. 62-260, and except carriers by air;
5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;
6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, an authority organized under the North Carolina Water and Sewer Authorities Act, electric or telephone membership corporation or nonprofit water membership or consumer-owned corporations financed by the Farmers Home Administration, the United States Department of Housing and Urban Development, or any similar or successor federal financing agency, provided, that (i) any such financing administration, department or agency exercise sub-

stantial control over and regulation of any such corporation's rates and terms and conditions of service, and (ii) the members or consumer-owners of any such corporation, pursuant to the corporation's articles of incorporation and bylaws, shall elect the governing board of the corporation; or any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973, and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

g. The term "public utility" shall not include a hotel or motel which imposes charges to guests for local or long-distance telephone calls when such calls are completed through the use of local access lines or long-distance message telecommunications service (MTS) of a public utility, and the applicable charges for telephone calls are displayed in each guest room.

(24) "Rate" means every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification.

(25) "Route" means the course or way which is traveled; the road or highway over which motor vehicles operate.

(26) "Securities" means stock, stock certificates, bonds, notes, debentures, or other evidences of ownership or of indebtedness, and any assumption or guaranty thereof.

(27) "Service" means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.

(27a) "Small power producer" means a person or corporation owning or operating an electrical power production facility with a power production capacity which, together with any other facilities located at the same site, does not exceed 80 megawatts of electricity and which depends upon renewable resources for its primary source of energy. For the purposes of this section, renewable resources shall mean: hydroelectric power. A small power producer shall not include persons primarily engaged in the generation or sale of electricity from other than small power production facilities.

(28) The word "State" means the State of North Carolina; "state" means any state.

(29) "Town" means any unincorporated community or collection of people having a geographical name by which it may be generally known and is so generally designated.

(30) "Panel" means a panel of three commissioners, a division of the Utilities Commission authorized for the purpose of carrying out certain functions of the Commission. (1913, c. 127, s. 7; C.S., s. 1112(b); 1933, c. 134, ss. 3, 8; c. 307, s. 1; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1947, c. 1008, s. 3; 1949, c. 1132, s. 4; 1953, c. 1140, s. 1; 1957, c. 1152, s. 13; 1959, c. 639, ss. 12, 13; 1963, c. 1165, s. 1; 1967, c. 1094, ss. 1, 2; 1971, c. 553; c. 634, s. 1; cc. 894, 895; 1973, c. 372, s. 1; 1975, c. 243, s. 2; cc. 254, 415; 1979, c. 652, s. 1; 1979, 2nd Sess., c. 1219, s. 1; 1981 (Reg. Sess., 1982), c. 1186, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Jan. 1, 1983, added paragraph g to subdivision (23).

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

Definitions Not Controlling Where Terms Are Used Elsewhere. — The definitions of "public utility" and "franchise" contained in this section are not controlling in determining whether an agreement of a municipality constitutes a franchise or a license, since the definitions of the statute do not purport to be authoritative definitions of those terms as used elsewhere. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

The term "franchise," as used by the courts and by text writers, is not limited to a special right granted to a public utility, as it is defined in this section. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

Applicability of Article 8. — The General Assembly intended Article 8 to apply to all public utilities doing business in this State, whether they be foreign or domestic corporations, and even though they are also engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

There is nothing in the language of Article 8 or of the Public Utilities Act generally to support the contention that Article 8 is not applicable to a multistate foreign corporation engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

"Public" means the whole body politic, the body of the people at large, the people as a whole. State ex rel. Utilities Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part, rev'd on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

What Is the "Public" Dependent on Regulatory Circumstances. — Whether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of "public" to be thereafter universally applied. What is the "public" in any given case depends rather on the regulatory circumstances of that case. Some of these circumstances are: (1) the nature of the industry sought to be regulated; (2) the type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) the effect of nonregulation or exemption from regulation of one or more persons engaged in the industry. The meaning of "public" must, in the final analysis, be such as will, in the context of the regulatory circumstances, accomplish the legislature's purpose and comport with its public policy. State ex rel. Utilities Comm'n v. Simpson, 295 N.C. 519, 246 S.E.2d 753 (1978).

Definition of "Public Utility" Cannot Be Expanded. — Neither the Commission nor the Supreme Court has authority to add to the types of business defined by the legislature as public utilities. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Test of System as Public Utility. — One test to determine whether a plant or system is a public utility is whether the public may enjoy it by right or by permission only. It is immaterial that the service is limited to a specified area and that the facilities are limited in capacity. State ex rel. Utilities Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part, rev'd on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

Service Up to Capacity as Service to "Public". — One offers service to the "public" within the meaning of subparagraph 6 of para-

graph a of subdivision (23) when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

As to "service" rendered in contemplation of former statute, see State v. Andrews, 191 N.C. 545, 132 S.E. 568 (1926).

Status of the grantee was a material factor in determining the validity of a grant of a franchise under the authority of former § 160-2, for that statute authorized municipal corporations to grant franchises only to "public utilities," though it did not necessarily follow that such grantee had to be the operator of a business within the definition of "public utility" contained in this section. Kornegay v. City of Raleigh, 269 N.C. 155, 152 S.E.2d 186 (1967).

If Applicant Is Not "Public Utility," Issuance of Certificate Is Nullity. — If an applicant's proposed service is not within the definition of "public utility" contained in subdivision (23) of this section, the issuance of a certificate of public convenience and necessity by the Commission to the applicant would be a nullity. It would not supply a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

The fact that a corporation has the authority to, and does, engage in private business in addition to its public service does not deprive it of its status as a public service corporation. A public service (public utility) corporation having the power of eminent domain makes such corporation amenable to State control through the Utilities Commission. State ex rel. Utilities Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part, rev'd on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

A mobile radio service falls clearly within the definition of "public utility" in subparagraph 6 of paragraph a of subdivision (23). State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

A medical doctor whose communication service consisted of seven two-way radios, three "beeper" radio devices and one base station, who was providing service only to 10 other members of the County Medical Society, was engaged in the operation of a public utility within the meaning of §§ 62-3(23)a6 and 62-119(3). State ex rel. Utilities Comm'n v. Simpson, 32 N.C. App. 543, 232 S.E.2d 871 (1977), aff'd, 295 N.C. 519, 246 S.E.2d 753 (1978).

Telephone Answering or Message Relaying Service Not a "Public Utility". — Neither a telephone answering nor a message relaying service is a public utility within the purview of subdivision (23). State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Municipal corporations are specifically excluded from the definition of a "public utility" in subdivision (23) of this section. Dale v. City of Morgantown, 270 N.C. 567, 155 S.E.2d 136 (1967); State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972), aff'd, 17 N.C. App. 522, 195 S.E.2d 76 (1973); State ex rel. Utilities Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

And Are Not Subject to Commission's Regulation. — A municipal corporation distributing and selling electric energy to its inhabitants, and to others in its vicinity, is not subject to regulation by the North Carolina Utilities Commission, and the provisions of this Chapter do not apply to it, except as otherwise expressly stated therein. Dale v. City of Morgantown, 270 N.C. 567, 155 S.E.2d 136 (1967); State ex rel. Utilities Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

Where parties constructed water mains from end of municipal lines to their properties, permitting others to tap into the mains, and the municipality installed meters and furnished water to the others directly, parties were not public utilities within the Public Utilities Act of 1933 so as to give the Utilities Commission jurisdiction. State v. New Hope Rd. Water Co., 248 N.C. 27, 102 S.E.2d 377 (1958).

The delivery of power by a Tennessee corporation domesticated to do business in this State to Tennessee Valley Authority and the distribution by TVA of that power under pooling and apportionment agreements to North Carolina utilities for distribution in North Carolina was the furnishing of electricity "to another for distribution to or for the public for compensation" within the meaning of paragraph (23)b of this section. State ex rel. Utilities Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part, rev'd on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

The word "rate," as used in the Public Utilities Act, refers not only to the monetary amount which each customer must ultimately pay, but also to the published method or schedule by which that amount is figured. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Rate Formula Permissible. — The definition of "rate" contained in this section is worded in such a broad manner as to encompass the use of a formula, and the fact that the

formula must be computed each month does not render it so imprecise as to be statutorily impermissible. State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975), aff'd, 291 N.C. 361, 230 S.E.2d 671 (1976).

Extension of Rate Increase Unauthorized. — The contention of the companies and the Commission that other provisions of this Chapter, including subdivision (24) of this section authorizing the Commission to fix reasonable and just rates for public utility service, permit the Commission to extend its previously authorized rate increases "based solely upon the increased cost of fuel" beyond Sept. 1, 1975, contrary to the mandate of § 62-134(e) (now repealed), was utterly without merit. It is well established that when there are two statutes, one dealing specifically with the matter in issue and the other being in general terms which, nothing else appearing, would include the matter in question, the specific statute controls. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

As to adjustment of fuel charges for changes in cost of fuel, see now § 62-133.2.

A common carrier by motor vehicle may be defined as a person who is not exempted from regulation under the provisions of § 62-260, and who holds himself out to the general public to engage in transportation of persons or property for compensation. State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972), aff'd, 283 N.C. 104, 194 S.E.2d 859 (1973).

Common carrier of petroleum products which commits part of its equipment to dedicated use should not be regarded as a matter of law as a contract carrier, since common carriers participating in the dedicated rate arrangement are also rendering service to the public generally and are providing service impartially to all persons requesting such service. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

As to what constitutes a contract carrier, see State ex rel. Utilities Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968).

Requirements for Permit to Operate as Contract Carrier. — In addition to the statutory requirements of § 62-262 and subdivision (8) of this section, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

The definition of "contract carrier" includes charter service. State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Lessor of Vehicles Held Not Contract Carrier. — Where the owner of trucks leased them to another corporation under an agreement requiring lessor to carry insurance and maintain the vehicles and giving lessee control over the operation of the trucks with right to use same exclusively for the transportation and delivery of lessee's goods, the lessor was not a contract carrier within the meaning of the statute as it stood in 1949, since the lessor merely leased its vehicles and was not a carrier of any kind, and lessee was solely a private carrier, and therefore lessor was not liable for additional assessment at the "for hire" rates under the statute. Equipment Fin. Corp. v. Scheidt, 249 N.C. 334, 106 S.E.2d 555 (1959).

Former Definition of Contract Carrier Not Retroactive. — The definition of "contract carrier" in the Bus Act of 1949 (former §§ 62-121.43 through 62-121.79) was definitive or regulatory and intended to be applied prospectively with respect to applications for permits as contract carriers under the general provisions of the act, and had no bearing on or relation to the grandfather rights confirmed in the act. To make these definitive and regulatory provisions retroactive, so as to place a limitation on the rights of a carrier under the grandfather clause contained in the act, would be in contravention of his constitutional rights and contrary to due process of law. Moreover, such a construction would completely nullify the grandfather clause and make it feckless. State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

For comparison of definitions in Federal Motor Carrier Act and Bus Act of 1949 (former §§ 62-121.43 through 62-121.79), see State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947); State ex rel. Utilities Comm'n v. Chapel Hill Tel. Co., 12 N.C. App. 543, 183 S.E.2d 802 (1971); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974); State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974); State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974); State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980); State ex rel. Utilities Comm'n v. Inter-

venor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Quoted in State ex rel. Utilities Comm'n v. Kenan Transport Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971); State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976); State ex rel. North Carolina Util. Comm'n v. Transylvania Util. Co., 30 N.C. App. 336, 226 S.E.2d 824 (1976); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 688 (1980).

Stated in State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Cited in Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

§ 62-4. Applicability of Chapter.

This Chapter shall not terminate the preexisting Commission or appointments thereto, or any certificates, permits, orders, rules or regulations issued by it or any other action taken by it, unless and until revoked by it, nor affect in any manner the existing franchises, territories, tariffs, rates, contracts, service regulations and other obligations and rights of public utilities, unless and until altered or modified by or in accordance with the provisions of this Chapter. (1963, c. 1165, s. 1.)

§§ 62-5 to 62-9: Reserved for future codification purposes.

Article 2.

Organization of Utilities Commission.

§ 62-10. Number; appointment; terms; qualifications; chairman; vacancies; compensation; other employment prohibited.

(a) The North Carolina Utilities Commission shall consist of seven commissioners who shall be appointed by the Governor subject to confirmation by the General Assembly in joint session. The names of commissioners to be appointed by the Governor shall be submitted by the Governor to the General Assembly for confirmation by the General Assembly on or before May 1, of the year in which the terms for which the appointments are to be made are to expire. Upon failure of the Governor to submit names as herein provided, the Lieutenant Governor and Speaker of the House jointly shall submit the names of a like number of commissioners to the General Assembly on or before May 15 of the same year for confirmation by the General Assembly. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to adjournment of the then current session of the General Assembly. This subsection shall be subject to the provisions of subsection (c) of this section.

(b) The terms of the commissioners now serving shall expire at the conclusion of the term for which they were appointed which shall remain as before with two regular eight-year terms expiring on July 1 of each fourth year after July 1, 1965, and the fifth term expiring on July 1 of each eighth year after July 1, 1963. The terms of office of utilities commissioners thereafter shall be eight years commencing on July 1 of the year in which the predecessor terms expired, and ending on July 1 of the eighth year thereafter.

(c) In order to increase the number of commissioners to seven, the names of two additional commissioners shall be submitted to the General Assembly on or before May 27, 1975, for confirmation by the General Assembly as provided in G.S. 62-10(a). The commissioners so appointed and confirmed shall serve

new terms commencing on July 1, 1975, one of which shall be for a period of two years (with the immediate successor serving for a period of six years), and one of which shall be for a period of two years.

Thereafter, the terms of office of the additional commissioners shall be for eight years as provided in G.S. 62-10(b).

(d) A commissioner in office shall continue to serve until his successor is duly confirmed and qualified but such holdover shall not affect the expiration date of such succeeding term.

(e) On July 1, 1965, and every four years thereafter, one of the commissioners shall be designated by the Governor to serve as chairman of the Commission for the succeeding four years and until his successor is duly confirmed and qualifies. Upon death or resignation of the commissioner appointed as chairman, the Governor shall designate the chairman from the remaining commissioners and appoint a successor as hereinafter provided to fill the vacancy on the Commission.

(f) In case of death, incapacity, resignation or vacancy for any other reason in the office of any commissioner prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor within four weeks after the vacancy arises to the General Assembly for confirmation by the General Assembly. Upon failure of the Governor to submit the name of the successor, the Lieutenant Governor and Speaker of the House jointly shall submit the name of a successor to the General Assembly within six weeks after the vacancy arises. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to the adjournment of the then current session of the General Assembly.

(g) If a vacancy arises or exists pursuant to either subsection (a) or (c) or (f) of this section when the General Assembly is not in session, and the appointment is deemed urgent by the Governor, the commissioner may be appointed and serve on an interim basis pending confirmation by the General Assembly.

(h) The salary of each commissioner shall be the same as that fixed from time to time for judges of the superior court except that the commissioner designated as chairman shall receive one thousand dollars ($1,000) additional per annum.

(i) The standards of judicial conduct provided for judges in Article 30 Chapter 7A of the General Statutes shall apply to members of the Commission. Members of the Commission shall be liable to impeachment for the causes and in the manner provided for judges of the General Court of Justice in Chapter 123 of the General Statutes. Members of the Commission shall not engage in any other employment, business, profession, or vocation while in office.

(j) Members of the Commission shall be reimbursed for travel and subsistence expenses at the rates allowed to State officers and employees by G.S. 138-6(a). (1941, c. 97, s. 2; 1949, c. 1009, s. 1; 1959, c. 1319; 1963, c. 1165, s. 1; 1967, c. 1238; 1975, c. 243, s. 3; c. 867, ss. 1, 2; 1977, c. 468, s. 1; c. 913, s. 2.)

State Government Reorganization. — The Utilities Commission was transferred to the Department of Commerce by § 143A-174, enacted by Session Laws 1971, c. 864, and repealed by Session Laws 1977, c. 198, s. 25.

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Applied in State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

§ 62-11. Oath of office.

Each utilities commissioner before entering upon the duties of his office shall file with the Secretary of State his oath of office to support the Constitution and laws of the United States and the Constitution and laws of the State of North Carolina, and to well and truly perform the duties of his said office as utilities commissioner, and that he is not the agent or attorney of any public utility, or an employee thereof, and that he has no interest in any public utility. (1933, c. 134, s. 5; 1935, c. 280; 1939, c. 404; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-12. Organization of Commission; adoption of rules and regulations therefor.

To facilitate the work of the Commission and for administrative purposes, the chairman of the Commission, with the consent and approval of the Commission, may organize the work of the Commission in several hearing divisions and operating departments and may designate a member of the Commission as the head of any division or divisions and assign to members of the Commission various duties in connection therewith. Subject to the provisions of the State Personnel Act (Article 2 of Chapter 143 of the General Statutes), the Commission shall prepare and adopt rules and regulations governing the personnel, departments or divisions and all internal affairs and business of the Commission. (1941, c. 97, s. 3; 1949, c. 1009, s. 2; 1957, c. 1062, s. 1; 1963, c. 1165, s. 1.)

Editor's Note. — Article 2, Chapter 143, referred to in this section, was repealed by Session Laws 1965, c. 640, s. 1. For present provisions as to State Personnel System, see §§ 126-1 through 126-12.

§ 62-13. Chairman to direct Commission.

(a) The chairman shall be the chief executive and administrative officer of the Commission.

(b) The chairman shall determine whether matters pending before the Commission shall be considered or heard initially by the full Commission, a panel of three commissioners, a hearing commissioner, or a hearing examiner. Subject to the rules of the Commission, the chairman shall assign members of the Commission to proceedings and shall assign members to preside at proceedings before the full Commission or a panel of three commissioners.

(c) The chairman, the presiding commissioner, hearing commissioner, or hearing examiner shall hear and determine procedural motions or petitions not determinative of the merits of the proceedings and made prior to hearing; and at hearing shall make all rulings on motions and objections.

(d) The chairman acting alone, or any three commissioners, may initiate investigations, complaints, or any other proceedings within the jurisdiction of the Commission. (1941, c. 97, s. 4; 1957, c. 1062, s. 2; 1963, c. 1165, s. 1; 1975, c. 243, ss. 9, 10; 1977, c. 468, s. 2; c. 913, s. 2.)

§ 62-14. Commission staff; structure and function.

(a) The Commission is authorized and empowered to employ hearing examiners; court reporters; a chief clerk and deputy clerk; a commission attorney and assistant commission attorney; transportation and pipeline safety inspectors; and such other professional, administrative, technical, and clerical personnel as the Commission may determine to be necessary in the proper discharge of the Commission's duty and responsibility as provided by law. The chairman shall organize and direct the work of the Commission staff.

(b) The salaries and compensation of all such personnel shall be fixed in the manner provided by law for fixing and regulating salaries and compensation by other State agencies.

(c) The chairman, within allowed budgetary limits and as allowed by law, shall authorize and approve travel, subsistence and related expenses of such personnel, incurred while traveling on official business. (1963, c. 1165, s. 1; 1977, c. 468, s. 3.)

§ 62-15. Office of executive director; public staff, structure and function.

(a) There is established in the Commission the office of executive director, whose salary shall be the same as that fixed for members of the Commission. The executive director shall be appointed by the Governor subject to confirmation by the General Assembly in joint session. The name of the executive director appointed by the Governor shall be submitted to the General Assembly on or before May 1 of the year in which the term of his office begins. The term of office for the executive director shall be six years, and the initial term shall begin July 1, 1977. The executive director may be removed from office by the Governor in the event of his incapacity to serve; and the executive director shall be removed from office by the Governor upon the affirmative recommendation of a majority of the Commission, concurred in by a majority of the Utility Review Committee of the General Assembly. In case of a vacancy in the office of executive director for any reason prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor to the General Assembly, not later than four weeks after the vacancy arises. If a vacancy arises in the office when the General Assembly is not in session, the executive director shall be appointed by the Governor to serve on an interim basis pending confirmation by the General Assembly.

(b) There is established in the Commission a public staff. The public staff shall consist of the executive director and such other professional, administrative, technical, and clerical personnel as may be necessary in order for the public staff to represent the using and consuming public, as hereinafter provided. All such personnel shall be appointed, supervised, and directed by the executive director. The public staff shall not be subject to the supervision, direction, or control of the Commission, the chairman, or members of the Commission.

(c) Except for the executive director, the salaries and compensation of all such personnel shall be fixed in the manner provided by law for fixing and regulating salaries and compensation by other State agencies.

(d) It shall be the duty and responsibility of the public staff to

(1) Review, investigate, and make appropriate recommendations to the Commission with respect to the reasonableness of rates charged or proposed to be charged by any public utility and with respect to the consistency of such rates with the public policy of assuring an energy supply adequate to protect the public health and safety and to promote the general welfare;

(2) Review, investigate, and make appropriate recommendations to the Commission with respect to the service furnished, or proposed to be furnished by any public utility;

(3) Intervene on behalf of the using and consuming public, in all Commission proceedings affecting the rates or service of any public utility;

(4) When deemed necessary by the executive director in the interest of the using and consuming public, petition the Commission to initiate proceedings to review, investigate, and take appropriate action with respect to the rates or service of public utilities;

(5) Intervene on behalf of the using and consuming public in all certificate applications filed pursuant to the provisions of G.S. 62-110.1, and provide assistance to the Commission in making the analysis and plans required pursuant to the provisions of G.S. 62-110.1 and 62-155;
(6) Intervene on behalf of the using and consuming public in all proceedings wherein any public utility proposes to reduce or abandon service to the public;
(7) Investigate complaints affecting the using and consuming public generally which are directed to the Commission, members of the Commission, or the public staff and where appropriate make recommendations to the Commission with respect to such complaints;
(8) Make studies and recommendations to the Commission with respect to standards, regulations, practices, or service of any public utility pursuant to the provisions of G.S. 62-43; provided, however, that the public staff shall have no duty, responsibility, or authority with respect to the enforcement of natural gas pipeline safety laws, rules, or regulations;
(9) When deemed necessary by the executive director, in the interest of the using and consuming public, intervene in Commission proceedings with respect to transfers of franchises, mergers, consolidations, and combinations of public utilities pursuant to the provisions of G.S. 62-111;
(10) Investigate and make appropriate recommendations to the Commission with respect to applications for certificates by radio common carriers, pursuant to the provisions of Article 6A of this Chapter;
(11) Review, investigate, and make appropriate recommendations to the Commission with respect to contracts of public utilities with affiliates or subsidiaries, pursuant to the provisions of G.S. 62-153;
(12) When deemed necessary by the executive director, in the interest of the using and consuming public, advise the Commission with respect to securities, regulations, and transactions, pursuant to the provisions of Article 8 of this Chapter.

(e) The public staff shall have no duty, responsibility, or authority with respect to the laws, rules or regulations pertaining to the physical facilities or equipment of common, contract and exempt carriers, the registration of vehicles or of insurance coverage of vehicles of common, contract and exempt carriers; the licensing, training, or qualifications of drivers or other persons employed by common, contract and exempt carriers, or the operation of motor vehicle equipment by common, contract and exempt carriers in the State.

(f) The executive director representing the public staff shall have the same rights of appeal from Commission orders or decisions as other parties to Commission proceedings.

(g) Upon request, the executive director shall employ the resources of the public staff to furnish to the Commission, its members, or the Attorney General, such information and reports or conduct such investigations and provide such other assistance as may reasonably be required in order to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation.

(h) The executive director is authorized to employ, subject to approval by the State Budget Officer, expert witnesses and such other professional expertise as the executive director may deem necessary from time to time to assist the public staff in its participation in Commission proceedings, and the compensation and expenses therefor shall be paid by the utility or utilities participating in said proceedings. Such compensation and expenses shall be treated by the Commission, for rate-making purposes, in a manner generally consistent with its treatment of similar expenditures incurred by utilities in the presentation of their cases before the Commission. An accounting of such compensation and

expenses shall be reported annually to the Utility Review Committee and to the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

(i) The executive director, within established budgetary limits, and as allowed by law, shall authorize and approve travel, subsistence, and related necessary expenses of the executive director or members of the public staff, incurred while traveling on official business. (1949, c. 1009, s. 3; 1963, c. 1165, s. 1; 1977, c. 468, s. 4; 1981, c. 475.)

Effect of Amendments. — The 1981 amendment rewrote subsection (h), which formerly read "The executive director is authorized, on his own initiative or at the request of the Commission, to employ expert witnesses for participation in Commission proceedings, and the compensation and expenses therefor shall be paid from the Contingency and Emergency Fund."

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 489.

For a survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

§ 62-16: Repealed by Session Laws 1977, c. 468, s. 5.

Cross References. — For provisions covering the subject matter of the repealed section, see § 62-15.

§ 62-17. Annual reports; monthly or quarterly release of certain information; publication of procedural orders and decisions.

(a) It shall be the duty of the Commission to make and publish annual reports to the Governor of Commission activities, including copies of its general orders and regulations, comparative statistical data on the operation of the various public utilities in the State, comparisons of rates in North Carolina with rates elsewhere, a detailed report of its investigative division, a review of significant developments in the fields of utility law, economics and planning, a report of pending matters before the Commission, and a digest of the principal decisions of the Commission and the North Carolina courts affecting public utilities. A monthly or quarterly release of such information shall be made if the Commission deems it advisable or if the Governor shall so request.

(a1) The public staff of the Commission shall make and publish annual reports to the General Assembly on its activities in the interest of the using and consuming public.

(b) The Commission shall publish in a separate volume at least once each year its final decisions made on the merits in formal proceedings before the Commission, and may include significant procedural orders and decisions. (1899, c. 164, s. 27; Rev., s. 1117; 1911, c. 211, s. 9; 1913, c. 10, s. 1; C.S., s. 1065; 1933, c. 134, s. 8; 1941, c. 97; 1955, c. 981; 1957, c. 1152, s. 1; 1963, c. 1165, s. 1; 1977, c. 468, s. 6.)

CASE NOTES

Matters of Public Record. — Reports of the Corporation Commission (now Utilities Commission) of North Carolina are matters of public record, of which the courts therein will take judicial notice. Staton v. Atlantic Coast Line R.R., 144 N.C. 135, 56 S.E. 794 (1907), decided under former statutory provisions.

§ 62-18. Records of receipts and disbursements; payment into treasury.

(a) The Commission shall keep a record showing in detail all receipts and disbursements.

(b) All license fees and seal taxes, all money received from fines and penalties, and all other fees paid into the office of the Utilities Commission shall be turned in to the State treasury. (1899, c. 164, ss. 26, 33, 34; Rev., ss. 1114, 1115; C.S., ss. 1063, 1064; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-19. Public record of proceedings; chief clerk; seal.

(a) The Commission shall keep in the office of the chief clerk at all times a record of its official acts, rulings, orders, decisions, and transactions, and a current calendar of its scheduled activities and hearings, which shall be public records of the State of North Carolina.

(b) Upon receipt by the Commission, the chief clerk shall furnish to the executive director copies of all rates, tariffs, contracts, applications, petitions, pleadings, complaints, and all other documents filed with the Commission and shall furnish to the executive director copies of all orders and decisions entered by the Commission.

(c) The Commission shall have and adopt a seal with the words "North Carolina Utilities Commission" and such other design as it may prescribe engraved thereon by which it shall authenticate its proceedings and of which the courts shall take judicial notice. Where an exemplified copy of Commission records and proceedings is required for full faith and credit outside of the State, such records and proceedings shall be attested by the chief clerk, or deputy clerk, and the seal of the Commission annexed, and there shall be affixed a certificate of a member of the Commission that the said attestation is in proper form. Such exemplification shall constitute an authenticated or exemplified copy of an official record of a court of record of the State of North Carolina. (1933, c. 134, ss. 13, 15; 1941, c. 97; 1963, c. 1165, s. 1; 1977, c. 468, s. 7.)

§ 62-20. Participation by Attorney General in Commission proceedings.

The Attorney General may intervene, when he deems it to be advisable in the public interest, in proceedings before the Commission on behalf of the using and consuming public, including utility users generally and agencies of the State. The Attorney General may institute and originate proceedings before the Commission in the name of the State, its agencies or citizens, in matters within the jurisdiction of the Commission. The Attorney General may appear before such State and federal courts and agencies as he deems it advisable in matters affecting public utility services. In the performance of his responsibilities under this section, the Attorney General shall have the right to employ expert witnesses, and the compensation and expenses therefor shall be paid from the Contingency and Emergency Fund. The Commission shall furnish the Attorney General with copies of all applications, petitions, pleadings, order and decisions filed with or entered by the Commission. The Attorney General shall have access to all books, papers, studies, reports and other documents filed with the Commission. (1949, c. 989, s. 1; c. 1029, s. 3; 1959, c. 400; 1963, c. 1165, s. 1; 1977, c. 468, s. 8.)

Legal Periodicals. — For brief comment on earlier section, see 27 N.C.L. Rev. 489.

CASE NOTES

Applied in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Cited in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972); State ex rel. Utilities Comm'n v. United Tel. Co., 15 N.C. App. 740, 190 S.E.2d 656 (1972).

§ 62-21: Repealed by Session Laws 1977, c. 468, s. 9.

Cross References. — For provisions covering the subject matter of the repealed section, see § 62-14.

§ 62-22. Utilities Commission and Department of Revenue to coordinate facilities for rate making and taxation purposes.

The Commission, at the request of the Department of Revenue, shall make available to the Department of Revenue the services of such of the personnel of the Commission as may be desired and required for the purpose of furnishing to the Department of Revenue advice and information as to the value of properties of public utilities, the valuations of which for ad valorem taxation are required by law to be determined by the Department of Revenue. It shall be the duty of the Commission and the Department of Revenue, with regard to the assessment and valuation of properties of public utilities doing business in North Carolina, to coordinate the activities of said agencies so that each of them shall receive the benefit of the exchange of information gathered by them with respect to the valuations of public utilities property for rate making and taxation purposes, and the facilities of each of said agencies shall be made fully available to both of them. (1949, c. 1029, s. 3; 1963, c. 1165, s. 1; 1973, c. 476, s. 193.)

§ 62-23. Commission as an administrative board or agency.

The Commission is hereby declared to be an administrative board or agency of the General Assembly created for the principal purpose of carrying out the administration and enforcement of this Chapter, and for the promulgation of rules and regulations and fixing utility rates pursuant to such administration; and in carrying out such purpose, the Commission shall assume the initiative in performing its duties and responsibilities in securing to the people of the State an efficient and economic system of public utilities in the same manner as commissions and administrative boards generally. In proceedings in which the Commission is exercising functions judicial in nature, it shall act in a judicial capacity as provided in G.S. 62-60. The Commission shall separate its administrative or executive functions, its rule making functions, and its functions judicial in nature to such extent as it deems practical and advisable in the public interest. (1963, c. 1165, s. 1.)

CASE NOTES

The rate-making activities of the Commission are a legislative function. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Rule-making is an exercise of the delegated legislative authority of the Commission, under §§ 62-30 and 62-31, to supervise and control the public utilities of this State and

to make reasonable rules and regulations to accomplish that end. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Administrative Rule Making not Res Judicata. — Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. Exercises of the Commission's rule-making power, therefore, are not governed by the principles of res judicata and are reviewable by the Supreme Court in later appeals of closely related matters. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

§§ 62-24 to 62-29: Reserved for future codification purposes.

Article 3.

Powers and Duties of Utilities Commission.

§ 62-30. General powers of Commission.

The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties. (1933, c. 134, s. 2; 1941, c. 97; 1963, c. 1165, s. 1.)

Legal Periodicals. — For comment, see 12 N.C.L. Rev. 292.

CASE NOTES

Power of the legislature, either directly or through appropriate agencies, to establish reasonable regulations for public service corporations in matters affecting the public interests is now universally recognized, and the principle has been approved in well considered decisions dealing directly with the question. Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907); Corporation Comm'n v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905); Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914); In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919). See also, Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393, 32 Am. St. R. 805 (1892); Corporation Comm'n v. Seaboard Air Line Sys., 127 N.C. 283, 37 S.E. 266 (1900).

The reason for strict regulation of public utilities is that they are either monopolies by nature or given the security of monopolistic authority for better service to the public. The public is best served in many circumstances where destructive competition has been removed and the utility is a regulated monopoly. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The Commission has no jurisdiction over parties unless they are public utilities within the meaning of the statute. State ex rel. North Carolina Util. Comm'n v. New Hope Rd. Water Co., 248 N.C. 27, 102 S.E.2d 377 (1958); State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

The rate-making activities of the Commission are a legislative function. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Rule-making is an exercise of the delegated legislative authority of the Commission, under this section and § 62-31, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Commission's Rule Making not Res Judicata. — Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. Exercising of the Commission's rule-making power, therefore, are not governed by the principles of res judicata and are reviewable by the Supreme Court in later appeals of closely related matters. State ex rel.

Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Whether there shall be competition in any given field and to what extent is largely a matter of policy committed to the sound judgment and discretion of the Commission. The Commission must maintain a reasonable balance to see that the public is adequately served and at the same time to see that the public and the public utilities involved are not prejudiced by the effects which flow from excessive competition brought about by excessive services. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Authority of Commission to Authorize Sale of Facilities of Power Company to Municipality. — A power company, with the consent and approval of the Commission, has the right to sell its facilities to a city, and thereby permit the city to assume the obligation for meeting the public convenience and necessity for the service theretofore rendered by the power company. The Commission has not only the authority but the duty to pass upon such a contract and to determine whether or not it is in the public interest to permit its consummation. State ex rel. North Carolina Util. Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957); Duke Power Co. v. Blue Ridge Elec. Membership Corp., 253 N.C. 596, 117 S.E.2d 812 (1961).

Former Railroad Commission did not interfere with interstate commerce, being concerned solely in domestic affairs and trade. State ex rel. Caldwell v. Wilson, 121 N.C. 425, 480, 28 S.E. 554 (1897).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947).

Quoted in State ex rel. Utilities Comm'n v. Simpson, 295 N.C. 519, 246 S.E.2d 753 (1978).

Stated in State ex rel. Utilities Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973).

Cited in State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

§ 62-31. Power to make and enforce rules and regulations for public utilities.

The Commission shall have and exercise full power and authority to administer and enforce the provisions of this Chapter, and to make and enforce reasonable and necessary rules and regulations to that end. (1907, c. 469, s. 1a; 1913, c. 127, s. 2; C.S., s. 1037; 1933, c. 134, s. 8; 1941, c. 97; 1947, c. 1008, s. 2; 1949, c. 1132, s. 3; 1963, c. 1165, s. 1.)

CASE NOTES

The rate-making activities of the Commission are a legislative function. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Rule-making is an exercise of the delegated legislative authority of the Commission, under § 62-30 and this section, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Commission's Rule Making Not Res Judicata. — Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. Exercises of the Commission's rule-making power, therefore, are not governed by the principles of res judicata and are reviewable by the Supreme Court in later appeals of closely related matters. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Authority to determine adequacy of public utility's service and rates to be charged therefor has been given to the Utilities Commission, not to the Supreme Court or the Court of Appeals. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 24 N.C. App. 327, 210 S.E.2d 543 (1975), vacated and appeal dismissed, 289 N.C. 286, 221 S.E.2d 322 (1976).

Finding That Rule Is Reasonable and Necessary Not Required. — In adopting a rule pursuant to this section, the Utilities Commission need not make a finding of fact that the rule is reasonable and necessary in order for it to administer and enforce the provisions of the Public Utilities Act. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612, cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Jurisdiction of Commission to Investigate. — The Commission had the jurisdiction to investigate, upon complaint or upon its own initiative without complaint, to determine whether any motor carrier was operating in vio-

lation of the provisions of the Bus Act of 1949 (former §§ 62-121.43 through 62-121.79). State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Rule Denying Rights under Grandfather Clause. — The Utilities Commission did not have the power to promulgate a rule and then to interpret or enforce the rule in such manner as to deny the exercise of rights which the legislature in clear and express terms preserved to all motor vehicle carriers of property who were in bona fide operation on January 1, 1947, and who met the additional requirements contained in the Bus Act of 1949 (former §§ 62-121.43 through 62-121.79). State ex rel. Utilities Comm'n v. Fox, 239 N.C. 253, 79 S.E.2d 391 (1954).

Supervisory Powers of Former Corporation Commission. — There was no intent to give a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless dealings between them and their patrons which the former Corporation Commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial commission, with power to make reasonable rules and orders, subject to the right of appeal by either party, the shipper or the carrier, to the courts, instead of leaving such dealing to the unrestricted will of the carrier. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

The former Corporation Commission was given the power to make orders and regulations for the safety, etc., of shippers or patrons of any public service corporation. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

Applied in State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975); State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979).

Stated in State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980).

Cited in State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964); State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utilities Comm'n v. Kenan Transp. Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 488 (1980).

§ 62-32. Supervisory powers; rates and service.

(a) Under the rules herein prescribed and subject to the limitations hereinafter set forth, the Commission shall have general supervision over the rates charged and service rendered by all public utilities in this State.

(b) The Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service. (1913, c. 127, s. 7; C.S., s. 1112(b); 1933, c. 134, s. 3; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1959, c. 639, s. 12; 1963, c. 1165, s. 1.)

Cross References. — As to report from municipality operating own utilities, see § 62-47.

Legal Periodicals. — For note on control of public utilities through zoning ordinances, see 42 N.C.L. Rev. 761 (1964).

For article on antitrust and unfair trade practice law in North Carolina, comparing federal law, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Editor's Note. — This section is similar to former § 1035 of the Consolidated Statutes. Many of the following cases dated prior to 1963 were decided under that section and are given as an aid in construing the present law, but should be considered in light of the former law.

Right of State to Regulate. — The right of the State to establish regulations for public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is firmly established. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907). See Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N.C. 52, 175 S.E. 698 (1934).

Railroad companies, due to the public nature of the business carried on by them and the interest which the public has in their operation, are subject as to their State business to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Purpose of Regulation. — An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. To prevent such result, the legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

With public utilities the State has undertaken to protect the public from the customary consequences of monopoly, by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Rate-Fixing Power May Be Delegated. — The General Assembly has the power to establish a commission to supervise and regulate the rates of common carriers. Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892); Corporation Comm'n v. Seaboard Air Line Sys., 127 N.C. 283, 37 S.E. 266 (1900); Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907); Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905); Corporation Comm'n v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905).

Scope of Power Delegated to Commission Not a Federal Question. — Whether a regulation of a state railroad commission otherwise legal is arbitrary and unreasonable because beyond the scope of the power delegated to the commission is not a federal question. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Authority of Commission to Regulate Service and Rates. — Under this section and § 62-42, the Utilities Commission is given the power and the duty to compel utility companies to render adequate service and to set reasonable rates for such service. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Authority to determine adequacy of public utility's service and rates to be charged therefor has been given to the Utilities Commission, not to the Supreme Court or to the Court of Appeals. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 24 N.C. App. 327, 210 S.E.2d 543 (1975), vacated and appeal dismissed, 289 N.C. 286, 221 S.E.2d 322 (1976).

Commission's Regulatory Powers Limited. — Notwithstanding the authority of the Commission to regulate its services and rates and other matters incidental thereto, the property of the utility is private property and the business is private business. Except as otherwise provided, expressly or by reasonable implication, in this Chapter, a utility is free to manage its property and business as it sees fit and the Commission may not restrict or control the discretion of the board of directors in the acquisition of property, or in the price paid for it. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Arbitrary Exercise of Regulatory Power. — The public power to regulate railroads and the private right of ownership of such property coexist, and the one does not destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership, the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

As to intrastate or domestic matters, the General Assembly has the right to establish regulations for public service corporations and for business enterprises in which the owners have devoted their property to public use, and to apply these regulations to certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, the limitation of this right of classification being that the same must be on some reasonable ground that bears a just and proper

relation to the attempted classification and is not a mere arbitrary selection. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907).

Recovery of Reasonable Cost of Approved Gas Exploration Projects. — The Commission, in ordering that the reasonable costs of approved exploration projects were to be recoverable through tracking rate increases, acted within its acknowledged duty and authority to compel adequate and efficient utility service to the citizens of this State, where it was clear from the Commission's findings that, without additional gas supplies, the gas utilities would be unable to render adequate service to their customers, that exploration programs were the most feasible means for obtaining these additional supplies, and that the utilities were unable, through traditional methods of financing, to fund sufficient exploration projects to obtain these supplies. State ex rel. Utilities Comm'n Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Contractual obligation to provide water service to a recreational subdivision, as well as the actual delivery thereof, directly affect a utility's ability to function as a utility. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Fees and Charges Made by Municipality. — The North Carolina Utilities Commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949). See also, Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951).

A rider approved by the Commission, which provided that the utility involved in a rate hearing would meter the protesting municipalities separately for purchases by the municipalities for normal resale and purchases by the municipalities for resale to industrial users, but which contained a provision that the municipalities were free to contract in respect to the price they would require the industrial users to pay, did not fix the rate at which the municipalities would be required to sell to industrial users in violation of the statute. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

A sanitary district which, as a part of its functions, furnishes drinking water to the public and also filters water for industrial consumers is a quasi-municipal corporation, and is not under the control and supervision of the North Carolina Utilities Commission as to services or rates. Halifax Paper Co. v Roanoke Rapids San. Dist., 232 N.C. 421, 61 S.E.2d 378 (1950).

Former Corporation Commission had general control and supervision of all railroad corporations. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

But No Power to Appraise and Assess. — The former Corporation Commission was not clothed with the power of appraising and assessing railroad property. Southern Ry. v. North Carolina Corp. Comm'n, 97 F. 513 (E.D.N.C. 1899), aff'd on rehearing, 99 F. 162 (E.D.N.C. 1900).

The State has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public, even though it may entail some pecuniary loss. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Commerce between States. — The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. Morris-Scarboro-Moffitt Co. v. Southern Express Co., 146 N.C. 167, 59 S.E. 667 (1907).

As to when a telegram is not interstate commerce, see State ex rel. Railroad Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897); Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897).

Telephone Company Subject to State Control. — A telephone company, acting under a quasi-public franchise, is properly classified among the public service corporations, and as such is subject to public regulation and reasonable control. Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897); Godwin v. Telephone Co., 136 N.C. 479, 48 S.E. 813 (1904); Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912).

A local telephone company having an arrangement for the transmission of long distance messages over the lines of another company for pay is a public service corporation and comes within the provisions of this section. Horton v. Interstate Tel. & Tel. Co., 202 N.C. 610, 163 S.E. 694 (1932).

Statute giving general control of telephone companies to former Corporation Commission did not oust court of its jurisdiction to compel the company to perform a public duty it owed to an individual. Walls v. Strickland, 174 N.C. 298, 93 S.E. 857 (1917).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947); Fulghum v. Town of Selma, 238 N.C. 100, 76 S.E.2d 368 (1953); State ex rel. North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960); State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Quoted in State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Cited in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-33. Commission to keep informed as to utilities.

The Commission shall at all times keep informed as to the public utilities, their rates and charges for service, and the service supplied and the purposes for which it is supplied. (1933, c. 134, s. 16; 1937, c. 165; 1939, c. 365, ss. 1, 2; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-34. To investigate companies under its control; visitation and inspection.

(a) The Commission shall from time to time visit the places of business and investigate the books and papers of all public utilities to ascertain if all the orders, rules and regulations of the Commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such public utilities, and all other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this Chapter.

(b) Members of the Commission, Commission staff, and public staff may during all reasonable hours enter upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any power provided for in this Article, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examinations, tests and inspections. (1899, c. 164, s. 1; Rev., s. 1064; 1913, c. 127, ss. 1, 2, 7; 1917, c. 194; C.S., s. 1060; 1933, c. 134, s. 8; c. 307, s. 14; 1941, c. 97; 1963, c. 1165, s. 1; 1977, c. 468, s. 10.)

§ 62-35. System of accounts.

(a) The Commission may establish a system of accounts to be kept by the public utilities under its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner of keeping such accounts.

(b) The Commission may require any public utility under its jurisdiction to keep separate or allocate the revenue from and the cost of doing interstate and intrastate business in North Carolina.

(c) The Commission may ascertain, determine, and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The Commission may prescribe such changes in such charges for depreciation as it finds necessary. (Ex. Sess. 1913, c. 20, s. 14; C.S.,

s. 1088; 1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 13; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Review of Annual Charge to Operating Expenses on Account of Depreciation. — If a reasonably close relationship between the reserve for depreciation and the actual accumulated depreciation is not present, the Utilities Commission may and should review and make appropriate changes in the annual charge to operating expenses on account of depreciation. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-36. Reports by utilities; canceling certificates for failure to file.

The Commission may require any public utility to file annual reports in such form and of such content as the Commission may require and special reports concerning any matter about which the Commission is authorized to inquire or to keep informed, or which it is required to enforce. All reports shall be under oath when required by the Commission. The Commission may issue an order, without notice or hearing, canceling or suspending any certificate of convenience and necessity 30 days after the date of service of the order for failing to file the required annual report at the time it was due. In the event the report is filed during the 30-day period, the order of cancellation or suspension shall be null and void. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 15; 1941, c. 97; 1959, c. 639, ss. 7, 8; 1963, c. 1165, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 62-37. Investigations.

(a) The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility. In conducting such investigation the Commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the parties affected thereby notice and hearing.

(b) If after such an investigation, or investigation and hearing, the Commission, in its discretion, is of the opinion that the public interest shall be served by an appraisal of any properties in question, the investigation of any particular construction, the audit of any accounts or books, the investigation of any contracts, or the practices, contracts or other relations between the public utility in question and any holding or finance agency with which such public utility may be affiliated, it shall be the duty of the Commission to report its findings and recommendation to the Governor and Council of State with request for an allotment from the Contingency and Emergency Fund to defray the expense thereof, which may be granted as provided by law for expenditures from such fund or may be denied. Provided, however, that the Commission is authorized to order any such appraisal, investigations, or audit to be undertaken by a competent, qualified, and independent firm selected by the Commission, the cost of such appraisal, investigation or audit to be borne by the public utility in question. Notwithstanding any other provisions of this Chapter, the Commission is authorized to initiate a full and complete management audit of any public utility company once every five years, by a

competent, qualified, and independent firm, such audit to thoroughly examine the efficiency and effectiveness of management decisions among other factors as directed by the Commission. The cost of such audit is to be borne by the particular public utility subject to the audit; provided, however, that carriers subject to regulation by and auditing of the Interstate Commerce Commission shall not be required to bear the expense of additional audit of accounts or management audit required hereunder. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 16; 1941, c. 97; 1963, c. 1165, s. 1; 1975, c. 867, s. 4.)

CASE NOTES

Applied in State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Stated in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-38. Power to regulate public utilities in municipalities.

The Commission shall have the same power and authority to regulate the operation of privately owned public utilities within municipalities as it has to regulate such public utilities operating outside of municipalities, with the exception of the rights of such municipalities to grant franchises for such operation under G.S. 160-2, paragraph 6, and such public utilities shall be subject to the provisions of this Chapter in the same manner as public utilities operating outside municipalities. (1917, c. 136, subch. 3, s. 3; C.S., ss. 2783, 2784, 2785; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Editor's Note. — Section 160-2, referred to in this section, was repealed by Session Laws 1971, c. 698, s. 2.

CASE NOTES

Power of Commission to Regulate Privately Owned Public Utilities within Cities. — The Utilities Commission has the same power and responsibility to regulate the operation of privately owned public utilities within cities as it does their operation outside of cities. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

The power of a municipality to grant franchises to public utilities for the use of its streets, and to provide service to its citizens, must yield to the paramount right of the State to regulate, through the Utilities Commission, public utilities even when they are operated within the corporate boundaries of a municipality. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

Municipal Charter Subject to State Powers. — The power conferred by a city charter "to provide water and lights and to contract for same" is subject to the police power of the State with respect to rates to be charged by a public service corporation under such contract as the city may make under its charter. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

Although the rate to be charged for water is stipulated by contract between city and water company, this may be changed by the Commission if it appears that the rate contracted for is too low, and the one fixed by the Commission is just. The burden of proof is on the one alleging that the rate fixed by the Commission is unreasonable. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

Corporation Held Not Entitled to Injunction against Commission. — A public service corporation having a contract with a city, applying to the Commission for the increase of the rate contracted for with the city and obtaining partial relief, would not be granted an injunction by the federal court against the Commission on the grounds that the rate was confiscatory, for such increase as was allowed by the Commission was that much more than could have been received under the contract with the city had the Commission refused to

act. Henderson Water Co. v. Corporation Comm'n, 269 U.S. 278, 46 S. Ct. 112, 70 L. Ed. 273 (1925).

Consent of Customer or Commission Necessary before Service May Be Abandoned. — Power company may not abandon service to any customer, subject to the customer's paying his bill, without the consent of the customer or authorization of the Utilities Commission. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

§ 62-39. To regulate crossings of telephone, telegraph, electric power lines and pipelines and rights-of-way of railroads and other utilities by another utility.

(a) The Commission, upon its own motion or upon petition of any public utility or upon petition of the North Carolina Rural Electrification Authority on behalf of any electric membership corporation, shall have the power and authority, after notice and hearing, to order that the lines and right-of-way of any public utility or electric membership corporation may be crossed by any other public utility or electric membership corporation. The Commission, in all such cases, may require any such crossings to be constructed and maintained in a safe manner and in accord with accepted and approved standards of safety and may prescribe the manner in which such construction shall be done.

(b) The Commission shall also have the power and authority to discontinue and prohibit such crossings where they are unnecessary and can reasonably be avoided and to order changes in existing crossings when deemed necessary.

(c) In all cases in which the Commission orders such crossings to be made or changed and when the parties affected cannot agree upon the cost of the construction of such crossings or the damages to be paid to one of the parties for the privilege of crossing the lines of such party, it shall be the duty of the Commission to apportion the cost of such construction and to fix the damage, if any, to be paid and to apportion the damages, if any, among the parties in such manner as may be just and equitable.

(d) This section shall not be construed to limit the right of eminent domain conferred upon public utilities and electric membership corporations by the laws of this State or to limit the right and duty conferred by law with respect to crossing of railroads and highways or railroads crossing railroads, but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. Any party shall have the right of appeal from any final order or decision or determination of the Commission as provided by law for appeals from orders or decisions or final determinations of the Commission. (1913, c. 130, s. 1; C.S., s. 1052; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1029, s. 1; 1963, c. 1165, s. 1.)

Local Modification. — Ashe: 1929, c. 101.

§ 62-40. To hear and determine controversies submitted.

When a public utility embraced in this Chapter has a controversy with another person and all the parties to such controversy agree in writing to submit such controversy to the Commission as arbitrator, the Commission shall act as such, and after due notice to all parties interested shall proceed to hear the same, and its award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county or counties in which said land, or any part thereof, is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall have the same effect as a

judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrator. (1899, c. 164, s. 25; Rev., s. 1073; C.S., s. 1059; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to power of Utilities Commission to settle dispute between railroad and drainage district, see § 156-91.

§ 62-41. To investigate accidents involving public utilities; to promote general safety program.

The Commission may conduct a program of accident prevention and public safety covering all public utilities with special emphasis on highway safety and transport safety and may investigate the causes of any accident on a railroad or highway involving a public utility, or any accident in connection with any other public utility. Any information obtained upon such investigation shall be reduced to writing and a report thereof filed in the office of the Commission, which shall be subject to public inspection but such report shall not be admissible in evidence in any civil or criminal proceeding arising from such accident. The Commission may adopt reasonable rules and regulations for the safety of the public as affected by public utilities and the safety of public utility employees. The Commission shall cooperate with and coordinate its activities for public utilities with similar programs of the Division of Motor Vehicles, the Insurance Department, the Industrial Commission and other organizations engaged in the promotion of highway safety and employee safety. (1899, c. 164, s. 24; Rev., s. 1065; C.S., s. 1061; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1975, c. 716, s. 5.)

§ 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

(a) Whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:

(1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or

(2) That persons are not served who may reasonably be served, or

(3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or

(4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or

(5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity.

The Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order. This section shall not apply to terminal or terminal facilities of motor carriers of property.

(b) If such order is directed to two or more public utilities, the utilities so designated shall be given such reasonable time as the Commission may grant within which to agree upon the portion or division of the cost of such additions, extensions, repairs, improvements or changes which each shall bear. If at the expiration of the time limited in the order of the Commission, the utility or utilities named in the order shall fail to file with the Commission a statement

that an agreement has been made for division or apportionment of the cost or expense, the Commission shall have the authority, after further hearing in the same proceeding, to make an order fixing the portion of such cost or expense to be borne by each public utility affected and the manner in which the same shall be paid or secured.

(c) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State. (1933, c. 307, s. 10; 1949, c. 1029, s. 2; 1963, c. 1165, s. 1; 1965, c. 287, s. 6.)

CASE NOTES

Purpose of Regulation. — With public utilities the State has undertaken to protect the public from the customary consequences of monopoly, by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Power and Duties of Commission. — This Chapter confers upon the Utilities Commission the power and the duty to compel a public utility to render adequate service, and it also confers upon the Commission the duty to fix reasonable rates for the rendering of adequate service. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

Under § 62-32 and this section, the Utilities Commission is given the power and the duty to compel utility companies to render adequate service and to set reasonable rates for such service. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

This section must be construed in connection with § 62-110, which requires the issuance of a certificate of public convenience and necessity to construct new facilities except where such construction is into territory contiguous to that already occupied and not receiving similar service from another public utility. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

Thus, Commission Is without Authority to Compel Duplicate Telephone Service. — A reading of this section in pari materia with § 62-110 results in the determination that the Commission does not have the authority to compel a public utility to provide local exchange service to an area which is already receiving such service from another public utility. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 295 S.E.2d 726 (1974).

To order a telephone company to render service to an area already occupied by another telephone company would foster duplication, wastefulness, and unwarranted competition, all of which are repugnant to the avowed policy of the public utility law. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

Duty of Utility to Render Reasonably Adequate Service. — Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Utility Must Accept Responsibility. — A public utility which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept responsibility for its resulting inability to render adequate service to its patrons. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

As to reduction of fair value of utilities' property where service is inadequate, see State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 596, 206 S.E.2d 866 (1974).

Recovery of Reasonable Cost of Approved Gas Exploration Projects. — The Commission, in ordering that the reasonable costs of approved exploration projects were to be recoverable through tracking rate increases, acted within its acknowledged duty and authority to compel adequate and efficient utility service to the citizens of this State, where it was clear from the Commission's findings that, without additional gas supplies, the gas utilities would be unable to render adequate service to their customers, that exploration programs were the most feasible means for obtaining these additional supplies, and that the utilities were unable, through traditional

methods of financing, to fund sufficient exploration projects to obtain these supplies. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Protest by City Not Notice. — A protest filed by a city in a proceeding by a power company for an increased cash fare on its city buses was not sufficient to constitute such notice as is required by this section so as to authorize the Commission to consider whether or not the service rendered by the power company was adequate or inadequate. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

Cited in State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-43. Fixing standards, classifications, etc.; testing service.

(a) The Commission may, after notice and hearing, had upon its own motion or upon complaint, ascertain and fix just and reasonable standards, classifications, regulations, practices, or service to be furnished, imposed, observed or followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity or service of any public utility.

(b) The Commission shall fix, establish and promulgate standards of quality and safety for gas furnished by a public utility and prescribe rules and regulations for the enforcement of and obedience to the same. (1919, c. 32; C.S., s. 1055; 1933, c. 134, s. 8; c. 307, s. 11; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

For case holding notice adequate under this section, see State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612, cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

§ 62-44. Commission may require continuous telephone lines.

The Commission may, upon its own motion or upon written complaint by any person, after notice and hearing, require any two or more telephone or telegraph utilities to establish and maintain through lines within the State between two or more localities, which cannot be communicated with or reached by the lines of either utility alone, where the lines or wires of such utilities form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points. The rate for such service shall be just and reasonable and the Commission shall have power to establish the same, and declare the portion thereof to which each utility affected thereby is entitled and the manner in which the same must be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such divisions of expense and labor, as may be required by the Commission. (1933, c. 307, s. 9; 1963, c. 1165, s. 1.)

CASE NOTES

Statutes Requiring Interconnection with Competitor Should Not Be Extended beyond Plain Meaning. — The power to require the proprietor of a business to interconnect its facilities with those of a competitor is a drastic power. Statutes conferring it should not be extended beyond their plain meaning. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

When Interconnection of Lines May Be Required. — This section authorizes the Commission to require a connection of the lines of two telephone companies, but only when they serve localities which cannot be communicated with by the lines of one of them alone. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

There is no provision in this Chapter which requires, or authorizes the Commission to require, a utility, with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Section Does Not Authorize Commission to Compel Telephone Company to Interconnect with Radio Company Serving Same Area. — This section may not reasonably be extended by construction to authorize the Commission to compel a telephone company to interconnect its system with the system of a radio company serving the identical area which the telephone company, itself, serves or desires to serve. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Mobile Radio Service Company Is Not "Telephone or Telegraph Utility". — Even if the record is sufficient to support an order granting an applicant a certificate of public convenience and necessity to act as a common carrier of communications providing mobile radio service, the Commission has no statutory authority to require a telephone utility to interconnect applicant's radio communications system with the utility's land telephone system. If permitted to render such service, the applicant would not be a "telephone or telegraph utility." State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

§ 62-45. Determination of cost and value of utility property.

The Commission, after notice and hearing, may ascertain and fix the cost or value, or both, of the whole or any part of the property of any public utility insofar as the same is material to the exercise of the jurisdiction of the Commission, make revaluations from time to time, and ascertain the cost of all new construction, extensions and additions to the property of every public utility. (1933, c. 307, s. 12; 1963, c. 1165, s. 1.)

§ 62-46. Water gauging stations.

The Commission may require the location, establishment, maintenance and operation of any water gauging station which it finds is needed in the State over and above those required by federal agencies, and the Commission may cooperate with federal and other State agencies as to the location, construction and reports and the results of operation of such station. (1933, c. 307, s. 33; 1963, c. 1165, s. 1.)

§ 62-47. Reports from municipalities operating own utilities.

Every municipality furnishing gas, electricity or telephone service shall make an annual report to the Commission, verified by the oath of the general manager or superintendent thereof, on the same forms as provided for reports of public utilities, giving the same information as required of public utilities. (1933, c. 307, s. 34; 1963, c. 1165, s. 1.)

Cross References. — As to admissibility of records in utility rate hearing, see § 62-65.

§ 62-48. Appearance before courts and agencies.

The Commission is authorized and empowered to initiate or appear in such proceedings before federal and State courts and agencies as in its opinion may be necessary to secure for the users of public utility service in this State just and reasonable rates and service; provided, however, that the Commission shall not appear in any State appellate court in support of any order or decision of the Commission entered in a proceeding in which a public utility had the burden of proof. (1899, c. 164, s. 14; Rev., s. 1110; 1907, c. 469, s. 5; C.S., s. 1075; 1929, c. 235; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1977, c. 468, s. 11.)

§ 62-49. Publication of utilities laws.

The Commission is authorized and directed to secure publication of all North Carolina laws affecting public utilities, together with the Commission rules and regulations, in an annotated edition, and the Commission may adopt rules for distribution of said publication, and shall publish biennial supplements to said utilities laws containing all amendments and additions thereto, and may republish said laws at such times as may be reasonable and necessary. (1963, c. 1165, s. 1; 1967, c. 1133.)

CASE NOTES

Stated in State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Cited in State ex rel. Utilities Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968).

§ 62-50. Safety standards for gas pipeline facilities.

(a) The Commission may promulgate and adopt safety standards for the operation of natural gas pipeline facilities in North Carolina. These safety standards shall apply to the pipeline facilities of gas utilities and pipeline carriers under franchise from the Utilities Commission and to pipeline facilities of other gas operators, as defined in subsection (g) of this section. The Commission shall require that all gas operators file with the Commission reports of all accidents occurring in connection with the operation of their gas pipeline facilities located in North Carolina. The Commission may require that all gas operators file with the Commission copies of their construction, operation, and maintenance standards and procedures, and any amendments thereto, and such other information as may be necessary to show compliance with the safety standards promulgated by the Commission. Where the Commission has reason to believe that any gas operator is not in compliance with the Commission's safety standards, the Commission may, after notice and hearing, order that gas operator to take such measures as may be necessary to comply with the standards. The Commission may require all gas operators to furnish engineering reports showing that their pipeline facilities are in safe operating condition and are being operated in conformity with the Commission's safety standards.

(b) The Commission is hereby authorized to enter into agreements with the United States Department of Transportation and other federal agencies and with other states or public utilities commissions of other states for the regu-

lation of natural gas pipelines located within the State of North Carolina and upon the execution of such cooperative agreements, the Commission is authorized to utilize Commission personnel for inspection, investigation, and regulation of safety standards for interstate and intrastate natural gas pipelines in North Carolina, and to share in the cost of such regulation with other agencies having duties with respect to the regulation of said natural gas pipelines, and to receive funds from the United States Department of Transportation for such regulation.

(c) The Utilities Commission is hereby authorized to enter into cooperative agreements for inspection of all natural gas pipelines of North Carolina to the end that the Utilities Commission may enter into agreements with the United States Department of Transportation or other federal or state agencies to regulate and inspect the safety standards for all natural gas pipelines in the State of North Carolina, including interstate natural gas pipelines.

(d) Any person who violates any provision of this section, or any regulation of the Utilities Commission issued thereunder, shall be subject to a civil penalty not to exceed one thousand dollars ($1,000) for each violation for each day that the violation persists, the maximum civil penalty not to exceed two hundred thousand dollars ($200,000) for any continuing violation.

(e) Any action for civil penalty or any claim for said penalty may be compromised by the Utilities Commission and settled for an agreed amount. In determining the amount of the penalty imposed in civil action, or the amount agreed upon in compromise, the amount of the penalty shall be considered in relation to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after any prior notification of a violation. The amount of the penalty, when finally determined in a civil action, or the amount agreed upon in compromise, may be deducted from any sums owing by the State to the person charged, or may be collected as in the case of any judgment in a civil action in the State courts.

(f) The General Court of Justice of North Carolina is authorized to issue court orders, restraining orders, injunctions and other processes of the court in actions by the Utilities Commission to enforce the provisions of this Chapter relating to gas pipeline safety, and the Commission is authorized to bring actions in said court, including actions for mandatory injunctions, restraining orders, temporary restraining orders, penalties, damages and such other relief as may be necessary to secure compliance with the provisions of this section and regulations of the Commission duly enacted and adopted hereunder relating to gas pipeline safety. This provision is in addition to other powers of the Commission and the courts in relation to the enforcement of provisions of this Chapter in the courts, and shall not limit the present powers of the Commission in bringing actions in the courts for enforcement of other provisions of this Chapter.

(g) For the purpose of this section, "gas operators" include gas utilities and gas pipeline carriers operating under a franchise from the Utilities Commission, municipal corporations operating municipally owned gas distribution systems, and public housing authorities and any person operating apartment complexes or mobile home parks that distribute or submeter natural gas to their tenants. This section does not confer any other jurisdiction over municipally owned gas distribution systems, public housing authorities or persons operating apartment complexes or mobile home parks. (1967, c. 1134, s. 1; 1969, c. 646; 1971, cc. 549, 1145; 1979, c. 269, s. 1.)

§ 62-51. To inspect books and records of corporations affiliated with public utilities.

Members of the Commission, Commission staff, and public staff are hereby authorized to inspect the books and records of corporations affiliated with public utilities regulated by the Utilities Commission under the provisions of this Chapter, including parent corporations and subsidiaries of parent corporations. This authorization shall extend to all reasonably necessary inspection of all books and records of account and agreements and transactions between public utilities doing business in North Carolina and their affiliated corporations where such records relate either directly or indirectly to the provision of intrastate service by the utility. The right to inspect such books and records shall apply both to books and records in the State of North Carolina and such books and records located outside of the State of North Carolina. If any such affiliated corporation shall refuse to permit such inspection of its books and records and its transactions with public utilities doing business in North Carolina, the Utilities Commission is empowered to order the public utility regulated in North Carolina to show cause why it should not secure from its affiliated corporation such books and records for inspection in North Carolina or why their franchise to operate as a public utility in North Carolina should not be cancelled. (1969, c. 764, s. 1; 1977, c. 468, s. 12.)

CASE NOTES

Broad Authority to Inspect and Investigate. — Within its proper rate-making authority, the Commission is expressly authorized to inspect the books and records of affiliated companies and to investigate contracts and practices between the petitioning utility and its affiliated companies, including parent corporations and subsidiaries of parent corporations. The authority of the Commission to inspect books and records and to make investigations into transactions between affiliates, as conferred by this section, is quite broad. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Applied in State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Stated in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981).

§ 62-52. Interruption of service.

The Utilities Commission may adopt appropriate rules and regulations which would allow public utilities to temporarily interrupt service when a structure is moved by the owner of such structure (or by a licensed mover authorized and acting on behalf of the owner) over or along public roads or streets and there are public utility facilities in place which would impede the movement of such structure. Such rules and regulations shall require:

(1) The owner to demonstrate that the public health and safety of the utility's customers and that of the general public will not be affected by the interruption of such service,
(2) That the inconvenience to said customers and the general public can be fully anticipated and reduced to a minimum,
(3) The utility cooperate with the owner in furnishing information relative to (1) and (2), and
(4) An initial application fee be paid the utility toward its cost to be incurred in investigating and planning.

Should the owner and the public utility be unable to agree on a practical procedure and/or the direction to follow in overcoming the impeding facilities in order that the public health and safety of the utility's customers and that

of the general public will not be affected, then and in such event the owner may petition the Utilities Commission to require the utility to temporarily interrupt its service to its customers by disconnecting the impeding facilities, provided the owner can demonstrate to the satisfaction of the Commission that the public health and safety of the utility's customers and that of the general public will not be affected by such interruption of service and that the public utility was unreasonable in the procedure, direction and cost proposed to the owner to overcome the impeding facility.

In any event, the owner of said structure shall reimburse the utility its full cost involved in such disconnection and reconnection including but not limited to planning, engineering, notification and administrative costs, labor, material and equipment. Should the impeding facility be overcome other than by disconnection, the owner shall nevertheless reimburse the utility its full cost related thereto. (1981 (Reg. Sess., 1982), c. 1186, s. 1.)

§§ 62-53 to 62-59: Reserved for future codification purposes.

Article 4.

Procedure before the Commission.

§ 62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.

For the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law. The commissioners and members of the Commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record. A majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Commission Is Administrative Agency with Powers of a Dual Nature. — The Utilities Commission, a creature of the General Assembly, is an administrative agency of the State, with such powers and duties as are given it by this Chapter. These powers and duties are of a dual nature — supervisory or regulatory, and judicial. State ex rel. North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

The rate-making activities of the Commission are a legislative function. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Rule-Making Is a Legislative Function. — Rule-making is an exercise of the delegated legislative authority of the Commission, under §§ 62-30 and 62-31, to supervise and control the

public utilities of this State and to make reasonable rules and regulations to accomplish that end. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

When the Commission is conducting a hearing, it is acting in a judicial capacity and shall render its decision upon questions of law and of fact in the same manner as a court of record. State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

As to Commission's having powers of court of general jurisdiction as to certain matters, see State ex rel. North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

Commission Is without Inherent Powers of Appellate Court. — The North Carolina Utilities Commission is a court of general jurisdiction only as to subjects embraced within this Chapter. It is a court of original jurisdiction and does not possess the inherent powers of an appellate court. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

Liberality and informality are essential to the workings of the Commission. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Ordinarily, the procedure before the Commission is more or less informal, and is not as strict as in superior court, nor is it confined by technical rules. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 115 (1980).

The Commission is required by § 62-65 (a) in deciding on an application for a certificate of public convenience and necessity to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." This section provides that the Commission shall render its decision "in the same manner as a court of record." The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules, in order that regulation may be consistent with changing conditions. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612, 281 N.C. 158, 188 S.E.2d 364 (1972).

Great liberality is indulged in pleadings in proceedings before the Commission, and the technical and strict rules of pleading applicable in ordinary court proceedings do not apply. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Substance and not form is controlling. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Commission may enlarge or restrict the inquiry before it unless a party is clearly prejudiced thereby. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612, cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Issues of Fact Not to Be Decided before All Evidence Is Offered. — It is erroneous if controverted questions of fact, or issues of fact, are decided by the Commission before all of the competent evidence of the parties is offered with respect thereto. State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

Findings Must Be Supported by Competent Evidence. — Since the Commission is required to render its decisions upon questions of law and of fact in the same manner as a court of record, its findings must be, as a matter of law, supported by competent evidence. State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

Finding May Be Based on "Late" Exhibits. — The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the capacity and ability of an applicant for a certificate of public convenience and necessity to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order, when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Findings of Fact Not Disagreed with in Other Opinions as Those of Commission. — Where neither of the two concurring opinions nor the two dissenting opinions indicated any disagreement with any of the findings of fact stated in the opinion of another commissioner, and the opinion of no other commissioner sug-

gested any other findings of fact, the findings of fact so stated in the opinion of the commissioner were, therefore, concurred in by a majority, if not all of the members of the Commission, and were, therefore, the findings of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Different Reasons Given by Concurring Commissioners Are Not Grounds for Reversal. — When this section and § 62-79(a) are construed together, as they must be, it is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, might be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and order. The diversity of the reasons given by the three commissioners who join in an ultimate decision and order are not a sufficient ground for its reversal. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Order in Opinion Concurred In by Majority Is Order of Commission. — Where a majority of the commissioners concurred in the order set forth in the opinion by one of them, it was the order of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

If three commissioners concur, the order entered by them constitutes the order of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

But All Commissioners Concurring Must Have Heard Evidence. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

It seems inconceivable that the General Assembly intended that when a matter was heard by a hearing division, if "as many as three commissioners hearing the case approved the recommended order," as provided by § 62-76, the order should become a final order, but that the Commission, when a matter was heard before it, could issue a final order when only one of the commissioners who heard the case approved the order. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

Order Approved by Only One Commissioner Not Final. — An order was held to be a recommended order and not a final order where only one of the three commissioners who had heard the evidence in a hearing before the Commission participated in approving the order. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

Res Judicata. — Only specific questions actually heard and finally determined by the Commission in its judicial character are res judicata, and then only as to the parties to the hearing. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. Exercises of the Commission's rule-making power, therefore, are not governed by the principles of res judicata and are reviewable by the Supreme Court in later appeals of closely related matters. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Deferring Use of Increased Rates Pending Investigation. — After rates for certain intrastate shipments had been duly established by the Utilities Commission, defendant sought to increase such rates by filing tariff schedules to that effect. The Commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred use of the new increased rates pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant. It was held that such action of the Commission was binding on defendant. However, defendant was entitled to a reasonable time to comply with the order before penalties might be invoked. State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

For cases construing § 1023 of the Consolidated Statutes, containing similar provisions, see State ex rel. Caldwell v. Wilson, 121 N.C. 425, 480, 28 S.E. 554 (1897); State ex rel. North Carolina Util. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909); North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1917); State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

§ 62-60.1. Commission to sit in panels of three.

(a) The Utilities Commission shall sit in panels of three commissioners each unless the chairman by order shall set the proceeding for hearing by the full Commission.

(b) Any order or decision made unanimously by a panel of three commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter; provided, however, that upon motion of any three commissioners not sitting on the panel, made within 10 days of issuance of such order or decision of the panel, with notice to parties of record, the order or decision of the panel shall thereby be stayed and the full Commission shall review the order or decision of the panel and shall within 30 days of said motion either affirm or modify the order or decision of the panel or remand the matter to the panel for further proceedings; provided that the foregoing shall not limit the right of parties to seek review of such order or decision under G.S. 62-90.

(c) In the event an order or decision of the panel of three is not made unanimously, such order or decision shall be a recommended order only, subject to review by the full Commission, with all commissioners eligible to participate in the final arguments and decision. Review shall take place in accordance with the provisions of G.S. 62-78 and the Commission shall decide the matter in controversy and make appropriate order or decision thereon within 60 days of the date of the recommended order. If within the filing period specified by the panel no exception has been filed by a party, or if the Commission within the same period has not advised the parties that it will conduct a review upon its own motion, the recommended order or decision shall become the final order or decision of the Commission. Nothing in this section shall amend or repeal the provisions of G.S. 62-134.

(d) This section shall become effective July 1, 1975, and shall not affect the utilization of or the procedures outlined for utilization of a hearing commissioner or a hearing examiner as provided for elsewhere in Chapter 62. (1975, c. 243, s. 4; 1977, c. 468, s. 13.)

§ 62-61. Witnesses; production of papers; contempt.

The Commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Cross References. — As to attendance of witnesses, see §§ 8-59 to 8-64. As to contempt, see § 5A-1 et seq.

§ 62-62. Issuance and service of subpoenas.

All subpoenas for witnesses to appear before the Commission, a division of the Commission or a hearing commissioner or examiner and notice to persons or corporations, shall be issued by the Commission or its chief clerk or a deputy clerk and be directed to any sheriff, constable or other officer authorized by law to serve process issued out of the superior courts, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. The Commission shall have the authority to require the applicant for a subpoena for persons and documents to make a reasonable showing that the evidence of such persons or documents will be material and relevant to the issue in the proceeding. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-63. Service of process and notices.

The chief clerk, a deputy clerk, or any authorized agent of the Commission may serve any notice issued by it and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and all officers authorized by law to serve process issuing out of the superior courts, to serve any process, subpoenas and notices issued by the Commission, and such officers shall be entitled to the same fees as are prescribed by law for serving similar papers issuing from the superior court. Service of notice of all hearings, investigations and proceedings by the Commission may be made upon any person upon whom a summons may be served in accordance with the provisions governing civil actions in the superior courts of this State, and may be made personally by an authorized agent of the Commission or by mailing in a sealed envelope, registered, with postage prepaid, or by certified mail. (1949, c. 989, s. 1; 1957, c. 1152, s. 2; 1963, c. 1165, s. 1.)

Cross References. — As to penalty imposed upon sheriff for failing to execute and return process, see § 162-14.

§ 62-64. Bonds.

All bonds or undertakings required to be given by any of the provisions of this Chapter shall be payable to the State of North Carolina, and may be sued on as are other undertakings which are payable to the State. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-65. Rules of evidence; judicial notice.

(a) When acting as a court of record, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, but no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record. Oral evidence shall be taken on oath or affirmation. The rules of privilege shall be effective to the same extent that they are now or hereafter recognized in civil actions in the superior court. The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence. All evidence, including records and documents in the possession of the Commission of which it desires to avail itself, shall be made a part of the record in the case by definite reference thereto at the hearing. Any party introducing any document or record in evidence by reference shall bear the expense of all copies required for the record in the event of an appeal from the Commission's order. Every party to a proceeding shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, to impeach any witness regardless of which party first called such witness to testify and to rebut the evidence against him. If a party does not testify in his own behalf, he may be called and examined as if under cross-examination.

(b) The Commission may take judicial notice of its decisions, the annual reports of public utilities on file with the Commission, published reports of federal regulatory agencies, the decisions of State and federal courts, State and federal statutes, public information and data published by official State and federal agencies and reputable financial reporting services, generally recognized technical and scientific facts within the Commission's specialized knowledge, and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice. When any Commission

decision relies upon such judicial notice of material facts not appearing in evidence, it shall be so stated with particularity in such decision and any party shall, upon petition filed within 10 days after service of the decision, be afforded an opportunity to contest the purported facts noticed or show to the contrary in a rehearing set with proper notice to all parties; but the Commission may notify the parties before or during the hearing of facts judicially noticed, and afford at the hearing a reasonable opportunity to contest the purported facts noticed, or show to the contrary. (1949, c. 989, s. 1; 1959, c. 639, s. 2; 1963, c. 1165, s. 1; 1973, c. 108, s. 21.)

Cross References. — As to rules of evidence generally, see § 8-1 et seq.

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Informality of Procedure. — The Commission is required by subsection (a) in deciding on an application for a certificate of public convenience and necessity to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." Section 62-60 provides that the Commission shall render its decision "in the same manner as a court of record." The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Procedure before the Commission in the trial of utilities matters, and particularly in the admission of evidence, is not so formal as litigation conducted in the superior court. State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

Admissibility of Annual Reports of Municipalities. — In a proceeding by a utility for an increase in rates, wherein municipalities engaged in resale of electrical energy purchased from the utility protested against the proposed schedules of the utility, copies of annual reports of the municipality to the Commission pursuant to statute, which showed profits made by the municipalities from resale of electrical energy, were admissible in evidence on the question of whether the proposed schedules were fair and equitable as between groups or classifications to be served under such schedules. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Admissibility of Evidence of Rates Charged by Another Utility. — In a proceeding by a utility for a rate increase, the Commission properly excluded evidence of rates charged by another utility in the same area as that involved in the proceeding, in the absence of evidence as to the relative cost conditions of the two utilities. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Admission of Expert-Opinion Evidence. — In a rule-making proceeding, the Utilities Commission did not err in admitting expert-opinion evidence without a specific finding that the witness was an expert, since the admission of the evidence over objection and the denial of a motion to strike constituted the Commission's ruling that the witness was qualified as an expert. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612, cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Findings May Be Based on "Late" Exhibits. — The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the capacity and ability of an applicant for a certificate of public convenience and necessity to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order, when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Judicial Notice of Financial Data. — Although the record before the Commission did not include testimony or documentary evidence as to the earnings of the 24 electric utilities whose earnings were shown in Moody's Investment Service, subsection (b) expressly authorizes the Commission to take judicial notice of data published by reputable financial reporting services, so that there was no error in the consideration of this data by the Commission in determining a fair rate of return to be allowed the utility. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

Burden of Proof. — In the hearing before the Utilities Commission, the burden was on the applicant to offer competent, material and

substantial evidence in support of his application for modification of his existing franchise. State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943); State ex rel. Utilities Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

The "whole record test" set forth in this section requires the Commission's order to be affirmed if, upon consideration of the whole record as submitted, the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

"Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

Quoted in State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Cited in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

§ 62-66. Depositions.

The Commission or any party to a proceeding may take and use depositions of witnesses in the same manner as provided by law for the taking and use of depositions in civil actions in the superior court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-67: Repealed by Session Laws 1981, c. 193, s. 1.

§ 62-68. Use of affidavits.

At any time, 10 or more days prior to a hearing or a continued hearing, any party or the Commission may send by registered or certified mail or deliver to the opposing parties a copy of any affidavit proposed to be used in evidence, together with the notice as herein provided. Unless an opposing party or the Commission at least five days prior to the hearing, if the affidavit and notice are received at least 20 days prior to such hearing, otherwise at any time prior to or during such hearing, sends by registered or certified mail or delivers to the proponent a request to cross-examine the affiant at the hearing, the right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant at the hearing is not afforded after request therefor is made as herein provided, the affidavit shall not be received in evidence. The notice accompanying the affidavit shall set forth the name and address of the affiant and shall contain a statement that the affiant will not be called to testify orally and will not be subject to cross-examination unless the opposing parties or the Commission demand the right of cross-examination by notice mailed or delivered to the proponent at least five days prior to the hearing if the notice and affidavit are received at least 20 days prior to such hearing, otherwise at any time prior to or during such hearing. (1949, c. 989, s. 1; 1957, c. 1152, s. 3; 1963, c. 1165, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 62-69. Stipulations and agreements; prehearing conference.

(a) In all contested proceedings the Commission, by prehearing conferences and in such other manner as it may deem expedient and in the public interest, shall encourage the parties and their counsel to make and enter stipulations of record for the following purposes:

(1) Eliminating the necessity of proof of all facts which may be admitted and the authenticity of documentary evidence,

(2) Facilitating the use of exhibits, and

(3) Clarifying the issues of fact and law.

The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default.

(b) Unless otherwise provided in the Commission's rules of practice and procedure, such prehearing conferences may be ordered by the Commission or requested by any party to a proceeding in substantially the same manner, and with substantially the same subsequent procedure, as provided by law for the conduct of pretrial hearings in the superior court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-70. Ex parte communications.

(a) In all matters and proceedings pending on the Commission's formal docket, with adversary parties of record, all communications or contact of any nature whatsoever between any party and the Commission or any of its members, or any hearing examiner assigned to such docket, whether verbal or written, formal or informal, which pertains to the merits of such matter or proceeding, shall be made only with full knowledge of, or notice to, all other parties of record. All parties shall have an opportunity to be informed fully as to the nature of such communication and to be present and heard with respect thereto. In all matters and proceedings which are judicial in nature, it is the specific intent of this section that all members of the Commission shall conduct all trials, hearings and proceedings before them in the manner and in accordance with the judicial standards applicable to judges of the General Court of Justice, as provided in Chapter 7A of the General Statutes, and upon the initiation of any such proceedings, and particularly during the trial or hearing thereof, there shall be no communications or contacts of any nature, including telephone communications, written correspondence, or direct office conferences, between any party or such party's attorney and any member of the Commission or any hearing examiner, without all other parties to such proceeding having full notice and opportunity to be present and heard with respect to any such contact or communication.

Any commissioner who knowingly receives any such communication or contact during such proceeding and who fails promptly to report the same to the Attorney General, or who otherwise violates any of the provisions of this subsection shall be liable to impeachment. Any examiner who knowingly receives any such communication or contact during such proceeding and who fails promptly to report the same to the Attorney General or who otherwise violates any of the provisions of this subsection shall be subject to dismissal from employment for cause.

(b) In the event any such communication or contact shall be received by the Commission or any commissioner or any hearing examiner assigned to such docket without such knowledge or notice to all other parties, the Commission shall immediately cause a formal record of such violation to be made in its docket and thereafter no ruling or decision shall be made in favor of such violating party until the aggrieved party shall waive such violation or the Commission shall find as a fact that such party was not prejudiced thereby or that any such prejudice, if present, has been removed.

(c) Any contacts or communications made in violation of this section which are not recorded by the Commission may be recorded by notice to the Commission by any aggrieved party and, unless the Commission shall find that such violation did not in fact occur, such recording shall have the same effect as if done by the Commission.

(d) In matters not under this section, the Commission may secure information and receive communications ex parte, it being the purpose of this section to protect adversary interests where they exist but not otherwise to restrict unduly the administrative and legislative functions of the Commission.

(e) This section shall not modify any notice required in the case of pleadings and proceedings which are subject to other requirements of notice to parties of record, whether by statute or by rule of the Commission, and the Commission may adopt reasonable rules to coordinate this section with such other requirements.

(f) In addition to the foregoing provisions regarding contacts with members of the Commission and hearing examiners, if any party of record, including the assistant attorney general when he is a party, confers with or otherwise contacts any staff personnel employed by the Commission regarding the merits of a pending proceeding, the staff employee shall promptly forward by regular mail a memorandum of the date and general subject matter of such contact to all other parties of record to the proceeding.

(g) Notwithstanding the foregoing, no communication by a public utility or by the public staff regarding the level of rates specifically proposed to be charged by a public utility shall be made or directed to the Commission, a member of the Commission, or hearing examiner, except in the form of written tariff, petition, application, pleading, written response, written recommendation, recorded conference, intervention, answer, pleading, sworn testimony and related exhibits, oral argument on the record, or brief. Willful violations of the provisions of this section on the part of any public utility shall subject such public utility to the penalties provided in G.S. 62-310(a). Willful violations of the provisions of this section by a member of the public staff shall subject such person to dismissal for cause. (1963, c. 1165, s. 1; 1977, c. 468, s. 14; 1979, c. 332, s. 2.)

§ 62-71. Hearings to be public; record of proceedings.

(a) All formal hearings before the Commission, a panel of three commissioners, a commissioner or an examiner shall be public, and shall be conducted in accordance with such rules as the Commission may prescribe. A full and complete record shall be kept of all proceedings on any formal hearing, and all testimony shall be taken by a reporter appointed by the Commission. Any party to a proceeding shall be entitled to a copy of the record or any part thereof upon the payment of the reasonable cost thereof as determined by the Commission.

(b) The Commission in its discretion may approve stenographic or mechanical methods of recording testimony, or a combination of such methods, and a transcript of any such record shall be valid for all purposes, subject to protest and settlement by the Commission.

(c) The Commission is authorized to provide daily transcripts of testimony in cases of substantial public interest and in other cases where time is an important factor to the parties involved.

(d) The Commission shall have authority to contract with or employ on a temporary basis, when deemed necessary by the chairman of the Commission, court reporters in addition to those employed on a full-time basis by the Commission, for the purpose of recording and transcribing testimony given at hearings before the Commission involving any Class A or B utility. The Commission is authorized to charge the cost of employing such court reporters

directly to the involved utility or utilities. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1975, c. 243, s. 9; 1981, c. 1022.)

Effect of Amendments. — The 1981 amendment added subsection (d).

CASE NOTES

Formal Hearing. — An informal conference between members of the Commission and representatives of the utility involved in a rate proceeding, which was called at the suggestion of the Commission, and which involved only a single question as to whether the protesting municipalities having industrial users could secure an industrial rate, and at which conference no testimony and no record was taken, was not a formal hearing within the meaning of this section. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

§ 62-72. Commission may make rules of practice and procedure.

Except as otherwise provided in this Chapter, the Commission is authorized to make and promulgate rules of practice and procedure for the Commission hearings. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

In the absence of statutory inhibition, the Commission may regulate its own procedure within broad limits, and may prescribe and adopt reasonable rules and regulations with respect thereto, provided such rules are consistent with the statutes governing its actions. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Rules Must Not Be Contrary to Statutes. — While the power of the legislature to delegate authority to an administrative agency of the State to prescribe rules and regulations for the due and orderly performance of its public functions is unquestioned, this does not authorize the formulation of rules contrary to the statute. State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

Waiver or Suspension of Rules. — The Commission may adopt its own rules governing pleadings, and has the power to waive or suspend the rules. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

As to challenge to validity of rules by appeal under former law, see State ex rel. North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

Cited in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-73. Complaints against public utilities.

Complaints may be made by the Commission on its own motion or by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law

or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable. Upon good cause shown and in compliance with the rules of the Commission, the Commission shall also allow any such person authorized to file a complaint, to intervene in any pending proceeding. The Commission, by rule, may prescribe the form of complaints filed under this section, and may in its discretion order two or more complaints dealing with the same subject matter to be joined in one hearing. Unless the Commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and opportunity to be heard, that no reasonable ground exists for an investigation of such complaint, the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than 10 days before the time set for such hearing. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

In a complaint case the field of inquiry is limited to the comparatively narrow question of fair treatment to a group or to a class. State ex rel. Utilities Comm'n v. County of Harnett, 30 N.C. App. 24, 226 S.E.2d 515 (1976).

As to standing of manufacturer and distributor of plastic telephone directory covers to complain and appeal, see State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Evidence of Actual Costs of Shipments by Protestant Not Required. — In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, respondent railroads were not required to present evidence of actual costs of shipments by protestant brick company between its mine and its manufacturing plant, since the appropriate group or class for the Utilities Commission's consideration was not protestant as an individual shipper at a certain mileage level, but all present and future shippers of crude earth who would be affected by the scale of rates. State ex rel. Utilities Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234, cert. denied, 301 N.C. 531, 273 S.E.2d 461 (1980).

Cited in State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-74. Complaints by public utilities.

Any public utility shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint and notice of hearing shall be served by the Commission upon such interested persons as it may designate. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-75. Burden of proof.

In all proceedings instituted by the Commission for the purpose of investigating any rate, service, classification, rule, regulation or practice, the burden of proof shall be upon the public utility whose rate, service, classification, rule, regulation or practice is under investigation to show that the same is just and reasonable. In all other proceedings the burden of proof shall be upon the complainant. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

Burden upon Party Seeking Rate Increase. — The burden of proof is upon the utility seeking a rate increase to show the proposed rates are just and reasonable. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 24 N.C. App. 327, 210 S.E.2d 543 (1975), vacated and appeal dismissed, 289 N.C. 286, 221 S.E.2d 322 (1976).

The burden is upon carriers asking for an increase in rates to prove justification for the increase and that the proposed rate is just and reasonable. State ex rel. North Carolina Util. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210, modified, 268 N.C. 204, 150 S.E.2d 337 (1966).

And Not upon Shippers or Customers. — At a hearing on a proposed increase in charges for railroad services, the shippers and customers of the railroads have no burden of proving anything; the previous rates are presumed to be fair and reasonable and so are the orders of the Commission. State ex rel. North Carolina Util. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210, modified, 268 N.C. 204, 150 S.E.2d 337 (1966).

The burden of proving that dedicated service rate is discriminatory and preferential lies with protestants, the complaining parties. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

The burden of proof is upon an applicant for a certificate of public convenience and necessity to show there is a public convenience and necessity for its proposed service. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Burden of Proof as to Counterclaim. — Where the challenge to the rate of return arose from protestants' counterclaim, the protestants were therefore complainants, and the burden was upon them. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Legality of Rule Placing Burden upon All Carriers as to All Rates. — This section uses the word "carrier" or "utility" in the singular. Therefore, when the Commission initiates an investigation of the entire rate structure of motor carriers, and places upon the carriers the burden of showing that the old rates, which have been in effect for a number of years with the approval of the Commission, are just and reasonable, a question arises as to whether the Commission has exceeded its legislative authority. See State ex rel. Utilities Comm'n v. North Carolina Motor Carriers Ass'n, 253 N.C. 432, 117 S.E.2d 271 (1960).

Plaintiff Must Prove Facts Essential to Relief. — This section imposes upon plaintiff the burden of proving the facts essential to its right to relief from the relationship of which it complains. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Applied in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utilities Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980).

Stated in State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

§ 62-76. Hearings by Commission, panel of three commissioners, single commissioner, or examiner.

(a) Except as otherwise provided in this Chapter, any matter requiring a hearing shall be heard and decided by the Commission or shall be referred to a panel of three commissioners or one of the commissioners or a qualified member of the Commission staff as examiner for hearing, report and recommendation of an appropriate order or decision thereon. Subject to the limitations prescribed in this Article, a panel of three commissioners, hearing commissioner or examiner to whom a hearing has been referred by order of the chairman shall have all the rights, duties, powers and jurisdiction conferred by this Chapter upon the Commission. The chairman, in his discretion, may direct any hearing by the Commission or any panel, commissioner or examiner to be held in such place or places within the State as he may determine to be in the public interest and as will best serve the convenience of interested parties. Before any member of the Commission staff enters upon the performance of duties as an examiner, he shall first take, subscribe to and file with the Commission an oath similar to the oath required of members of the Commission.

(b) Repealed by Session Laws 1975, c. 243, s. 5.

(c) In all cases in which a pending proceeding shall be assigned to a hearing commissioner, such commissioner shall hear and determine the proceedings and submit his recommended order, but, in the event of a petition to the full Commission to review such recommended order, the hearing commissioner

shall take no part in such review, either in hearing oral argument or in consideration of the Commission's decision, but his vote shall be counted in such decision to affirm his original order. (1949, c. 989, s. 1; 1959, c. 639, s. 3; 1963, c. 1165, s. 1; 1975, c. 243, ss. 5, 9, 10.)

CASE NOTES

This section supports the holding that three commissioners concurring in order of Commission must have heard evidence. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

§ 62-77. Recommended decision of panel of three commissioners, single commissioner or examiner.

Any report, order or decision made or recommended by a panel of three commissioners, commissioner or examiner with respect to any matter referred for hearing shall be in writing and shall set forth separately findings of fact and conclusions of law and shall be filed with the Commission. A copy of such recommended order, report and findings shall be served upon the parties who have appeared in the proceeding. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1975, c. 243, s. 9.)

§ 62-78. Proposed findings, briefs, exceptions, orders, expediting cases, and other procedure.

(a) Prior to each decision or order by the Commission in a proceeding initially heard by it and prior to any recommended decision or order of a panel of three commissioners, commissioner or examiner, the parties shall be afforded an opportunity to submit, within the time prescribed by order entered in the cause, unless further extended by order of the Commission, for the consideration of the Commission, panel, commissioner or examiner, as the case may be, proposed findings of fact and conclusions of law and briefs or, in its discretion, oral arguments in lieu thereof.

(b) Within the time prescribed by the panel of three commissioners, commissioner, or examiner, the parties shall be afforded an opportunity to file exceptions to the recommended decision or order and a brief in support thereof, provided the time so fixed shall be not less than 15 days from the date of such recommended decision or order. The record shall show the ruling upon each requested finding and conclusion or exception.

(c) In all proceedings in which a panel of three commissioners, commissioner or examiner has filed a report, recommended decision or order to which exceptions have been filed, the Commission, before making its final decision or order, shall afford the party or parties an opportunity for oral argument. When no exceptions are filed within the time specified to a recommended decision or order, such recommended decision or order shall become the order of the Commission and shall immediately become effective unless the order is stayed or postponed by the Commission; provided, the Commission may, on its own motion, review any such matter and take action thereon as if exceptions thereto had been filed.

(d) When exceptions are filed, as herein provided, it shall be the duty of the Commission to consider the same and if sufficient reason appears therefor, to grant such review or make such order or hold or authorize such further hearing or proceeding as may be necessary or proper to carry out the purposes of this Chapter. The Commission, after review, upon the whole record, or as supplemented by a further hearing, shall decide the matter in controversy and make appropriate order or decision thereon.

(e) The Commission may expedite the hearing and decision of any case if the public interest so requires by the use of pretrial conferences, daily transcripts of evidence, trial briefs, and prompt oral argument, and by granting priority to the hearing and decision of such case. (1949, c. 989, s. 1; 1959, c. 639, s. 4; 1963, c. 1165, s. 1; 1975, c. 243, ss. 9, 10; c. 867, s. 5.)

CASE NOTES

Ordinarily, the procedure before the Commission is more or less informal and is not as strict as in superior court, nor is it confined by technical rules; substance and not form is controlling. State ex rel. Utilities Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

This section requires the Commission to find all facts essential to a determination of the question at issue. Having found the facts, it may then make factual conclusions. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

The reason for compelling adequate factual findings is to permit proper judicial review. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

The duty imposed is similar to that duty imposed on a judge of the superior court by former § 1-185 when a jury trial is waived, and on the Industrial Commission by § 97-84 before it can award or deny compensation. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Failure to Make Findings Necessitates Remand. — A failure by the Commission to find facts essential to a determination of the rights of the parties necessitates a remand to the Commission to make necessary findings on which it may base its order. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Applied in State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

§ 62-79. Final orders and decisions; findings; service; compliance.

(a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:

(1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and

(2) The appropriate rule, order, sanction, relief or statement of denial thereof.

(b) A copy of every final order or decision under the seal of the Commission shall be served by registered or certified mail upon the person against whom it runs or his attorney and notice thereof shall be given to the other parties to the proceeding or their attorney. Such order shall take effect and become operative when issued unless otherwise designated therein and shall continue in force either for a period which may be designated therein or until changed or revoked by the Commission. If an order cannot, in the judgment of the Commission, be complied with within the time designated therein, the Commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. (1949, c. 989, s. 1; 1957, c. 1152, s. 4; 1959, c. 639, s. 4; 1961, c. 472, s. 1; 1963, c. 1165, s. 1; 1981, c. 193, s. 2.)

Effect of Amendments. — The 1981 amendment deleted, at the end of the second sentence of subsection (b), a proviso which read: "provided, upon filing of new, changed or additional rates, it shall not be necessary to obtain relief from an outstanding order of the Commission fixing rates except in the case of transportation rates where the rates have been in effect less than one year."

CASE NOTES

The Commission is required by this section to find all facts essential to a determination of the question at issue. State ex rel. Utilities Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

Findings under § 62-133(d). — The "other material facts of record" considered by the Commission under § 62-133(d) in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

The Commission is required to set forth factors it considers in fixing reasonable and just rates which are not enumerated in § 62-133. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Questions of Original and Replacement Costs as "Material Issues of Fact". — When the record before the Commission presents questions of the original cost, less depreciation and the replacement cost, less depreciation, these are "material issues of fact," upon each of which the Commission must make its finding. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Determination of "Fair Value". — Having made properly supported findings, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

While the Commission has the duty to weigh evidence of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Findings Must Be Supported by Competent Evidence. — Since the Commission is required to render its decisions upon questions of law and of fact in the same manner as a court of record, its findings must, as a matter of law, be supported by competent evidence. State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

Reasons for Rejecting Uncontradicted Opinion Testimony. — The Commission is not, as a matter of law, required to set forth in its order its reasons for rejecting uncontradicted opinion testimony; however, it is the better practice for the Commission to do so. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, the Utilities Commission was not required to make a specific finding that an emergency or change of circumstances not affecting the entire rate structure had occurred in order to allow a change in the rates. State ex rel. Utilities Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234, cert. denied, 301 N.C. 531, 273 S.E.2d 461 (1980).

Different Reasons Given by Concurring Commissioners Not Grounds for Reversal. — When § 62-60 and subsection (a) of this section are construed together, as they must be, it is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, might be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and order. The diversity of the reasons given by the three commissioners who join in an ultimate decision and order are not a sufficient ground for its reversal. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Applied in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

Stated in State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utilities Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980).

§ 62-80. Powers of Commission to rescind, alter or amend prior order or decision.

The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision

shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

Procedure to Be Informal. — Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules, in order that regulation may be consistent with changing conditions. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612, cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

This section does not require a motion by the public utility, or other party, as a condition precedent to the authority of the Utilities Commission to amend a previously issued order. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

Authority to Rescind, Alter or Amend Is Discretionary. — The statutory authority of the Utilities Commission to rescind, alter or amend any order or decision made by it, upon proper notice to parties and after opportunity for hearing, is obviously discretionary. State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

Reconsideration until Order Is Final. — At least until an order becomes final by expiration of the time allowed for appeal, this section authorizes the Commission, upon its own motion or upon the motion of any party, to reconsider a previously issued order, upon proper notice and hearing, upon the record already compiled, without requring the institution of a new and independent proceeding by complaint or otherwise. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

Modification, etc., Based on Prior Misapprehension of Facts. — This section is broad enough to permit the Commission to modify and amend its order, even substantially, where, upon further consideration of the record before it, the Commission comes to the opinion that its order was due to the Commission's misapprehension of the facts, or disregard of facts, shown by the evidence received at the original hearing. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

The Commission may not arbitrarily or capriciously rescind its order approving a contract between utilities. It must appear that such rescission is made because of a change of circumstances requiring it in the public interest. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

In the absence of statutory authority, and in the absence of any additional evidence or a change in conditions, the Commission has no power to reopen a proceeding and modify or set aside an order theretofore made by it, where the order was made in pursuance of an agreement entered into by the parties to the proceeding. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Circumstances Justifying Rescission of Prior Order Approving Agreement between Carriers. — The improvement and construction of highways between two municipalities making feasible a new and quicker bus route between them was a sufficient change of condition to empower the Utilities Commission to modify or rescind a prior order entered by it approving an agreement between two carriers in regard to their respective services to the public between the two municipalities along the older routes. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Revocation of Prior Order Reversed. — An order of the Utilities Commission revoking its prior order approving an agreement between carriers in regard to their respective services along the route in question and substituting in lieu thereof an order of the Commission having the same effect as the agreement, was reversed, there being no evidence to support the Commission's conclusion that the new order would promote harmony among the carriers, and there being no showing of a change of condition requiring a revision of the prior order in the public interest. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

"Complaint Proceeding" Distinguished from General Rate Case. — A hearing pursuant to the provisions of this section and § 62-136 which involves a single rate or small part of a rate structure of a public utility is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure of a utility and may be resolved without involving the procedure outlined in § 62-133. State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

An appeal does not lie from the denial of a petition to rehear. State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

§ 62-81. Special procedure in hearing and deciding rate cases.

(a) All cases or proceedings, declared to be or properly classified as general rate cases under G.S. 62-137, or any proceedings which will substantially affect any utility's overall level of earnings or rate of return, shall be set for trial or hearing by the Commission, which trial or hearing shall be set to commence within six months of the institution or filing thereof, and all such cases or proceedings shall be tried or heard and decided, with the issuance of a final order, by the Commission within nine months of the institution or filing thereof. All such cases or proceedings shall be tried or heard and decided in accordance with the rate-making procedure set forth in G.S. 62-133 and such cases shall be given priority over all other cases or proceedings pending before the Commission. In all such cases the Commission shall make a transcript of the evidence and testimony presented and received by it and shall furnish a copy thereof to any party so requesting by the third business day after the taking of such evidence and testimony.

(b) Any public utility filing or applying for an increase in rates for electric, telephone, natural gas or water service shall notify its customers proposed to be affected by such increase of such filing by regular mail or by newspaper publications, as directed by the Commission, within 30 days of such filing, which notice shall state that the Commission shall set and shall conduct a trial or hearing with respect to such filing or application within six months of said filing date. All other public utilities shall give such notice in such manner as shall be prescribed by the Commission.

(c) In cases or proceedings filed with and pending before the Commission, where the total annual revenue requested, or where the total annual revenue increase requested, is less than three hundred thousand dollars ($300,000), even though all or a substantial portion of the rate structure is being initially established or is under review, the chairman of the Commission may refer the proceeding to a panel of three commissioners or to a hearing commissioner or to a hearing examiner for hearing.

(d) In all proceedings for an increase in rates and all other proceedings declared to be general rate cases under G.S. 62-137, the Commission shall conduct the hearing or portions of the hearing within the area of the State served by the public utility whose rates are under consideration, provided this subsection shall not apply to proceedings held pursuant to G.S. 62-134(e) and 62-133(f).

(e) Notwithstanding the provisions of this section, application by any public utility for permission and authority to adjust its rates and charges based solely upon the cost of fuel used in the generation or production of electric power shall be determined in accordance with the provisions of G.S. 62-134(e).

(f) Notwithstanding the provisions of this section, or other provisions of this Chapter which would otherwise require a hearing, where there is no significant public protest received within 30 days of the publication of notice of a proposed rate change for a water or sewer utility, the Commission may decide the proceeding based on the record without a trial or hearing, provided said utility and all other parties of record have waived their right to any such hearing. Any decision made pursuant to this subsection shall be made in accordance with the provisions of G.S. 62-133 or 62-133.1. (1963, c. 1165, s. 1; 1973, c. 1074; 1975, c. 45; c. 243, ss. 6, 9; c. 867, s. 6; 1977, c. 468, s. 15; 1981, c. 193, s. 3; c. 439.)

Effect of Amendments. — The first 1981 amendment substituted "three hundred thousand dollars ($300,000)" for "one hundred thousand dollars ($100,000)" in subsection (c).

The second 1981 amendment added subsection (f).

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976); State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

§ 62-82. Special procedure on application for certificate for generating facility; appeal from award order.

(a) Notice of Application for Certificate for Generating Facility; Hearing; Briefs and Oral Arguments. — Whenever there is filed with the Commission an application for a certificate of public convenience and necessity for the construction of a facility for the generation of electricity under G.S. 62-110.1, the Commission shall require the applicant to publish a notice thereof once a week for four successive weeks in a daily newspaper of general circulation in the county where such facility is proposed to be constructed and thereafter the Commission upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three months after the filing of such application, and the procedure for rendering decisions therein shall be given priority over all other cases on the Commission's calendar of hearings and decisions, except rate proceedings referred to in G.S. 62-81. Such applications shall be heard as provided in G.S. 62-60.1, and the Commission shall furnish a transcript of evidence and testimony submitted by the end of the second business day after the taking of each day of testimony. The Commission or panel shall require that briefs and oral arguments in such cases be submitted within 30 days after the conclusion of the hearing, and the Commission or panel shall render its decision in such cases within 60 days after submission of such briefs and arguments. If the Commission or panel does not, upon its own initiative, order a hearing and does not receive a complaint within 10 days after the last day of publication of the notice, the Commission or panel shall enter an order awarding the certificate.

(b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; Bond Prerequisite to Appeal. — Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs, and other expenses incurred in connection with the appeal). No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party. The Commission may, when there are two or more such appealing parties, permit them to file a joint bond or undertaking. If the award order of the Commission is affirmed on appeal, the Commission shall determine the amount, if any, of damages sustained by the party to whom the certificate was awarded, and shall issue appropriate orders to assure that such damages be paid and, if necessary, that the bond or undertaking be enforced. (1965, c. 287, s. 3; 1975, c. 243, s. 7.)

§§ 62-83 to 62-89: Reserved for future codification purposes.

ARTICLE 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions.

(a) No party to a proceeding before the Commission may appeal from any final order or decision of the Commission unless within 30 days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commission, by order made within 30 days, the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

(b) Any party may appeal from all or any portion of any final order or decision of the Commission in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commission, to each party to the proceeding to the addresses as they appear in the files of the Commission in the proceeding. The failure of any party, other than the Commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(c) The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.

(d) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The procedure for the appeal shall be as provided by the rules of appellate procedure.

(e), (f) Repealed by Session Laws 1975, c. 391, s. 12.

(g) The Court of Appeals shall hear and determine all matters arising on such appeal, as in this Article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals. (1949, c. 989, s. 1; 1955, c. 1207, s. 1; 1959, c. 639, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 1; 1975, c. 391, s. 12.)

CASE NOTES

I. In General.
II. Cases Decided prior to 1949 Revision of Procedural Sections.

I. IN GENERAL.

Necessity for Timely Filing. — An affected party must file exceptions to the determination or decision within 10 (now 30) days after notice of the determination or decision. In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1961).

The Court of Appeals is without jurisdiction to review an original order of the Utilities Commission where no appeal has been taken from the order and the time for giving notice and perfecting appeal has expired. State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

Who May Appeal. — An appeal from the Utilities Commission is limited to parties to the proceeding; a party is not affected by a ruling of the Utilities Commission unless the decision affects or purports to affect some right or interest of a party to the controversy and is in some way determinative of some material question involved. In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1961).

Section 62-137 Inapplicable to Proceedings under Subsection (c) of This Section. — Section 62-137 is inapplicable to proceedings conducted under subsection (c) of this section, since their scope is limited by stat-

ute to the exceptions on which the particular appeal of a final order or decision is based, leaving the Commission without authority to declare the hearings a general rate case or complaint proceeding. The Commission may consider only the grounds upon which the applicant asserts that the Commission's order or decision is unlawful, unjust, unreasonable or unwarranted, including alleged errors committed by the Commission. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Applied in State ex rel. Utilities Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963); State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973); State ex rel. Utilities Comm'n v. Edmisten, 29 N.C. App. 258, 224 S.E.2d 219 (1976).

Cited in State ex rel. Utilities Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

II. CASES DECIDED PRIOR TO 1949 REVISION OF PROCEDURAL SECTIONS.

Editor's Note. — All of the cases in the following note were decided before the 1949 revision of the statute relating to procedure before the Utilities Commission and appeals therefrom, and construe former §§ 62-19 and 62-20, to which this section corresponds.

Powers and Jurisdiction of Commission. — Under this Chapter as it stood prior to the revision of 1949, it was held that, for the purpose of making investigations and conducting hearings, the legislature had constituted the North Carolina Utilities Commission a court of record, with all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure was prescribed and authorized, with the right in "any party affected thereby" to appeal "from all decisions or determinations made by the Utilities Commission." State ex rel. North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

Orders of Commission Need No Confirmation. — The Utilities Commission is a State administrative agency of original and final jurisdiction, and its orders require no confirmation by any court to be effective. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Injunctive Relief Against Exercise of Rights Granted by Commission Refused. — Where plaintiffs instituted action against a competing carrier to restrain it from exercising rights given it by orders of the Utilities Commission amending its franchise, the orders having been entered in proceedings to which plaintiffs were parties, it was held that plaintiffs had an adequate remedy for the protection of their rights by appeal under former §§ 62-19 and 62-20, and judgment sustaining defendant's demurrer in the independent action was proper. Atlantic Greyhound Corp. v. North Carolina Util. Comm'n, 229 N.C. 31, 47 S.E.2d 473 (1948).

Right of Appeal Confined to Parties. — Former § 62-20 distinctly confined the right of appeal to a party to the proceeding. North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Former statute, providing that "from all decisions or determinations made by the Corporation Commission any party affected thereby shall be entitled to an appeal," necessarily meant from a decision which affected or purported to affect some right or interest of a party to the controversy and was in some way determinative of some material question involved. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

Under the provisions of former § 62-20, "any party affected" by the order of the Commission as to rates or charges for passengers by a street railway company, etc., was given the right of appeal to the court from such order. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

The right of appeal conferred by former § 62-20 was limited to a party to the proceeding. For purposes of appeal, those who had no property or proprietary rights which were or might be affected by orders of the Commission were not such parties. An appeal by persons who were not parties to the proceeding would be dismissed by the superior court for the reason that said court acquired no jurisdiction by such appeal. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928); State ex rel. North Carolina Util. Comm'n v. City of Kinston, 221 N.C. 359, 20 S.E.2d 322 (1942).

Municipality Entitled to Appeal. — It is the duty of a municipality granting a charter to a corporation to operate a streetcar system therein, which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon a petition filed by the railway company before the Commission requesting that it be permitted to raise the fares beyond those limited in the contract, and thus the municipality might appeal through the courts as former § 62-20 prescribed, when the order was adverse

to it or the interest it represented, as a "party affected by the decision and determination of the Commission," expressly provided for by the statute. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

Citizens seeking to have a railway station moved could not appeal from the Commission's decision, under former § 62-20, because they were not parties. North Carolina Corp. Comm'n, v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Notice Mandatory. — Under former § 62-20, the statutory notice of an appeal by a railroad company from an order of the Commission was mandatory, and could not be extended by the consent of the parties of record. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923); State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

Notice to Complaining Party under Former § 62-20. — When notice of appeal to the superior court was given to the Commission by a railroad company, and other requirements of former § 62-20 relating thereto were met by the company, this was sufficient, without giving notice of the appeal to the complaining party in the proceedings had before the Commission, as upon this appeal the statute made the Commission the party plaintiff. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Removal to Federal Courts. — Assuming that an order of the Commission made to compel a carrier to change the location and conditions of its depot to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, this would not transform the proceedings in which the order was made into "a suit at law or in equity," and, as such, removable from the superior court of the State to an inferior federal tribunal, upon the ground of diverse citizenship. State ex. rel. North Carolina Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

In proceedings for the removal of a cause from the State to the federal courts upon the question of diversity of citizenship under the applicable federal statute, the State court is not bound to surrender its jurisdiction until a case has been made which, on the face of the petition, shows the petitioner has a right to the transfer of the cause to the federal courts. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Final Process. — Under this Article as it stood before the 1949 revision, the Commission had no power to enforce its orders and decrees by final process issuing directly therefrom, and for such purpose resort had to be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts on appeal. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908). See §§ 62-97, 62-98.

Removal of Franchise Restriction as to Carriage of Passengers by Motor Carrier. — Former § 62-20 authorized a petitioner to appeal to the superior court from an adverse ruling of the Utilities Commission on its petition for the removal from its franchise of a restriction in regard to the carriage of passengers, and the contention that no appeal would lie from such order because the right of appeal was governed by the motor carrier laws authorizing an appeal from an order affecting franchise only when entered for violation of law was untenable. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 216 N.C. 325, 4 S.E.2d 897 (1939).

Petitioner had the right to appeal to the superior court from the denial of its petition for the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between such cities. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

§ 62-91. Appeal docketed; title on appeal; priorities on appeal.

Unless otherwise provided by the rules of appellate procedure, the cause on appeal from the Utilities Commission shall be entitled "State of North Carolina ex rel. Utilities Commission (here add any additional parties in support of the Commission Order and their capacity before the Commission), Appellee(s) v. (here insert name of appellant and his capacity before the Commission), Appellant." Appeals from the Utilities Commission pending in the superior courts on September 30, 1967, shall remain on the civil issue docket of such superior court and shall have priority over other civil actions. Appeals to the Court of Appeals under G.S. 7A-29 shall be docketed in accordance with the rules of appellate procedure. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 6; 1975, c. 391, s. 13.)

CASE NOTES

Utilities Commission as Party. — When the Utilities Commission sits as a court of record to determine the rights of rival claimants to a valuable franchise, it is somewhat anomalous to find it appearing in the Supreme Court to uphold its order from which one or the other party has appealed. However, this procedure seems to have been authorized by the General Assembly. State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

§ 62-92. Parties on appeal.

In any appeal to the Court of Appeals, the complainant in the original complaint before the Commission shall be a party to the record and each of the parties to the proceeding before the Commission shall have a right to appear and participate in said appeal. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 2.)

CASE NOTES

The Utilities Commission is a party of record in a proceeding before it, and upon appeal the Commission becomes the party plaintiff. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

As to standing of manufacturer and distributor of plastic telephone directory covers to complain and appeal, see State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

§ 62-93. No evidence admitted on appeal; remission for further evidence.

No evidence shall be received at the hearing on appeal but if any party shall satisfy the court that evidence has been discovered since the hearing before the Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the Commission with directions to take such subsequently discovered evidence, and after consideration thereof, to make such order as the Commission may deem proper, from which order an appeal shall lie as in the case of any other final order from which an appeal may be taken as provided in G.S. 62-90. (1949, c. 989, s. 1; 1955, c. 1207, s. 2; 1963, c. 1165, s. 1.)

CASE NOTES

No Basis for Remand. — Where nothing in the record indicates that any party made a motion to remand, that any party desired to offer further evidence, or that newly discovered evidence was available, there is no basis for the court, in its discretion, to remand the cause. State ex rel. Utilities Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

§ 62-94. Record on appeal; extent of review.

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or
(2) In excess of statutory authority or jurisdiction of the Commission, or
(3) Made upon unlawful proceedings, or
(4) Affected by other errors of law, or
(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

(d) The court shall also compel action of the Commission unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable. (1949, c. 989, s. 1; 1955, c. 1207, s. 3; 1963, c. 1165, s. 1; 1969, c. 614; 1975, c. 391, s. 14.)

Legal Periodicals. — For case law survey as to judicial review of decisions of administrative agencies, see 45 N.C.L. Rev. 816 (1967).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

I. In General.
II. Cases Decided prior to 1949 Revision of Procedural Sections.

I. IN GENERAL.

Subsection (b) States Authority of Court. — The authority of the court to which an appeal is taken from an order of the Utilities Commission is stated in subsection (b) of this section. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And Commission's Decision Will Be Upheld Unless Assailable Under Subsection (b). — The decision of the Commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in subsection (b) of this section. State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria of this section which circumscribe judicial review. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Subsection (c) requires the reviewing court to take due note of the rule of prejudicial error. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Due account shall be taken of the rule of prejudicial error in the consideration of an appeal. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Limitation on Authority to Review. — The authority of the Court of Appeals and of the Supreme Court in reviewing an order of the Utilities Commission is limited to that conferred by this section. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

Upon appeal, the authority of the reviewing court to reverse or modify the order of the Commission, or to remand the matter to the Com-

mission for further proceedings, is limited to that specified in this section. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Courts do not ordinarily review or reverse the exercise of discretionary power by an administrative agency such as the Utilities Commission, except on showing of capricious, unreasonable or arbitrary action or disregard of law. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

On review of orders from the Commission, the Court of Appeals' action is guided by this section, and where the Commission's actions do not violate the Constitution or exceed statutory authority, appellate review is limited to errors of law, arbitrary action, or decisions unsupported by competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

The authority of an appellate court to reverse or modify an order of the Utilities Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section, which includes the authority to reverse or modify such order on the ground that it violates a constitutional provision. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

Court's Power to Reverse, Modify or Nullify Substantially Circumscribed. — The court's power to affirm or remand is not specifically circumscribed by this section. However, the power of the court to reverse or modify and, a fortiori, to declare null and void, is substantially circumscribed. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Function of Court on Review. — The Court of Appeals looks to the findings of fact and conclusions of the Commission and determines whether the Commission has considered the factors required by law and whether its findings are supported by competent, substantial and material evidence in view of the whole record. State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

Appeals from the Utilities Commission are confined to questions of law upon grounds specifically set forth in appellant's petition for rehearing by the Commission. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951). See State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Commission without Discretionary Power Where No Evidence to Weigh. — The weighing of the evidence and the exercise of judgment thereon within the scope of its authority are matters for the Commission; even so, the Commission has no discretionary power, where its function is to weigh the evidence and make judgment thereon, if there is no evidence to weigh. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Weighing of Evidence and Exercise of Judgment Thereon Are Matters for Commission. — The decisions of the Utilities Commission must be within the authority conferred by statute; however, the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The credibility of testimony and the weight to be given it are for the Commission, not for the reviewing court. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

The credibility of testimony was for the determination of the Commission. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Court May Not Find Facts or Regulate Utilities. — Although in reviewing an order of the Commission, a court might, upon the same facts, have reached a different result, it is not for the court to find the facts or to regulate utilities. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When an appeal to the superior court (now to the Court of Appeals) is taken from an order entered by the North Carolina Utilities Commission, the review is limited to the record as certified and to the questions of law presented therein. There is no provision for additional findings of fact by the judge for the purpose of determining the validity of the order entered by the Commission. State ex rel. Utilities Comm'n v. Fox, 236 N.C. 553, 73 S.E.2d 464 (1952); State v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953). See State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

What constitutes public convenience and necessity is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service, whether the existing carriers can reasonably meet this need, and whether the service would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Determination by Commission Is Prima Facie Just and Reasonable. — A determination by the Commission is not simply prima facie evidence of its validity, but is prima facie just and reasonable. State ex rel. Utilities Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953); State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955); State ex rel. North Carolina Util. Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957); State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

By this section an order of the Commission is prima facie just and reasonable. This applies to orders approving contracts of public utilities. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Upon appeal, rates fixed by the Commission shall be deemed prima facie just and reasonable. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966); State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

This section provides that on an appeal, the Commission's decision is considered "prima facie just and reasonable," and it should be affirmed if supported by substantial evidence. State ex rel. Utilities Comm'n v. Southern Coach Co., 20 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

Findings supported by competent, material, and substantial evidence in view of the entire record are binding upon the reviewing court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 488 (1980); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980). See also, State ex rel. Utilities Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

All findings of fact made by the Commission, which are supported by competent, material and substantial evidence, are conclusive. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utilities Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981).

When the Commission's findings are supported by competent, material and substantial evidence, they are binding upon the appellate court. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

Even Though Reviewing Court Might Have Reached Different Conclusion. — Neither findings of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

If the rates are reasonable upon an application of the whole record test, the Court of Appeals is bound by the findings of fact establishing them and may not reach a different finding merely because it could have reached another determination upon the evidence. State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of the factors in the fixing of reasonable rates under § 62-133, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission, nor is the Commission required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness. State ex rel. Utilities Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The Commission, not the reviewing court, is to make determination of fair value of the properties. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

While the Commission has the duty to weigh evidences of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

The Supreme Court may not reverse an order of the Commission because of its weighting of the respective indicators of "fair value," unless it finds such weighting to have been arbitrary and lacking support in the evidence, in view of the entire record, or otherwise affected by error of law. State ex rel. Utility Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The question of whether a case "is to be a general rate case" under the terms of

§ 62-137 is a mixed question of law and fact. As to such questions, courts should be hesitant to disturb the Commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish. Even at that stage, however, the Commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

Burden Is on Appellant to Show Error of Law in Proceedings. — The law imposes the duty upon the Utilities Commission and not the courts to fix rates, and the burden is upon appellant from an order of the Commission to show an error of law in the proceeding before the Commission. State ex rel. Utilities Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

But Appellant May Show That Order Was Unsupported by Evidence. — Upon appeal the orders made by the Utilities Commission "shall be prima facie just and reasonable," but this does not preclude the appellant from showing that the evidence offered rebuts the prima facie effect of the order, and that the order was unsupported by competent, material and substantial evidence in view of the entire record. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 235 N.C. 273, 69 S.E.2d 502 (1952); State ex rel. Utilities Comm'n v. Gulf-Atlantic Towing Corp., 251 N.C. 105, 110 S.E.2d 886 (1959).

An order of the Commission requiring a transportation company to maintain public service facilities must be considered prima facie reasonable and just, but this does not preclude the transportation company affected from showing that the order was unsupported by competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 238 N.C. 701, 78 S.E.2d 780 (1953); State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

While the determination of a petition by a carrier to be allowed to discontinue an established service rests in large measure in the sound judgment and discretion of the Utilities Commission, and its order in regard thereto is prima facie just and reasonable, such order is reviewable to ascertain whether it is arbitary or capricious or if the essential findings of fact on which it is based are supported by competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

Substantial Evidence Defined. — Substantial evidence is defined as "more than a scintilla or a permissible inference." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

Evidence of Reasonableness of Practice. — Where the Commission's order required the defendants to do no more than they did voluntarily and without objection for 30 years or more, preceding the last six or eight years, this would seem to be "strong evidence" of the reasonableness of the practice. State ex rel. Utilities Comm'n v. Southern Ry., 256 N.C. 359, 124 S.E.2d 510 (1962).

Minimal Consideration of Competent Evidence Correctable on Appeal. — Although it is not for an appellate court to dictate to the Commission what weight it should give to material facts before it, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

When Order Remanded to Commission for Further Hearing. — An order of the Commission based on an erroneous interpretation of law should be remanded to the Commission for further hearing and not be terminated by the court where the Commission has the duty to make a positive determination, such as the fixing of rates, and because of some error of law the determination is in suspense, and the utility is entitled to have the determination made. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Contents of Order Remanding Cause. — If a cause is remanded under this section, the order should specify the ground on which it is based and thereby indicate to the Commission the nature of its further proceedings. State ex rel. Utilities Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

When Order Will Be Affirmed. — Where the order of the Utilities Commission granting petitioner an increase in rates in a general rate case is justified by the findings of fact which are supported by plenary evidence, the order of the Commission will be affirmed. State ex rel. Utilities Comm'n v. Tidewater Natural Gas Co., 259 N.C. 558, 131 S.E.2d 303 (1963).

The rate order of the Commission will be affirmed if upon consideration of the whole record the appellate court finds that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

In the consideration of an appeal the court is required to review the whole record, or such portions thereof as may be cited. State ex rel. Utlities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Questions on appeal from the Commission must be determined from the record certified by it. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Unless Facts Are in Record, Commission's Expert Knowledge Cannot Be Considered. — The Commission's knowledge, however expert, cannot be considered by the Supreme Court on appeal unless the facts embraced within that knowledge are in the record. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

As to necessity for raising grounds for relief before Commission, see State ex rel. Utilities Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959).

Attorney General Not Prejudiced by Failure to Hold Hearing. — The Attorney General was not prejudiced by the action of the Commission in allowing an exploration tracking rate increase to go into effect without a hearing, since a refund could be sought under this section. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Applied in State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963); State ex rel. North Carolina Util. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977); In re Duke Power Co., 37 N.C. App. 138, 245 S.E.2d 787 (1978); State ex rel. Utilities Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980).

Stated in State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Cited in State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utilities Comm'n v. Public Serv. Co. of N.C., Inc., 35 N.C. App. 156, 241 S.E.2d 79 (1978); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

II. CASES DECIDED PRIOR TO 1949 REVISION OF PROCEDURAL SECTIONS.

Editor's Note. — All of the cases in the following note were decided before the 1949 revision of the procedural provisions of this Chapter, and construe former §§ 62-20 and 62-21, corresponding to § 62-90 and this section. It should be noted that the 1949 revision made many changes in procedure, and especially in the extent of review.

Appeal to Superior Court under Former Law Was Trial de Novo. — Upon appeal under the former statute by a party to a proceeding before the Corporation Commission from an order made therein under former §§ 62-42 and 62-43, the superior court had jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Commission. The trial of such issues by the superior court was de novo. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928). See also State ex rel. Corporation Comm'n v. Seaboard Air Line & S. Ry., 161 N.C. 270, 76 S.E. 554 (1912).

A provision of former § 62-21 that on appeal the trial should be "under the same rules and regulations as are prescribed for the trial of other civil causes" meant that the trial should be de novo. State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943). See also North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Under this Chapter as it stood before the 1949 revision, the trial in the superior court was de novo, and from thence only would a further appeal lie to the Supreme Court, governed by the rule that such an appeal should not be fragmentary, but should be from a final judgment or one final in its nature. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Rules Applicable on Appeal to Superior Court. — Prior to the 1949 revision, on appeal to the superior court the trial was under the same rules and regulations applicable in other civil causes, save and except the prima facie effect to be given the decision or determination of the Commission. State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

Appeals from the Utilities Commissioner were analogous to appeals from a justice of the peace rather than appeals from a referee; hence, since the trial in the superior court was de novo upon issues of fact raised by the excep-

tions, the superior court properly refused to pass upon appellant's exceptions to the findings of fact seriatim. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Decision of Commission "Prima Facie Just and Reasonable". — While an appeal from the Utilities Commission to the superior court the provision of former § 62-21 was interpreted to mean that the trial should be de novo, the section also provided that the decision or determination of the Commission "shall be prima facie just and reasonable." State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

Findings of Fact Not Conclusive. — Former §§ 62-20 and 62-21 did not contain any provision that the findings of fact by the Utilities Commission should be conclusive on appeal. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

What Evidence Admissible. — On appeal from an order of the Commission under former § 62-21 the trial was de novo, tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence could be there introduced, whether it had theretofore been introduced before the Commission or not. State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912). See § 62-26.9.

Admission of Evidence Held Reversible Error. — Where a union passenger depot had been ordered by the Commission, it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a nearby town where the present station of one of the roads was located. State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

When Appellee Entitled to Affirmance of Decision. — Under former § 62-21, in the absence of a showing that the decision of the Utilities Commission was clearly unreasonable and unjust, appellee, on appeal to the superior court, was entitled to an affirmance of the decision of the Commission. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 224 N.C. 390, 30 S.E.2d 328 (1944).

In an application for a certificate of public convenience and necessity, the Utilities Commission must act within the authority conferred by the statute; however, the findings from the evidence and the exercise of judgment thereon within the scope of its powers are matters for the Commission, and its order will not be disturbed when sustained by the findings upon competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Fredrickson Motor Express, 232 N.C. 180, 59 S.E.2d 582 (1950).

§ 62-95. Relief pending review on appeal.

Pending judicial review, the Commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, a judge of the Court of Appeals is authorized to issue all necessary and appropriate process to postpone the effective date of any action by the Commission or take such action as may be necessary to preserve status or rights of any of the parties pending conclusion of the proceedings on appeal. The court may require the applicant for such stay to post adequate bond as required by the court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 8.)

§ 62-96. Appeal to Supreme Court.

In all appeals heard in the Court of Appeals, any party may file a motion for review in the Supreme Court of the decision of the Court of Appeals under G.S. 7A-31, and in cases entitled to be appealed as a matter of right under G.S. 7A-30(3) any party may appeal to the Supreme Court from the decision of the Court of Appeals under the same rules and regulations as are prescribed by law for appeals, except that the Commission, if it shall appeal, shall not be required to give any undertaking or make any deposit to assure the cost of such appeal, and such court may advance the cause on its docket. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 3.)

CASE NOTES

An appeal does not lie directly from the Commission to the Supreme Court. State ex rel. Board of R.R. Comm'rs v. Wilmington & W. R.R., 122 N.C. 877, 29 S.E. 334 (1898); North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Scope of Review. — Where the evidence is sufficient to permit and sustain the Commission's findings of fact, conclusions and the decision based thereon, the Supreme Court will consider the proceedings before the Commission only to the extent necessary to determine whether the Court of Appeals committed an error of law. State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 283 N.C. 104, 194 S.E.2d 859 (1973).

When Supreme Court May Affirm Judgment Reversing Commission. — Upon an appeal to the Supreme Court from a judgment of the superior court (now the Court of Appeals) reversing a decision of the Commission and remanding the matter for further proceedings, the Supreme Court may affirm the judgment of the superior court if the record discloses one or more of the statutory grounds for such judgment and if such ground therefor is set forth specifically in the notice of appeal from the Commission to the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

In order to affirm a judgment of the superior court (now the Court of Appeals) reversing and remanding a decision of the Commission, it is not required that the Supreme Court concur in the ruling by the superior court upon every ground for relief set forth in the notice of appeal from the Commission to the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

As to standing of manufacturer and distributor of plastic telephone directory covers to complain and appeal, see State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Applied in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965).

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

§ 62-97. Judgment on appeal enforced by mandamus.

In all cases in which, upon appeal, an order or decision of the Commission is affirmed, in whole or in part, the appellate court shall include in its decree a mandamus to the appropriate party to put said order in force, or so much thereof as shall be affirmed, or the appellate court may make such other order as it deems appropriate. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

Mandamus under Former § 62-25. — Under former § 62-25, the court could compel performance only by resort to the high prerogative writ of mandamus, and that by authority of the statute. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Under former § 62-25, the right to a mandamus to enforce a valid order was given in causes which had been carried to the superior court by appeal. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

§ 62-98. Peremptory mandamus to enforce order, when no appeal.

(a) If no appeal is taken from an order or decision of the Commission within the time prescribed by law and the person to which the order or decision is directed fails to put the same in operation, as therein required, the Commission may apply to the judge regularly assigned to the superior court district which includes Wake County, or to the resident judge of said district at chambers, or to the judge holding the superior court in any judicial district in which the business is conducted upon 10 days' notice, for a peremptory mandamus upon

said person for the putting in force of said order or decision; and if said judge shall find that the order of said Commission was valid and within the scope of its powers, he shall issue such peremptory mandamus.

(b) An appeal shall lie to the Court of Appeals in behalf of the Commission, or the defendant, from the refusal or the granting of such peremptory mandamus. The remedy prescribed in this section for enforcement of orders of the Commission is in addition to other remedies prescribed by law. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 4.)

CASE NOTES

As to enforcement of order by mandamus where no appeal was taken, under former law, see State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

Where the Commission had ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads had lost or waived their statutory right to appeal, such order was regarded as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon failure of the railroads to except and appeal therefrom was the remedy authorized by statute. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

§ 62-99: Repealed by Session Laws 1967, c. 1190, s. 5.

§§ 62-100 to 62-109: Reserved for future codification purposes.

Article 6.

The Utility Franchise.

§ 62-110. Certificate of convenience and necessity.

No public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to necessity for certificate of convenience and necessity for housing projects, see § 157-28.

CASE NOTES

The basis for the requirement of a certificate of public convenience and necessity, as a prerequisite to the right to serve, is the adoption, by the General Assembly, of the policy that, nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv.,

Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Requirement Curtails Competition. — Regarding public utilities, competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

By this section the State has granted to the utility company a legal monopoly upon a service vital to the economic well-being and the domestic life of the people of a large territory. This franchise is a property right of great value. Normally, when the grantee sells its business to another company, the monopolistic franchise commands a substantial price, over and above the exchange value of the physical properties transferred with it. Thus, the value of the franchise enters into and affects the market price of the utility's stock. It does not, however, enter into the computation of the utility's rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

This State has adopted the policy of granting a telephone company a monopoly upon the rendering of telephone service within its service area. State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

But nothing in this Chapter confers upon a telephone company a monopoly upon advertising by its business subscribers. State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

The power of eminent domain is inherent in the certificate of public convenience and necessity. State ex rel. Utilities Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part and rev'd in part on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

This section does not apply to municipal corporations. Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951).

A municipal corporation in the operation of a municipally owned electric power plant with transmission lines extended to supply consumers beyond its corporate limits is not required under this section to obtain from the Utilities Commission a certificate of public convenience and necessity before it can lawfully operate. Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951); Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co., 253 N.C. 610, 117 S.E.2d 764 (1961).

This section is not applicable to an electric membership corporation organized under the provisions of §§ 117-6 to 117-26. Carolina Power & Light Co. v. Johnston County Elec. Membership Corp., 211 N.C. 717, 192 S.E. 105 (1937); Pitt & Greene Elec. Membership Corp. v. Carolina Power & Light Co., 255 N.C. 258, 120 S.E.2d 749 (1961).

Certificate Not Required for Business other than Public Utility. — One does not need a certificate of public convenience and necessity in order to engage in a business which is not that of a "public utility" as defined in § 62-3 (23). State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part and rev'd in part on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

Nor before City Issues Franchise. — Even if a television cable company is a "public utility" as defined in § 62-3, it is not required to obtain from the Utilities Commission a certificate of public convenience and necessity before a franchise is issued by a city to it. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

But Certificate Is Required before Utility Commences Construction or Operation. — A certificate of public convenience and necessity from the Utilities Commission is required by this section before a public utility may commence construction of its plant or operation of its business. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

Issuance of Certificate a Nullity If Applicant Is Not Public Utility. — If an applicant's proposed service is not within the definition of "public utility" contained in § 62-3(23), the issuance of a certificate of public convenience and necessity by the Commission to the applicant would be a nullity. It would not supply a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And in Excess of Commission Authority. — To grant a certificate of public convenience and necessity to conduct a business which is not a public utility, within the definition of the statute, would be both arbitrary and in excess of the statutory authority of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And Would Not Transform Ordinary Business into Public Utility. — The issuance of a certificate of public convenience and necessity by the Commission does not transform an ordinary business into a public utility, so as to entitle its operator to the rights of a public utility, or so as to impose upon him the duties and limitations of a public utility. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Definition of Public Utility Cannot Be Extended. — Neither the Commission nor the

Supreme Court has authority to add to the types of business defined by the legislature as public utilities. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Neither a telephone answering nor a message relaying service is a public utility within the purview of § 62-3(23). State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Finding of Both Convenience and Public Need Is Required. — A finding by the Commission that the rendering of the proposed service by an applicant would be a convenience to the public, even if supported by competent and substantial evidence, is not an adequate basis for an order granting the applicant a certificate of public convenience and necessity. To entitle the applicant to such a certificate it is, of course, not necessary for him to show, and the Commission to find, that the proposed service is necessary in the sense of being indispensable. Nevertheless, a mere showing of convenience is not sufficient. There must be an element of public need for the proposed service by the applicant in the area. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Public Convenience and Necessity Must Require Proposed Operation. — The Commission is authorized to issue a certificate of public convenience and necessity if, but only if, the Commission has made findings of fact, supported by competent, material, and substantial evidence, which findings, in turn, support the conclusion that public convenience and necessity "require or will require" the proposed operation by the applicant. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Finding Necessary for Granting Certificate to Competitor. — The requirement of a certificate of public convenience and necessity is not an absolute prohibition of competition between public utilities rendering the same service. There is, however, inherent in this requirement the concept that, once a certificate is granted which authorizes the holder to render the proposed service within the geographic area in question, a certificate will not be granted to a competitor in the absence of a showing that the utility already in the field is not rendering and cannot or will not render the specific service in question. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Services Need Not Be Identical to Give Utility Serving Area Prior Right. — Two services need not be identical in every respect in order to give the utility already serving the area the prior right. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Section 62-42 must be construed in connection with this section, which requires the issuance of a certificate of public convenience and necessity to construct new facilities except where such construction is into territory contiguous to that already occupied and not receiving similar service from another public utility. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

Thus, Commission Is without Authority to Compel Duplicate Telephone Service. — A reading of § 62-42 in pari materia with this section results in the determination that the Commission does not have the authority to compel a public utility to provide local exchange service to an area which is already receiving such service from another public utility. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

To order a telephone company to render service to an area already occupied by another telephone company would foster duplication, wastefulness, and unwarranted competition, all of which are repugnant to the avowed policy of the public utility law. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App, 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

A certificate of public convenience and necessity to render telephone service grants the right to adopt new methods of telephonic communications, including a mobile radio telephone service. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

A certificate of public convenience and necessity, which authorizes its holder to render "telephone service" does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment and methods then in use. Obviously, it is the intent of such a certificate to authorize the holder to improve its service by adopting and using new and improved devices and methods for telephonic communication. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Where a public utility had a certificate of convenience and necessity for telephone service in a certain area and was ready and able to provide such area a mobile radio service, the Utilities Commission should have denied an application for a certificate of public convenience and necessity to an applicant who proposed to render substantially the same

mobile radio service in the area; the fact that the applicant proposed to offer an electronic personal paging service as an auxiliary to its mobile radio service was not a sufficient difference to justify the issuance of the certificate, when it appeared that the Commission could compel the established utility to install such a service when the public convenience so required. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Applied in State ex rel. Utilities Comm'n v. Town of Pineville, 17 N.C. App. 522, 195 S.E.2d 76 (1973); State ex rel. Utilities Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973); State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Stated in State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

§ 62-110.1. Certificate for construction of generating facility; analysis of long-range needs for expansion of facilities.

(a) Notwithstanding the proviso in G.S. 62-110, no public utility or other person shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service, even though the facility be for furnishing the service already being rendered, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

(b) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State, and the term "public utility service" shall include the service rendered by any such electric membership corporation.

(c) The Commission shall develop, publicize, and keep current an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina, including its estimate of the probable future growth of the use of electricity, the probable needed generating reserves, the extent, size, mix and general location of generating plants and arrangements for pooling power to the extent not regulated by the Federal Power Commission and other arrangements with other utilities and energy suppliers to achieve maximum efficiencies for the benefit of the people of North Carolina, and shall consider such analysis in acting upon any petition by any utility for construction. In developing such analysis, the Commission shall confer and consult with the public utilities in North Carolina, the utilities commissions or comparable agencies of neighboring states, the Federal Power Commission, the Southern Growth Policies Board, and other agencies having relevant information and may participate as it deems useful in any joint boards investigating generating plant sites or the probable need for future generating facilities. In addition to such reports as public utilities may be required by statute or rule of the Commission to file with the Commission, any such utility in North Carolina may submit to the Commission its proposals as to the future needs for electricity to serve the people of the State or the area served by such utility, and insofar as practicable, each such utility and the Attorney General may attend or be represented at any formal conference conducted by the Commission in developing a plan for the future requirements of electricity for North Carolina or this region. In the course of making the analysis and developing the plan, the Commission shall conduct one or more public hearings. Each year, the Commission shall submit to the Governor and to the appropriate committees of the General Assembly a report of its analysis and plan, the progress to date in carrying out such plan, and the program of the Commission for the ensuing year in connection with such plan.

(d) In acting upon any petition for the construction of any facility for the generation of electricity, the Commission shall take into account the appli-

cant's arrangements with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient and economical electric service.

(e) As a condition for receiving such certificate the applicant shall file an estimate of construction costs in such detail as the Commission may require. The Commission shall hold a public hearing on each such application and no certificate shall be granted unless the Commission has approved the estimated construction costs and made a finding that such construction will be consistent with the Commission's plan for expansion of electric generating capacity.

(f) The Commission shall maintain an ongoing review of such construction as it proceeds and the applicant shall submit each year during construction a progress report and any revisions in the cost estimates for the construction.

(g) The certification requirements of this section shall not apply to persons who construct an electric generating facility primarily for that person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation; provided, however, that such persons shall, nevertheless, be required to report to the Utilities Commission the proposed construction of such a facility before beginning construction thereof. (1965, c. 287, s. 2; 1975, c. 780, s. 1; 1979, c. 652, s. 2.)

CASE NOTES

This section was enacted to help curb overexpansion of generating facilities beyond the needs of the service area. To this end, the General Assembly used the term "public convenience and necessity" to define the standard to be applied by the Utilities Commission to proposed facilities. State ex rel. Utilities Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978).

The purpose of requiring a certificate of public convenience and necessity before a generating facility can be built is to prevent costly overbuilding. Environmental concerns were generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed generating facility. State ex rel. Utilities Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978).

Public convenience and necessity is based on an element of public need for the proposed service. State ex rel. Utilities Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978).

Review of Grant of Certificate. — On appeal from a decision of the Commission granting a certificate under this section, the court must look to the findings of fact and conclusions of the Commission and determine if the Commission has considered the factors required by law and if the findings of fact necessary to support granting of the certificate are supported by substantial evidence in view of the whole record. State ex rel. Utilities Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978).

§ 62-110.2. Electric service areas outside of municipalities.

(a) As used in this section, unless the context otherwise requires, the term:

(1) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for commercial, industrial, institutional, or governmental purposes, shall together constitute one "premises," except that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; and

(2) "Line" means any conductor for the distribution or transmission of electricity, other than

a. In the case of overhead construction, a conductor from the pole nearest the premises of a consumer to such premises, or a conductor from a line tap to such premises, and

b. In the case of underground construction, a conductor from the transformer (or junction point, if there be one) nearest the premises of a consumer to such premises.

(3) "Electric supplier" means any public utility furnishing electric service or any electric membership corporation.

(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

(1) Every electric supplier shall have the right to serve all premises being served by it, or to which any of its facilities for service are attached, on April 20, 1965.

(2) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of such electric supplier's lines as such lines exist on April 20, 1965, except premises which, on said date, are being served by another electric supplier or to which any of another electric supplier's facilities for service are attached.

(3) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of lines that such electric supplier constructs after April 20, 1965, to serve consumers that it has the right to serve, except premises located wholly within a service area assigned to another electric supplier pursuant to subsection (c) hereof.

(4) Any premises initially requiring electric service after April 20, 1965, which are located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier, as each of such supplier's lines exist on April 20, 1965, or as extended to serve consumers that the supplier has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(5) Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(6) Any premises initially requiring electric service after April 20, 1965, which are located partially within a service area assigned to one electric supplier and partially within a service area assigned to another electric supplier pursuant to subsection (c) hereof, or are located partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and partially within 300 feet of the lines of another electric supplier, as such lines exist on April 20, 1965, or as extended to serve consumers it has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and the electric supplier not so chosen shall not thereafter furnish service to such premises.

(7) Any premises initially requiring electric service after April 20, 1965, which are located only partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and are located wholly outside the service areas assigned to other electric suppliers and are located wholly more than 300 feet from other electric suppliers' lines, may be served by any electric supplier which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(8) Every electric supplier shall have the right to serve all premises located wholly within the service area assigned to it pursuant to subsection (c) hereof.

(9) No electric supplier shall furnish temporary electric service for the construction of premises which it would not have the right to serve under this subsection if such premises were already constructed. The construction of lines for, and the furnishing of, temporary service for the construction of premises which any other electric supplier, if chosen by the consumer, would have the right to serve if such premises were already constructed, shall not impair the right of such other electric supplier to furnish service to such premises after the construction thereof, if then chosen by the consumer; nor, unless the consumer chooses to have such premises served by the supplier which furnished the temporary service, shall the furnishing of such temporary service or the construction of a line therefor impair the right of any other electric supplier to furnish service to any other premises which, without regard to the construction of such temporary service line, it has the right to serve.

(10) No electric supplier shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as permitted by this section; provided, that nothing in this section shall restrict the right of an electric supplier to furnish electric service to itself or to exchange or interchange electric energy with, purchase electric energy from or sell electric energy to any other electric supplier.

(c) (1) In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

(2) The Commission, upon agreement of the affected electric suppliers, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another; and the Commission, notwithstanding the lack of such agreement, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another, except premises being served by the other electric supplier or to which any of its facilities for service are attached and except such portions of such area as are within 300 feet of the other

electric supplier's lines, upon finding that such reassignment is required by public convenience and necessity. In determining whether public convenience and necessity requires such reassignment, the Commission shall consider, among other things, the adequacy and dependability of the service of the affected electric suppliers, but shall not consider rate differentials between such electric suppliers.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section:

(1) Any electric supplier may furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, upon agreement of the affected electric suppliers; and

(2) The Commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to order any electric supplier which may reasonably do so to furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, and to order such other electric supplier to cease and desist from furnishing electric service to such premises, upon finding that service to such consumer by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory.

(e) The furnishing of electric service in any area which becomes a part of any municipality after April 20, 1965, either by annexation or incorporation, (whether or not such area, or any portion thereof, shall have been assigned pursuant to subsection (c) of this section) shall be subject to the provisions of Article 41 of Subchapter X of Chapter 160 of the General Statutes, and any provisions of this section inconsistent with said Article shall not be applicable within such area after the effective date of such annexation or incorporation. (1965, c. 287, s. 5.)

Editor's Note. — Article 41 of Subchapter X of Chapter 160, referred to in subsection (e), was repealed by Session Laws 1971, c. 698, s. 2. For present provisions as to electric service in urban areas, see §§ 160A-331 through 160A-338.

CASE NOTES

Purpose. — One of the purposes of this Chapter is to vest the Utilities Commission with authority and responsibility to assign territory to electric suppliers. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

Another purpose of this Chapter, and particularly subsection (b) of this section, is to declare certain rights of electric suppliers in areas outside of municipalities pending the assignment of territory. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

A principal purpose of this section is to provide an orderly method for allocation of service areas as among competing suppliers of electricity and thereby to eliminate unnecessary duplication of electric line facilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 3 N.C. App. 318, 164 S.E.2d 895 (1968), aff'd, 275 N.C. 250, 166 S.E.2d 663 (1969).

The overriding purpose of this section is to promote the public interest, not the business of the electric membership cooperative or that of the investor-owned utility. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The former absence of statutory provisions restricting competition between electric membership corporations and public utility suppliers of electric power gave rise to many

contracts between these two types of suppliers designed to fix their respective territorial rights, which contracts, in turn, gave rise to much litigation. In the hope of putting an end to or reducing this turmoil, the 1965 legislature enacted this section, the language of which was the result of collaboration and agreement between the two types of suppliers. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The clear purpose of Session Laws 1965, c. 287, is to prevent wasteful duplication of competing facilities, and thereby serve the public interest. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Prior to the enactment of this section in 1965, there was no restraint upon competition in rural areas between electric membership corporations and public utility suppliers of electric power, except as established by contract. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Prior to enactment of this section, electric membership cooperatives and investor-owned public utility companies were free to compete in the rural portions of this State, in the absence of contractual restrictions upon such right, irrespective of the fact that such competition resulted in substantial duplication of power lines and facilities. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Section Passed Together With §§ 160A-331 through 160A-338. — This section applying to rural areas, and §§ 160A-331 to 160A-338, applying to muncipalities, were part of the same act, and both sought to eliminate the wasteful duplication of power lines by assigning territories to specific suppliers of electricity. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Considered together, the sections cover the entire State and reflect the interests of municipalities, utility companies and cooperatives. They form a unified plan for eliminating duplication of electric facilities by assigning territories to particular suppliers. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E. 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

This section controls over § 160A-312 in case of a dispute regarding electrical services. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Legislature Determines What Policy Is in Public Interest. — It is for the legislature, not for the Supreme Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power, or the policy of territorial monopoly, or an intermediate policy is in the public interest. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Neither Supreme Court Nor Utilities Commission May Forbid Service Permitted by Legislature. — If the legislature has enacted a statute declaring the right of a supplier of electricity to serve, notwithstanding the availability of the service of another supplier closer to the customer, neither the Supreme Court nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

The Commission cannot arbitrarily attach conditions to a franchise, for it must exercise its discretion in good faith in the light of existing facts and circumstances. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Authority of Utilities Commission to Restrict Competition. — The Utilities Commission is a creature of the legislature and has no authority to restrict competition between suppliers of electricity, except insofar as that authority has been conferred upon it by statute. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Competitionve Rights as to Areas outside City Limits Not Altered. — Session Laws 1965, c. 287, including this section, did not, without more, alter the competitive rights of municipalities, investor-owned utilities and electric membership corporations to compete for patronage in areas outside the corporate limits of municipalities. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

An electric membership corporation and a public utility corporation are free to compete in rural areas unless forbidden by some provision of this section. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

Except as restricted by contract, electric membership corporations and public utility companies supplying electricity are free to compete in the rural areas of this State, notwithstanding the fact that such competition may result in substantial duplication of electric power lines and other facilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Mem-

bership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

No Territorial Monopoly. — In the absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in the absence of a valid contract with its competitor or with the person to be served, a supplier of electric power or other public utility service has no territorial monopoly or other right to prevent its competitor from serving anyone who desires the competitor to do so. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Construction. — Where provisions of this section relating to assignment of electric service territory in rural areas are clear and understandable on their face, the Supreme Court is not required to construe this statute in connection with other provisions of this Chapter relating to powers of the Utilities Commission to regulate public utilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Manufacturing Plant But Not Tract as "Premises". — "Premises," as that word is defined in subsection (a)(1), embraces the manufacturing plant of an electric consumer and not the tract upon which it is located; consequently, public membership corporation had no right under subsection (b)(1) to provide electric service to a plant on the ground that it had served a residence and electric signs previously located on the tract. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

A municipality is not an "electric supplier," as that term is used in this section. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

Nor Is a Municipally Owned System. — Electric power companies and electric membership corporations are defined by statute as "electric suppliers"; municipally owned systems are not so defined. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Municipality Not Prohibited from Serving Customers outside City. — Since a city is neither a "public utility" nor an electric membership corporation and therefore is not an "electric supplier," it is not prohibited from serving customers outside the city. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

Concerns of Municipal Electrical System and Utility Company or Cooperative Distinguished. — The primary purpose of a municipal electrical system is to serve customers within the boundaries of the municipality, while a utility company or cooperative is chiefly concerned with customers outside the city limits. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Rights Conferred on Electric Suppliers by Subsection (b). — Subsection (b) of this section confers upon each electric supplier in the State the right, in territories outside of municipalities, to serve all "premises" being served by it on April 20, 1965, and the right to serve "premises" initially requiring service after that date, located within 300 feet of a line of such supplier and not in a territory assigned by the Utilities Commission to a different supplier pursuant to subsection (c) of this section. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Any "premises" in territories lying outside of a municipality and more than 300 feet from the line of any electric supplier can be served, prior to an assignment of such territory by the Utilities Commission, by any electric supplier chosen by the user, and service of such premises by any other supplier is prohibited. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The language of subsection (b)(5) is clear and unambiguous and presents no problem of construction. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 3 N.C. App. 318, 164 S.E.2d 895 (1968), aff'd, 275 N.C. 250, 166 S.E.2d 663 (1969).

One seeking electric service should not be denied the right to choose between vendors unless compelled by some cogent reason. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Right of Electric Supplier Chosen Under Subsection (b) to Deny Service. — Conclusion of the Utilities Commission that a consumer has the unrestricted choice of an electric supplier under subsection (b) of this section is subject to the right of the chosen electric supplier to deny the service unless required otherwise by the Utilities Commission. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

Subsection (c) contemplates the assignment of a territory to a single supplier for all classes of users of electric power, nothing else appearing. However, the statutory direction that the Commission assign service areas "by adequately defined boundaries" does not compel the conclusions that the intent of the legislature was to require the Commission to choose between (1) jeopardizing the industrial development of a geographic area

by assigning it exclusively to an electric membership cooperative, or (2) boxing the cooperative into the narrow strips bordering its existing lines by assigning the territory outside those strips to an investor-owned utility for all types of electric service. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

But One Area May Be Assigned Jointly to Two Electric Suppliers. — The Utilities Commission did not exceed its authority under this section in assigning the same areas jointly to two electric suppliers, subject to consumers' reasonable choice of supplier, since under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may require such an assignment. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may determine that some areas be assigned to two or more electric suppliers with later determination of the circumstances under which a particular electric supplier may properly extend service to a particular consumer. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

The Commission did not exceed its statutory authority in making an assignment of an area jointly to two electric suppliers. State ex rel. Utilities Comm'n v. Edgecombe-Martin County Elec. Membership Corp., 5 N.C. App. 680, 169 S.E.2d 225 (1969).

Division May Be Made on Basis of Users' Demand Level. — It is within the statutory authority of the Commission, when the public convenience and necessity so requires, to assign a territory to one supplier of electricity for service below a specified level of demand and to another supplier for service above that level of demand. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Reassignment to Serve User Whose Demand Is Above Division Line. — Subsection (c) of this section authorizes the Commission, having determined, upon sufficient and competent evidence, that the public convenience and necessity would best be promoted by dividing the geographic area into two service areas on the basis of the users' demand levels, to permit, on the basis of public convenience and necessity, an electric membership cooperative, to which the area of the smaller demands has been assigned, to serve a user whose demand is above the division line, if that user desires to become a member of the cooperative and thus to use its service. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Considerations in Assigning Areas to Electric Suppliers. — Subsection (c) of this section declares the purpose for which the authority to assign "areas" is conferred upon the Commission. That purpose is "to avoid unnecessary duplication of electric facilities." To accomplish this objective, the statute directs the Commission to make assignments "in accordance with public convenience and necessity." In determining whether an assignment is in accord with "public convenience and necessity," the Commission is directed to consider the "adequacy and dependability of the service of electric suppliers." It is also directed to consider "other things." State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

In assigning rural service areas to electric suppliers pursuant to this section, the Utilities Commission may consider, in addition to development of natural resources and employment opportunities, (1) the past history of service to residential, agricultural, and small commercial users in adjacent territories, (2) the capital required for supplying electric power to large users in the territory and the past experience of a supplier in serving such users, and (3) the demonstrated preference of a substantial class of potential users for one supplier over another. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The attraction of industry to a sparsely settled rural territory, which will develop its natural resources and provide opportunity of employment to its residents, is one of the "other things" to be considered by the Commission in determining what assignment of territory to electrical suppliers will be in accord with public convenience and necessity. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Right to Serve Not Exclusive. — While an electric supplier has the right to serve all premises in its assigned area, the mere grant of a right to serve is not the grant of an exclusive right to do so. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

The assignment of an area to an electric supplier by the Utilities Commission does not automatically preclude a city from extending its service lines into the area. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

Validity of Requiring Certificate of Convenience and Necessity for Extension of Facilities. — The police power of the State

is broad enough to include a statute providing that a public utility company, desiring to serve a new area, must obtain from the Utilities Commission a certificate that public convenience and necessity requires the proposed extension of its distribution facilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

For case holding extension of city's electric system across its city limits beyond its authority, see Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

§ 62-111. Transfers of franchises; mergers, consolidations and combinations of public utilities.

(a) No franchise now existing or hereafter issued under the provisions of this Chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity. Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets.

(b) No certificates or permits issued under the provisions of this Chapter for motor carriers of passengers shall be sold, assigned, pledged, transferred, or control changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier of passengers be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the Commission as in this section provided, provided that the above provisions shall not apply to regular trading in listing securities on recognized markets. The applicant shall give not less than 10 days' written notice of such application by registered mail or by certified mail to all connecting and competing carriers. When the Commission is of the opinion that the transaction is consistent with the purposes of this Chapter, the Commission may, in the exercise of its discretion, grant its approval, provided, however, that when such transaction will result in a substantial change in the service and operations of any motor carrier of passengers party to the transaction, or will substantially affect the operations and services of any other motor carrier, the Commission shall not grant its approval except upon notice and hearing as required in G.S. 62-262 upon an application for an original certificate or permit. In all cases arising under this subsection it shall be the duty of the Commission to require the successor carrier to satisfy the Commission that the operating debts and obligations of the seller, assignor, pledgor, lessor or transferor, including taxes due the State of North Carolina or any political subdivision thereof are paid or the payment thereof is adequately secured. The Commission may attach to its approval of any transaction arising under this section such other conditions as the Commission may determine are necessary to effectuate the purposes of this Article.

(c) No sale of a franchise for a motor carrier of property shall be approved by the Commission until the seller shall have filed with the Commission a statement under oath of all debts and claims against the seller, of which such seller has any knowledge or notice, (i) for gross receipts, use or privilege taxes due or to become due the State, as provided in the Revenue Act, (ii) for wages due employees of the seller, other than salaries of officers and in the case of motor carriers, (iii) for unremitted C.O.D. collections due shippers, (iv) for loss of or damage to goods transported, or received for transportation, (v) for overcharges on property transported, and, (vi) for interline accounts due other carriers, together with a bond, if required by the Commission, payable to the State, executed by a surety company authorized to do business in the State, in an amount double the aggregate of all such debts and claims conditioned upon

the payment of the same within the amount of such bond as the amounts and validity of such debts and claims are established by agreement of the parties, or by judgment. This subsection shall not be applicable to sales by personal representatives of deceased or incompetent persons, receivers or trustees in bankruptcy under court order.

(d) No person shall obtain a franchise for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such certificate or permit was obtained for the purpose of sale.

(e) The Commission shall approve applications for transfer of motor carrier franchises made under this section upon finding that said sale, assignment, pledge, transfer, change of control, lease, merger, or combination is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that service under said franchise has been continuously offered to the public up to the time of filing said application or in lieu thereof that any suspension of service exceeding 30 days has been approved by the Commission as provided in G.S. 62-112(b)(5). (1947, c. 1008, s. 22; 1949, c. 1132, s. 20; 1953, c. 1140, s. 3; 1957, c. 1152, s. 10; 1961, c. 472, ss. 6, 7; 1963, c. 1165, s. 1; 1967, c. 1202.)

CASE NOTES

Showing of Public Need Not Required. — The showing of public need which § 62-262(e)(1) requires of an application for a new authority is not applicable in a transfer proceeding under this section and was not written into it by subsection (a) of this section. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Subsection (e) of this section does not indicate a policy change toward protecting existing certificate holders from lawful competition. Moreover, like the test of "public convenience and necessity" in subsection (a), the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the new certificate test of public need required by § 62-262(e)(1). State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Where the issue of dormancy under § 62-112(c) has been raised, if the Commission finds that the franchise is not dormant, it must then determine if the criteria required by this section for approval of the transfer have been met. If the Commission finds that the franchise is dormant under § 62-112(c), the application for transfer must be denied, because approval would in effect constitute the granting of a new franchise without satisfying the new authority test and other requirements of § 62-262(e). State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

Test for "Public Convenience and Necessity". — The requirement of "public convenience and necessity" referred to in subsection (a) of this section is satisfied by a showing that the authority has been and is being actively applied in satisfaction of the public need which was shown to exist when the authority was originally acquired. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

The criteria "if justified by the public convenience and necessity" in subsection (a) of this section has been interpreted as a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in § 62-262(e). Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights are under no burden to show through shipper witnesses that a demand and need exist. The rationale is that public convenience and necessity was shown to exist when the authority was granted or acquired, and the rebuttable presumption of law is that it continues. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

State Policy Favors Transfers of Actively Operated Motor Freight Carrier Certificates. — The policy of the State, as declared in the Public Utilities Act of 1963, clearly favors

transfers of actively operated motor freight carrier certificates without unreasonable restraint. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970); State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

Transfer to a More Competitive Carrier Not Prohibited. — The possibility that a transfer of authority to a more competitive carrier will adversely affect existing carriers does not make such a transfer contrary to the public interest as a matter of law. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970); State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

Requirement of subsection (e) of this section that the Commission find that the proposed transfer "will not adversely affect the service to the public under said franchise" is satisfied by a determination that the proposed transferee of the franchise is capable of rendering service equal to that of the proposed transferor, and does not prohibit approval where transfer of the franchise to a more competitive hauler would have an adverse effect on existing carriers. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Bond as Condition Precedent to Commission's Approval. — This section requires as a condition precedent to the Commission's approval of the sale of a motor carrier's franchise a bond from the seller conditioned for the payment of (1) taxes, (2) wages due employees of the seller, (3) unremitted C.O.D. collections due seller, (4) "for loss or damage of goods transported or received for transportation," (5) overcharge on property transported, and (6) for interline accounts to other carriers. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963), decided under this section as it stood prior to the 1963 amendment.

Certificate Holder Not Released from Liability for Nonperformance of Duties. — This section does not confer upon the Utilities Commission the power to release the holder of a certificate of convenience and necessity from liability for the nonperformance of public duties incident to the certificate, and the Commission possesses no such power in the absence of a delegation thereof by the legislature. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

A lease of intrastate motor vehicle common carrier operating rights, approved by the Utilities Commission, does not release lessor, the holder of the certificate of convenience and necessity, from liability for nonperformance of franchise duties or torts incident to operation, and a shipper may hold lessor liable for lessee's failure to make prompt remittance of C.O.D. collections as required by § 62-273. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

Duty of Transferee to Render Services Called for. — Approval by the Commission of the transfer of a carrier's certificate of authority implies a duty on the part of the transferee to render the service called for in the certificate, which it must perform in a substantial manner. State ex rel. Utilities Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

Right to Combine Purchased Route Authority and Original Route Authority of Purchasing Carrier. — Where an irregular carrier acquired the certificate of another irregular carrier with the authority of the Utilities Commission, the purchasing carrier had the legal right to combine or "tack" the irregular route authority purchased by it and its original irregular route authority, as there were no conditions or restrictions imposed by statute or any rule or regulation of the Commission in effect at the time of the purchase. State ex rel. Utilities Comm'n v. Forbes Transf. Co., 259 N.C. 688, 131 S.E.2d 452 (1963).

Findings Held to Obviate Application of Subsection (d). — In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings of the Commission, supported by substantial evidence, to the effect that the franchise carrier did not in fact obtain its franchise for the purpose of transferring it to another obviated the application of subsection (d) of this section. State ex rel. Utilities Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967).

Findings Held to Support Conclusion That Transfer of Stock Was Justified. — In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings, supported by evidence, that the franchise carrier was conducting active operations under the franchise and that its ability to render service to the public within the limits of its franchise rights would not be adversely affected by the proposed transfer of its stock supported conclusion that the proposed sale of its stock was justified by the public convenience and necessity within the meaning of this section. State ex rel. Utilities Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967).

Contract to Pay Claims under Section as Surety Contract. — That portion of a contract under which a company obligates itself to pay any shipper or consignee claims for which the assured would be liable by the provision of this section, with stipulation that the assured should reimburse the company for any such

payment, is a surety contract. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

Applied in State ex rel. Utilities Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

§ 62-112. Effective date, suspension and revocation of franchises; dormant motor carrier franchises.

(a) Franchises shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(b) Any franchise may be suspended or revoked, in whole or in part, in the discretion of the Commission, upon application of the holder thereof; or, after notice and hearing, may be suspended or revoked, in whole or in part, upon complaint, or upon the Commission's own initiative, for wilful failure to comply with any provision of this Chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition or limitation of such franchise; provided, however, that any such franchise may be suspended by the Commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(1) For failure to provide and keep in force at all times security, bond, insurance or self-insurance for the protection of the public as required in G.S. 62-268 of this Chapter.

(2) For failure to file and keep on file with the Commission applicable tariffs or schedules of rates as required in this Chapter.

(3) For failure to pay any gross receipts, use or privilege taxes due the State of North Carolina within 30 days after demand in writing from the agency of the State authorized by law to collect the same; provided, that this subdivision shall not apply to instances in which there is a bona fide controversy as to tax liability.

(4) For failure for a period of 60 days after execution to pay any final judgment rendered by a court of competent jurisdiction against any holder or lessee of a franchise for any debt or claim specified in G.S. 62-111(b) and (c).

(5) For failure to begin operations as authorized by the Commission within the time specified by order of the Commission, or for suspension of authorized operations for a period of 30 days without the written consent of the Commission, save in the case of involuntary failure or suspension brought about by compulsion upon the franchise holder or lessee.

(c) The failure of a common carrier or contract carrier of passengers or property by motor vehicles to perform any transportation for compensation under the authority of its certificate or permit for a period of 30 consecutive days shall be prima facie evidence that said franchise is dormant and the public convenience and necessity is no longer served by such common carrier certificate or that the needs of a contract shipper are no longer served by such a contract carrier. Upon finding after notice and hearing that no such service has been performed for a period of 30 days the Commission is authorized to find that the franchise is dormant and to cancel the certificate or permit of such common or contract carrier. The Commission in its discretion may give consideration in such finding to other factors affecting the performance of such service, including seasonal requirements of the passengers or commodities authorized to be transported, the efforts of the carrier to make its services known to the public or to its contract shipper, the equipment and other facilities maintained by the carrier for performance of such service, and the means by which such carrier holds itself out to perform such service. A proceeding may be brought under this section by the Commission on its own

motion or upon the complaint of any shipper or any other carrier. The franchise of a motor carrier may be canceled under the provisions of this section in any proceeding to sell or transfer or otherwise change control of said franchise brought under the provisions of G.S. 62-111, upon finding of dormancy as provided in this section. Any motor carrier who has obtained authority to suspend operations under the provisions of G.S. 62-112(b)(5) and the rules of the Utilities Commission issued thereunder shall not be subject to cancellation of its franchise under this section during the time such suspension of operations is authorized. In determining whether such carrier has made reasonable efforts to perform service under said franchise the Commission may in its discretion give consideration to disabilities of the carrier including death of the owner and physical disabilities. (1947, c. 1008, s. 23; 1949, c. 1132, s. 21; 1963, c. 1165, s. 1; 1967, c. 1201.)

Legal Periodicals. — For a survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

CASE NOTES

Evidence Justifying a Finding of Dormancy. — Under subsection (c) the failure to perform any transportation for compensation under the authority of the franchise for a period of 30 days is prima facie evidence that the franchise is dormant. Such evidence is sufficient to justify but not to compel a finding that the franchise is dormant. State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

Upon a prima facie showing of dormancy under subsection (c) the Commission in its discretion may then consider other factors affecting the performance of such services, the subsection listing factors which may be considered. If the Commission in its discretion considers other factors, it may find that the evidence relating to one or more of these factors rebuts the prima facie evidence of dormancy and that the franchise is not dormant. And if the evidence relating to one or more of these factors, as found by the Commission, is competent, material and substantial, the finding will not be disturbed on appeal under § 62-94(d)(5). State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

Evidence Sufficient to Rebut Dormancy Case. — Evidence that transferor continuously advertised its services, that it was ready, willing and able to haul both exempt and nonexempt commodities under its franchise, and that it charged published tariff rates in hauling both exempt and nonexempt commodities, was competent, material and substantial, and was sufficient to rebut the prima facie evidence of dormancy and to support the consideration by the Commission of one or more of the "other factors" listed in subsection (c). State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

Effect on Transfer of Dormancy Finding. — Where the issue of dormancy under subsection (c) has been raised, if the Commission finds that the franchise is not dormant, it must then determine if the criteria required by § 62-111 for approval of the transfer have been met. If the Commission finds that the franchise is dormant under subsection (c), the application for transfer must be denied, because approval would in effect constitute the granting of a new franchise without satisfying the new authority test and other requirements of § 62-262(e). State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

When the irregular route operating authority portion of applicant's franchise certificate was suspended, any service provided under this part of the certificate naturally was suspended, so that the Commission did not err in concluding that the portion of the franchise certificate providing for irregular route authority was suspended. State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

Applied in Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967); State ex rel. Utilities Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

Cited in State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

§ 62-113. Terms and conditions of franchises.

Each franchise shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, a motor carrier or other public utility is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the privileges granted by the franchise such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of a carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of a carrier or other public utility, the requirements established by the Commission under this Chapter; provided, however, that no terms, conditions, or limitations shall restrict the right of a motor carrier of property only to add to its equipment and facilities over the routes, between the termini, or within the territory specified in the franchises, as the development of the business and the demands of the public shall require. (1947, c. 1008, s. 12; 1949, c. 1132, s. 11; 1963, c. 1165, s. 1.)

CASE NOTES

The Commission need not approve or reject an application as submitted. It may attach to the certificate granted such reasonable terms, conditions and limitations as the public convenience and necessity may require. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Obligations Inherent in Acceptance of Certificate. — Inherent in the acceptance of a certificate and the exercise of the rights and privileges evidenced thereby is the correlative obligation to serve the shipping public faithfully, in accordance with reasonable rules and regulations prescribed by the Utilities Commission and in conformity with the requirements of the statute prescribing duties to be performed by the carrier for the protection of the shipping public. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

§ 62-114. Contract carriers; issuance of permits; terms and conditions.

When the Commission issues a permit to any contract carrier, it shall specify in the permit, or amendment thereto, the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under G.S. 62-261 provided, that the permit shall list the name of all contract parties the carrier is authorized to serve, and no additions or substitutions of contracts shall be made without approval of the Commission, and the Commission may adopt rules and regulations limiting the number of contract parties served by a contract carrier so that contract carriers shall not hold themselves out to serve in the manner of common carriers. (1947, c. 1008, s. 13; 1949, c. 1132, s. 12; 1963, c. 1165, s. 1; 1967, c. 1094, s. 3.)

§ 62-115. Issuance of partnership franchises.

No franchise shall be issued under this Article to two or more persons until such persons have executed a partnership agreement, filed a copy of said agreement with the Commission, and indicated to the Commission, in writing, that they have complied with Article 14 of Chapter 66 relating to doing business under an assumed name. (1947, c. 1008, s. 14; 1949, c. 1132, s. 14; 1961, c. 472, s. 5; 1963, c. 1165, s. 1.)

§ 62-116. Issuance of temporary or emergency authority.

(a) Upon the filing of an application in good faith for a franchise, the Commission may in its discretion, after notice by regular mail to all persons holding franchises authorizing similar services within the same territory and upon a finding that no other adequate existing service is available, pending its final decision on the application, issue to the applicant appropriate temporary authority to operate under such just and reasonable conditions and limitations as the Commission deems necessary or desirable to impose in the public interest; provided, however, that pending such final decision on the application, the applicant shall comply with all the provisions of this Chapter, and with the lawful orders, rules and regulations of the Commission promulgated thereunder, applicable to holders of franchises, and upon failure of an applicant so to do, after reasonable notice from the Commission requiring compliance therewith in the particulars set out in the notice, and after hearing, the application may be dismissed by the Commission without further proceedings, and temporary authority issued to such applicant may be revoked. The authority granted under this section shall not create any presumption nor be considered in the action on the permanent authority application.

(b) Upon its own initiative, or upon written request by any customer or by any representative of a local or State government agency, and after issuance of notice to the owner and operator and after hearing in accordance with G.S. 1A-1, Rule 65(b), the Commission may grant emergency operating authority to any person to furnish water or sewer utility service to meet an emergency to the extent necessary to relieve the emergency; provided, that the Commission shall find from such request, or from its own knowledge, that a real emergency exists and that the relief authorized is immediate, pressing and necessary in the public interest, and that the person so authorized has the necessary ability and is willing to perform the prescribed emergency service. Upon termination of the emergency, the emergency operating authority so granted shall expire upon order of the Commission. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. (1947, c. 1008, s. 10; 1949, c. 1132, s. 9; 1963, c. 1165, s. 1; 1973, c. 1108.)

§ 62-117. Same or similar names prohibited.

No public utility holding or operating under a franchise issued under this Chapter shall adopt or use a name used by any other public utility, or any name so similar to a name of another public utility as to mislead or confuse the public, and the Commission may, upon complaint, or upon its own initiative, in any such case require the public utility to discontinue the use of such name, preference being given to the public utility first adopting and using such name. (1947, c. 1008, s. 15; 1949, c. 1132, s. 15; 1963, c. 1165, s. 1.)

§ 62-118. Abandonment and reduction of service.

(a) Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service. Upon request from any party having an interest in said utility service, the Commission shall hold a public hearing on such petition, and may on its own motion hold a public hearing on such petition. Provided, however, that abandonment or reduction of service of motor carriers shall not be subject to this section, but shall be authorized only under the provisions of G.S. 62-262(k).

(b) If any person or corporation furnishing water or sewer utility service under this Chapter shall abandon such service without the prior consent of the Commission, and the Commission subsequently finds that such abandonment of service causes an emergency to exist, the Commission may, unless the owner or operator of the affected system consents, apply in accordance with G.S. 1A-1, Rule 65, to the resident superior court judge of any judicial district where such person or corporation operates, or to any superior court judge holding court in such judicial district, for an order restricting the lands, facilities and rights-of-way used in furnishing said water or sewer utility service to continued use in furnishing said service during the period of the emergency. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. The court shall have jurisdiction to restrict the lands, facilities, and rights-of-way to continued use in furnishing said water or sewer utility service by appropriate order restraining their being placed to other use, or restraining their being prevented from continued use in furnishing said water or sewer utility service, by any person, corporation, or their representatives. The court may, in its discretion, appoint an emergency operator to assure the continued operation of such water or sewer utility service. The court shall have jurisdiction to require that reasonable compensation be paid to the owner, operator or other party entitled thereto for the use of any lands, facilities, and rights-of-way which are so restricted to continued use for furnishing water or sewer utility service during the period of the emergency, and it may require the emergency operator of said lands, facilities, and rights-of-way to post bond in an amount required by the court. In no event shall such compensation, for each month awarded, exceed the net average monthly income of the utility for the 12-month period immediately preceding the order restricting use.

(c) Whenever the Commission, upon complaint or investigation upon its own motion, finds that the facilities being used to furnish water or sewer utility service are inadequate to such an extent that an emergency (as defined in G.S. 62-118(b) above) exists, and further finds that there is no reasonable probability of the owner or operator of such utility obtaining the capital necessary to improve or replace the facilities from sources other than the customers, the Commission shall have the power, after notice and hearing, to authorize by order that such service be abandoned or reduced to those customers who are unwilling or unable to advance their fair share of the capital necessary for such improvements. The amount of capital to be advanced by each customer shall be subject to approval by the Commission, and shall be advanced under such conditions as will enable each customer to retain a proprietary interest in the system to the extent of the capital so advanced. The remedy prescribed in this subsection is in addition to other remedies prescribed by law. (1933, c. 307, s. 32; 1963, c. 1165, s. 1; 1971, c. 552, s. 1; 1973, c. 1393.)

CASE NOTES

Paramount Right of State to Regulate Public Utilities. — The power of a municipality to grant franchises to public utilities for the use of its streets and to provide service to its citizens must yield to the paramount right of the State to regulate public utilities through the Utilities Commission, even when they are operated within the corporate boundaries of a municipality. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

Utility Owes Duty of Continuous Operation. — While a public utility retains its franchise, it owes to the State and the public the duty of continuous operation. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Consent of Customer or Commission Necessary before Abandonment of Service. — A power company may not abandon service to any customer, subject to the customer's paying his bill, without the consent of the customer or authorization of the Utilities Commission. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

Customer Entitled to Restoration of Service Absent Contrary Order. — Where a power company discontinued its service for nonpayment of charges, the customer, upon payment of the charges, was entitled to restoration of the service where the company did not obtain an order from the Commission. Sweetheart Lake, Inc. v. Carolina Power & Light Co., 211 N.C. 269, 189 S.E. 785 (1937).

Discretionary Power of Commission to Authorize Discontinuance. — The General Assembly intended that the Utilities Commission exercise the power conferred upon it to authorize a discontinuance of an established service in large measure according to its judgment and discretion. State ex rel. Utilities Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

Showing Required for Abandonment. — When a public utility seeks to abandon service, it must establish that the public no longer needs the service which it was created to render, or that there is no reasonable probability of its being able to realize sufficient revenue by the rendition of such service to meet its expenses. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

The doctrine of convenience and necessity is a relative or elastic theory rather than an abstract or absolute rule. The facts in each case must be separately considered, and from those facts it must be determined whether or not public convenience and necessity require a given service to be performed or dispensed with. The convenience and necessity required are those of the public and not of an individual or individuals. State ex rel. Utilities Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

Waste of a utility's manpower or other resources, with no substantial resulting benefit to the public, is not in the public interest and is not required. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

A railroad may not be denied the right to curtail or abandon a service for which there is no substantial public need, even though, upon its entire business, the company is earning a fair rate of return. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Though prosperous, a railroad or other utility company may not be denied the right to effect economies in its operation, so as to increase its earnings, unless it may reasonably be found, upon the evidence before the Commission, that the public convenience and necessity requires the continuation of the service in question. An occasional inconvenience to a shipper, which is trivial in comparison with the saving to the railroad from the elimination of the service, will not suffice to show such public convenience and necessity. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

But It May Be Required to Retain Station Required by Public Convenience and Necessity. — A railroad may be required to keep a station open, with an agent in attendance, if the public convenience and necessity requires such service, even though this can be done only at a loss to the railroad, provided such loss is not so great as to be unreasonable in comparison with the public's benefit from the service. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

And It May Not Substantially Reduce Hours Station Is Open without Commission's Order. — A liberal construction of §§ 62-2, 62-32, 62-131 and 62-247 and this section, so as to effectuate the policy of the State as therein declared, compels the conclusion that when a railroad corporation has established and maintained a freight depot or passenger station pursuant to the order of the Commission, or has established and maintained for a year or more such depot or station on its own initiative, it may not, without first obtaining an order from the Commission authorizing it to do so, substantially reduce the

number of hours per day during which such station shall be kept open and attended by an agent of the railroad for the service of the public. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

But Commission May Not Withhold Approval of Reduction Unreasonably. — When a railroad company applies for an order authorizing it to substantially reduce the number of hours per day during which a depot or station shall be kept open and attended by an agent, the Commission may not withhold its approval unreasonably and arbitrarily. It may deny such permission only after a hearing and only if it finds and concludes, upon competent, material and substantial evidence, in view of the entire record, both that the public convenience and necessity requires the station or depot to be so kept open for a greater portion of the day, and that the railroad, by so doing, will not incur costs out of proportion to any benefit to the public. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

As to power of Commission under former § 62-39 to require transportation and transmission companies to maintain facilities, see State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 233 N.C. 365, 64 S.E.2d 272 (1951); State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 235 N.C. 273, 69 S.E.2d 502 (1952); State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 238 N.C. 701, 78 S.E.2d 780 (1953).

ARTICLE 6A.

Radio Common Carriers.

§ 62-119. Powers of Commission generally; definitions.

The North Carolina Utilities Commission shall exercise over and in relation to radio common carriers the powers conferred by this Article.

(1) The word "Commission" when used in this Article means the North Carolina Utilities Commission.

(2) The word "commissioners" when used in this Article means the commissioners of the North Carolina Utilities Commission.

(3) The term "radio common carriers" when used in this Article includes every corporation, company, association, partnership and person and lessees, trustees, or receivers, appointed by any court whatsoever owning, operating or managing a business of providing or offering a service for hire to the public of one-way or two-way radio or radiotelephone communications whether interconnected with the land line telephone system or not and licensed by the Federal Communications Commission, but not engaged in the business of providing a public land line message telephone service or a public message telegraph service. The terms "telephone or telegraph utilities," "telephone or telegraph company," or a "person operating telegraph or telephone lines" when used in this Chapter, shall not be construed as including radio common carriers. (1969, c. 766; 1973, c. 1274.)

CASE NOTES

Legislative Intent. — By enactment of this Article, the General Assembly has decided that companies or persons providing two-way radio communications for the public perform a service which is within the public interest. It concluded that in this field of service the public is better served by a regulated monopoly than by competing carriers. State ex rel. Utilities Comm'n v. Simpson, 32 N.C. App. 543, 232 S.E.2d 871 (1977), aff'd, 295 N.C. 519, 246 S.E.2d 753 (1978).

The legislature, by enacting this Article, clearly intended to regulate radio common carriers which offered for hire services consisting of radio or radio-telephone communications to the public. State ex rel. Utilities Comm'n v. Simpson, 295 N.C. 519, 246 S.E.2d 753 (1978).

Communication Service Held a Public Utility. — Applicant, a medical doctor, whose communication service consisted of seven two-way radios, three "beeper" radio devices

and one base station, and who was providing service only to 10 other members of the County Medical Society, was engaged in the operation of a public utility within the meaning of § 62-3(23)a6 and subdivision (3) of this section. State ex rel. Utilities Comm'n v. Simpson, 32 N.C. App. 543, 232 S.E.2d 871 (1977), aff'd, 295 N.C. 519, 246 S.E.2d 753 (1978).

Quoted in State ex rel. Utilities Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981).

Cited in State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

§ 62-120. Certificate of convenience and necessity required; exceptions; rules and regulations.

No radio common carrier shall begin, or continue, the construction or operation of any radio system, or any extension thereof, or acquire ownership or control thereof either directly or indirectly without first obtaining from the Public Utilities Commission a certificate that the present or future public convenience and necessity requires or will require such construction, operation or acquisition; provided this Article shall not require, nor shall it be so construed as to require, any such carrier to secure a certificate for an extension within any authorized service area within which such person has heretofore lawfully commenced operations, or for any extension within or to territory already served by such carrier, necessary in the ordinary course of business, or for substitute facilities within or to any authorized service area or territory already served by such carrier, or for any extension into territory contiguous to that already served by such carrier and not receiving similar service from another such carrier when no certificate of convenience and necessity has been issued to or applied for by any other radio common carrier, or for the acquisition and operation of any plant or system heretofore constructed or hereafter constructed under authority of a certificate of convenience and necessity hereafter issued. The commissioners are hereby authorized to prescribe appropriate and reasonable rules and regulations governing the issuance of such certificates. (1969, c. 766.)

§ 62-121. Issuance of certificate for carrier licensed by Federal Communications Commission.

Any person not presently franchised or certificated by the North Carolina Utilities Commission as a radio common carrier but engaged in the operation of any radio common carrier licensed by the Federal Communications Commission on June 11, 1969, shall receive a certificate of convenience and necessity from the North Carolina Utilities Commission authorizing such person to continue the operation of such radio common carrier in the territory professed to be served by such person on June 11, 1969, if, within 30 days after June 11, 1969, such person shall file with the Commission an application for such certificate, including copies of any license or licenses issued by the Federal Communications Commission to such person, showing the area professed to be served by such person. (1969, c. 766.)

§ 62-122. Commission may set and regulate rates.

The Commission shall have the power and authority to set and regulate rates charged to the public by radio common carriers. (1969, c. 766.)

§ 62-123. Granting of certificate for operation in established service area of another carrier.

The Commission shall not grant a certificate for a proposed radio common carrier operation or extension thereof into the established service area which will be in competition with or duplication of any other radio common carrier unless it shall first determine that the existing service is inadequate to meet the reasonable needs of the public and that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonably adequate service. (1969, c. 766.)

§ 62-124. Article not applicable to mobile radio telephone service.

The provisions of this Article relate only to "radio common carriers" as defined herein and are distinguishable from mobile radio telephone service offered by land line telephone or telegraph utilities regulated by the Commission. (1969, c. 766.)

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

§§ 62-125 to 62-129: Reserved for future codification purposes.

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

(a) The Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction. A rate is made, fixed, established or allowed when it becomes effective pursuant to the provisions of this Chapter.

(b) The Commission may make or approve in its discretion special passenger or excursion rates.

(c) The Commission may make, require or approve, after public hearing, for intrastate shipments what are known as milling-in-transit, processing-in-transit, or warehousing-in-transit rates on grain, lumber to be dressed, cotton, peanuts, tobacco, or such other commodities as the Commission may designate.

(d) The Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility.

(e) In all cases where the Commission requires or orders a public utility to refund moneys to its customers which were advanced by or overcollected from its customers, the Commission shall require or order the utility to add to said refund an amount of interest at such rate as the Commission may determine to be just and reasonable; provided, however, that such rate of interest applicable to said refund shall not exceed ten percent (10%) per annum. (1899, c. 164, ss. 2, 7, 14; 1903, c. 683; Rev., ss. 1096, 1099, 1106; 1907, c. 469, s. 4;

Ex. Sess. 1908, c. 144, s. 1; 1913, c. 127, s. 2; 1917, c. 194; C.S., ss. 1066, 1071, 3489; Ex. Sess. 1920, c. 51, s. 1; 1925, c. 37; 1929, cc. 82, 91; 1933, c. 134, s. 8; 1941, c. 97; 1953, c. 170; 1963, c. 1165, s. 1; 1981, c. 461, s. 1.)

Cross References. — As to the regulation of rates for ferries connecting links of the State highway system, see §§ 136-84 and 136-85.

Effect of Amendments. — The 1981 amendment added subsection (e).

Legal Periodicals. — For article on electric rates, see 12 N.C.L. Rev. 289.

CASE NOTES

Purpose of Regulation. — With public utilities the State has undertaken to protect the public from the customary consequences of monopoly, by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. To prevent such result, the legislature has conferred upon the Utilities Commission the power to police the operations of the utility company, so as to require it to render service of good quality at charges which are reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Article Not in Conflict with Chapter 75. — The provisions of this Article as to rate regulation are not in conflict with Chapter 75, Monopolies and Trusts. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Rate Making within Police Power of State. — The authority conferred upon the Commission to establish reasonable and just rates for charges by a public service corporation for furnishing electrical power to its customers comes within the police powers of the State, and contracts previously made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a safe return upon its investments, having proper regard to the public interest that plants of this character should be properly run and maintained. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

The Commission is given general supervision over railways, street railways, and like companies of the State, and is empowered to fix such notes, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sums required to meet operating expenses, and other specific matters pertinent to such an inquiry; these are police powers, delegated to the Commission, and governmental so far as they extend. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

Power to Establish Rates Delegated to Commission. — The General Assembly has delegated to the Commission, and not to the courts, the duty and power to establish rates for public utilities. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

This section, in general terms, directs the Commission to establish just and reasonable rates for all utilities. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

The Commission is given broad and general powers to make rates for freight and passenger service. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

But authority of the Utilities Commission to set different rates is not unbridled. There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Duty to Fix Just and Reasonable Rates. — When the Commission is called upon by either a corporation or those to whom the services are rendered under its franchise to exercise its rate fixing power and authority, it is its duty to fix and establish just and reasonable rates to be charged for such services. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

Classification Must Not Be Arbitrary. — The mere fact of classification in rate regulating is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground, something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L. Ed. 666 (1897); Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907).

Where substantial differences in services or conditions exist, unreasonable application of the same rates may be discriminatory and thus improper. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such discrimination. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Rates Set by Commission Supersede Contrary Private Contract Provisions. — Rates for public utility service fixed by an order of the Commission, otherwise lawful, supersede contrary provisions in private contracts concerning rates for such service. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The rates of transportation allowed carriers of freight are established by the Interstate Commerce Commission and the State Corporation Commission (now the Utilities Commission), and may not be affected by any agreement to the contrary between the carriers or their agents or employees and the shipper; notwithstanding any such agreement, the carrier may demand and enforce the rates established by law. Southern Ry. v. Latham, 176 N.C. 417, 97 S.E. 234 (1918).

A public service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the Commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919); City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

And Enforcement of Such Rates Does Not Impair Obligations of Contract. — The enforcement of an order of the Commission superseding rates set by contract does not constitute an impairment of the obligation of such contract, since contracts of public utilities, fixing rates for service, are subject to the police power of the State. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The consumer has no vested right in existing rates and the Commission may change the rates as circumstances dictate. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

The Commission has plenary authority to modify an application by a utility when its modification is based on competent evidence, findings and conclusions showing it to be just and reasonable. The Commission is not limited by the utility's application in the entry of its final order based on evidence adduced at the hearings. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 361, 230 S.E.2d 671 (1976).

And to Correct Rate Schedules. — In the unlikely event that other costs of the utility should decline, the Commission, either on its own motion or that of another interested party, has plenary authority to intervene and make corrections in the utility's rate schedules including, if circumstances should require it, the abrogation of the fuel clause. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

North Carolina rates may not be structured by external system usage. Such action is outside the intended scope of the Commission's authority under § 62-2. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Rates Must Be Fixed Prospectively. — The Utilities Commission exceeded its statutory authority in requiring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to subsection (a) of this section, and rates must be fixed prospectively from their effective date. Section 62-136(a) provides that the Commission shall determine rates to be thereafter observed and in force. The Commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979), cert. denied, 299 N.C. 124, 261 S.E.2d 926 (1980).

An annual "true up" of the curtailment tracking rate of a natural gas company was not a change in the general fixed rate, since the curtailment tracking rate merely creates an estimated rate based on projected gas availability. Therefore, the "true up" of the CTR is a correction of an estimated rate, and does not constitute retroactive general rate making. State ex rel. Utilities Comm'n v. CF Indus., Inc., 299 N.C. 504, 263 S.E.2d 559 (1980).

Fuel adjustment clause formula used by power company qualified as a valid part of a rate or rate schedule within the meaning of this section. State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975), aff'd, 291 N.C. 361, 230 S.E.2d 671 (1976).

Testing Reasonableness of Affiliated Company Expenses. — The Commission has the authority and the right at all times to test the reasonableness of expenses paid to affiliated companies (or allocated by them) and to cause the petitioning utility to offer affirma-

tive evidence of their reasonableness or risk their disapproval. The Commission has the obligation to test the reasonableness of such expenses whenever they are properly challenged. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

The Commission must always determine that expenses paid to affiliated companies are reasonable, and the burden of persuasion on that issue always rests with the utility. The Commission, of course, has the right to test the reasonableness of such expenses. If there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Although it always has the authority to do so, in the absence of contradiction or challenge by affirmative evidence offered by any party to the proceeding, the Commission has no affirmative duty to make further inquiry or investigation into the reasonableness of charges or fees paid to affiliated companies. While affiliation calls for close scrutiny, affiliation alone does not impose an additional burden of proof or require the presentation of additional evidence of reasonableness. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 707 (1982).

Reasonableness of affiliated company expenses may be tested on the basis of (1) the cost of the same services on the open market, (2) the cost similar utilities pay to their service companies, or (3) the reasonableness of the expenses incurred by the affiliated company in generating the service. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Power to Ascertain Corporation in Control. — The Commission has the incidental power (subject to the right of appeal) to ascertain what particular corporation is in the control of or operates any telegraph line in this State, in order that it may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations. State ex rel. Railroad Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897).

Fees and Charges Made by Municipality for Sewerage Connections. — The Utilities Commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949).

The Commission has authority to fix city bus fares. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956). See § 62-260.

An intracity carrier, holding a certificate of exemption issued by the Commission and a franchise from the city or town in which it operates, is exempt from control of the Commission except as to rates and controversies with respect to extensions and services. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

When Fares of Street Railway May Be Raised. — A public service street railway company, operating under a city charter and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized by the Commission to raise charges to its passengers when, in the opinion of the Commission, such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

Joint Rate between Lumber Railroad and Connecting Carrier. — When a lumber railroad is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. Corporation Comm'n ex rel. Raleigh Granite Co. v. Atlantic Coast Line R.R., 187 N.C. 424, 121 S.E. 767 (1924).

Electric Power Rates Coextensive with State's Jurisdiction. — When the Commission has finally established, under the provisions of the statute, rates to be charged by a public service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Sale of Electricity Generated in Another State. — While the generation of electricity in another state, when transported to purchasers in this State, may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Commission to establish a just and reasonable rate of charge in conformity with the statutory powers, there being no interfering act of Congress relating to the subject. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Telephone Company Must Not Discriminate. — A telephone company is subject to public regulation and reasonable control, and is

required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions. Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912). See also, Godwin v. Telephone Co., 136 N.C. 258, 48 S.E. 636 (1904); Walls v. Strickland, 174 N.C. 298, 93 S.E. 857 (1917).

Telegram Transmitted over Lines of Another Company. — Where a telegraph company had a continuous line between two points in this State, the fact that, in transmitting a message, it sent the message over the lines of another company, did not excuse its violation of the rate prescribed by the Railroad Commission (now Utilities Commission). Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897).

Telegraphic Messages Traversing Another State. — Telegraphic messages transmitted by a company from and to points in this State, although traversing another state in the route, are subject to the tariff regulations of the Railroad Commission (now Utilities Commission). State ex rel. Railroad Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897).

Authority to Allow Use of Availability Charge in Rate Schedule for Recreational Subdivision. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Mandamus to Remedy Discrimination. — Where a public service corporation has discriminated among its patrons in its charges for electricity, mandamus will lie to compel it to charge a uniform or undiscriminating rate, for the question does not require the courts to fix a rate or pass upon its reasonableness. North Carolina Pub. Serv. Co. v. Southern Power Co., 179 N.C. 18, 101 S.E. 593 (1919), rehearing dismissed, 179 N.C. 330, 102 S.E. 625 (1920).

Quoted in State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Stated in State ex rel. Utilities Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980); State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981).

Cited in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); State ex rel. North Carolina Util. Comm'n v. Transylvania Util. Co., 30 N.C. App. 336, 226 S.E.2d 824 (1976); State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-131. Rates must be just and reasonable; service efficient.

(a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable.

(b) Every public utility shall furnish adequate, efficient and reasonable service. (1933, c. 307, ss. 2, 3; 1963, c. 1165, s. 1.)

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Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in § 62-133. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

The word "rate" used in the Public Utilities Act refers not only to the monetary amount which each customer must ultimately pay, but also to the published method or schedule by which that amount is figured. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The term "public utility" in subsection (b) includes a railroad corporation. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Duty and Authority of Commission. — The statutes confer upon the Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and rea-

sonable rates therefor. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

There is nothing in the applicable provisions of the Public Utilities Act which prohibits the use of a fossil fuel adjustment clause in the context of the factual circumstances which the utility and the Commission face in a given case. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Testing Reasonableness of Affiliated Company Expenses. — The Commission has the authority and the right at all times to test the reasonableness of expenses paid to affiliated companies (or allocated by them) and to cause the petitioning utility to offer affirmative evidence of their reasonableness or risk their disapproval. The Commission has the obligation to test the reasonablensss of such expenses whenever they are properly challenged. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

The Commission must always determine that expenses paid to affiliated companies are reasonable and the burden of persuasion on that issue always rests with the utility. The Commission, of course, has the right to test the reasonableness of such expenses. If there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Although it always has the authority to do so, in the absence of contradiction or challenge by affirmative evidence offered by any party to the proceeding, the Commission has no affirmative duty to make further inquiry or investigation into the reasonableness of charges or fees paid to affiliated companies. While affiliation calls for close scrutiny, affiliation alone does not impose an additional burden of proof or require the presentation of additional evidence of reasonableness. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Reasonableness of affiliated company expenses may be tested on the basis of (1) the cost of the same services on the open market, (2) the cost similar utilities pay to their service companies, or (3) the reasonableness of the expenses incurred by the affiliated company in generating the service. State ex rel. Utilities Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Duty of Utility to Render Adequate Service. — Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Utility Must Accept Responsibility. — A public utility, which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept the responsibility for its resulting inability to render adequate service to its patrons. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

Quality of Service to be Considered in Fixing Rates. — It was not the intent of the legislature to require the Commission to fix rates without any regard to the quality of the service rendered by the utility and thus to assure a "complacent monopoly" a fair return upon the fair value of its properties while it persists in rendering mediocre service and turns a deaf ear both to customer complaints and to Commission orders for improvement. On the contrary, the quality of the service rendered is, necessarily, a factor to be considered in fixing the "just and reasonable" rate therefor. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Findings Showing Effect of Inadequacy of Service on Decision Fixing Rates. — If the Commission found the quality of a utility's service to fall short of the requirement in this section that it be adequate, efficient and reasonable, then the Commission should make specific findings showing the effect of any such inadequacy upon its decision under § 62-133 fixing rates which are fair both to the public utility and to the consumer. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Cited in State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976); State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981); State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

§ 62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.

The rates established under this Chapter by the Commission shall be deemed just and reasonable, and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable. Provided, however, that upon petition filed by any interested person, and a hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission may enter an order awarding such petitioner and all other persons in the same class a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the Commission to be just and reasonable, nondiscriminatory and nonpreferential, to the extent that such rates or charges were collected within two years prior to the filing of such petition. (1913, c. 127, s. 3; C.S., s. 1067; 1929, cc. 241, 342; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Legal Periodicals. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

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There is in this Article a clear statutory dichotomy between rates which are made, fixed or established by the Commission on the one hand and those which are simply permitted or allowed to go into effect at the instance of the utility on the other. Rates which are established by the Commission, that is after a full hearing, findings, conclusion and a formal order, "shall be deemed just and reasonable, and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable." Rates which the Commission simply allows to go into effect by any of the methods described in §§ 62-134 and 62-135 are subject to being challenged by interested parties or the Commission itself and after a "hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission may" order refund pursuant to the provisions of this section. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Rates Fixed by Commission Are Prima Facie Valid, Just and Reasonable. — The rates fixed by the Commission are not only prima facie evidence of their validity, but also prima facie evidence that they are just and reasonable. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Until Modified on Appeal or by Commission. — Rates or charges fixed by an order of the Commission are to be considered just and reasonable unless and until they shall be changed or modified on appeal or by the further action of the Commission itself. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919). See also State ex rel. North Carolina Corp. Comm'n v. Seaboard Air Line Ry., 173 N.C. 413, 92 S.E. 150 (1917).

Rates Other Than Those Fixed Deemed Unjust. — The rates approved by the Commission shall be deemed to be just and reasonable, and any different rate shall be deemed unjust and unreasonable. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

The Commission is authorized by statute to fix just and reasonable rates or charges, and when they are so fixed, other or lower rates are to be deemed as unjust and unreasonable. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

One claiming that rates or charges established by the Commission are unreasonable or excessive has the burden of proving his contention. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925); State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

A refund pursuant to this section may be ordered even absent a utility's agreement to provide one. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Attorney General Not Prejudiced Where Refund Could Be Sought. — The Attorney General was not prejudiced by the action of the Commission in allowing an exploration tracking rate increase to go into effect without a hearing since a refund could be sought under this section. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Where Utilities Commission after due notice and hearing, established rates for intrastate shipments of pulpwood which it found to be just and reasonable, and thereafter upon petition of defendant and other carriers for reconsideration, the rate so established was ordered "to remain in full force and effect," these rates so established would be deemed the only just and reasonable rates for this commodity over defendant's lines, rendering it unlawful for defendant to charge a greater amount. State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

In a proceeding to recover excessive freight charges collected because of an error in the tariff distance table filed with the Utilities Commission, the charges being in conformity with the tariff schedule for a greater distance than the correct distance between the termini, evidence offered by the carriers as to whether the higher rate was fair and reasonable for the shorter distance was properly excluded, since the carriers should not be permitted to change the rate by reason of a mistake in their tariff distance table, and petitioners were entitled to recover that part of the excess charged which was not barred by the limitation contained in the statute. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

Applied in State ex rel. Utilities Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Stated in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

§ 62-133. How rates fixed.

(a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utility and to the consumer.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection may be included, to the extent the Commission considers such inclusion in the public interest and necessary to the financial stability of the utility in question, subject to the provisions of subparagraph (b)(5) of this section.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to complete in the market for capital funds on terms which are

reasonable and which are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate based upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in progress not included in the utility's property upon which the rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivision (1).

(c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding.

(f) Unless otherwise ordered by the Commission subsections (b), (c), and (d) shall not apply to rate changes of utilities engaged in the distribution of natural gas bought at wholesale by the utility for distribution to consumers to the extent such rate changes are occasioned by changes in the wholesale rate of such natural gas. The Commission may permit such rate changes to become effective simultaneously with the effective date of the change in the wholesale cost of such natural gas, or at such other time as the Commission may direct. This subsection shall not prohibit the Commission from investigating and changing unreasonable rates in accordance with the provisions of this Chapter. The public utility shall give such notice, which may include notice by publication, of the changes to interested parties as the Commission in its discretion may direct.

(g) Reserved.

(h) The Commission is not authorized to entertain applications filed on behalf of intrastate rail carriers to fix rates for a single commodity or to fix rates for groups of commodities which constitute less than a general rate increase. (1899, c. 164, s. 2, subsec. 1; Rev., s. 1104; C.S., s. 1068; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971, c. 1092; 1973, c. 956, s. 1; c. 1041, s. 1; 1975, c. 184, s. 2; 1977, c. 691, ss. 2, 3; 1981, c. 476; 1981 (Reg. Sess., 1982), c. 1197, s. 6.)

Cross References. — As to small water and sewer utility rates, see § 62-133.1.

Effect of Amendments. — The 1981 amendment added subsection (h).

The 1981 (Reg. Sess., 1982) amendment substituted "may be included, to the extent the Commission consider such inclusion in the public interest and necessary to the financial stability of the utility in question," for "shall be included" in the second sentence of subdivision (b)(1).

Session Laws 1981 (Reg. Sess., 1982), c. 1197, s. 5, provides: "The North Carolina Utility Review Committee shall, upon public notice and hearing with all interested parties allowed to participate and testify, investigate the present and future need and justification for inclusion in the rate base of public utilities construction work in progress, as now provided for in G.S. 62-133(b)(1), and report its findings and recommendations to the Governor and the General Assembly in the 1983 Session."

Legal Periodicals. — For survey of 1972 case law on public utility rate regulation, see 51 N.C.L. Rev. 1140 (1973).

For survey of 1974 case law on public utilities, see 53 N.C.L. Rev. 1083 (1975).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1977 law on public utility rate regulation, see 56 N.C.L. Rev. 847 (1978).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

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I. IN GENERAL.

Constitutionality. — The power to grant franchises to public service corporations and to fix their rates rests in the General Assembly, which power the General Assembly may delegate to an administrative agency, provided the General Assembly prescribes rules and standards to guide such agency in the exercise of the delegated authority. The statute delegating to the Utilities Commission this authority is constitutional in fixing adequate rules and standards. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

This section merely codified the former statute as interpreted by Supreme Court. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in this section. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The primary purpose of this Chapter is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment, but is to assure the public of adequate service at a reasonable charge. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

The provisions of this Chapter designed to assure the utility of adequate revenues are in the nature of corollaries to the basic proposition that the public is entitled to adequate service at reasonable rates and safeguards against administrative action which would violate constitutional protections by confiscation of the utility's property. Without such assurance, the owners of capital would not invest in the utility's bonds or stock and the utility could not provide the plant necessary for the rendering of adequate service. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

By adopting this section, the legislature intended to establish an overall scheme for fixing rates, and this section must be interpreted in its entirety in order to comply with the legislative intent. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Purpose of Subsection (f). — The purpose of subsection (f) of this section is to allow the retailer to automatically pass on to the consumer changes in the wholesale cost of natural gas, over which neither the retailer nor the Utilities Commission has control, whenever the natural gas suppliers' price is revised upward or downward, thus avoiding costly and protracted rate proceedings. State ex rel. Utilities Comm'n v. CF Indus., Inc., 39 N.C. App. 477, 250 S.E.2d 716, cert. denied, 297 N.C. 180, 254 S.E.2d 39 (1979).

Subdivision (b)(3) shall be read in conjunction with subsection (c) of this section, as must subdivision (b)(1). State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Applied in City of High Point v. Duke Power Co., 34 F. Supp. 339 (M.D.N.C. 1940); State ex rel. Utilities Comm'n v. Martel Mills Corp., 232 N.C. 690, 62 S.E.2d 80 (1950); State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utilities Comm'n v. VEPCO, 21 N.C. App. 45, 203 S.E.2d 418 (1974); State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974); State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975); State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); State ex rel. Utilities Comm'n v. Duke Power Co., 51 N.C. App. 698, 277 S.E.2d 444 (1981).

Quoted in State ex rel. North Carolina Util. Comm'n v. Transylvania Util. Co., 30 N.C. App. 336, 226 S.E.2d 824 (1976); State ex rel. Utilities Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981).

Stated in State ex rel. Utilities Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980).

Cited in State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923); State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944); State ex rel. Utilities Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959); State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

II. POWERS AND DUTIES OF UTILITIES COMMISSION, GENERALLY.

Commission Exercises Function of Legislative Branch of Government. — In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government. It may not, therefore, exceed the limitations imposed upon the legislature by the State and federal Constitutions. The Commission, however, does not have the full power of the legislature, but only that portion conferred upon it in this Chapter. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

And Must Comply with Requirements of This Chapter. — In fixing the rates to be charged by a public utility for its service, the Commission must comply with the requirements of this Chapter. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The Utilities Commission acted in excess of its statutory authority when it permitted the North Carolina Natural Gas Corporation to pass on additional costs resulting solely from an increase in storage capacity without complying with the statutory procedures required for a general rate case. State ex rel. Utilities Comm'n v. CF Indus., Inc., 39 N.C. App. 477, 250 S.E.2d 716, cert. denied, 297 N.C. 180, 254 S.E.2d 39 (1979).

This section is a part of the rate-making power of the Commission. State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98, cert. denied, 284 N.C. 124, 199 S.E.2d 663 (1973).

And Controls Commission in Establishing Rates. — In establishing rates, the Commission is governed and controlled by the provisions of this section. Southern Ry. v. McNeill, 155 F. 756 (E.D.N.C. 1907).

The legislative mandate is that the Commission shall fix rates which will enable a well managed utility to earn a "fair rate of return" on the "fair value" if its properties are "used and useful" in rendering its service. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

The responsibility for fixing rates rests with the Utilities Commission and not the Supreme Court. However, there is nothing in the statutes that requires the Commission to accept the rate or rates proposed, or to reject them altogether. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

It is the prerogative of the Commission, and not the Court of Appeals, to decide the question as to what constitutes fair and reasonable rates that may be charged by a utility, as the Commission is an agency composed of men of special knowledge, observation, and experience in their field, and has at hand a staff trained for this type of work, and the law imposes upon it, not the Court of Appeals, the duty to fix the rates. State ex rel. Utilities Comm'n v. Morgan, 1 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The statutes confer upon the Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and reasonable rates therefor. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

It is the Commission's duty to sift through the evidence and draw a conclusion therefrom as to a fair and reasonable rate of return. State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Thus, neither the Supreme Court nor the Court of Appeals is authorized to fix rates for a public utility. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Power and Duty to Compel Adequate Service and Fix Rates. — This Chapter confers upon the Utilities Commission the power and duty to compel a public utility to render adequate service, and also confers upon the Commission the duty to fix reasonable rates for the rendering of adequate service. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Commission to Fix Rates As Low as Constitutionally Possible. — The origin of this section supports the inference that the legislature intended for the Commission to fix rates as low as may be reasonably consistent with the requirements of the due process clause of the Fourteenth Amendment to the Constitution of the United States, those of N.C. Const., Art. I, § 19, being the same in this respect. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Specific and unambiguous factual findings by the Commission are necessary to enable a reviewing court to determine whether the duty imposed by § 62-131 has been performed. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Findings as to Original and Replacement Cost Less Depreciation. — Where evidence of original cost, less depreciation, and of replacement cost, less depreciation, is introduced, the Commission must make, and set forth in its order, its findings as to both of these evidential facts, along with any "other facts" considered by it. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972). See also, State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Exercise of Subjective Judgment by Commission. — Under this section the weight to be given the respective indications of fair value, the determination of the total amount reasonably necessary for working capital and the determination of what constitutes a fair rate of return requires exercise of a subjective judgment by the Commission. State ex rel. Utilities Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The Commission is not required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness. State ex rel. Utilities Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The findings of the Commission, when supported by competent evidence, are conclusive. State ex rel. Utilities Comm'n v. Duke Power Co., 21 N.C. App. 89, 203 S.E.2d 404, rev'd on other grounds, 285 N.C. 377, 206 S.E.2d 269 (1974).

If there is competent evidence to support the findings and conclusions of the Commission, they will be upheld by the reviewing court. State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

And May Not Be Disturbed Merely Because Court Might Have Concluded Differently. — The Commission's findings, supported by substantial evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence. State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of these factors in the fixing of reasonable rates, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission. State ex rel. Utilities Comm'n v. VEPCO, 385 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utilities Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The Commission's determination, reached pursuant to the mandate of this section and to the statutory procedural requirements, may not be reversed by the Court of Appeals or by the Supreme Court merely because it would have reached a different conclusion upon the evidence, but it is otherwise if it does not appear from the order of the Commission that the statutory mandates have been obeyed. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Under this section the determination of what constitutes a fair rate of return requires the exercise of a subjective judgment by the Commission and its decision may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

When a telephone company offered substantial evidence to show that there was no significant excess plant margin, this conflict of evidence presented a question of fact upon which the finding of the Commission was conclusive and could not be disturbed by the reviewing court, even though the court might have reached a different conclusion thereon. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Commission's Decision Will Be Upheld Unless Assailable Under § 62-94(b). — The decision of the Commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in § 62-94(b). State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Commission May Determine Nature of Proceeding. — It is within the province of the Commission to determine whether a hearing is a general rate case or a complaint proceeding. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

And Such Determination Must Be Made as to Every Hearing. — It is necessary as a matter of procedure that a determination as to whether a hearing is a general rate case or a complaint proceeding be made in every hearing involving the establishment, modification or revocation of rates. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Determination of Commission as to Nature of Case Not Disturbed Absent Showing of Prejudice. — The findings of the Commission on whether a hearing is a general rate case or a complaint proceeding will not be disturbed in any case in the absence of a clear showing that the right of the parties have been prejudiced. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

As to implementation of 30 day notice requirement by rule requiring written notification, see State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

III. FIXING OF RATES, GENERALLY.

The word "rate," as used in the Public Utilities Act, refers not only to the monetary amount which each customer must ultimately pay, but also to the published method or schedule by which that amount is figured. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

"General Rate" Case. — Where the whole or a substanital portion of the rate structure of a public utility is being initially established or is under review, and where the required procedure under this section is being carried out, the hearing before the Commission to establish or revise the rates is referred to as a "general rate." State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

"Complaint Proceeding." — A hearing which involves a single rate or a small part of the rate structure is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure and may be resolved without involving the procedure outlined in this section, and does not justify the expense and loss of time involved in such procedure. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Fuel Clause Subject to This Chapter. — It is the fuel clause, a formula for figuring certain monetary additions or subtractions to a customer's bill, not the ultimate amount so figured, which constitutes that part of the utility's published schedule subject to the provi-

sions of the Public Utilities Act. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Section Applicable in Fixing or Revising Rate Schedules and Rate Classifications. — In fixing rate schedules and rate classifications, or in revising said rates and classifications or a substantial part thereof, the procedure indicated by this section must be observed. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Section May Not Apply Where Only One or a Few Rates Are Involved. — This section may not apply where a public utility has many rate schedules applying to many different classes of service customers, and only one rate or a few rates are involved in a petition for amendment, modification or recission. Ordinarily it is not required that the utility's property be valued and that the provisions of this section be observed in such case. State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959); State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Section prescribes formula which Commission is required to follow in fixing rates for service to be charged by a public utility. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Formula Under Section. — The formula of the mandate of this section is: A x B = C (fair rate of return multiplied by the fair value of the properties equals the fair return in dollars). State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Steps Which Commission Must Take Prescribed by Section. — In order to assure the utility of earnings sufficient to attract capital and also in order to limit its charges for service to levels sufficient for that purpose, the legislature has prescribed in this section the steps which the Commission must take in fixing such charges. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Rates to Be Based on Domestic Business. — The reasonableness of the rates to be fixed by the State must be decided with reference exclusively to what is just and reasonable in respect of domestic business. Hence, when a company operates in two or more states, the operations are treated as separate businesses for the purpose of rate regulation. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Utilities Commission is empowered and directed to make reasonable and just rates as applied to the distribution and sale of power in this State and not otherwise, and such power cannot be directly controlled or weakened by conditions existent in other states, either from the action or nonaction of official bodies there or from dealings between private parties. To hold otherwise would, in its practical operation, be to withdraw or nullify the powers that this section professes to confer. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

But Net Return Earned in Other States May Be Considered. — In fixing intrastate rates for a telephone company operating in serveral states, the Utilities Commission should take into consideration the net return such utility earns on its properties in such other states to the extent of not requiring customers in North Carolina, in order to maintain the utility's financial condition, to pay a substantially higher rate than permitted in other states. A substantial differential might be considered some evidence that the rates charged in this State are unreasonable and unjust to the local public. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Rate Increase Conforming with Interstate Rates Allowed by Interstate Commerce Commission. — An order of the Utilities Commission increasing intrastate rates of State carriers so that such rates would conform with an increase in interstate rates allowed by the Interstate Commerce Commission was invalid where such order was unsupported by proof of the fair value of the properties of the carriers used and useful in conducting their intrastate business, separate and apart from their interstate business. State ex rel. Utilities Comm'n v. State, 243 N.C. 12, 89 S.E.2d 727 (1955).

Objective of Rate Making. — The fixing of rates for service which will enable the utility to do the things enumerated in subsection (b)(4), and no more, is the ultimate objective of rate making. At best, the result of the complex rate making procedure is an approximation of this objective. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Rate making is, of necessity, a matter of estimate and prediction, since rates are set for the future. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The ultimate question in determining appropriate rates is: What is a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future? The determination of this question is for the Commission, in accordance with the direction of this section. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C.

App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

A rate must not only be fair, just and reasonable to the consumer, but fair, just and reasonable to the utility. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

What is a "just and reasonable" rate which will produce a fair return on the investment depends on: (1) the value of the investment, usually referred to in rate-making cases as the rate base, which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined rate base. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954); State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959); State ex rel. North Carolina Util. Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961); State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965); State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

The Commission, in fixing a reasonable and just rate of charges for public service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

In finding essential, ultimate facts, the Commission must consider all factors particularized in the statute and "all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs." It must then arrive at its own independent conclusion, without reference to any specific formula, as to: (1) what constitutes a fair value, for rate-making purposes, of applicant's investment used in rendering intrastate service, the rate base, and; (2) what rate of return on the predetermined rate base will constitute a rate that is just and reasonable both to the applicant and to the public. While both original cost and replacement value are to be considered, neither constitutes a proper rate base. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954); State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959); State ex rel. North Carolina Util. Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961); State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

Calculation of Requisite Additional Gross Revenue When Essential Facts Established. — When essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Commission must be given broad discretion with respect to the extent which it will hear evidence relating to a particular schedule when the basic question for consideration is: Does the utility need an increase in rates to function effectively or, conversely, can the utility continue to operate, provide efficient service to its customers, and make a fair return to the owners of its properties, or may it so function after a reduction in rates? State ex rel. Utilities Comm'n v. County of Harnett, 30 N.C. App. 24, 226 S.E.2d 515 (1976).

Rates charged by one telephone company do not, per se, constitute a standard by which to determine the reasonableness of those of another company, even when the territories served and operating conditions are similar. The probative value of such evidence is slight at best, but where there is evidence of substantial similarity of conditions, evidence of comparative rates may have some relevancy for use as a guide to the limits of the zone of reasonableness. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Subsections (b)(2), (b)(3) and (c) contemplate that the Commission will consider "probable future revenues and expenses" in setting rates for the future. Obviously, conditions do not remain static. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The Commission can take into account the future effect of inflation by fixing rates slightly in excess of that which is necessary to meet the test of reasonableness. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Efficiency of Operation. — Heat rate and capacity factor furnish convenient measuring devices by which to evaluate the overall efficiency with which a particular electrical utility system is operated, and the Utilities Commission should take into account the efficiency of a company's operation in fixing its rates in a general rate case as provided in this section, although plant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by § 62-134(e) (now repealed). State ex rel. Utilities Comm'n v. Virginia Elec. & Power Co., 48 N.C. App. 453, 269 S.E.2d 657, cert. denied,

301 N.C. 531, 273 S.E.2d 462 (1980).

For present provisions as to increments based upon increase in cost of fuel, see § 62-133.2.

Anticipated Tax Expense. — Rates for use of a utility's service are set at a level which will enable the company to pay, among other items, its anticipated tax expense. If, by virtue of some change in the tax law, it develops that the company did not incur the anitcipated expense, for the payment of which it collected revenues in prior months, its rates for present and future service may not be cut, on that account, below what it otherwise would be entitled to charge for the present or future service. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Apportionment of Increases in Retail Natural Gas Rates. — Any increase in the retail rates attributable to charges by a wholesaler of natural gas for storage capacity must be approptioned in a general rate case pursuant to subsections (a) through (c) of this section. State ex rel. Utilities Comm'n v. CF Indus., Inc., 39 N.C. App. 477, 250 S.E.2d 716, cert. denied, 297 N.C. 180, 254 S.E.2d 39 (1979).

There is nothing in the applicable provisions of the Public Utilities Act which prohibits the use of a fossil fuel adjustment clause in the context of the factual circumstances which the utility and the Commission face in a given case. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

For a discussion of the operation of and the authorities supporting the use of fuel adjustment clauses, see State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

In considering whether fuel adjustment clause would ever operate to increase utility's rate of return, the Commission was entitled to act on the normal assumption in rate cases generally, there being no evidence to the contrary, that other costs of the utility would not decline but would probably increase or at least remain fairly constant. In the unlikely event that other costs of the utility should decline, the Commission, either on its own motion or that of another interested party, has plenary authority to intervene and make corrections in the utility's rate schedules including, if circumstances should require it, the abrogation of the fuel clause. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

A schedule of rates fixed by the Commission under the standard prescribed by the legislature is binding upon the interested parties and the courts, provided it is within the bounds of reason. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

IV. RATE BASE.

A. In General.

The general doctrine is that the rate base is made up of values used in furnishing the service. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

There Is But One Rate Base. — It is incorrect to speak of "the original cost rate base" and the "trended original cost rate base." There is but one rate base, namely, the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, which value the Commission must determine as of the end of the test period. The original cost of the properties is simply evidence to be considered in making this determination. The replacement cost, whether determined by use of trended cost indices or otherwise, is also but evidence of the fair value of the properties. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

It is the duty of the Commission to arrive at an independent rate base upon consideration of all factors, including cost, replacement and trended cost, and it is its duty to exercise its independent judgment in doing so. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

What Property to Be Considered. — This section clearly contemplates that only that property of the utility which is devoted to the public use for which the utility has been granted a franchise is to be considered, both in arriving at the fair value rate base and in projecting probable future revenues and expenses. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

In a proceeding by a power company for an increase in the cash fares on its city bus system, the Commission was correct in considering the value only of the properties used and useful in connection with the operation of the bus system, without regard to the value of the electric properties of the power company. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

Question Whether Property Is "Used and Useful" Is One of Fact. — The question of whether specific property is presently "used and useful" in rendering service is one of fact, to be determined by the Commission upon competent and substantial evidence. State ex rel.

Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Property Not Presently Used to Its Full Capacity. — The fact that a transmission line, a building or a telephone company's central office equipment is not presently used to its full capacity does not necessarily justify the exclusion of any portion of it from the rate base on the theory that such portion is not presently "used and useful" in rendering service. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

While central office equipment might have provided at the end of the test period capacity in excess of the amount needed at that moment, there being no question raised that it was not in operation at that time, it was at that time property both used and useful by the utility in providing services to the public; therefore, the Commission had no authority to deduct any portion of its costs in arriving at the reasonable original cost of the property for consideration by it in making its ultimate determination of fair value. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

The question for determination in connection with an alleged overbuilding of a utility plant is whether the properties in question can be deemed "used and useful" in rendering the service, as of the end of the test period. If not, they may not properly be included in the rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Property Held for Future Use. — A telephone company, with central office equipment sufficient to serve any reasonably anticipated increase in customers, may not properly add to its rate base additional units of central office equipment merely because, in the long future, it hopes to have customers who will use it. This is especially true where the supplier of such equipment is an affiliated corporation, controlled by the same holding company which controls the telephone company. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

There is no merit in the contention that exclusion from the rate base of the value of property held by a public utility for future use amounts to confiscation of its property. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Exclusion of Plant Under Construction. — A generating plant of a power company, half-completed at the end of the test period, or a half-completed line of telephone wire, cannot be deemed property "used in providing the service" "as of the end of the test period used in the hearing." Neither can it be deemed property "useful" in rendering the service at that time. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971), decided prior to 1977 amendment.

It was error for the Commission to include in the rate base of a public utility the value of the plant under construction at the end of the test period, and to make a pro forma adjustment to revenues by adding to the actual revenue earned in the test period "interest charged to construction," since the plant under construction was not in operation at the end of the test period. State ex rel. Utilities Comm'n v. Morgan, 27 N.C. 235, 179 S.E.2d 419 (1971), decided prior to 1977 amendment.

A telephone plant under construction at the end of the test period is not property "used and useful" within the meaning of this section and is not to be included in the rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972), decided prior to 1977 amendment.

Contributions in aid of utility construction must be excluded from rate base. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

The term "the public utility's property used and useful in providing the service" in subdivision (b)(1) was not intended by the legislature to include that portion of the utility plant in service represented by contributions made by the utility's patrons in aid of construction. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

It makes no difference whether contributions to utility company were made initially by customers or by land development companies, or whether some of the latter were closely related to the utility company. The controlling factor is whether the utility company's customers ultimately bore the cost of such contributions. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

"Contribution" Correctly Excluded. — The Utilities Commission did not err in excluding from the rate base of a water utility an amount representing the difference between the original cost of a water system constructed by the developers of a real estate subdivision and the price paid to such developers by the water utility, where the Commission found that such difference amounted to an indirect payment from the customers to the utility through the purchase of their lots, which allowed the original owners to sell the water system to the utility for less than the probable cost of installation. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

The Commission was not required to include a contributed plant in applicant's fair value rate base. State ex rel. Utilities Comm'n v. Heater Util., Inc., 26 N.C. App. 404, 216 S.E.2d 487, aff'd, 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

When Addition to Plant May Be Added to Rate Base. — When the addition to plant is completed and put into service, the entire cost of it, including the cost of capital incurred in construction, is added to the rate base of the company. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971), decided prior to 1977 amendment.

Unnecessary Additions. — A utility may not justify an increase in its rates for service to its present customers by evidence of its present intent to build additions to its plant not reasonably considered necessary for adequate service, including proper reserve capacity, by the end of the time needed for the completion of such additions. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Value of franchise does not enter into computation of the utility's rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The rate base should include working capital supplied by the company. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The utility's own funds reasonably invested in such materials and supplies and its cash funds reasonably so held for payment of operating expenses, as they become payable, fall within the meaning of the term "property used and useful in providing the service," and are a proper addition to the rate base on which the utility must be permitted to earn a fair rate of return. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

But such rate base should not include funds supplied by customers. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

As funds collected from customers and used by utility as working capital are not "the public utility's property" within the meaning of subsection (b)(1). State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The utility is not entitled to include in its rate base funds which it has not provided but which it has been permitted to collect from its customers for the purpose of paying expenses at some future time and which it actually uses as working capital in the meantime. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Overcharge to Investment Does Not Directly Affect Rate Base. — Only those purchases for operating materials and supplies, including current maintenance, are chargeable to operating expense, and purchases for plant construction go into an account for investment in plant, not to operating expense, so that an overcharge, if any, to investment in plant does not affect the net operating income. While such overcharge would improperly add to the account for original cost of the plant, which is an item to be considered in computing the rate base, it actually would not affect the rate base directly, since the rate base is the fair value of the plant, not the cost of it. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Acceptance by Commission of "book value" or "cost less depreciation" as rate base is in conflict with the standard prescribed in the statute. The conclusion is inescapable that by accepting the book value as the rate base, it necessarily excluded consideration of present cost of replacement and all other factors from effective consideration. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Excess of Fair Value over Original Cost Less Depreciation to Be Included in Rate Base. — This section contemplates that the excess of "fair value," ascertained by the Commission, over and above the original cost, less depreciation, shall be included in the rate base of the utility, just as if it were a realized profit invested in additional property used and useful in rendering service to the public. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Excess of Fair Value over Total Capital of Company. — The excess of "fair value" over the actual total capital of the company (debt capital, plus capital stock, plus actual surplus) is to be added to the equity component of the capital structure for the purpose of fixing rates under this section. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The Commission may reduce a utility's rate base by increasing its accumulated depreciation account as an offset to a pro forma adjustment by the utility in the same amount to depreciation expense. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

B. Fair Value.

Commission Must Consider Requirements of Section in Arriving at Fair Value of Property. — In arriving at the fair value of a public utility's property used and useful in providing the service rendered to its customers, the Commission is charged with the duty to consider the requirements set forth in this section,

as well as other relevant factors. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

"Minimal Consideration" Inadequate. — The Commission may not brush aside one of the prescribed indicators of original cost and replacement cost by giving it "minimal consideration." State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Neither the Commission nor the Supreme Court may evade the mandate of this section by determining the number of dollars which would be a fair return on the original cost, depreciated, and then simply translating that amount into a percentage of "fair value." State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Meaning of "Value." — The term "value" in this section does not refer to the original or the replacement cost of the property or to the exchange or sales price it would command, as used or secondhand property, on the market. It has reference to the value of the property actually in use, serving its purpose as a part of a composite public utility, earning an income for its owner. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Value is not the price for which the property could be sold as used or secondhand property. It is not the sale or exchange value of the entire business as a going concern. It is not the same as the fair value to be awarded by a jury in a condemnation case. The concept of "fair value," as used with reference to a public utility's rate base, is unique to rate making. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Necessity for Determining Fair Value of Utility's Property. — The first step prescribed by subsection (b)(1), that of ascertaining the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, becomes of critical importance in the rate-making process, for only after the determination of this rate base can judgment be intelligently exercised fixing the rate of return which the utility is entitled to receive on the fair value of its property and fixing rates to be charged by the utility which are fair both to the public utility and to the consumer. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Factors to Be Considered in Determining Fair Value. — This section contemplates a weighing of (1) the reasonable original cost, less depreciation, (2) the replacement cost, which may be determined by trending such reasonable depreciated cost to current cost levels or by any other reasonable method, and (3) any other relevant factor, by the Commission in the exercise of its own expert judgment in determining "fair value." State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

This section contemplates that, normally, the Commission will ascertain the "fair value" of the properties at a point somewhere between the original cost, less depreciation, and the cost of replacement new, less depreciation. The Commission has the duty to weigh these evidences of "fair value" and may not disregard either, or brush either aside. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Fair Value Not Ascertainable by Mathematical Formula. — "Replacement cost" and "fair value" are not synonymous. Nor is "fair value" an arithmetical average of original cost and replacement cost, less depreciation, nor is it to be ascertained by the application of any mathematical formula. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Neither original cost, depreciated, nor replacement cost, depreciated is the measure of "fair value." They are indicators of "fair value" and their respective weights are to be determined by the Commission in its expert judgment. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Balancing of Factors by Commission in Determining Fair Value. — Having made properly supported findings, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

It is the clear intent of subsection (b)(1) that the Commission, in considering the indicators of "fair value" which themselves are supported by competent and substantial evidence, shall use its own expert judgment as to the credibility of the evidence in the record and as to the weight to be given to it. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Necessity that Commission Review Management Decisions. — Review of management decisions by the Utilities Commission in a general rate case is not only entirely appropriate but even necessary, for poorly maintained equipment justifies a subtraction from both the original cost and the reproduction cost of existing plant before weighing these factors in ascertaining the present "fair value" rate base of the utility's properties as required by this section. State ex rel. Utilities Comm'n v. Virginia Elec. & Power

Co., 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

Effect of Improper Plant Engineering and Maintenance. — Neither the original cost nor the reproduction cost may properly be taken as the present fair value of telephone properties which were improperly engineered, have not been properly maintained, and are consequently in need of extensive rehabilitation. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The fact that a plant or a unit thereof is not well adapted to, or is inappropriate for, its present and/or reasonably to be anticipated future use tends materially to reduce its value below its reproduction new cost. One of the forms of inappropriateness is inappropriate engineering layout. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

The fair value of a new addition, when completed and in service, would almost certainly be found to be its total cost and, thereafter, would be found by considering such cost and the reproduction, or trended, cost, including interest during construction. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Method of Taking Inflation and Rising Cost of Plant Additions into Account. — An accepted method of taking inflation and rising cost of plant additions into account in rate making is to fix rates for service sufficient, presently, to bring to the company a rate of return, on its present rate base, slightly in excess of that which is necessary to meet the test of reasonableness. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Weight of Trended Cost Evidence. — In times of increased construction costs and decreased dollar value, trended cost evidence deserves weight in proportion to the accuracy of the tests and their intelligent application. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Trended cost is useful only when it becomes necessary to fix the present value of facilities constructed when the cost was low and replacement has become expensive. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Trended Cost Evidence Useful But Not Conclusive. — The trended cost takes into account the type of facility, its age, its original and replacement cost, terrain, location, its probable useful life, and other factors. Such evidence is not conclusive, but it does appear to be a useful guide in determining value of facilities. State ex. rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

"Fair value" does not cover money stupidly, extravagantly, or corruptly spent and if a utility has been seriously overbuilt, or its promoters have been seriously overpaid, the the law does not intend that its customers shall be saddled with the payment of interest on money that was thrown away. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

And a utility may not inflate its rate base by extragance in purchasing equipment or constructing its plant. In this connection, it is immaterial whether such extravagance is due to careless improvidence or willful payment of exorbitant prices to an affiliate. On the other hand, the management of the business of a public utility, including the fixing of the prices which it pays for the construction and equipment of its plant and for its maintenance and operation, rests with its board of directors in the absence of clear mismanagement or abuse of discretion. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Credibility and weight of evidence in determination of "fair value" is for the Commission, not for a court, to determine. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 398, 206 S.E.2d 283 (1974).

It is not the meaning of subsection (b)(1) that, in the absence of expert opinion testimony as to the weight to be given the respective indicators of "fair value," the Commission must give them equal weight and find "fair value" by the mere striking of an arithmetic average of the indicators. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Having made findings of the original cost less depreciation and replacement cost less depreciation, the weight to be given those figures in reaching the ultimate finding of fair value is to be determined by the Commission, not by the reviewing court. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The Commission is not required to accept expert witness' opinion as to the weight to be given the original cost and replacement cost increments of fair value, even though there be no contrary expert testimony. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

This section does require expert testimony as to the weight which the Commissioner should give to original cost and to replacement cost factors in carrying out its mandate to "consider" these indicators of "fair value." State ex rel.

Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Reviewing court may not properly disturb an order of the Commission merely because it would have given different weight to each of the indicators of "fair value." State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

A reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

A finding of "fair value" by the Commission is not rendered immune to judicial review by Commission's declaration that, in reaching such finding, it followed no formula. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The mere recital by the Commission that it has considered all of the factors prescribed by this section in arriving at its ascertainment of "fair value" does not preclude the reviewing court from setting aside the finding of "fair value" where the record discloses that the Commission in fact failed to do so. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

When Commission's Finding of Fair Value May Be Set Aside. — The determination of the weight to be given each factor in its ascertainment of "fair value" is for the Commission, not the reviewing court. But if it is clear from the record that the Commission reached its finding of "fair value" by disregarding or giving minimal consideration to one of the enumerated factors, its finding of the ultimate fact of "fair value" may be set aside by the court on the ground of error of law in such ascertainment. Similarly, the finding of "fair value" may be set aside by the reviewing court if it clearly appears that the Commission has made its determination thereof by giving weight to a factor as to which there is no substantial evidence in the record, and likewise where the order of the Commission shows that it reached its determination of "fair value" by considering unspecified facts other than original cost and replacement cost depreciated. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Determination of Fair Value Upheld. — There was no reversible error in the Commission's determination that the fair value of the power company's properties, exclusive of the allowance for working capital, should be determined by giving a weighting of one third to replacement cost, depreciated, and two-thirds weighting to original cost, depreciated. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

C. Original Cost.

In fixing fair value, original cost is an item to be considered. State ex rel. Utilities Comm'n v. Public Serv. Co. of N.C., Inc., 257 N.C. 233, 125 S.E.2d 457 (1962).

But Is Only One Factor. — The establishment of the reasonable original cost of the property, as referred to in subsection (b)(1), is of significance only because reasonable original cost is one of several figures and factors which the statute requires the Commission to consider in arriving at fair value. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Ordinarily, Price Actually Paid Is Considered Reasonable Original Cost. — Where a public utility's property has been purchased from a stranger, ordinarily the price actually paid by the utility would be considered its reasonable costs, though it would not necessarily be so. Even in such a case the Commission may find that the management of the utility acted improvidently or carelessly and paid a price greater than reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Determining Reasonable Original Cost of Property Sold to Utility by Affiliated Corporation. — In determining the rate base, the fact that equipment or services are sold to the utility by an affiliated corporation does not alter the ultimate question for the Commission. That question is whether the prices paid by the utility are reasonable and, therefore, reflect the "reasonable original cost" of the properties. The only effect of the affiliation between the utility and its supplier is that such relationship calls for a close scrutiny by the Commission of the price paid by the utility. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

For purposes of determining a utilities rate base, when considering a purchase made from an affiliated company, the bargaining is not at arm's length and when the transaction is called in question, the burden is upon the utility to show that the price it paid was reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

In cases in which a substantial portion of a utility's property was acquired by purchase from an affiliated company, it becomes obligatory upon the Commission to scrutinize the prices paid and, to the extent it finds such prices unreasonable, to make adjustments in the utility's figures accordingly. This is all the more true where the affiliated supplier so dominates the market that its pricing policies may not be sufficiently controlled by normal competition. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Where the prices paid by a telephone company to an affiliated manufacturing company are the same as those which the manufacturing company charges other affiliated companies to which it makes a majority of its sales, the Utilities Commission could properly determine the reasonableness of the prices charged by the manufacturing company by comparing its rate of return on common equity with the rates of return experienced by other manufacturing companies operating in similar fields. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Fixing of Fair Value at Original Cost Plus Six Percent Held Improper. — In a telephone rate case, the Utilities Commission's finding of the fair value of the telephone company's property by first determining original cost and then increasing that figure by 6% was unsupported by competent, material and substantial evidence in the record and was arrived at by a method which failed to comply with the directives contained in subsection (b)(1). State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

D. Replacement Cost.

Necessity of Finding Replacement Cost. — Without a finding by the Commission of the replacement cost of a public utility's properties "used and useful in providing the service," the Commission's finding of "fair value" was affected by an error of law and, consequently, its finding of a fair rate of return on such "fair value" was so affected and was premature. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

While the consideration or weight to be given replacement cost, depreciated, in ascertaining "fair value" rests in the sound discretion of the Commission, the reviewing court cannot satisfactorily determine whether the Commission considered or weighed this element at all, or merely gave it minimal consideration, unless the Commission sets forth what it found this element to be. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Discounting Replacement Cost for Depreciation. — In determining "fair value," the Commission may discount the replacement cost new by the same percentage as that indicated by the total accumulated depreciation in arriving at the replacement cost factor, or, if there is evidence to support such a finding, may discount replacement cost new by a greater or a smaller amount on account of depreciation, including obsolescence. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

It is for the Commission to determine what weight to give to evidence as to replacement cost. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Fair Value Usually Less Than Reconstruction Cost. — Ordinarily, the fair value of a utility's property is found to be less than the reconstruction cost of the property. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Fair Value Cannot Exceed Present Cost of Constructing Substitute. — The present "fair value" of a utility system of generating plants, transmission lines and distribution lines cannot exceed the present cost of constructing a substitute system of modern design, capable of generating and distributing the same quantity of power at less operating expense. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

V. OPERATING EXPENSES AND WORKING CAPITAL.

Reasonable Operating Expenses Must Be Ascertained. — In fixing rates to be charged by the public utility, the Commission is directed to ascertain, among other things, the public utility's reasonable operating expenses. State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98, cert. denied, 284 N.C. 124, 199 S.E.2d 663 (1973).

Term to Be Liberally Interpreted and Applied. — When a narrow construction of the operating expense element of a regulatory act would frustrate the purposes of the act, the term should be liberally interpreted and applied. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

A restrictive interpretation of the operating expense element of the rate-making formula would severely limit the ability of the Commission to act in the best interest of the consuming public in emergency situations. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Cost of collecting past-due accounts is an operating expense. State ex rel. Utilities

Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Tracking Rate Increases as Operating Expenses. — Tracking rate increases, designed to recover the reasonable costs of approved exploration projects, must be said to be operating expenses, if practical effect is to be given to this chapter, where the Commission has found that if no new supply source were obtained, the utilities would be unable to supply adequate service to their customers. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

As to constitutionality of permiting utilities to recover excess costs of exploration ventures through tracking rate increases, see State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Error to Add Interest Charged to Construction to Operating Revenue. — It was error for the Commission to add to the company's operating revenue for the best period interest charged to construction during the test period. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

"Depreciation" Defined. — Broadly speaking, depreciation is the loss not restored by current maintenance which is due to all the factors causing the ultimate retirement of the property. While property remains in the plant, the estimated depreciation rate is applied to the book cost and the resulting amounts are charged currently as expenses of operation. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Depreciation Deductions. — For rate-making purposes a public utility is allowed to deduct annually, as an operating expense, so much of its capital investment as is actually consumed during the current year in rendering the service required of it. But the cost represents the amount of the investment, and it is the actual cost, not theretofore recouped by depreciation deductions, that must constitute the base for this allowance. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954); State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

In establishing rates a public utility is entitled to deduct each year as an operating expense only such depreciation as represents the investment currently consumed and not provided against by maintenance. Thus the integrity of the investment is maintained, and this is all the utility has a right to demand. The rate should be fixed, as near as may be, so that it will extend over the usable life of the property being depreciated. Otherwise the allowance will be unjust either to the utility or to the public. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

The purpose of an annual allowance for depreciation and the resulting accumulation of a depreciation reserve is not, as is sometimes erroneously supposed, to provide the utility with a fund by which it may purchase a replacement for the property when it is worn out. The purpose of the allowance is to enable the utility to recover the cost of such property to it. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

The rate of depreciation allowed by the federal government for income tax purposes is not necessarily the proper rate to be allowed for rate-making purposes. Indeed, for rate-making purposes it would ordinarily be excessive, especially in respect to buildings and like permanent improvements. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Depreciation Based on Original Cost. — Subdivision (b)(3) clearly directs that the annual allowance for depreciation of durable properties, such as a pipeline, be based upon the original cost of the property to the utility and not upon either its current fair value or the cost of installation borne by a former owner, such as the real estate developers in the present case. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

An instruction that the current rather than the cost value of capital investment shall be used as the basis for estimating depreciation allowances is incorrect. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Using Property Which Has Been Fully Depreciated for Other Purposes. — It would be unfair to a utility not to take into consideration the present fair value of property now in use but which has been fully depreciated for other purposes. On the other hand, if the rate of depreciation allowed for rate-making purposes is in excess of the investment currently consumed, over and above maintenance costs, it is unfair to the public, for then the company is permitted to recover annually a part of its investment which is not currently consumed. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Transactions between Utilities and Affiliated Supply Companies. — It is the duty of the Commission to look closely at transactions between utility operating companies and affiliated supply companies to be sure that the public is not required to pay rates based on excessive costs resulting from excessive profits earned by an unregulated supplier. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The financial condition of a public utility and the demand for its bonds and securities which affect its capacity to compete on the open market for additional equity and debt capital are ordinarily material considerations in fixing rates. But these factors are of little moment where the applicant has available at all times a fund provided by its parent company from which it may borrow at will for needed improvements or enlargements. What it has to pay for its borrowings from this fund is of more importance. These are some of the "other facts" the statute requires the Commission to consider. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Capital Investment Determined as of Time Rates Are Effective. — Where a utility is currently investing large amounts of capital in expansion, the Utility Commission should determine the capital invested as of the time the rates fixed by it are to be effective, rather than the average net investment of the utility for the entire test year, since the rates fixed are prospective. State ex rel. North Carolina Util. Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961).

Large Sum of Money on Hand for Working Capital. — When, in fixing rates which will produce a fair return on the investment of a utility, it is made to appear that it has on hand continuously a large sum of money it is using as working capital and to pay current bills for materials and supplies, that fact must be taken into consideration. And if the fund on hand is sufficient, no additional sum should be allowed at the expense of the public. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Where a public utility uses, for operating capital, moneys collected by it in taxes for the federal government which it is not required to pay to the federal government until a later date, the Utilities Commission should take such capital into consideration in fixing rates, which action is neither a condemnation nor a condonement of the practice. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Advance Billing Not Creditable to Working Capital Requirements. — In determining the local rates for a telephone company, the amounts paid to the company by its customers as a result of the company's practice of billing the customers one month in advance are not creditable to the company's working capital requirements. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Income Produced by Increase of Facilities. — In fixing the rate for a telephone company, the Utilities Commission must take into consideration the net income to be produced by the increase in the number of telephones in service at the end of any test period adopted by the Commission. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

VI. RATE OF RETURN.

Commission to Determine Fair Rate of Return. — It is for the Commission, not for the Supreme Court, to determine what is a fair rate of return. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

A public utility corporation is entitled to a just and reasonable rate of return based upon the fair value of the properties used and useful in rendering the service for which the rate is established. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

Even though a utility contemplates no substantial expansion of its plant, and so presently does not contemplate the issuance of either stocks or bonds, it is, nevertheless, entitled to charge rates sufficient to enable it to earn a fair rate of return, as defined in subsection (b)(4), upon the fair value of its properties used and useful in rendering its service in this State. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

As to a "just and reasonable" rate, see Smyth v. Ames, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819, modified, 171 U.S. 361, 18 S. Ct. 888, 43 L. Ed. 197 (1898); State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Reasonableness of Rate of Return Depends on Whether Property Is Fairly Valued. — Whether a 4%, 5%, or 6% return is just and reasonable depends very largely on whether the Commission has placed a fair value on the property of the utility which is used and useful in producing its revenue. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

There is no fixed "fair rate of return" applicable to all utility companies, or to a single utility company at all times. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

"Fair rate of return" is one sufficient to enable the utility to attract, on reasonable terms, capital necessary to enable it to render adequate service. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

In this State the test of a fair rate of return is that laid down by the Supreme Court of the United States in Bluefield Waterworks & Imp. Co. v. Public Serv. Comm'n, 262 U.S. 679, 43 S.

Ct. 675, 67 L. Ed. 1176 (1923), namely, if the company continues to earn such a rate of return, will it be able to attract on reasonable terms the capital it needs for the expansion of its service to the public? State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

The rate-making procedure prescribed in this section is designed to yield to the utility a return which will meet the test laid down in Bluefield Waterworks & Imp. Co. v. Public Serv. Comm'n, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923). State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Crucial Question as to Rate of Return. — To require the Commission in a general rate case to go into minute details with respect to each of the proposed increases and the possible inequalities which might be created thereby would distract its attention from the crucial question, namely: What is a fair rate of return on company's investment so as to enable it by sound management to pay a fair profit to its stockholders and to maintain and expand its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise? State ex rel. Utilities Comm'n v. County of Harnett, 30 N.C. App. 24, 226 S.E.2d 515 (1976).

What Dollar Return Contemplated. — Under this section a fair rate of return on the fair value of the properties used in rendering the service clearly contemplates the allowance of a greater dollar return than would be allowed if the rate base were the original cost, depreciated, of the same properties, assuming that the value of the properties has been enhanced by inflation. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Power company is entitled to earn same rate of return on fair value of its plant as on retained earnings which it has reinvested in its plant. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Absolute Accuracy Not Required. — Since the rate of return on the fair value of its properties which will enable a utility company to attract the capital it needs cannot be pinpointed with absolute accuracy, it is universally recognized that, for a utility rendering acceptable service, there is a zone of reasonableness extending over a few hundredths of one percent, within which a rate of return fixed by a regulatory commission will not be disturbed by the courts. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

It is impossible to fix rates which will give the utility each day a fair return, and no more, upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the person served, is to fix rates on the basis of a substantial period of time. Otherwise, rate hearings and adjustments would be a perpetual process. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Utility Not Entitled to Compensation for Past Deficit. — Failure of utility, in a previous period, to earn the anticipated return over and above its then expenses, does not authorize it to charge its present customers a rate higher than reasonable for present service in order to compensate for the past deficit. Prospective rate-making to recover unexpected past expense, or to refund expected past expense which did not materialize, is as improper as is retroactive rate-making. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Effect of Rate of Return in Other State. — An inadequate return in Virginia would not of itself justify a rate increase in North Carolina, nor would a high rate of return in Virginia justify less than a fair and reasonable rate in North Carolina. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Utilities Commission of this State does not have the right to fix less than a reasonable or fair rate of return on a telephone company's investment in North Carolina because the utilities commission in Virginia may have fixed rates in Virginia which, in the opinion of the Utilities Commission in this State, gives the company a reasonable return on its entire properties when its Virginia and North Carolina revenues are combined. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Anticipated Rate of Return. — Adjusted revenue deductions are subtracted from adjusted revenues to determine what net operating income a company may anticipate under the previously established rates, in a period of the same length as the test period, during which all presently known conditions prevail. Such net operating income, divided by the rate base, gives the rate of return which the company may anticipate, on its properties used in rendering its service, under the previously established rates for service, in a period of the same length as the test period, throughout which all presently known conditions prevail. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Finding that New Rate Is Fair Tantamount to Finding Existing Rates Inadequate. — The finding that a new rate represented a fair rate of return on the fair value of a company's utility property is tantamount to a finding that the existing rates were inadequate. State ex rel. Utilities Comm'n

v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Less Than Fair Rate of Return Necessitates Raising of Rates. — If the rate of return derived from the previously established rates during the test period, adjusted pro forma, is less than a fair rate of return, this section requires the Commission to raise the company's rates for services, assuming that the quality of service is adequate. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

No Change in Rates May Be Justified. — If the rate of return derived from the previously established rates for service during the test period, adjusted pro forma, was fair, no change in the rates for service is justified. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Rate Reduction May Be Required. — If the rate of return derived from the previously established rates for service during the test period, adjusted pro forma, was in excess of a fair rate of return, the statute requires the Commission to reduce the rates for service. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Consideration of Expert Opinion Testimony. — The Commission must consider and weigh testimony of expert witnesses, on the question of the fair rate of return, in the light of its own adjustment, for rate-making purposes, of the utility's actual capital structure by its determination of the "fair value" of its properties. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The Commission may reject the uncontradicted testimony of a utility's expert witnesses as to the fair rate of return on the utility's common equity, and while the better practice is for the Commission to state its reasons for doing so in its order establishing a lower rate of return, it is not required to do so as a matter of law. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Previous findings are not res judicata, even as to what was a fair rate of return on common equity capital as of the dates of former orders, and such findings do not prevent the Commission from finding a lower return on common equity capital fair in a later case, even though the tide of inflation has continued to rise. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Its former allowance of a rate of return is not res judicata barring the Commission from fixing a lesser rate in a subsequent proceeding. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

The court may not substitute its judgment for that of the Commission even when it is of the opinion that the rate of return authorized by the Commission is inadequate. State ex rel. Utilities Comm'n v. Duke Power Co., 21 N.C. App. 89, 203 S.E.2d 404, rev'd on other grounds, 285 N.C. 377, 206 S.E.2d 269 (1974).

VII. TEST PERIOD.

Basic, underlying theory of using company's operating experience in a test period, recently ended, in fixing rates to be charged by it for its service in the near future is that rates for service, in effect throughout the test period, will, in the near future, produce the same rate of return on the company's property, used in rendering such service, as was produced by them on such property in the test period, adjusted for known changes in conditions. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Rates Fixed on Basis of Substantial Period of Time. — It is impossible to fix rates which will give the utility each day a fair return, and no more, upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the persons served, is to fix rates on the basis of a substantial period of time. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Test Period Fixed to Estimate Revenues and Operating Expenses. — For the purpose of making required estimates of the public utility's revenues and operating expenses, the customary and proper procedure is for the Commission to fix a test period of 12 months, ending, as close as practicable, before the opening of the hearing. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The factors used in fixing rates are to be determined as of the end of the test period. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Value of Property Determined as of End of Trial Period. — The Commission is required under subsection (c) to determine the fair value of the utility's property as of the end of the trial period, based on the plant and equipment in operation at that time. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966), decided prior to 1977 amendment.

Not by Averaging over Period. — The value of plant and service must be determined as of a specific date, the end of the test period, and not by averaging a group of periods or months within a period. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 205, 177

S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Adjustments for Abnormalities and Changes in Conditions. — The actual experience of the company during the test period, both as to revenues produced and as to operating expenses, is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, but only if, appropriate pro forma adjustments are made for abnormalities which existed in the test period and for changes in conditions occurring during the test period. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Operating revenue deductions (operating expenses, depreciation, taxes and all other proper deductions from revenue) for expenditures actually made in the test period are adjusted, pro forma, for changes in conditions during the test period, such as an increase in the wage rate, so that the result reflects what would have been the total of such deductions had the conditions, prevailing at the end of the test period, prevailed throughout it. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Pro forma adjustments to revenue are made to reflect what the revenues would have been in the test period, which is usually 12 months, had present conditions prevailed throughout that period, so that the result shows what revenues will be produced in 12 months by application of the previously established rates for service conditions existing at the end of the test period; i.e., at the date, nearest the present, for which data are available. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Subdivision (b)(3) and subsection (c) of this section, taken together, allow the Commission to make pro forma adjustments to revenue and expenses to reflect what their effect would have been had those future conditions prevailed throughout, or at the end of, the test period or to adjust for abnormalities and changes in conditions. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Probable Future Revenues. — Subsection (c) clearly provides that the Commission is to include in the probable future revenues of the company only those revenues based on the plant and equipment in operation at the end of the test period. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971), decided prior to 1977 amendment.

Estimates regarding probable future revenues and expenses must be based upon the utility's plant and equipment actually in operation at the end of the test period. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976), decided prior to 1977 amendment.

VIII. OTHER FACTS.

A. In General.

The plain meaning of subsection (d) of this section is that, after considering all other factors, considerations and adjustments specifically set forth in the various sections of the statute, the Commission must consider "all other material facts of record" which ought to be taken into consideration in setting rates which are reasonable and just. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Other Facts to Be Established by Evidence and Set Forth in Record. — The Legislature properly understood that, at times, other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in this section; it was contemplated that such facts be established by evidence, be found by the Commission, and be set forth in the record so that the utility might have them reviewed by the courts. State ex rel. Utilities Comm'n v. Public Serv. Co. of N.C., Inc., 257 N.C. 233, 125 S.E.2d 457 (1962); State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

"Other facts" which the Commission considers in determining the "fair value" of the utility's properties must be found and set forth in its order, so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as "relevant to the present fair value." State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The "other material facts of record" considered by the Commission under subsection (d) in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are. State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Right to Consider "Other Facts" Limited. — This section gives the Commission the right to consider "all other facts" that will enable it to determine what are reasonable and just rates, but this right is not a grant to roam at large in an unfenced field. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The right of the Commission to consider "all other facts" is not a grant to roam at large in an unfenced field. State ex rel. Utilities Comm'n v. Public Serv. Co. of N.C., Inc., 257 N.C. 233, 125 S.E.2d 457 (1962).

B. Quality and Adequacy of Service.

Subsection (d) of this section authorizes the Commission to consider quality of service as a factor in determining what constitutes just and reasonable rates to be charged by a utility. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Evidence of service deficiencies provides other material facts of record which the Commission is required to consider in making its determination as to what are just and reasonable rates for the quality of service which the applicant utility is providing its customers. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Serious inadequacy of service, found by the Commission upon substantial evidence, is one of the facts which the Commission is required by this section to take into account in making a determination of rates. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

It was not the intent of the legislature to require the Commission to fix rates without any regard to the quality of the service rendered by the utility and thus to assure a "complacent monopoly" a "fair return upon the fair value of its properties" while it persists in rendering mediocre service and turns a deaf ear both to customer complaints and to Commission orders for improvement. On the contrary, the quality of the service rendered is, necessarily, a factor to be considered in fixing the "just and reasonable" rate therefor. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

This section lays down the procedure by which the Commission is to fix rates which will enable the utility "by sound management" to pay all of its costs of operation, including maintenance, depreciation and taxes, and have left a fair return upon the fair value of its properties, but this must be applied in the light of the provisions of this Chapter relating to the duty of the utility to render adequate service. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Serious inadequacy of a utility company's service, whether due to poor maintenance of its equipment or to other causes, is one of the facts which the Commission is required to take into account in determining what is a reasonable rate to be charged by the particular utility company for the service it proposes to render. State ex rel. Utilities Comm'n v. Virginia Elec. & Power Co., 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

Commission Is Not Required to Ignore Inadequate Service. — It is not reasonable to construe subsection (b) of this section to require the Commission to shut its eyes to "poor" and "substandard" service resulting from a company's willful or negligent failure to maintain its properties or to heed complaints from its subscribers when the Commission is called upon by the company to permit it to increase its rates for its inadequate service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

But the Commission is not forbidden to grant a rate increase to a company whose service is inadequate, even though the inadequacy be due to a willful or negligent failure by the company to perform its duty. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

In a hearing upon an application by a telephone company for a rate increase in its franchise area, the Utilities Commission is authorized to grant the company an increase in the rates charged to its customers, notwithstanding a finding by the Commission that the quality of service rendered by the company was poor and substandard. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Assuming adequate findings of fact, supported by competent, substantial evidence, there is nothing in the provisions of this Chapter which makes it unlawful for the Commission, in the exercise of its sound administrative discretion, to conclude that an increase in rates is warranted, notwithstanding existing service inadequacy due to the company's neglect of its properties, and that such increase is an appropriate step in the improvement of the service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Customer Should Not Be Required to Pay for Inefficiency. — If a utility fails to provide adequate service on account of inefficient management, rates should not be permitted which would require the customer to pay for this inefficiency. State ex rel. Utilities Comm'n

v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405, reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Subtraction for Consistently Poor Service in Ascertaining Fair Value. — Consistently poor service, attributable to defective or inadequate or poorly designed equipment or construction, justifies a subtraction from both the original cost and the reproduction cost of the existing plant before weighing these factors in ascertaining the present "fair value" of the properties. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Reduction of Rate Where Inadequate Service Due to Defective Equipment, etc. — If inadequate service is attributable to defective, inadequate or poorly designed equipment or construction or obsolete equipment, then the Commission is justified in reducing the present fair value of the utilities' properties. In such a case, this is not a penalty, and a reduction of the rate arrived at by way of penalty for inadequate service is justified. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

And Where Due to Bad Management. — When, upon substantial evidence, a public utility is found to be rendering grossly inadequate service, due to bad management and managerial indifference, and the rates presently charged by it yield a return sufficient to pay the interest on its indebtedness and a substantial dividend upon its stock, but less than that which would be deemed a fair return upon the fair value of its properties were the service adequate, the Utilities Commission may lawfully deny it authority to increase its rates for such service. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Inadequacy of service due not to the condition of the properties but to inefficient personnel, bad management and the indifference of a "complacent monopoly" does not relate to the value of the properties, but to the value of the service and to the reasonableness of the rates proposed to be charged therefor. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

If reduction from fair value of utilities' properties is because of inadequate service due to inefficient personnel and human error, then the reduction amounts to a penalty, and a further penalty for inadequate service by reduction of rate is not justified by statute or by decided cases. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

Finding Required as to Quality of Service. — The Commission may not lawfully ignore the duty imposed upon it by this section to consider the quality of service by reason of the company's poor service, nor does it discharge that duty by a mere statement that it has considered the matter, without showing the effect given to it. Such finding or conclusion is necessary to enable a reviewing court to determine whether the duty imposed by statute has been performed. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

If the Commission found the quality of a utility's service to fall short of the requirement in § 62-131 that it be adequate, efficient and reasonable, then the Commission should make specific findings showing the effect of any such inadequacy upon its decision under this section. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

The Commission must make a specific finding showing the effect it gave the relevant factor of consistently poor service, if it made a deduction from the original cost and reproduction cost of the existing plant on that account. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

The Bluefield test assumes reasonably good service. State ex rel. Utilities Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974). See notes under Analysis Line VI, Rate of Return.

§ 62-133.1. Small water and sewer utility rates.

(a) In fixing the rates for any water or sewer utility, the Commission may fix such rates on the ratio of the operating expenses to the operating revenues, such ratio to be determined by the Commission, unless the utility requests that such rates be fixed under G.S. 62-133(b). Nothing in this subsection shall be held to extinguish any remedy or right not inconsistent herewith. This subsection shall be in addition to other provisions of this Chapter which relate to public utilities generally, except that in cases of conflict between such other provisions, this section shall prevail for water and sewer utilities.

(b) A water or sewer utility may enter into uniform contracts with nonusers of its utility service within a specific subdivision or development for the payment by such nonusers to the utility of a fee or charge for placing or maintaining lines or other facilities or otherwise making and keeping such utility's service available to such nonusers; or such a utility may, by contract of assignment, receive the benefits and assume the obligations of uniform contracts entered into between the developers of subdivisions and the purchasers of lots in such subdivisions whereby such developer has contracted to make utility service available to lots in such subdivision and purchasers of such lots have contracted to pay a fee or charge for the availability of such utility service; provided, however, that the maximum nonuser rate shall be as established by contract, except that the contractual charge to nonusers of the utility service can never exceed the lawfully established minimum rate to user customers of the utility service. (1973, c. 956, s. 2.)

CASE NOTES

This section was enacted in direct response to the Utilities Commission's conclusion that nonusers were not "consumers" of the utility and that an "availability charge" could not be made to property owners solely because they owned land in an area served by the utility. State ex rel. North Carolina Util. Comm'n v. Transylvania Util. Co., 30 N.C. App. 336, 226 S.E.2d 824, cert. denied, 291 N.C. 179, 229 S.E.2d 692 (1976).

Section Proscribes Commission's Power. — By enacting this section, the General Assembly proscribed the Commission's power to disapprove charges called for in uniform contracts between utilities and nonuser property owners if the charges do not exceed those expressly authorized by the statute. State ex rel. North Carolina Util. Comm'n v. Transylvania Util. Co., 30 N.C. App. 336, 226 S.E.2d 824, cert. denied, 291 N.C. 179, 229 S.E.2d 692 (1976).

Components of Expenses Must Be Examined. — For rates to be reasonable, the figures from which they are derived must be reasonable. To uphold its statutory duty to establish reasonable rates, then, the Commission must examine each of the components going to make up a utility's expenses for reasonableness. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Stated in State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

Cited in State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

§ 62-133.2. Fuel charge adjustments for electric utilities.

(a) The Commission may allow electric utilities to charge a uniform increment or decrement as a rider to their rates for changes in the cost of fuel and the fuel component of purchased power used in providing their North Carolina customers with electricity from the cost of fuel and the fuel component of purchased power established in their previous general rate case.

(b) For each electric utility engaged in the generation and production of electric power by fossil or nuclear fuels, the Commission shall hold a hearing within 12 months of the last general rate case order and determine whether an increment or decrement rider is required to reflect actual changes in the cost of fuel and the fuel cost component of purchased power over or under base rates established in the last preceding general rate case. Additional hearings shall be held on an annual basis but only one hearing for each such electric utility may be held within 12 months of the last general rate case.

(c) Each electric utility shall submit to the Commission for the hearing verified annualized information and data in such form and detail as the Commission may require, for an historic 12-month test period, relating to:

(1) Purchased cost of fuel used in each generating facility owned in whole or in part by the utility.

(2) Fuel procurement practices and fuel inventories for each facility.
(3) Burned cost of fuel used in each generating facility.
(4) Plant capacity factor for each generating facility.
(5) Plant availability factor for each generating plant.
(6) Generation mix by types of fuel used.
(7) Sources and fuel cost component of purchased power used.
(8) Recipients of and revenues received for power sales and times of power sales.
(9) Test period kilowatt hour sales for the utility's total system and on the total system separated for North Carolina jurisdictional sales.

(d) The Commission shall provide for notice of a public hearing with reasonable and adequate time for investigation and for all intervenors to prepare for hearing. At the hearing the Commission shall receive evidence from the utility, the public staff, and any intervenor desiring to submit evidence, and from the public generally. In reaching its decision, the Commission shall consider all evidence required under subsection (c) of this section. The Commission may also consider, but is not bound by, the fuel costs incurred by the utility and the actual recovery under the rate in effect during the test period as well as any and all other competent evidence that may assist the Commission in reaching its decision including changes in the price of fuel consumed and changes in price of the fuel in the fuel component of purchased power occurring within a reasonable time (as determined by the Commission) after the test period is closed. The burden of proof as to the correctness and reasonableness of the charge shall be on the utility. The Commission shall allow only that portion, if any, of a requested fuel adjustment that is based on adjusted and reasonable fuel expenses prudently incurred under efficient management and economic operations. To the extent that the Commission determines that an increment or decrement to the rates of the utility due to changes in the cost of fuel and the fuel cost component of purchased power over or under base fuel costs established in the preceding general rate case is just and reasonable, the Commission shall order that the increment or decrement become effective for all sales of electricity and remain in effect until changed in a subsequent general rate case or annual proceeding under this section.

(e) If the Commission has not issued an order pursuant to this section within 120 days of a utility's submission of annual data under subsection (c) of this section, the utility may place the requested fuel adjustment into effect. If the change in rate is finally determined to be excessive, the utility shall make refund of any excess plus interest to its customers in a manner ordered by the Commission.

(f) Nothing in this section shall relieve the Commission from its duty to consider the reasonableness of fuel expenses in a general rate case and to set rates reflecting reasonable fuel expenses pursuant to G.S. 62-133. (1981 (Reg. Sess., 1982), c. 1197, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1197, s. 4, provides: "The Utilities Commission shall, upon public notice and hearing with all interested parties allowed to participate and testify, investigate the present and future need and justification for electric utility fuel charge adjustments as provided for in this act and report its findings and recommendations to the Governor and the Utility Review Committee of the General Assembly on or before the convening date of the 1983 General Assembly, Second Session 1984; or if there is no 1984 Session, to the 1985 General Assembly on or before its convening date."

§ 62-134. Change of rates; notice; suspension and investigation.

(a) Unless the Commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this Chapter, except after 30 days' notice to the Commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice, which may include notice by publication, of the proposed changes to other interested persons as the Commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Commission, for good cause shown in writing, may allow changes in rates without requiring the 30 days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

(b) Whenever there is filed with the Commission by any public utility any schedule stating a new or revised rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate shall go into effect at the end of such period. After hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective.

(c) At any hearing involving a rate changed or sought to be changed by the public utility, the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable.

(d) Notwithstanding the provisions of this Article, any public utility engaged solely in distributing electricity to retail customers, which electricity has been purchased at wholesale rates from another public utility, an electric membership corporation or a municipality, may in its discretion, and without the necessity of public hearings as in this section is otherwise provided, elect to adopt the same retail rates to customers charged by the public utility, electric membership corporation or municipality from whom the wholesale power is purchased for the same service, unless the North Carolina Utility Commission finds upon a hearing, either on its own initiative or upon complaint, that the rate of return earned by such utility upon the basis of such rates is unjust and unreasonable. In such a proceeding the burden of proof shall be upon the electrical distribution company.

(e) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1197, s. 2.

(f) The Commission may adopt rules prescribing the information and exhibits required to be filed with any applications, or tariff for an increase in utility rates, including but not limited to all of the evidence or proof through the end of the test period which the utility will rely on at any hearing on such increase, and the Commission may suspend such increase until such data, information or exhibits are filed, in addition to the time provided for suspension of such increase in other provisions of this Chapter. (1933, c. 307, s. 7; 1939, c. 365, s. 3; 1941, c. 97; 1945, c. 725; 1947, c. 1008, s. 24; 1949, c. 1132, s. 22; 1959, c. 422; 1963, c. 1165, s. 1; 1971, c. 551; 1973, c. 1444; 1975, c. 243, s. 8; c. 510; c. 867, s. 7; 1981 (Reg. Sess., 1982), c. 1197, s. 2.)

Cross References. — As to fuel charge adjustments for electric utilities, see § 62-133.2.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment repealed subsection (e), relating to modifications in rates and charges based solely upon the cost of fuel needs in the generation or production of electric power.

Session Laws 1981 (Reg. Sess., 1982), c. 1197, s. 3, provides: "All rates and charges under G.S. 62-134(e) shall terminate not later than December 1, 1982. In general rate cases now pending, the Commission shall not use fuel costs or costs of purchased power established in a proceeding pursuant to G.S. 62-134(e), but shall determine the just and reasonable amount of the costs pursuant to G.S. 62-133(b)(3)." The act was ratified June 17, 1982 and made effective upon ratification.

Session Laws 1981 (Reg. Sess., 1982), c. 1197, s. 4, provides: "The Utilities Commission shall, upon public notice and hearing with all interested parties allowed to participate and testify, investigate the present and future need and justification for electric utility fuel charge adjustments as provided for in this act and report its findings and recommendations to the Governor and the Utility Review Committee of the General Assembly on or before the convening date of the 1983 General Assembly, Second Session 1984; or if there is no 1984 Session, to the 1985 General Assembly on or before its convening date."

Legal Periodicals. — For survey of 1977 law on public utility rate regulation, see 56 N.C.L. Rev. 847 (1978).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

I. In General.
II. Suspension of Rate Changes.
III. Rate Changes Based on Fuel Costs Under Former Subsection.

I. IN GENERAL.

Ex Parte Order Allowing Effectuation of Fuel Adjustment Clause Held Constitutional. — An order entered ex parte allowing a utility to effectuate a fuel adjustment clause did not, in view of the procedures available to contest such action, violate Art. I, § 19 of the State Constitution. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Limits on Commission's Authority. — The Commission is a creation of the legislature and, in fixing rates to be charged by public utilities, exercises the legislative function. It has no authority except that given to it by statute. A fortiori, the Commission has no authority to permit that which is forbidden by this section or to extend a previously granted rate increase which subsection (e) has declared terminated. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Power to Refrain from Prescribing Conditions. — The power to prescribe conditions under subsection (a), like the power to suspend rate changes, includes the power to refrain from prescribing them. Thus the Commission by its affirmative order may allow applied-for rate changes to become immediately effective, conditionally or unconditionally. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Authority to Enter Interim Orders. — Section 62-135 and this section clearly authorize the Commission to permit rate schedule changes applied for by a utility to be placed into effect on an interim basis before hearing and final determination. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The Utilities Commission had authority to enter an interim order allowing a power company's initially requested rate increase to go into effect pending final determination of the case, subject to the refund with interest of any protion of the increase ultimately determined to be excessive. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Petition to Be Determined on Basis of Facts Existing When Increase Effective. — The Utilities Commission must determine a petition for an increase in telephone rates on the basis of the facts existing at the time such increase is effective. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

And Not on Basis of Subsequent Events. — The Utilities Commission cannot consider events occurring subsequent to the date certain rates went into effect, to ascertain what were proper rates on that date. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

If a subsequent change in conditions warrants a new rate, such new rate must relate to the date of change. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Transfer of Exchanges to Subsidiary during Pendency of Petition. — Where a telephone company, during the pendency of its

petition for an increase in rates, transfers part of its exchanges to a subsidiary, the Utilities Commission, in the exercise of its discretion, may make the subsidiary a formal party and treat the original petition as a joint petition for a uniform system of rates; or it may make the subsidiary a party and fix proper rates for the subsidiary's exchanges and for the original petitioner's exchanges. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

The parties must be accorded an opportunity to be heard with respect to the effect, if any, a subsequent change in conditions had on the rate structure, and a denial of such opportunity would be a deprivation of due process. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

The Commission's findings, supported by substantial evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence. State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Decision Upheld unless Assailable under § 62-94(b). — The decision of the Commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in § 62-94(b). State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

For discussion of procedure to be followed in request for coal adjustment clause prior to 1975 enactment of former subsection (e), see State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975), aff'd, 291 N.C. 361, 230 S.E.2d 671 (1976).

Applied in State ex rel. North Carolina Util. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 453, 192 S.E.2d 842 (1972); State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 361, 230 S.E.2d 671 (1976); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 477, 232 S.E.2d 199 (1977); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 478, 232 S.E.2d 200 (1977).

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

Stated in Senior Citizens Clubs v. Duke Power Co., 425 F. Supp. 411 (W.D.N.C. 1976).

Cited in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978); State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979); State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

II. SUSPENSION OF RATE CHANGES.

Language of Subsection (b) Is Permissive. — While the language of subsection (b) gives the Commission authority to suspend changes in rates subject to the time limitation imposed, it does not require that it do so. The language is permissive, not mandatory. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The power granted the Commission by subsection (b) to suspend a requested change in rates is a discretionary one which the Commission may, but need not, exercise. State ex rel. Utilities Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

Authority to Suspend Rates for Lesser Period. — The authority to suspend rates for not more than 270 days clearly includes the power to suspend them for some lesser period. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Power to Suspend Portion of Change for Lesser Period. — The discretionary power granted the Commission by subsection (b) to suspend a proposed change in rates for a period not longer than 270 days clearly includes the lesser power to suspend a portion of the change for some lesser period. State ex rel. Utilities Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

Suspension of Rates May Be Withdrawn or Modified. — Nothing in this section indicates a legislative intent that once the Commission exercises its discretionary power and suspends rates, it thereby necessarily exhausts its authority in that regard, so as thereafter to be precluded from withdrawing or modifying the suspension. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

It is entirely consistent with the statutory procedure contemplated by this section that

upon the filing with the Commission by a utility of a new or revised rate, the Commission, if it exercises its discretion to suspend such rate, should (1) act promptly and suspend the rate for up to the maximum period it is permitted to do so; (2) hold a preliminary hearing, if the Commission should deem this desirable, to receive additional evidence and information; and (3) in the clearer light furnished by the additional information so acquired, reconsider its original order and either modify it or cancel it altogether. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Implicit within the discretionary authority granted to determine whether and for how long to suspend is the discretion to cancel or modify a suspension once it has been made, and nothing in the language of this section suggests that the legislature intended that the Commission could exercise the discretionary authority granted it only if it did so on an all-or-nothing, once-and-for-all basis. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

III. RATE CHANGES BASED ON FUEL COSTS UNDER FORMER SUBSECTION.

Subsection (e) dealt specifically with the continuation of previously granted rate increases based solely on the increased cost of fuel. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Former subsection (e) did not roll back electric power rates. On the contrary, it authorized the Commission, after hearing, to incorporate into the basic rates of the utility, chargeable on and after September 1, 1975, an increase determined by the then cost of coal. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Heat Rate and Plant Availability Not Bases for Determination under Former Subsection (e). — Pursuant to former subsection (e) of this section, a public utility could apply to the Utilities Commission for authority to increase its rates and charges based solely upon the increased cost of fuel used in the generation of electric power, and the Commission, on its own motion or upon request of an interested rate payor, could consider and determine a decrease in rates or charges based solely upon a decrease in the cost of fuel; therefore, insofar as the Commission considered and passed upon the cost of fuel used by defendant in the generation of electric power during the periods in question by considering the reasonableness of the prices paid by defendant for such fuel, it acted within the scope of the statutorily prescribed procedure, but insofar as the Commission considered and based its determination upon such factors as defendant's heat rate and plant availability in these proceedings, it went beyond the scope of the procedure authorized by former subsection (e). State ex rel. Utilities Comm'n v. Virginia Elec. & Power Co., 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

Plant Efficiency Not Considered in Proceedings Under Former Subsection (e). — Heat rate and capacity factor furnish convenient measuring devices by which to evaluate the overall efficiency with which a particular electrical utility system is operated, and the Utilities Commission should take into account the efficiency of a company's operation in fixing its rates in a general rate case as provided in § 62-133. However, plant efficiency as it bears upon fuel cost was not a factor to be considered in the limited and expedited proceeding provided for by former subsection (e) of this section. State ex rel. Utilities Comm'n v. Virginia Elec. & Power Co., 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

Commission's Decision Held Improper. — Commission's "decision" that the legislature, in enacting former subsection (e), did not intend to deny the utility "recovery of its July and August 1975 fuel expenses actually incurred" was not an interpretation of the statute but a nullification of it, which was beyond the authority of the Commission. The wisdom and fairness of the legislature's determination, clearly expressed, may not be reviewed by the Commission, or even by the courts in the absence of a constitutional question. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

§ 62-135. Temporary rates under bond.

(a) Notwithstanding an order of suspension of an increase in rates, any public utility except a common carrier may, subject to the provisions of subsections (b), (c) and (d) hereof, put such suspended rate or rates into effect upon the expiration of six months after the date when such rate or rates would have become effective, if not so suspended, by notifying the Commission and its consumers of its action in making such increase not less than 10 days prior to the day when it shall be placed in effect; provided, however, that utilities engaged in the distribution of utility commodities bought at wholesale by the

utility for distribution to consumers may put such suspended rate or rates, to the extent occasioned by changes in the wholesale rate of such utility commodity, into effect at the expiration of 30 days after the date when such rate or rates would become effective if not so suspended; provided that no rate or rates shall be left in effect longer than one year unless the Commission shall have rendered its decision upon the reasonableness thereof within such period. This section to become effective July 1, 1963.

(b) No rate or rates placed in effect pursuant to this section shall result in an increase of more than twenty percent (20%) on any single rate classification of the public utility.

(c) No rate or rates shall be placed in effect pursuant to this section until the public utility has filed with the Commission a bond in a reasonable amount approved by the Commission, with sureties approved by the Commission, or an undertaking approved by the Commission, conditioned upon the refund in a manner to be prescribed by order of the Commission, to the persons entitled thereto of the amount of the excess plus interest from the date that such rates were put into effect, if the rate or rates so put into effect are finally determined to be excessive. The amount of said interest shall be determined pursuant to G.S. 62-130(e).

(d) If the rate or rates so put into effect are finally determined to be excessive, the public utility shall make refund of the excess plus interest to its customers within 30 days after such final determination, and the Commission shall set forth in its final order the terms and conditions for such refund. If such refund is not paid in accordance with such order, any persons entitled to such refund may sue therefor, either jointly or severally, and be entitled to recover, in addition to the amount of the refund, all court costs and reasonable attorney fees for the plaintiff, to be fixed by the court. (1933, c. 307, s. 7; 1959, c. 422; 1963, c. 1165, s. 1; 1981, c. 461, s. 2.)

Effect of Amendments. — The 1981 amendment substituted "plus interest" for "and interest at the rate of six percent (6%) per annum" near the end of the first sentence in subsection (c) and added the second sentence of subsection (c).

CASE NOTES

Purpose. — This section was enacted for the purpose of minimizing the effect of the unavoidable time lag between the filing of an application by a utility company for an increase in its rates for service and the entry of an order of the Commission finding such increase proper. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

This section is a direct exercise of the police power of the State by the legislature itself. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

This section prevails over a private contract in conflict therewith. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Prior contracts between a power company and the municipalities do not bar the power company from putting different rates into effect pursuant to this section, pending final determination by the Commission. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

But Power Company May Not at Will Disregard Such Contract. — The mere existence in the Commission of authority to increase the rates previously specified in a municipal contract does not authorize a power company at its own will to disregard such contract and to charge the other party thereto a higher rate. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Conditions for Putting Proposed Rates into Effect. — This section authorizes the utility to put its proposed rates into effect after the passage of six months from the filing of its application, if no order has been entered by the Commission determining the validity of the proposed rates and if the utility company files its undertaking, approved by the Commission, for a refund of any portion of such rates ultimately disapproved by the Commission. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Rate Changes on Interim Basis Permitted. — Section 62-134 and this section clearly authorize the Commission to permit rate schedule changes applied for by a utility to be placed into effect on an interim basis before hearing and final determination. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Preference as to Interests of Current Customers. — The power of the Commission to suspend a rate increase under investigation for a six months' period gives an absolute preference for that period to the interest of current customers in paying no more than they have been paying for the electricity they consume. Senior Citizens Clubs v. Duke Power Co., 425 F. Supp. 411 (W.D.N.C.), aff'd, 425 U.S. 928, 96 S. Ct. 1658, 48 L. Ed. 2d 172 (1976).

Conditional Preference as to Future Customers. — If increases may be suspended for longer periods, the interest of a utility's future customers may be impaired by the lack of adequate capacity to serve their needs. Thus, under this section, after lapse of the six-month period during which the interest of present customers has an absolute preference, a conditional preference is given to the interest of future customers by permitting the implementation of the increase subject to mandatory refund to the extent that the implemented increase is larger than the rates ultimately approved by the Commission. Senior Citizens Clubs v. Duke Power Co., 425 F. Supp. 411 (W.D.N.C.), aff'd, 425 U.S. 928, 96 S. Ct. 1658, 48 L. Ed. 2d 172 (1976).

Implementation of rate increase without Commission's approval does not involve state action under 42 U.S.C. § 1983. Senior Citizens Clubs v. Duke Power Co., 425 F. Supp. 411 (W.D.N.C.), aff'd, 425 U.S. 928, 96 S. Ct. 1658, 48 L. Ed. 2d 172 (1976).

Municipality Not Entitled to Temporary Restraining Order. — Where a public service company has filed bond with the Utilities Commission and has obtained authority from the Commission to put into effect an increase in rates in the territory served by it, a municipal corporation is not entitled to a temporary order restraining the service company from putting the rates into effect within the municipality upon the assertion that the increase in rates was contrary to contractual provisions in the franchise granted the public service company by the city, since an adequate and efficient remedy is afforded the city and its inhabitants by suit upon the bond in the event the increase in rate was not justified in law, and therefore the municipality could not suffer irreparable injury. City of Durham v. Public Serv. Co. of N.C., Inc., 257 N.C. 546, 126 S.E.2d 315 (1962).

Applied in State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 613, 216 S.E.2d 743 (1975).

Stated in State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

Cited in State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

§ 62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.

(a) Whenever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint of anyone directly interested, finds that the existing rates in effect and collected by any public utility are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force, and shall fix the same by order.

(b) All municipalities in the State are deemed to be directly interested in the rates and service of public utilities operating in such municipalities, and may institute or participate in proceedings before the Commission involving such rates or service. Any municipality may institute proceedings before the Commission to eliminate unfair and unreasonable discrimination in rates or service by any public utility between such complainant or its inhabitants and any other municipality or its inhabitants, and the Commission shall, upon complaint, after hearing afforded to the public utility affected and to all municipalities affected, have authority to remove such discrimination.

(c) If any refund is made to a distributing company operating as a public utility in North Carolina of charges paid to the company from which the distributing company obtains the energy, service or commodity distributed, the

Commission may, in cases where the charges have been included in rates paid by the customers of the distributing company, require said distributing company to distribute said refund plus interest among the distributing company's customers in a manner prescribed by the Commission. The amount of said interest shall be determined pursuant to G.S. 62-130(e). (Ex. Sess. 1913, c. 20, s. 7; C.S., s. 1083; 1933, c. 134, s. 8; c. 307, s. 8; 1937, c. 401; 1941, c. 97; 1963, c. 1165, s. 1; 1981, c. 460, s. 1.)

Effect of Amendments. — The 1981 amendment deleted "if practicable," following "the Commission may," and "and where the company had a reasonable return exclusive of the refund," following "customers of the distributing company," in the first sentence of subsection (c), substituted "plus interest among the distributing company's customers in a manner prescribed by the Commission" for "among said customers in proportion of their payment of the charges refunded" at the end of that sentence and added the second sentence in subsection (c).

Session Laws 1981, c. 460, s. 2, provides that the act shall not be applied to pending litigation.

CASE NOTES

Subsection (a) refers to rate fixing as envisioned by § 62-133. State ex rel. Utilities Comm'n v. Edmisten, 30 N.C. App. 459, 227 S.E.2d 593, rev'd on other grounds, 291 N.C. 451, 232 S.E.2d 184 (1976).

The Commission may not fix rates retroactively so as to make them collectible for past service. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The Utilities Commission exceeded its statutory authority in requiring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to § 62-130(a), and rates must be fixed prospectively from their effective date. Subsection (a) of this section provides that the commission shall determine rates to be thereafter observed and in force. The commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979), cert. denied, 299 N.C. 124, 261 S.E.2d 926 (1980).

The Commission may investigate rates upon the request of any person directly interested. It may hear evidence as to the reasonableness of the maximum rates fixed by law or by the Commission, and establish such rates as it may deem just. The authority conferred upon the Commission is plenary. Corporation Comm'n ex rel. Raleigh Granite Co. v. Atlantic Coast Line R.R., 187 N.C. 424, 121 S.E. 767 (1924).

As to authority of the Commission, on its own motion or that of another interested party, to intervene and make corrections in the utility's rate schedules, including, if circumstances should require it, the abrogation of the fuel clause, see State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Refunds to Customers. — The wording of this section clearly requires that refunds be made to the customers who paid the charges, and that these refunds be contingent upon practicability. State ex rel. Utilities Comm'n v. Public Serv. Co., — N.C. App. —, 289 S.E.2d 82 (1982).

"Complaint Proceeding". — A hearing which involves a single rate or a small part of the rate structure of a public utility is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure of the utility and may be resolved without involving the procedure outlined in § 62-133, and does not justify the expense and loss of time involved in such procedure. State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

"General Rate" Case. — A proceeding in which a utility seeks an increase in rates for classes of customers providing its major source of revenue in order to provide funds assertedly necessary for continued operation is a general rate case and not a complaint proceeding, even though the increase is not requested for all classes of customers. State ex rel. Utilities Comm'n v. Tidewater Natural Gas Co., 259 N.C. 558, 131 S.E.2d 303 (1963).

Stated in State ex rel. Utilities Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980).

Cited in Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974); State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

§ 62-137. Scope of rate case.

In setting a hearing on rates upon its own motion, upon complaint, or upon application of a public utility, the Commission shall declare the scope of the hearing by determining whether it is to be a general rate case, under G.S. 62-133, or whether it is to be a case confined to the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate of return. (1963, c. 1165, s. 1.)

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

This section is inapplicable to proceedings conducted under § 62-90(c), since their scope is limited by statute to the exceptions on which the particular appeal of a final order or decision is based, leaving the Commission without authority to declare such a hearing a general rate case or complaint proceeding. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

The question of whether a case "is to be a general rate case" under the terms of this section is a mixed question of law and fact. As to such questions, courts should be hesitant to disturb the commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish. Even at that stage, however, the commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

Applied in State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utilities Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980).

Quoted in State ex rel. Utilities Comm'n v. Virginia Elec. & Power Co., 48 N.C. App. 453, 269 S.E.2d 657 (1980).

Cited in State ex rel. Utilities Comm'n v. Beatties Ford Util., Inc., 21 N.C. App. 213, 203 S.E.2d 649 (1974); State ex rel. Utilities Comm'n v. County of Harnett, 30 N.C. App. 24, 226 S.E.2d 515 (1976); State ex rel. Utilities Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

§ 62-138. Utilities to file rates, service regulations and service contracts with Commission; publication; certain telephone service prohibited.

(a) Under such rules as the Commission may prescribe, every public utility:

(1) Shall file with the Commission all schedules of rates, service regulations and forms of service contracts, used or to be used within the jurisdiction of the Commission; and

(2) Shall keep copies of such schedules, service regulations and contracts open to public inspection.

(b) Every regular route common carrier of general commodities and every common carrier of passengers shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of property or passengers in intrastate commerce and all services in connection therewith between points on its own routes and between points on its own routes and points on the routes of other such common carriers, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates.

(c) Every irregular route common carrier shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of property in intrastate commerce between points within the area of its authorized operation, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates between points within the area of its own authorized operation and points on the line or route of such other common carriers.

(d) The schedules required by this section shall be published, filed, and posted in such form and manner and shall contain such information as the Commission may prescribe; and the Commission is authorized to reject any schedule filed with it which is not in compliance with this section. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) No public utility, unless otherwise provided by this Chapter, shall engage in service to the public unless its rates for such service have been filed and published in accordance with the provisions of this section.

(f) Under such rules as the Commission may prescribe, every electric membership corporation operating within this State shall file with the Commission, for information purposes, all rates, schedules of rates, charges, service regulations, and forms of service contracts, used or to be used within the State, and shall keep copies of such schedules, rates, charges, service regulations, and contracts open to public inspection.

(g) No public utility may offer or maintain telephone service to any subscriber to such service who has in use or proposes to place in use equipment which will enable said subscriber to observe or monitor telephone calls directed to or placed by said subscriber unless said subscriber shall agree that such equipment shall be used in conformity with the standards for the use of such equipment adopted by the Commission. (1899, c. 164, s. 7; Rev., s. 1109; 1907, c. 217, s. 5; C.S., s. 1074; 1933, c. 134, s. 8; c. 307, s. 4; 1941, c. 97; 1947, c. 1008, s. 25; 1949, c. 1132, s. 23; 1959, c. 209; 1963, c. 1165, s. 1; 1965, c. 287, s. 7; 1977, c. 799.)

Legal Periodicals. — For a survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

CASE NOTES

Use of Availability Charge in Rate Schedule for Recreational Subdivision. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Contractual obligation to provide water service to a recreational subdivision as well as the actual delivery thereof directly affect a utility's ability to function as a utility. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

§ 62-139. Rates varying from schedule prohibited; refunding overcharge; penalty.

(a) No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that

prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this Article, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules.

(b) Any public utility in the State which shall willfully charge a rate for any public utility service in excess of that prescribed in the schedules of such public utility applicable thereto then filed under this Article, and which shall omit to refund the same within 30 days after written notice and demand of the person overcharged, unless relieved by the Commission for good cause shown, shall be liable to him for double the amount of such overcharge, plus a penalty of ten dollars ($10.00) per day for each day's delay after 30 days from such notice or date of denial or relief by the Commission, whichever is later. Such overcharge and penalty shall be recoverable in any court of competent jurisdiction. (1903, c. 590, ss. 1, 2; Rev., ss. 2642, 2643, 2644; Ex. Sess. 1913, c. 20, ss. 5, 12; C.S., ss. 1082, 1086, 3514; 1933, c. 134, s. 8; c. 307, s. 5; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to venue of actions against railroad, see § 1-81. As to charging higher rates after rates reestablished upon reconsideration, see § 62-132.

CASE NOTES

Constitutionality of Former Section. — Under the Interstate Commerce Act, as amended, Congress, in exercise of the constitutional powers conferred on it, has taken entire control of rates upon interstate shipments of goods, and former § 60-110 was inoperative as to such shipments. Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

Former § 60-110, prohibiting freight charges in excess of printed tariffs, was not unconstitutional as in violation of the Fourteenth Amendment to the federal Constitution or the commerce clause of said Constitution and the acts passed in pursuance thereof. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907); Raleigh Iron Works v. Southern Ry., 148 N.C. 469, 62 S.E. 595 (1908). But see Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

Assurance of Equal Service as Basis for Regulation. — A fundamental basis for the regulation of public utilities is to assure that once monopoly powers have been granted, the utility will provide all of its customers similarly situated with service on a reasonably equal basis. State ex rel. North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Telephone Company Proscribed from Furnishing Free Service, etc., to Municipalities. — The Utilities Commission properly proscribes a telephone company from furnishing service to certain municipalities within its territory free or at a reduced rate, and contractual agreements of a telephone company to do so in consideration for franchise rights to use the streets, alleys and roads in such municipalities for its pole line and underground conduits are void, since such concessions constitute discrimination against other customers similarly situated. State ex rel. North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Electric Rate Based on Old Contract Upheld. — Where, at the termination of a contract between city and electric company, city officials were doubtful whether it would be advantageous to adopt the new schedule of the electric company, and elected to take current on basis from month to month, it was held that the electric company was not exacting an unlawful rate by billing the city for current on rates contained in the old contract rather than under the new schedule. City of High Point v. Duke Power Co., 34 F. Supp. 339 (M.D.N.C. 1940), aff'd, 120 F.2d 866 (4th Cir. 1941).

Freight Rates Need Not Be Same for Both Directions. — In shipments to a great distance, special circumstances, such as flow of traffic, may justify a higher rate between two points in one direction than in the opposite; and in an action for recovery of the penalty for excessive freight rates, it was error for the judgment below in effect to charge the jury that such tariff rate published between the two points for freight moving in an opposite direction to that of the shipment in question was conclusive, and that they should be governed in their verdict as to the overcharge accordingly. James H. Scull & Co. v. Atlantic Coast Line R.R., 144 N.C. 180, 56 S.E. 876 (1907).

Freight Charge on Undelivered Shipment. — Where defendant collected freight charges, for an entire shipment, as invoiced and originally billed, and the sum of 96 cents was

paid as freight on that part of the shipment which was "short" and not delivered, this was an overcharge; failure to refund such overcharge after the 60 days allowed for investigation rendered defendant liable for the statutory penalty. Cottrell v. Railroad, 141 N.C. 383, 54 S.E. 288 (1906).

Collection of Surcharge before Tariff Became Effective. — The Utilities Commission exceeded its statutory authority in requring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to § 62-130(a) and rates must be fixed prospectively from their effective date. Section 62-136(a) provides that the commission shall determine rates to be thereafter observed and in force. The commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979), cert. denied, 299 N.C. 124, 261 S.E.2d 926 (1980).

Penalty Enforceable though Charges Small. — The penalty fixed by former § 60-110 to enforce the duty of a carrier in regard to proper charges for transporting freight and refund of overcharges, which penalty could not in any event exceed $100.00, was enforceable for a default established against defendant, even though the particular transportation charges might appear disproportionately small. It is on failure to return small amounts wrongfully overcharged that penalties are especially required. In large matters the claimant can better afford the cost of litigation. Efland v. Southern Ry., 146 N.C. 129, 59 S.E. 359 (1907).

Recovery of Excess Caused by Error in Tariff Distance Table. — Where carriers charged rates in accordance with the published tariffs on file, but because of error in the tariff distance table the charges were excessive, the shippers could recover the excess charged by petition before the Utilities Commission, the remedy by civil action under former §§ 60-110, 62-138 and this section to recover overcharges and penalties being the proper remedy only when the charges were collected in excess of the published tariffs. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

Agent as Party Aggrieved. — Where, under agreement with his principal, the agent of a manufacturer was obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he paid its unlawful charges on a shipment, he was the party aggrieved, and could maintain his action to recover the excess, and also the penalty when settlement was not made within 60 days. Tilley v. Southern Ry., 172 N.C. 363, 90 S.E. 309 (1916).

What Demand Must Specify. — Where carrier demanded and received an unlawful freight charge for a shipment, and the party aggrieved made written demand of the carrier for payment of the overcharge, as required by the statute, it was not necessary, in order to maintain an action for the penalty imposed upon the carrier failing to settle in 60 days, that the written demand specify the penalty, or that demand therefor be made in the justice's court or alleged in the complaint filed on appeal therefrom. Tilley v. Southern Ry., 172 N.C. 363, 90 S.E. 309 (1916).

Separate Demands in Same Envelope. — The mere fact that plaintiff enclosed separate written demands in the same envelope, and gave an aggregate amount thereof, in a letter accompanying them, did not affect the demands, when the overcharges were separate and distinct, demand was made specifically as to each and was accompanied separately with the paid freight bill and duplicate bill of lading, and each demand was complete in itself; such was a compliance with the provisions of the statute. Efland v. Southern Ry., 146 N.C. 129, 59 S.E. 359 (1907).

Burden of Proving Overcharge. — The burden is upon the plaintiff to show that a freight rate charged and collected by a carrier was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the statutory penalty; hence, where the shipment was routed over one line of connecting carriers and the tariff filed by the carrier over another route was shown, no evidence was afforded as to the rate of the actual route of the shipment, and, in the absence of further evidence, a judgment as of nonsuit was proper. Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

§ 62-140. Discrimination prohibited.

(a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may deter-

mine any questions of fact arising under this section; provided that it shall not be an unreasonable preference or advantage or constitute discrimination against any person, firm or corporation or general rate payer for telephone utilities to contract with motels, hotels and hospitals to pay reasonable commissions in connection with the handling of intrastate toll calls charged to a guest or patient and collected by the motel, hotel or hospital; provided further, that payment of such commissions shall be in accordance with uniform tariffs which shall be subject to the approval of the Commission.

(b) The Commission shall make reasonable and just rules and regulations:

(1) To prevent discrimination in the rates or services of public utilities.

(2) To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or misleading or deceiving the public in any manner as to rates charged for the services of public utilities.

(c) No public utility shall offer or pay any compensation or consideration or furnish any equipment to secure the installation or adoption of the use of such utility service except upon filing of a schedule of such compensation or consideration or equipment to be furnished and approved thereof by the Commission, and offering such compensation, consideration or equipment to all persons within the same classification using or applying for such public utility service; provided, in considering the reasonableness of any such schedule filed by a public utility the Commission shall consider, among other things, evidence of consideration or compensation paid by any competitor, regulated or nonregulated, of the public utility to secure the installation or adoption of the use of such competitor's service. Provided, further, that nothing herein shall prohibit a public utility from carrying out any contractual commitment in existence at the time of the enactment hereof, so long as such program does not extend beyond December 31, 1963. For the purpose of this subsection, "public utility" shall include any electric membership corporation operating within this State, and the terms "utility service" and "public utility service" shall include the service rendered by any such electric membership corporation. (1899, c. 164, s. 2, subsecs. 3, 5; Rev., s. 1095; 1913, c. 127, s. 6; C.S., s. 1054; 1933, c. 134, s. 8; c. 307, s. 6; 1941, c. 97; 1963, c. 1165, s. 1; 1965, c. 287, s. 8; 1977, 2nd Sess., c. 1146.)

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

Subsection (a) is similar to § 3 of the Interstate Commerce Act. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

The language of subsection (a) does not mean that customer classifications, once established by a utility, must remain frozen absent a showing of change of conditions justifying a change in classifications. State ex rel. Utilities Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

Former Section Declaratory of Common Law. — Former § 60-5, making discrimination in charges by common carriers a misdemeanor, was declaratory of the common law, and secured to every person the right to participate in the use of the facilities furnished, or which it was its duty to furnish, by a common carrier upon terms of equality, in regard to price, and otherwise, and free from unlawful discrimination. Lumber Co. v. Railroad, 141 N.C. 171, 53 S.E. 823 (1906).

Duty Imposed by this Section as Development of Common Law Obligation. — The duty now imposed by this section upon privately owned distributors and sellers of electric power not to discriminate in service or rates is merely a development of the common-law obligation of equal and undiscriminating service. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

The obligation of a public service corporation to serve impartially and without unjust discrimination is fundamental. It is not essential that consumers who are charged

different rates for service should be competitors in order to invoke this principle. There must be substantial differences in service or conditions to justify differences in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953); State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

The question of law with respect to public utility rate differentials is not whether the differential is merely discriminatory or preferential but is whether the differential is an unreasonable or unjust discrimination. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

What Constitutes Unlawful Discrimination by Carriers. — Discrimination in freight tariffs by railroad companies means charging shippers of freight unequal sums for carrying the same quantity of freight equal distances, that is, more in proportion for a short than for a long distance. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

A common carrier is guilty of unlawful discrimination, by the principles of the common law and the terms of the statute, when it charges one person, for service rendered, a larger sum than is charged another person for like service under substantially similar conditions. Lumber Co. v. Railroad, 141 N.C. 171, 53 S.E. 823 (1906).

There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utilities Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234, cert. denied, 301 N.C. 531, 273 S.E.2d 461 (1980).

All who ship goods with common carriers are required to be treated equally with respect to the same category of service. State ex rel. Utilities Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838, rev'd on other grounds, 302 N.C. 14, 273 S.E.2d 232 (1980).

But Rates May Differ under Varying Conditions. — The charging of different rates for service rendered under varying conditions and circumstances is not unlawful. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Provided Differences in Service or Conditions Are Substantial. — There must be substantial differences in service or conditions to justify difference in rates. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

The authority of the Utilities Commission to set different rates is not unbridled. There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

And where substantial differences in services or conditions exist, unreasonable application of the same rates may be discriminatory and thus improper. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Factors which constitute "substantial differences in service or conditions" and, therefore, justify a rate differential include (1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material factor in the determination of rates. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Rates for Shipments from Different Origins Need Not Be Equal. — Subsection (a) of this section does not require an equality of rates where the shipments are from different points of origin to the same destination even though the distances be equal or approximately so. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Charging Subsequent Users for Expense of Serving Prior Users as Discrimination. — The cost of coal burned in generating power has no relation whatever to service in any subsequent month. Thus, it, like wage expense, should be borne by the users of the service in the month in which the expense was incurred and may not properly be amortized so as to make subsequent users pay part of this burden. So to cast upon subsequent users the expense of serving prior users is discrimination forbidden by this section. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Difference in Service among Customers in the Same Municipality. — The fact that a power company which is a "secondary supplier" directly serves seven customers within a municipality pursuant to the provisions of § 160A-332 but does not directly serve other customers within the municipality does not constitute an "unreasonable preference or advantage" within the meaning of this section. State ex rel. Utilities Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

Different Rate Schedules for Municipalities and Industrial Users of Electrical Energy. — The Commission, in determining whether there is a justifiable basis for establishment of different rate schedules for munic-

ipalities engaged in resale of electrical energy and industrial users, must consider use characteristics and load factors as well as the amount of electrical energy purchased under the respective schedules. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

The Commission was justified in placing municipalities engaged in resale of electrical energy and industrial users under different schedules based upon a difference in the load factor. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Right of City to Refuse to Serve Is Same as Private Company's. — The right of a municipal corporation operating a plant for the distribution and sale of electricity to its inhabitants to refuse to serve is neither greater nor less than that of a privately owned electric power company to do so. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

City May Not Deprive Inhabitant of Service to Compel Obedience to Police Regulations. — A city may not deprive an inhabitant, otherwise entitled thereto, of light, water, or other utility service as a means of compelling obedience to its police regulations, however valid and otherwise enforceable those regulations may be. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

Furnishing free service for municipal purposes in compliance with franchise provisions constitutes an unjust and illegal discrimination. State ex rel. North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Rates charged REA cooperatives were not available to municipalities engaged in resale of electrical energy due to the following factors: (1) The cooperatives were required to extend their lines though sparsely settled rural areas with resulting line losses; and (2) the cooperatives were created and operated on a nonprofit basis pursuant to the established public policy of State and federal government. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

An attempted justification of rate differentials by a classification of power furnished as "secondary" and "primary" was held insupportable on the facts. State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Giving Preference to Parent Corporation. — A power company which is a subsidiary of one of its commercial customers may not give a preference to its parent corporation, but must give equal treatment to all its customers similarly situated. State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

A power company which is a subsidiary may not be allowed to structure its economic affairs or physical operations in such a way as to effect an unreasonable preference or advantage to anyone, including its parent. State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Commission May Not Permit Unjustified Service Refusal. — A refusal by a telephone company to serve, without a reasonable justification therefor, is a violation of the company's duty, and the Commission has no authority to permit it. State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Discriminatory Embargoes. — A common carrier cannot place an embargo on its customer or patron so as to discriminate against him or those dealing with him. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

A railroad carrying logs to a sawmill cannot charge a shipper agreeing to ship the manufactured products by the same line less for the same service than it charges a shipper who makes no such agreement. Lumber Co. v. Railroad, 136 N.C. 479, 48 S.E. 813 (1904).

Utilities Commission has authority to allow use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Recovery of Excess Charges. — Where a higher freight charge was paid than that charged other shippers, the payment was not to be considered voluntary, and the excess could be recovered back upon account for money had and received, and it was not necessary that at the time of payment there should have been any protest. Lumber Co. v. Railroad, 141 N.C. 171, 53 S.E. 823 (1906).

Allegation that common carrier for hire gave a named person undue preference by transporting him free ex vi termini alleged discrimination. State v. Southern Ry., 125 N.C. 666, 34 S.E. 527 (1899).

What Party Entitled to Injunctive Relief. — Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party, and that the shippers would be the real parties in interest, not the contract truck carriers. Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R., 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

Question for Decision of Court. — Where the Utilities Commission concluded upon undisputed facts that there was no unlawful discrimination by a power company in the rates

charged its commercial customers, whether the conclusion was supported by competent, material and substantial evidence in view of the entire record was held to present a question of law for the decision of the court. State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Quoted in State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Cited in State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398 (1977).

§ 62-141. Long and short hauls.

(a) Except when expressly permitted by the Commission, it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Chapter to charge and receive as great compensation for a shorter as for a longer distance.

(b) Upon application to the Commission, common carriers may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section. (1899, c. 164, s. 14; Rev., s. 1107; Ex. Sess. 1913, c. 20, s. 9; 1915, c. 17, s. 1; C.S., s. 1072; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-142. Contracts as to rates.

All contracts and agreements between public utilities as to rates shall be submitted to the Commission for inspection that it may be seen whether or not they are a violation of law or the rules and regulations of the Commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing public utilities shall be submitted to the Commission for inspection and approval insofar as they affect the rules and regulations made by the Commission to secure to all persons doing business with such utilities just and reasonable rates. The Commission may make such rules and regulations, as to such contracts and agreements as the public interest may require. (1899, c. 164, s. 6; Rev., s. 1108; C.S., s. 1073; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-143. Schedule of rates to be evidence.

The schedule of rates fixed by statute or under this Article, in suits brought against any public utility involving the rates of a public utility or unjust discrimination in relation thereto, shall be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable. Any such schedule when certified by a clerk of the Commission as a true copy of a schedule on file with the Commission shall be received in all courts as prima facie evidence of such schedule without further proof, and, if the clerk certifies that said schedule has been approved by the Commission, as prima facie evidence of such approval. (1899, c. 164, s. 7; Rev., s. 1112; C.S., s. 1077; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-144. Free transportation.

(a) All common carriers under the supervision of the Commission shall furnish free transportation to the members of the Commission, and, upon written authority of the Commission, such carriers shall also furnish free transportation to such persons as the Commission may designate in its employ or in the employ of the Department of Motor Vehicles for the inspection of equipment and supervision of safe operating conditions and of traffic upon the highways of the State.

(b) Except as provided in subsection (a), no common carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, commission agents, employees and retired employees, and members of their immediate families: Provided, that common carriers under this Article may exchange free transportation within the limits of this section and may accept as a passenger a totally blind person accompanied by a guide at the usual and ordinary fare charged to one person under such reasonable regulations as may have been established by the carrier and approved by the Commission.

(c) Any person except those permitted by law accepting free transportation shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court.

(d) Nothing in this section shall prohibit the carriage, storage or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable or educational purposes, or the use of passes for journeys wholly within this State which have been or may be issued for interstate journeys under the authority of the United States Interstate Commerce Commission. (1899, c. 164, s. 22; c. 642; 1901, c. 652; c. 679, s. 2; 1905, c. 312; Rev., s. 1105; Ex. Sess. 1908, c. 144, s. 4; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160; C.S., ss. 1069, 1070, 3492; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1132, s. 27; 1953, c. 1279; 1963, c. 1165, s. 1.)

CASE NOTES

Transportation by a common carrier of any person, except of the classes specified, without charge, is unlawful, the offense being the actual free transportation and not the issuance of the free pass. State v. Southern Ry., 122 N.C. 1052, 30 S.E. 133 (1898).

A gratuitous passenger is not in pari delicto with the common carrier. McNeill v. Railroad, 135 N.C. 682, 47 S.E. 765, rehearing denied, 137 N.C. 704, 49 S.E. 1038 (1904).

Recovery for Injury Occasioned While Riding on Illegally Issued Pass. — The rights, privileges and protection attaching to the relation of passenger are imposed by law upon common carriers upon consideration of public policy, independent of contract, and arise from the nature of their public employment. Hence, one injured while riding on a pass illegally issued may recover from the railroad. McNeill v. Railroad, 135 N.C. 682, 47 S.E. 765 (1904).

Construction of Penal Statute. — In construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers generally, and by private individuals and officials, will not be considered. State v. Southern Ry., 122 N.C. 1052, 30 S.E. 133 (1898).

§ 62-145. Rates between points connected by more than one route.

When there is more than one route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by the Commission for the shorter route shall be the maximum rate which may be charged, and it shall be unlawful to charge

more for transporting such freight over the longer route than the lawful charge for the shorter route. (Ex. Sess. 1913, c. 20, s. 11; C.S., s. 1085; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Mileage is calculated over the shortest rail line between the point of origin and the point of delivery. State ex rel. North Carolina Util. Comm'n v. Norfolk Southern Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

Carrier may not present evidence that rate charged was just and reasonable where a rate was set for a short line distance and the carrier unlawfully charged a shipper the rate at a longer mileage level. State ex rel. Utilities Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234, cert. denied, 301 N.C. 531, 273 S.E.2d 461 (1980).

§ 62-146. Rates and service of motor common carriers.

(a) It shall be the duty of every common carrier by motor vehicle to provide safe and adequate service, equipment, and facilities for transportation in intrastate commerce and to establish, observe and enforce just and reasonable regulations and practices relating thereto, and, in the case of property carriers, relating to the manner and method of presenting, marking, packing and delivering property for transportation in intrastate commerce.

(b) Except under special conditions and for good cause shown, a common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle; and such common carrier may establish, with the prior approval of the Commission, such routes, joint rates, charges and classifications with any irregular route common carrier by motor vehicle, or any common carrier by rail, express, or water.

(c) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through rates with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, and the carrying of personal, sample and excess baggage.

(d) In case of joint rates between common carriers, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein, which shall not unduly prefer or prejudice any of such participating carriers. Upon investigation and for good cause, the Commission may, in its discretion, prohibit the establishment of joint rates or service.

(e) Any person may make complaint in writing to the Commission that any rate, classification, rule, regulations, or practice in effect or proposed to be put into effect, is or will be in violation of this Article. Whenever, after hearing, upon complaint or in an investigation or its own initiative, the Commission shall be of the opinion that any individual or joint rate demanded, charged, or collected by any common carrier or carriers by motor vehicle, or by any such common carrier or carriers in conjunction with any other common carrier or carriers, for transportation of property in intrastate commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate or the minimum

or maximum, or the minimum and maximum rate thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective, and in the case of passenger carriers, the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes, and joint rates, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maximum or minimum, or maximum and minimum to be charged, and the terms and conditions under which such through routes shall be operated.

(f) Whenever, after hearing upon complaint or upon its own initiative, the Commission is of the opinion that the divisions of joint rates applicable to the transportation of property in intrastate commerce between a common carrier by motor vehicle and another carrier are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable division thereof to be received by the several carriers; and in cases where the joint rate or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers in accordance with the order from the date of filing the complaint or entry of order of investigation or such other dates subsequent thereto as the Commission finds justified, and in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

(g) In any proceeding to determine the justness or reasonableness of any rate of any common carrier by motor vehicle, there shall not be taken into consideration or allowed as evidence any elements of value of the property of such carrier, good will, earning power, or the certificate under which such carrier is operating, and such rates shall be fixed and approved, subject to the provisions of subsection (h) hereof, on the basis of the operating ratios of such carriers, being the ratio of their operating expenses to their operating revenues, at a ratio to be determined by the Commission; and in applying for and receiving a certificate under this Chapter any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of every transferee of such certificate or of any part thereof.

(h) In the exercise of its power to prescribe just and reasonable rates and charges for the transportation of property in intrastate commerce by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon movement of traffic by the carrier or carriers for which rates are prescribed; to the need in the public interest of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers under honest, economical, and efficient management to provide such service.

(i) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. This section shall be in addition to other provisions of this Chapter which relate to public utilities generally, except that in cases of conflict between such other provisions and this section, this section shall prevail for motor carriers. (1947, c. 1008, s. 24; 1949, c. 1132, s. 22; 1963, c. 1165, s. 1.)

CASE NOTES

Subsection (c) of this section encourages cooperation and agreements between common carriers respecting their service to the public. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Carriers have legal right to contract inter se, and the law encourages cooperation and agreements between them respecting their service to the public. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Duty to Establish Joint Rates and Divide Revenues. — Motor carriers of freight in intrastate commerce who exchange freight in the course of delivery are not only given authority to establish joint rates, but are required to do so, and to provide for the division of revenues derived from such shipments by contract, subject only to the limitation that the contract shall not unduly prefer or prejudice any of the participating carriers. State ex rel. Utilities Comm'n v. Thurston Motor Lines, 240 N.C. 166, 81 S.E.2d 404 (1954).

Authority of Commission to Interfere with Division of Revenue from Interchanged Freight. — The Utilities Commission is given authority to intervene and vacate a contract for division of revenue from interchanged freight between two intrastate motor carriers only upon finding after hearing that the contractual agreement between the carriers for the division of revenue from such shipments is, or will be, unjust, unreasonable and inequitable, or unduly preferential or prejudicial as between the contracting carriers, and when an order is entered by the Commission without such jurisdictional finding, the cause must be remanded. A finding merely that the Commission does not accept the contractual practice of the carriers as being equitable is insufficient. And the provision of subsection (d), giving the Commission discretionary power to prohibit the establishment of joint rates, is inapplicable. State ex rel. Utilities Comm'n v. Thurston Motor Lines, 240 N.C. 166, 81 S.E.2d 404 (1954).

Mileage alone is not a sufficient basis for the determination of intrastate rates by the Utilities Commission, but the Commission must consider all factors involved in rate making, including competition from interstate carriers, the different modes of transportation, the topography and volume of business as affecting costs, etc. State ex rel. Utilities Comm'n v. North Carolina Motor Carriers Ass'n, 253 N.C. 432, 117 S.E.2d 271 (1960).

An operating ratio of 100% means that for every dollar of freight revenue received, the carrier spends a dollar in operating expenses. State ex rel. North Carolina Util. Comm'n v. Attorney Gen., 2 N.C. App. 657, 163 S.E.2d 638 (1968); State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

Lower Operating Ratios Indicative of More Profitable Operations. — When the operating ratio exceeds 100%, it means that the expenses exceed the revenues. The lower the operating ratio, the more profitable the operation is to the carrier. State ex rel. North Carolina Util. Comm'n v. Attorney Gen., 2 N.C. App. 657, 163 S.E.2d 638 (1968).

Basis for Determination of Ratios. — A determination of intrastate operating ratios must be based on revenues and expenses incurred in North Carolina alone; where ratios do not reflect an actual separation of intrastate and interstate revenues and expenses, a rate increase based thereon cannot be sustained. State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

The operating ratios for the movement of tobacco in intrastate traffic cannot be determined with mathematical exactitude. But the carriers can no doubt approximate the rateable proportion of their operating ratios from tobacco movements in intrastate traffic and offer evidence of other facts and circumstances in respect thereto sufficient in probative force to enable the Commission to make findings of fact and to issue such orders as the findings of fact may warrant. State ex rel. North Carolina Util. Comm'n v. Attorney Gen., 2 N.C. App. 657, 163 S.E.2d 638 (1968).

Authority to transport general commodities includes authority to transport meats and packing house products. State ex rel. Utilities Comm'n v. Forbes Transf. Co., 259 N.C. 688, 131 S.E.2d 452 (1963).

§ 62-147. Rates of motor contract carriers.

(a) It shall be the duty of every contract carrier to establish and observe reasonable minimum rates for any service rendered or to be rendered in the transportation of property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates. It shall be the duty of every contract carrier

to file with the Commission, publish, and keep open for public inspection, in the form and matter prescribed by the Commission, schedules containing the minimum rates of such carrier actually maintained and charged for the transportation of property in intrastate commerce, and any rule, regulation, or practice affecting such rates and the value of the service thereunder. No such contract carrier, unless otherwise provided by this Article, shall engage in transportation in intrastate commerce unless the minimum rates for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this Article. No reduction shall be made in any such rate either directly or by means of any change in any rule, regulation or practice affecting such rate or the value of service thereunder, except after 30 days' notice of the proposed change filed in the aforesaid form and manner, but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the rates filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum rates so filed or prescribed; provided, that any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the policy declared in this Chapter.

(b) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate, or the value of the service thereunder, contravenes the policy declared in this Chapter, or is in contravention of any provision of this Chapter, the Commission may prescribe such just and reasonable minimum rate, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this Chapter. Such minimum rate, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this Chapter, which the Commission may find to be undue or inconsistent with the public interest and the policy declared in this Chapter, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(c) Whenever there shall be filed with the Commission by any such contract carrier any schedule stating a rate for a new service or a reduced rate, directly or by means of any rule, regulation, or practice, for transportation in intrastate commerce, the Commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such

suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, or such rule, regulation, or practice, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change in any rate or rule, regulation, or practice shall go into effect at the end of such period. After hearing, whether completed before or after the rate, or rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it has become effective.

(d) At any hearing before the Commission under this paragraph, the burden of proof shall be upon the carrier to show that the changed rate, rule, regulation or practice, or the proposed changed rate, rule, regulation or practice, is just and reasonable.

(e) If any provision of this section is in conflict with any other provision of this Chapter, the provisions of this section shall prevail. (1947, c. 1008, s. 26; 1949, c. 1132, s. 24; 1963, c. 1165, s. 1.)

CASE NOTES

"Tariff" and "Rates" Synonymous. — The word "tariff," used in connection with the rates of a common carrier, does not have any special legal significance that would differentiate it in effect from the word "rates," used in this section in connection with a contract carrier. State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

§ 62-148. Rates on leased or controlled utility.

If any public utility operating in the State other than a motor carrier is owned, controlled or operated by lease or other agreement by any other public utility doing business in the State, its rates may, in the discretion of the Commission, be determined for such public utility by the rates prescribed for the public utility which owns, controls or operates it. (Ex. Sess. 1908, c. 144, s. 2; C.S., s. 3490; 1963, c. 1165, s. 1.)

§ 62-149. Unused tickets to be redeemed.

Whenever any ticket is sold and is not wholly used by the purchaser, it shall be the duty of the carrier selling such ticket to redeem it or the unused portion thereof at the price paid for it, or in such manner and at such price as the Commission shall prescribe by regulation. (1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418; Rev., s. 2627; C.S., s. 3503; 1963, c. 1165, s. 1.)

§ 62-150. Ticket may be refused intoxicated person; penalty for prohibited entry.

The ticket agent of any common carrier of passengers shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, driver or other person in charge of any conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such conveyance. If any intoxicated person, after being forbidden by the conductor, driver or other person having charge of any such conveyance for the use of the traveling public, shall enter such conveyance, he shall be guilty of a misdemeanor. (1885, c. 358, ss. 1, 2, 3; Rev., ss. 2625, 2626, 3757; C.S., s. 3504; 1963, c. 1165, s. 1.)

CASE NOTES

When Exemplary Damages Allowed. — In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, exemplary damages would be allowed if such refusal was made with malice, undue force, or insult. Story v. Norfolk & S.R.R., 133 N.C. 59, 45 S.E. 349 (1903).

§ 62-151. Passenger refusing to pay fare or violating rules may be ejected.

If any passenger shall refuse to pay his fare, or be or become intoxicated, or violate the rules of a common carrier, it shall be lawful for the conductor or driver of the train or bus, or other conveyance, and servants of the carrier, on stopping the conveyance, to put him and his baggage out of the conveyance, using no unnecessary force. (1871-2, c. 138, s. 34; Code, s. 1962; Rev., s. 2629; C.S., s. 3507; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, s. 11; 1963, c. 1165, s. 1.)

CASE NOTES

Ejection from Baggage Car. — A person who gets on a blind baggage car, even though he has a ticket, and does not tell the conductor that he has it, where the conductor does not see it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Railroad, 135 N.C. 264, 47 S.E. 758 (1904).

Where individual shipped horses by express with an agreement that he should ride in the same car, he could not ride in the passenger coach without paying his fare. Teeter v. Southern Express Co., 172 N.C. 616, 90 S.E. 761, rehearing denied, 172 N.C. 620, 90 S.E. 927 (1961).

Mileage Book Holder Must Comply with Terms. — The holder of a mileage book must comply with its terms if reasonable opportunity is given, or he may be ejected. Mason v. Seaboard Air Line Ry., 159 N.C. 183, 75 S.E. 25 (1912); McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

Ejection of Party Refusing to Show Mileage Book. — When a purchaser of a mileage book from a railroad company is riding on an exchange ticket and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the right to eject him from the train. Mason v. Seaboard Air Line Ry., 159 N.C. 183, 75 S.E. 25 (1912).

Ejection Caused by Failure of Conductor to Return Ticket. — Where the conductor failed to return a ticket to a passenger to be used on another train, and the passenger was ejected therefrom for lack of the ticket, the railroad was liable for all damages attending the ejection. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Reliance on Agent's Statements. — The purchaser of a ticket may rely upon the statements of the railroad agent as to trains, connection, validity of ticket, etc., and if the passenger is ejected as a result of the agent's mistake the railroad is liable. Hallman v. Southern Ry., 169 N.C. 127, 85 S.E. 298 (1915); Creech v. Atlantic Coast Line R.R., 174 N.C. 61, 93 S.E. 453 (1917).

Carrier Not Liable for Unforeseen Result of Ejection. — A conductor requiring an intoxicated man to leave the train for nonpayment of fare did not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893).

Evidence of Drunkenness Held Inadmissible. — In an action for wrongful ejection from a train, evidence of drunkenness of plaintiff was not admissible where the answer simply denied the wrongful ejection alleged in the complaint. Raynor v. Wilmington Seacoast R.R., 129 N.C. 195, 39 S.E. 821 (1901).

As to requirement of former statute that passenger be ejected near usual stopping place or dwelling house, see Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893); Bullock v. Atlantic Coast Line R.R., 152 N.C. 66, 67 S.E. 60 (1910); McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

§ 62-152. Carriers to establish joint rates.

Any railroad is authorized and directed to enter into arrangements for the establishment of joint rates and through routes with common carriers by water and with other railroads for the transportation of persons and property transported wholly within the State of North Carolina, and it may, with approval of the Commission, establish such joint rates with common carriers by motor vehicle under the provisions of G.S. 62-146. (1931, c. 195; 1963, c. 1165, s. 1.)

§ 62-152.1. Uniform rates; joint rate agreements among carriers.

(a) Definitions. — As used in this section, unless the context otherwise requires, the term:

(1) "Carrier" means any common carrier as defined in G.S. 62-3(6).

(2) For purposes of this section, carriers by rail are carriers of the same class, carriers by motor vehicles are carriers of the same class, carriers by pipeline are carriers of the same class, carriers by water are carriers of the same class, carriers by air are carriers of the same class, and freight forwarders are carriers of the same class.

(3) The term "antitrust laws" means the provisions of Chapter 75 of the General Statutes (N.C.G.S. 75-1, et seq.), relating to combinations in restraint of trade.

(b) For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this Commission and party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by subsection (d) or (e) of this section) if it finds that, by reason of furtherance of the transportation policy and goal declared in this section and in G.S. 62-2 or G.S. 62-259 as may be pertinent, the relief provided in subsection (h) shall apply with respect to the making and carrying out of such agreement; otherwise, the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this subsection.

(c) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under this section shall maintain such accounts, records, files and memoranda and shall submit to the Commission such information and reports as may be prescribed by the Commission, and all the accounts, records, files and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(d) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that the agreement is of the character described in subsection (b) of this section and is limited to matters relating to transportation under joint rates or over through routes.

(e) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure.

(f) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which the approval was granted is not or are not in conformity with the standards set forth in subsection (b) of this section, or whether any such terms and conditions are not necessary for the purposes of conformity with such standards, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standards, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standards or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardships.

(g) No order shall be entered under this section except after interested parties have been afforded reasonable notice and opportunity for hearing.

(h) Parties to any agreement approved by the Commission under this section and other parties are, if the approval of such agreement is not prohibited by subsection (d) or (e) of this section, hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with the terms and conditions prescribed by the Commission.

(i) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of subsection (h) of this section. (1977, c. 219, s. 1.)

Editor's Note. — Session Laws 1977, c. 219, s. 2, contains a severability clause.

Legal Periodicals. — For a survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

§ 62-153. Contracts of public utilities with certain companies and for services.

(a) All public utilities shall file with the Commission copies of contracts with any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency, and when requested by the Commission, copies of contracts with any person selling service of any kind. The Commission may disapprove, after hearing, any such contract if it is found to be unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility. Such contracts so disapproved by the Commission shall be void and shall not be carried out by the public utility which is a party thereto, nor shall any payments be made thereunder. Provided, however, that in the case of motor carriers of passengers this subsection shall apply only to such contracts as the Commission shall request such carriers to file.

(b) No public utility shall pay any fees, commissions or compensation of any description whatsoever to any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the Commission and obtaining its approval. Provided, however, that this subsection shall not apply to motor carriers of passengers. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 17; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Purpose. — The purpose of this section is merely to assure that executory contracts between affiliates be just and reasonable on their face. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

This section was clearly enacted for the purpose of discovering contracts between affiliated corporations which are "unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility." State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Affiliate Company Cannot Be Used to Transmit Unreasonable Profits to Parent Holding Company. — The Commission cannot permit parent holding companies to use affiliate companies as a device for transmitting an unreasonable level of profits to such parent holding company from goods or services supplied the operating company by way of an affiliate company. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The statutory scheme is directed at prior approval. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Standard for Approval. — The consideration of the Commission under this section is directed to whether the contracts are just and reasonable. If they are, and are not efforts to divert or conceal profits, they are to be approved. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Basis for Determining Reasonableness of Affiliate's Charges. — The Utilities Commission must determine the reasonableness of charges to a public utility by an affiliated corporation on the basis of either: (1) the cost of the same services on the open market; (2) the cost similar utilities pay to their service companies; or (3) the reasonableness of the expenses incurred by the affiliated corporation in generating its services. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Consideration for Ratemaking Purposes of Expenses Pursuant to Unfiled Contracts. — This section does not prohibit the Utilities Commission from considering fees or charges owed to affiliated corporations under unfiled contracts as expenses of the public utility for purposes of ratemaking, so long as the Commission determines in the ratemaking procedure that the agreements between the utility and the affiliated corporations are just and reasonable and it does not appear that their purpose is to conceal or divert profits from the public utility to an affiliate. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Expenses incurred under unreasonable contracts would have to be disregarded in computing a utility's expenses. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Examination of Books and Records of Affiliated Companies. — An examination by the Utilities Commission of the books and records of companies affiliated with a regulated utility is necessary in a rate case only if there is no evidence of what the utility would have had to pay nonaffiliated companies for the same services or of what similar utilities pay their service companies for similar services. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Stated in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-154. Surplus power rates.

The Commission is authorized to investigate the sale of surplus electric power and the rates made for such energy, and to prescribe reasonable rules and rates for such sales. (1963, c. 1165, s. 1.)

§ 62-155. Electric power rates to promote conservation.

(a) It is the policy of the State to conserve energy through efficient utilization of all resources.

(b) If the Utilities Commission after study determines that conservation of electricity and economy of operation for the public utility will be furthered thereby, it shall direct each electric public utility to notify its customers by the most economical means available of the anticipated periods in the near future when its generating capacity is likely to be near peak demand and urge its customers to refrain from using electricity at these peak times of the day. In addition, each public utility shall, insofar as practicable, investigate, develop, and put into service, with approval of the Commission, procedures and devices that will temporarily curtail or cut off certain types of appliances or equipment for short periods of time whenever an unusual peak demand threatens to overload its system.

(c) The Commission itself shall inform the general public as to the necessity for controlling demands for electricity at peak periods and shall require the several electric public utilities to carry out its program of information and education in any reasonable manner.

(d) The Commission shall study the feasibility of and, if found to be practicable, just and reasonable, make plans for the public utilities to bill customers by a system of nondiscriminatory peak pricing, with incentive rates for off-peak use of electricity charging more for peak periods than for off-peak periods to reflect the higher cost of providing electric service during periods of peak demand on the utility system. No order regarding such rates shall be issued by the Commission without a prior public hearing, whether in a single electric utility company rate case or in general orders relating to two or more or all electric utilities.

(e) No Class A electric public utility shall apply for any rate change unless it files at the time of the application a report of the probable effect of the proposed rates on peak demand on it and its estimate of the kilowatt hours of electricity that will be used by its customers during the ensuing one year and five years from the time such rates are proposed to become effective. (1975, c. 780, s. 2.)

§ 62-156. Power sales by small power producers to public utilities.

(a) In the event that a small power producer and an electric utility are unable to mutually agree to a contract for the sale of electricity or to a price for the electricity purchased by the electric utility, the commission shall require the utility to purchase the power, under rates and terms established as provided in subsection (b) of this section.

(b) No later than March 1, 1981, and at least every two years thereafter, the commission shall determine the rates to be paid by electric utilities for power purchased from small power producers, according to the following standards:

(1) Term of Contract. — Long-term contracts for the purchase of electricity by the utility from small power producers shall be encouraged in order to enhance the economic feasibility of small power production facilities.

(2) Avoided Cost of Energy to the Utility. — The rates paid by a utility to a small power producer shall not exceed, over the term of the purchase power contract, the incremental cost to the electric utility of the electric energy which, but for the purchase from a small power producer, the utility would generate or purchase from another source. A determination of the avoided energy costs to the utility shall include a consideration of the following factors over the term of the power contracts: the expected costs of the additional or existing generating capacity which could be displaced, the expected cost of fuel and other operating expenses of electric energy production which a utility would otherwise incur in generating or purchasing power from another source, and the expected security of the supply of fuel for the utilities' alternative power sources.

(3) Availability and Reliability of Power. — The rates to be paid by electric utilities for power purchased from a small power producer shall be established with consideration of the reliability and availability of the power. (1979, 2nd Sess., c. 1219, s. 2.)

§§ 62-157 to 62-159: Reserved for future codification purposes.

Article 8.

Securities Regulation.

§ 62-160. Permission to pledge assets.

No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, without first making application to the Commission and by order obtain its permission so to do. (1933, c. 307, s. 17; 1963, c. 1165, s. 1.)

CASE NOTES

The General Assembly intended this Article to apply to all public utilities doing business in this State, whether they be foreign or domestic corporations, and even though they are also engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

The Commission may not lawfully require a multistate foreign corporation engaged in interstate commerce to comply with this Article and issue securities in the future only after first making application to and obtaining an order from the Commission authorizing such issue. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

The regulation and control by this State over the issuance of securities by a multistate foreign corporation engaged in interstate commerce, which the attempted enforcement by the Commission of this Article was held necessarily to entail, is to impose such an undue burden on interstate commerce as to make such regulation and control constitutionally beyond the State's power to enforce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

§ 62-161. Assumption of certain liabilities and obligations to be approved by Commission; refinancing of public utility securities.

(a) No public utility shall issue any securities, or assume any liability or obligation as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by such utility, and after investigation by the Commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the Commission by order authorizes such issue or assumption.

(b) The Commission shall make such order only if it finds that such issue or assumption is (i) for some lawful object within the corporate purposes of the public utility, (ii) is compatible with the public interest, (iii) is necessary or appropriate for or consistent with the proper performance by such utility of its service to the public and will not impair its ability to perform that service, and (iv) is reasonably necessary and appropriate for such purpose.

(c) Any such order of the Commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the public utility making such application.

(d) If a public utility shall apply to the Commission for the refinancing of its outstanding shares of stock by exchanging or redeeming such outstanding shares, the exchange or redemption of such shares of any dividend rate or rates, class or classes, may be made in whole or in part, in the manner and to the extent approved by the Commission, notwithstanding any provisions of law applicable to corporations in general: Provided, that the proposed transactions are found by the Commission to be in the public interest and in the interest of consumers and investors, and provided that any redemption shall be at a price or prices, not less than par, and at a time or times, stated or provided for in the utility's charter or stock certificates. (1933, c. 307, s. 18; 1945, c. 656; 1963, c. 1165, s. 1.)

CASE NOTES

The General Assembly intended this Article to apply to all public utilities doing business in this State, whether they be foreign or domestic corporations, and even though they are also engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

The Commission may not lawfully require a multistate foreign corporation engaged in interstate commerce to comply with this Article and issue securities in the future only after first making application to and obtaining an order from the Commission authorizing such issue. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

The regulation and control by this State over the issuance of securities by a multistate foreign corporation engaged in interstate commerce, which the attempted enforcement by the Commission of this Article was held necessarily to entail, is to impose such an undue burden on interstate commerce as to make such regulation and control constitutionally beyond the State's power to enforce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

The common capital stock of a corporation is a "security" within the meaning of that term as used in this section and § 62-162. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

§ 62-162. Commission may approve in whole or in part or refuse approval.

The Commission, by its order, may grant or deny the application provided for in the preceding section [G.S. 62-161] as made, or may grant it in part or deny it in part or may grant it with such modification and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises and may, from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate and may, by any such supplemental order, modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which any securities so authorized or the proceeds thereof may be applied; subject always to the requirements of the foregoing section [G.S. 62-161]. (1933, c. 307, s. 19; 1963, c. 1165, s. 1.)

CASE NOTES

Authority of Commission to Set Minimum Price for Sale of Unissued Common Stock. — In view of the language used by the legislature in conferring power of the Utilities Commission to supervise and control the issue and sale of securities by a public utility, the Commission had the authority not only to veto the sale of unissued common stock of a utility at par but also to impose the condition that such stock should be sold at a price not less than $125.00 per share. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

§ 62-163. Contents of application for permission.

Every application for authority for such issue or assumption shall be made in such form and contain such matters as the Commission may prescribe. Every such application and every certificate of notification hereinafter provided for shall be made under oath, signed and filed on behalf of the public utility by its president, a vice-president, auditor, comptroller, or other executive officer duly designated for that purpose by such utility. (1933, c. 307, s. 20; 1963, c. 1165, s. 1.)

§ 62-164. Applications to receive immediate attention; continuances.

All applications for the issuance of securities or assumption of liability or obligation shall be placed at the head of the Commission's docket and disposed of promptly, and all such applications shall be disposed of in 30 days after the same are filed with the Commission, unless it is necessary for good cause to continue the same for a longer period for consideration. Whenever such application is continued beyond 30 days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. (1933, c. 307, s. 21; 1963, c. 1165, s. 1.)

§ 62-165. Notifying Commission as to disposition of securities.

Whenever any securities set forth and described in any such application for authority or certificate of notification as pledged or held unencumbered in the treasury of the utility shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of, by the utility, such utility shall, within 10 days after such sale, pledge, repledge, or other

disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission. (1933, c. 307, s. 22; 1963, c. 1165, s. 1.)

§ 62-166. No guarantee on part of State.

Nothing herein shall be construed to imply any guarantee or obligation as to such securities on the part of the State of North Carolina. (1933, c. 307, s. 23; 1963, c. 1165, s. 1.)

§ 62-167. Article not applicable to note issues and renewals; notice to Commission.

The provisions of the foregoing sections shall not apply to notes issued by a utility for proper purposes and not in violation of law, payable at a period of not more than two years from the date thereof, and shall not apply to like notes issued by a utility payable at a period of not more than two years from date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes, and shall not apply to renewals thereof from time to time not exceeding in the aggregate six years from the date of the issue of the original note or notes so renewed or refunded. No such notes payable at a period of not more than two years from the date thereof, shall, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded by any issue of securities or another kind of any term or character or from the proceeds thereof without the approval of the Commission. Within 10 days after the making of any such notes, so payable at periods of not more than two years from the date thereof, the utility issuing the same shall file with the Commission a certificate of notification, in such form as may be determined and prescribed by the Commission. (1933, c. 307, ss. 24, 25; 1963, c. 1165, s. 1.)

§ 62-168. Not applicable to debentures of court receivers.

Nothing contained in this Article shall limit the power of any court having jurisdiction to authorize or cause receiver's certificates or debentures to be issued according to the rules and practice obtained in receivership proceedings in courts of equity. (1933, c. 307, s. 25; 1963, c. 1165, s. 1.)

§ 62-169. Periodical or special reports.

The Commission shall require periodical or special reports from each public utility issuing any security, including such notes payable at periods of not more than two years from the date thereof, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds. (1933, c. 307, s. 26; 1963, c. 1165, s. 1.)

§ 62-170. Failure to obtain approval not to invalidate securities or obligations; noncompliance with Article, etc.

(a) Securities issued and obligations and liabilities assumed by a public utility, for which the authorization of the Commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption.

(b) Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this Article or rule or regulation of the Commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto.

(c) A copy of any order made and entered by the Commission and certified by a clerk of the Commission approving the issuance of any securities or the assumption of any obligation or liability by a public utility shall be sufficient evidence of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order.

(d) Any public utility which willfully issues any such securities, or assumes any such obligation or liability, or makes any sale or other disposition of securities, or applies any securities or the proceeds thereof to purposes other than the purposes specified in an order of the Commission with respect thereto, contrary to the provisions of this Article, shall be liable to a penalty of not more than ten thousand dollars ($10,000), but such utility is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the Commission with respect thereto shall likewise be in general terms. (1933, c. 307, s. 27; 1963, c. 1165, s. 1.)

§ 62-171. Commission may act jointly with agency of another state where public utility operates.

If a commission or other agency or agencies is empowered by another state to regulate and control the amount and character of securities to be issued by any public utility within such other state, then the Utilities Commission of the State of North Carolina shall have the power to agree with such commission or other agency or agencies of such other state on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this State, and shall have the power to approve such issue jointly with such commission or other agency or agencies and to issue joint certificate of such approval: Provided, however, that no such joint approval shall be required in order to express the consent to an approval of such issue by the State of North Carolina if said issue is separately approved by the Utilities Commission of the State of North Carolina. (1933, c. 134, s. 8; c. 307, s. 28; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

The General Assembly intended this Article to apply to all public utilities doing business in this State, whether they be foreign or domestic corporations, and even though they are also engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

The Commission may not lawfully require a multistate foreign corporation engaged in interstate commerce to comply with the provisions of this Article and issue securities in the future only after first making application to and obtaining an order from the Commission authorizing such issue. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

The regulation and control by this State over the issuance of securities by a multistate foreign corporation engaged in interstate commerce, which the attempted enforcement by the Commission of this Article was held necessarily to entail, is to impose such an undue burden on interstate commerce as to make such regulation and control constitutionally beyond the State's power to

enforce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

§§ 62-172 to 62-179: Reserved for future codification purposes.

Article 9.

Acquisition and Condemnation of Property.

§ 62-180. Use of railroads and public highways.

Any person operating electric power, telegraph or telephone lines or authorized by law to establish such lines, has the right to construct, maintain and operate such lines along any railroad or public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder unreasonably the usual travel on such railroad or highway. (1874-5, c. 203, s. 2; Code, s. 2007; 1899, c. 64, s. 1; 1903, c. 562; Rev., s. 1571; C.S., s. 1695; 1939, c. 228, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

Constitutionality of Former Law. — The provisions of former §§ 56-1 to 56-10, empowering electric power or lighting companies, etc., to condemn lands for the erection of poles, establishment of offices, and other appropriate purposes, were constitutional and valid. Wissler v. Yadkin River Power Co., 158 N.C. 465, 74 S.E. 460 (1912).

No Rights over Private Land under Former Law. — Former § 56-1 applied to constructing lines along the highway and not to constructing the lines over private land. Wade v. Carolina Tel. & Tel. Co., 147 N.C. 219, 60 S.E. 987 (1908).

Upon What Telegraph Companies Rights Conferred. — The right to construct and operate telegraph lines along any railroad or other public highway in the State, and to obtain the right-of-way therefor by a condemnatory proceeding, was expressly conferred upon any telegraph company incorporated by this or by any other state. North Carolina & R. & D.R.R. v. Carolina Cent. Ry., 83 N.C. 489 (1880); Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

Telegraph Line as Additional Burden on Land. — A telegraph line along a railroad and on the right-of-way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902); Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903); Query v. Postal Tel. Cable Co., 178 N.C. 639, 101 S.E. 390 (1919).

As to electric light wires placed along the street being an additional burden on the land, see Brown v. Electric Co., 138 N.C. 533, 51 S.E. 62 (1905).

The construction of a street passenger railway does not impose any additional servitude upon the property fronting on the street so occupied. Hester v. Traction Co., 138 N.C. 288, 50 S.E. 711 (1905).

Maintenance of a utility pole along a public highway does not constitute an act of negligence unless the pole constitutes a hazard to motorists using the portion of the highway designated and intended for vehicular travel in a proper manner. Shapiro v. Toyota Motor Co., 38 N.C. App. 658, 248 S.E.2d 868 (1978).

Maintenance of a telephone pole 12½ inches beyond the elevated curbing of a road did not constitute an act of negligence in a personal injury action in which a car failed to negotiate a curve and crashed into the pole. Shapiro v. Toyota Motor Co., 38 N.C. App. 658, 248 S.E.2d 868 (1978).

§ 62-181. Electric and hydroelectric power companies may appropriate highways; conditions.

Every electric power or hydroelectric power corporation, person, firm or copartnership which may exercise the right of eminent domain under the Chapter Eminent Domain, where in the development of electric or hydroelectric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the public road authorities having supervision of such public highway, shall have power to appropriate said public highway for the development of electric or hydroelectric power: Provided, that said electric power or hydroelectric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the public road authorities having supervision of such public highway: Provided further, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road. (1911, c. 114; C.S., s. 1696; 1939, c. 228, s. 2; 1963, c. 1165, s. 1.)

Cross References. — As to what corporations, etc., may exercise the right of eminent domain, see § 40A-3.

CASE NOTES

Change in Section of Highway. — Where a hydroelectric power company appropriated a section of a public highway and built another section in lieu thereof, the provision of the statute that the company pay all damages assessed as provided by law did not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. Crowell v. Tallassee Power Co., 200 N.C. 208, 156 S.E. 493 (1931).

§ 62-182. Acquisition of right-of-way by contract.

Such telegraph, telephone, or electric power or lighting company has power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right-of-way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation. This section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation. (1874-5, c. 203, s. 3; Code, s. 2008; 1899, c. 64; 1903, c. 562, ss. 1, 2; Rev., s. 1572; C.S., s. 1697; 1963, c. 1165, s. 1.)

Cross References. — As to recording deeds of easement, see § 47-27.

CASE NOTES

Nonowner Cannot Grant Easement. — Railroad company which is not the owner of the soil cannot grant an easement to a telegraph company. Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903). See also, Narron v. Wilmington & W.R.R., 122 N.C. 856, 29 S.E. 356 (1898).

How Easement Acquired. — A telegraph company can acquire an easement in lands for construction and maintenance of its lines by grant, or pursuant to statute, or by adverse and continuous use for the period of 20 years. Teeter v. Postal Tel. Cable Co., 172 N.C. 783, 90 S.E. 941 (1916).

§ 62-183. Grant of eminent domain.

Such telegraph, telephone, electric power or lighting company shall be entitled, upon making just compensation therefor, to the right-of-way over the lands, privileges and easements of other persons and corporations, including rights-of-way for the construction, maintenance, and operation of pipelines for transporting fuel to their power plants; and to the right to erect poles and towers, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, railroads, or sidetracks, or powerhouses, with the right to divert the water from such ponds or reservoirs, and conduct the same by flume, ditch, conduit, waterway or pipeline, or in any other manner, to the point of use for the generation of power at its said powerhouses, returning said water to its proper channel after being so used. (1874-5, c. 203, s. 4; Code, s. 2009; 1899, c. 64; 1903, c. 562; Rev., s. 1573; 1907, c. 74; C.S., s. 1698; 1921, c. 115; 1923, c. 60; 1925, c. 175; 1957, c. 1046; 1963, c. 1165, s. 1; 1981, c. 919, s. 2.)

Cross References. — As to the right of eminent domain in general, see Chapter 40A.

Effect of Amendments. — The 1981 amendment, effective January 1, 1982, deleted the former second sentence, prohibiting interference with mills, power plants and water powers, but authorizing the taking of mills and water powers in certain circumstances, and the former third sentence, repealing conflicting provisions in special charters granted before January 31, 1907.

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Power of Eminent Domain Granted for Public Benefit. — The power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large. Wissler v. Yadkin River Power Co., 158 N.C. 465, 74 S.E. 460 (1912).

Limitation of Right of Eminent Domain. — The statute limits the right of eminent domain, and any special power claimed by charter must clearly appear. Yadkin River Power Co. v. Whitney Co., 150 N.C. 31, 63 S.E. 188 (1908), appeal dismissed, 214 U.S. 503, 29 S. Ct. 702, 53 L. Ed. 1061 (1909). See also, Blue Ridge Interurban Ry. v. Hendersonville Light & Power Co., 169 N.C. 471, 86 S.E. 296 (1915), on rehearing, 171 N.C. 314, 88 S.E. 245 (1916).

Extent of Rights Usually Determined by Companies. — The extent of the rights to be acquired is primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of facts tending to show bad faith on the part of the companies, or an oppressive or manifest abuse of their discretion. Yadkin River Power Co., v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912). See also, Carolina Cent. Ry. v. Love, 81 N.C. 434 (1879).

The right of eminent domain is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Thomason v. Railroad, 142 N.C. 318, 55 S.E. 205 (1906); Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

Compensation Essential. — Private property may not be taken for public use, directly or indirectly, without just compensation. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Conflicting Claims. — Where the claims of two companies conflict, the prior right belongs to that company which first defines and marks its route. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N.C. 248, 88 S.E. 349 (1916).

Effect of Subsequent Charter. — Where a legislative charter has been granted since a statute was passed, the powers given in the charter are not subject to the restriction of the statute. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N.C. 248, 88 S.E. 349 (1916).

Burden of Proof of Excepted Status on Defendant. — Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power within the provision of the statute excepting them. Blue Ridge Interurban Ry. v. Hendersonville Light & Power Co., 171 N.C.

314, 88 S.E. 245 (1916), aff'd, 243 U.S. 563, 37 S. Ct. 440, 61 L. Ed. 900 (1917).

As to effect of federal statute, see Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Applied in Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 51 S.E.2d 191 (1949).

§ 62-184. Dwelling house of owner, etc., may be taken under certain cases.

The dwelling house, yard, kitchen, garden or burial ground of the owner may be taken under G.S. 62-183 when the company alleges, and upon the proceedings to condemn makes it appear to the satisfaction of the court, that it owns or otherwise controls not less than seventy-five percent (75%) of the fall of the river or stream on which it proposes to erect its works, from the location of its proposed dam to the head of its pond or reservoir; or when the Commission, upon the petition filed by the company, shall, after due inquiry, so authorize. Nothing in this section repeals any part or feature of any private charter, but any firm or corporation acting under a private charter may operate under or adopt any feature of this section. (1907, c. 74; 1917, c. 108; C.S., s. 1699; 1933, c. 134, ss. 7, 8; 1963, c. 1165, s. 1.)

§ 62-185. Exercise of right of eminent domain; parties' interests only taken; no survey required.

When such telegraph, telephone, electric power or lighting company fails on application therefor to secure by contract or agreement such right-of-way for the purposes aforesaid over the lands, privilege or easement of another person or corporation; it may condemn the said interest through the procedures of the Chapter entitled Eminent Domain.

Only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right-of-way of a railroad or railway company sought to be condemned extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right-of-way extends.

It is not necessary for the petitioner to make any survey of or over the right-of-way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors. (1874-5, c. 203, s. 5; Code, s. 2010; 1899, c. 64, s. 2; 1903, c. 562; Rev., s. 1574; C.S., s. 1700; 1963, c. 1165, s. 1; 1981, c. 919, s. 3.)

Cross References. — As to eminent domain, see Chapter 40A.

Effect of Amendments. — The 1981 amendment, effective January 1, 1982, rewrote the first paragraph, substituting "it may condemn the said interest through the procedures of the Chapter entitled Eminent Domain" for specific provisions relating to the exercise of the right of eminent domain.

CASE NOTES

Editor's Note. — The cases cited below were decided under former statutory provisions, and prior to the 1981 amendment to this section, which substituted reference to the Eminent Domain Chapter for specific procedural provisions.

"Right-of-way" is not used as synonymous with "easement," but, as applied to railroads, includes the strip of land over which the track is laid through the country, and which is used in connection therewith, whether the railroad company owns only an easement therein or the title in fee. Postal Tel. Cable Co. v. Southern Ry., 90 F. 30 (W.D.N.C. 1898).

Condemnation Not Confined to Right-of-Way. — The power of condemnation is not confined to a right-of-way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions

outside of these boundaries, when required for reasonable preservation and protection of lines and other property. Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

No Entry Until Damage Paid. — A telegraph company seeking to condemn a right-of-way for its line cannot be authorized to enter into possession and construct its line until damages have been assessed and paid into court. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

Permanent damages may be awarded a landowner who was injured by telegraph poles placed on his land. The company then acquires an easement. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902); Lambreth v. Southern Power Co., 152 N.C. 371, 67 S.E. 921 (1910).

A purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages for the easement taken, and the telegraph company thereby acquires the easement and right to maintain its line thereon. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Limitation of City's Authority. — Authority granted by a city to defendant electric company to remove a shade tree in front of plaintiff's home in order to put up its poles and wires did not justify the act of defendant in removing the tree; the city had no power to deprive plaintiff of his own property for such purpose without compensation. Brown v. Electric Co., 138 N.C. 533, 51 S.E. 62 (1905).

Who May File Petition. — The telegraph, etc., company alone has the right to file the petition in condemnation proceedings. The landowner is not given such right. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Petition Need Not State Railroad Company's Tenure. — It is not necessary that a petition asking for the condemnation of a right-of-way over the right-of-way of a railroad should state by what tenure the railroad company holds. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

Proceeding Does Not Affect Landowner Not Made a Party. — Condemnation proceeding by a telegraph company against a railroad company to condemn the right-of-way, to which the landowner is not a party, gives no rights against the landowner, but gives rights only against the parties before the court. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Jury Trial. — While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply where the pleadings put at issue the question of whether the character of the lands is such as to be embraced within the right conferred, or within an exception to that right under the terms of a statute. Blue Ridge Interurban R.R. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913).

Judgment Necessary to Give Vested Right under Prior Act. — In order to acquire a vested right under a statute to condemn lands which was subsequently repealed, it was necessary to show a finality by judgment in the proceedings before the later act became effective; and where it appeared that the summons was served in time, but that the prosecution bond, made a prerequisite by § 1-109, was not, no vested right in the former statute could be acquired by further prosecution of the condemnation proceedings. Blue Ridge Interurban R.R. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913).

Federal statute authorizing telegraph companies to construct their lines over and along any military or post roads of the United States does not give such companies the right to build their lines over the right-of-way of a railroad or other private property without the consent of the owner, or the condemnation of the right-of-way over such property in accordance with the laws of the state where situated. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

§ 62-186: Repealed by Session Laws 1981, c. 919, s. 4, effective January 1, 1982.

§ 62-187. Proceedings as under eminent domain.

The proceedings for the condemnation of lands, or any easement or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Chapter 40A, the Chapter entitled Eminent Domain. (Code, s. 2012; 1899, c. 64; 1903, c. 562; Rev., s. 1576; C.S., s. 1702; 1963, c. 1165, s. 1; 1981, c. 919, s. 5.)

Effect of Amendments. — The 1981 amendment, effective January 1, 1982, substituted "Chapter 40A" for "Article 2 entitled Condemnation Proceedings of" near the end of the section.

CASE NOTES

This section refers to proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it refers to the proceedings after the parties are all before the court. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Applied in Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966); Duke Power Co. v. Parker, 18 N.C. App. 242, 196 S.E.2d 553 (1973).

§ 62-188: Repealed by Session Laws 1981, c. 919, s. 6, effective January 1, 1982.

§ 62-189. Powers granted corporations under Chapter exercisable by persons, firms or copartnerships.

All the rights, powers and obligations given, extended to, or that may be exercised by any corporation or incorporated company under this Chapter shall be extended to and likewise be exercised and are hereby granted unto all persons, firms or copartnerships engaged in or authorized by law to engage in the business herein described. Such persons, firms, copartnerships and corporations engaging in such business shall be subject to the provisions and requirements of the public laws which are applicable to others engaged in the same kind of business. (1939, c. 228, s. 3; 1963, c. 1165, s. 1.)

§ 62-190. Right of eminent domain conferred upon pipeline companies; other rights.

Any pipeline company transporting or conveying natural gas, gasoline, crude oil, coal in suspension, or other fluid substances by pipeline for the public for compensation, and incorporated under the laws of the State, or foreign corporations domesticated under the laws of North Carolina, may exercise the right of eminent domain under the provisions of the Chapter, Eminent Domain, and for the purpose of constructing and maintaining its pipelines and other works shall have all the rights and powers given railroads and other corporations by this Chapter and acts amendatory thereof. Nothing herein shall prohibit any such pipeline company granted the right of eminent domain under the laws of this State from extending its pipelines from within this State into another state for the purpose of transporting natural gas or coal in suspension into this State, nor to prohibit any such pipeline company from conveying or transporting natural gas, gasoline, crude oil, coal in suspension, or other fluid substances from within this State into another state. All such pipeline companies shall be deemed public utilities and shall be subject to regulation under the provisions of this Chapter. (1937, c. 280; 1951, c. 1002, s. 3; 1957, c. 1045, s. 2; 1963, c. 1165, s. 1.)

Cross References. — As to definition of "public utility" including pipeline company, see § 62-3(23)a5. As to eminent domain in general, see Chapter 40A.

Legal Periodicals. — For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

CASE NOTES

For case reviewing the history of this section, see Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

The history of this indicates a legislative intent to broaden the scope of the act and to encompass interstate as well as local pipeline companies. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

This section clearly confers the right of eminent domain upon interstate pipeline companies incorporated or domesticated under the laws of North Carolina, regardless of whether their pipelines originate in North Carolina. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

Effect of Former § 40-2. — The legislature did not intend pipeline companies to be limited by former § 40-2. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

The language "pipelines originating in North Carolina" in former § 40-2 does not impose a limitation on this section. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

Measure of Damages. — The measures of damages to which landowners were entitled for taking of an easement by a gas company was the difference in the fair market value of the land immediately before the taking as compared to the fair market value of the land immediately after the taking. Public Serv. Co. v. Kiser, 9 N.C. App. 202, 175 S.E.2d 686 (1970).

Consideration of Precluded Future Uses in Determining Market Value. — In determining market value where a gas company has taken land for a pipeline, consideration of future uses to which the property is adapted and which are precluded by the taking should be limited to those uses which are so reasonably probable as to have an effect on the present market value of the land, and purely imaginative or speculative value should not be considered. Public Serv. Co. v. Kiser, 9 N.C. App. 202, 175 S.E.2d 686 (1970).

§ 62-191. Flume companies exercising right of eminent domain become common carriers.

All flume companies availing themselves of the right of eminent domain under the provisions of the Chapter Eminent Domain shall become common carriers of freight, for the purpose for which they are adapted, and shall be under the direction, control and supervision of the Commission in the same manner and for the same purposes as is by law provided for other common carriers of freight. (1907, c. 39, s. 4; C.S., s. 3517; 1933, c. 134, s. 8; 1941, c. 97, § 5; 1963, c. 1165, s. 1.)

Local Modification. — Duplin: 1911, c. 214.

Cross References. — As to eminent domain in general, see Chapter 40A.

§ 62-192. Map required for railroad condemnation.

(a) Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for such condemnation is served there shall also be served by the railroad company a map showing how the line of the road is to be located on the land sought to be condemned, and a profile showing the depth of the cuts and the height of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are to be located. This section shall not apply to street railways.

(b) Every railroad company shall, within a reasonable time after its road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and shall file the same in the office of the Commission. Every such map shall be drawn on a scale and on paper to be designated by the Commission, and shall be certified and signed by the president or engineer of such company. (1871-2, c. 138, ss. 24, 41; Code, ss. 1952, 1977; 1893, c. 396, s. 2; 1901, c. 6, s. 3; Rev., ss. 2599, 2600; C.S., ss. 3471, 3472; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

CASE NOTES

As to necessity of complying with map requirement before company can construct any part of its road, see Durham & N.R.R. v. Richmond & D.R.R., 106 N.C. 16, 10 S.E. 1041 (1890).

Defect May Be Cured by Amendment. — The failure to serve a map and profile with the summons in condemnation proceedings may be cured by amendment. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).

Railroad corporations are required, within a reasonable time after their road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission (now the Utilities Commission). But this is for the information of that body and is not required as a part of a correct and completed location. Fayetteville St. Ry. v. Railroad, 142 N.C. 423, 55 S.E. 345 (1906).

Survey Unnecessary When Old Roadbed Adopted. — Where the line of a railroad is clearly defined by the existence of an old roadbed which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors as its permanent location, a survey by engineers is not essential. Fayetteville St. Ry. v. Railroad, 142 N.C. 423, 55 S.E. 345 (1906).

The profile required to be filed must show whether there will be any "fills" or "cuts" on the land sought to be condemned. Kinston & C.R.R. v. Stroud, 132 N.C. 413, 43 S.E. 913 (1903).

Where railroad was completed through the locus in quo prior to passage of the predecessor of subsection (b) of this section, it was not necessary to the validity of the location that a map of the route should be filed. Purifoy v. Richmond & D.R.R., 108 N.C. 100, 12 S.E. 741 (1891).

§§ 62-193 to 62-199: Reserved for future codification purposes.

Article 10.

Transportation in General.

§ 62-200. Duty to transport freight within a reasonable time.

(a) It shall be unlawful for any common carrier of property doing business in this State to omit or neglect to transport within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in this State, unless otherwise agreed upon between the carrier and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the Commission.

(b) Any common carrier violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars ($15.00) for the first day and two dollars ($2.00) for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of ten dollars ($10.00) for the first day and one dollar ($1.00) for each succeeding day, but the forfeiture shall not be collected for a period exceeding 30 days.

(c) In reckoning what is a reasonable time for such transportation, it shall be considered that such common carrier has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight by similar carriers between the receiving and shipping stations. The Commission is authorized to establish reasonable times for transportation by the various modes of carriage which shall be held to be prima facie reasonable, and a failure to transport within such times shall be held prima facie unreasonable. This section shall be construed to refer not only to delay in starting the freight from the station where it is received, but to require the delivery at its destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care

have been foreseen or which were unavoidable, then upon the establishment of these facts to the satisfaction of the court trying the cause, the defendant common carrier shall be relieved from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a common carrier under this section, the burden of proof shall be upon such carrier to show where the delay, if any, occurred. The penalties provided in this section shall be in addition to the damages recoverable for failure to transport within a reasonable time.

(d) This section shall not apply to motor carriers of passengers. (Code, s. 1964; 1899, c. 164, s. 2, subsecs. 2, 7; 1903, c. 444; c. 590, s. 3; c. 693; 1905, c. 545; Rev., ss. 1094, 2631, 2632; 1907, cc. 217, 461; C.S., ss. 1053, 3515, 3516; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to venue of actions against railroads, see § 1-81.

CASE NOTES

As to constitutionality of former section, see Grocery Co. v. Railroad Co., 136 N.C. 396, 48 S.E. 801 (1904); Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907); Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908); Owens v. Hines, 178 N.C. 325, 100 S.E. 617 (1919), rev'd on other grounds, 256 U.S. 565, 41 S. Ct. 597, 65 L. Ed. 1093 (1921).

Penalty Not Applicable to Interstate Shipments. — A penalty may not be recovered of the carrier of an interstate shipment for negligent delay in transportation under this section. Bivens Bros. v. Atlantic Coast Line R.R., 176 N.C. 414, 97 S.E. 215 (1918). See also, Hickory Marble & Granite Co. v. Southern Ry., 147 N.C. 53, 60 S.E. 719 (1908).

A penalty cannot be recovered for the failure of a railroad company to transport freight within a reasonable time when the initial and terminal points are within the State, but the shipment necessarily passes into another state in transit. Such is interstate commerce and cannot be interfered with by the State. Shelby Ice & Fuel Co. v. Southern Ry., 147 N.C. 66, 60 S.E. 721 (1908).

For review of the history of legislative penalties for refusal of railroads to transport freight, see Grocery Co. v. Railroad Co., 136 N.C. 396, 48 S.E. 801 (1904).

As to strict construction of former section, see Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907).

Former section did not supersede or alter carrier's duty at common law, but merely enforced an admitted duty and superadded a penalty. Meredith v. Railroad Co., 137 N.C. 478, 50 S.E. 1 (1905).

"Ordinary Time" a Jury Question. — The question of "ordinary time" for the transportation of freight by the carrier, in a suit for a penalty for failure to transport, is a question of fact for the jury. Shelby Ice & Fuel Co. v. Southern Ry., 147 N.C. 66, 60 S.E. 721 (1908); Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908).

In an action for the recovery of a penalty, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time, as well as the amount of recovery. It is error for the trial court to instruct the jury that if they believe the evidence they should answer the issue in a certain way or in a sum certain. Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908).

No "hard and fast" rule is fixed in defining reasonable time. Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907).

Burden of Proof Where Time Prima Facia Reasonable. — When the evidence discloses that the time taken by the railroad company for transporting goods, etc., was prima facie reasonable as fixed by the statute, the question of reasonable time is one for the jury to measure by the statutory standard, the burden of proof being upon the plaintiff. Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907).

How Unreasonableness of Time May Be Shown. — In an action to recover the penalty, the burden of proof is on the plaintiff to show that the carrier failed to transport and deliver the goods within a reasonable time, which is defined to be the "ordinary time" required to transport and deliver. This may be shown by proving the distance over which the goods are to be transported and the time consumed therein. From this evidence the jury may, as a matter of common knowledge and observation, draw the conclusion whether, in view of the usual speed of freight trains, the time consumed, the distance, and other conditions, the carrier has failed to transport and deliver within a reasonable time. Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907).

Over 21 Days to Transport Articles 58 Miles. — Where it was admitted that certain articles were received by defendant to be transported and delivered to plaintiff, the place of shipment and destination both being in the State, 58 miles apart, with but one intermediate point between them, and that the articles were not delivered to plaintiff within 21 days, the delay was unreasonable. Watson v. Atlantic Coast Line R.R., 145 N.C. 236, 59 S.E. 55 (1907).

Twelve Days to Transport Shipment 25 Miles. — When there was evidence that it took 12 days to transport a certain shipment from one station to another only 25 miles away, on the same railroad, the jury would be permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and, in the absence of explanation by defendant, fix the amount of wrongful delay. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

For cases construing former provision making delay of two days at initial point and 48 hours at one intermediate point for each 100 miles prima facie reasonable, see Meredith v. Railroad Co., 137 N.C. 478, 50 S.E. 1 (1905); Davis & Hooks v. Atlantic Coast Line R.R., 145 N.C. 207, 59 S.E. 53 (1907); Watson v. Atlantic Coast Line R.R., 145 N.C. 236, 59 S.E. 55 (1907); Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907); Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908); Blue Ridge Collection Agency v. Southern Ry., 147 N.C. 593, 61 S.E. 462 (1908); Talley & Baughman, Inc. v. Atlantic Coast Line R.R., 198 N.C. 492, 152 S.E. 390 (1930).

Negligent Default in Delivery to Consignee. — Former similar section extended the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee. Mitchell v. Atlantic Coast Line R.R., 183 N.C. 162, 110 S.E. 859 (1922). For case holding contra, decided prior to 1907 amendment including such delays, see Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907).

When Transportation Ceases. — Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches its destination and is placed for unloading. What particular parts of the carrier's tracks and freight yards may be used for such purposes must of necessity be left to its discretion, but the car must be reasonably accessible and placed for delivery before transportation is fully ended. Brooks Mfg. Co. v. Southern Ry., 152 N.C. 665, 68 S.E. 243 (1910).

Former section did not apply to a delivery on the private tracks of a consignee, but to avoid the penalty it was required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible. Brooks Mfg. Co. v. Southern Ry., 152 N.C. 665, 68 S.E. 243 (1910).

Transportation does not cease when a carload is placed by the carrier within the yard limits of the point of destination. Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908).

Duty to Notify Consignee. — Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery. This principle applied to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen. Acme Mfg. Co. v. Tucker, 183 N.C. 303, 111 S.E. 525 (1922).

When Goods Travel over Several Lines. — When the initial carrier delivers goods to its connecting carrier for further transportation to their destination, and an unreasonable delay occurs, without evidence as to which carrier was responsible for the delay, the defendant, the initial carrier, is liable for the entire delay, the burden of proof being upon it as the party having the evidence peculiarly within its own knowledge or possession. Watson v. Atlantic Coast Line R.R., 145 N.C. 236, 59 S.E. 55 (1907).

Where an intrastate shipment of goods is transported over connecting lines to its destination, it is proper for the trial court to make both roads parties to an action to recover the penalty for the failure to transport safely and within a reasonable time, the burden being upon each defendant to show that it had not failed in its duty. Sellars Hosiery Mills v. Southern Ry., 174 N.C. 449, 93 S.E. 952 (1917).

Who Is "Party Aggrieved". — The plaintiff is entitled to recover the penalty as the "party aggrieved," for defendant's wrongfully failing to transport freight within a reasonable time, where the facts show that, from the attendant circumstances or terms of the agreement, he is the one whose legal right is denied and who is alone interested in having the transportation properly made. Cardwell v. Southern Ry., 146 N.C. 218, 59 S.E. 673 (1907).

When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," and the proper party plaintiff. Robertson v. Atlantic Coast Line R.R., 148 N.C. 323, 62 S.E. 413 (1908).

The plaintiff could maintain his action against the defendant railroad company for wrongful failure to transport certain goods received by the latter, and bill of lading issued by it to plaintiff, when it appeared that plaintiff shipped the goods to be sold for his benefit by the consignee, and that the plaintiff was the one

who alone acquired the right to demand the service to be rendered by the defendant, and was the party aggrieved. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

Consignor as Party Aggrieved Where Goods Not to Be Paid for until Delivery. — When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor could maintain his action for delay in transit, as the party aggrieved. Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908).

Vendor as Aggrieved Party. — When by the contract or agreement between a vendor and vendee of goods, the goods were to be "received, inspected and weighed" by the vendee before any part of the purchase price was payable, the title did not vest in the vendee, and the vendor was the "party aggrieved." Elliott v. Southern Ry., 155 N.C. 235, 71 S.E. 339 (1911).

Defendant's Knowledge of Who Is Aggrieved Party Immaterial. — When it is shown that the plaintiff is the "party aggrieved," it is of no importance and bears in no way on the justice of plaintiff's demand or of defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

The real "party aggrieved" is entitled to recover the penalty, irrespective of the question of knowledge of or notice to the defendant. Cardwell v. Southern Ry., 146 N.C. 218, 59 S.E. 673 (1907).

Action Not Brought "on Relation of State". — The action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, failure to bring the action in such form would be a mere informality, which could be remedied by amendment. Robertson v. Atlantic Coast Line R.R., 148 N.C. 323, 62 S.E. 413 (1908).

Joinder of Actions. — An action for damages against a carrier for a lost shipment, and one for the penalty for unreasonable delay, do not merge into each other. They arise on contract and may be joined in the same action. Robertson v. Atlantic Coast Line R.R., 148 N.C. 323, 62 S.E. 413 (1908).

Burden of Proof as to Destruction of Goods. — The burden of proof is on the carrier to show that it is relieved of the penalty because the goods were burned, stolen or destroyed. A showing that the goods were placed in defendant's car by the initial carrier and that search had been made therefor, and the absence of evidence that the goods had since been seen, was no evidence that they were burned, stolen or destroyed. Robertson v. Atlantic Coast Line R.R., 148 N.C. 323, 62 S.E. 413 (1908).

When Bill of Lading Not Presumptive Evidence. — When it was the consignor's duty to load a car for shipment, which had been placed at its mill by the carrier, and the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being required to verify the statement, the bill of lading was not presumptive evidence of the receipt of the contents of the car, and the question was an open one for the jury in a suit by the consignee for the penalty for failure to deliver. Peele v. Atlantic Coast Line R.R., 149 N.C. 390, 63 S.E. 66 (1908).

Motion for Nonsuit Properly Denied. — Where a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing and remained in the carrier's warehouse beyond the statutory reasonable time, a motion for nonsuit was properly denied. Mitchell v. Atlantic Coast Line R.R., 183 N.C. 162, 110 S.E. 859 (1922).

Verdict Incomplete. — Where it was established by the jury that a consignment of goods was carried to the delivering point by the carrier, which failed to deliver to the consignee, or to notify him, and the goods were lost while in its possession, the verdict was incomplete where there was no issue submitted as to whether the carrier, which was a party to the action, was in default in not delivering the goods to the consignee. Acme Mfg. Co. v. Tucker, 183 N.C. 303, 111 S.E. 525 (1922).

§ 62-201. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.

All common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the North Carolina Utilities Commission in the case of intrastate shipments, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty

of such common carriers to inform any consignee of the correct amount due for freight according to such classification and rates. Upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates, such common carrier shall deliver the freight in question to the consignee. Any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to liability for actual damages plus a penalty of fifty dollars ($50.00) for each such failure or refusal, to be recovered by any consignee aggrieved by a suit in a court of competent jurisdiction. Provided, however, that this section shall not apply to motor carriers of passengers. (1905, c. 330, s. 1; Rev., s. 2633; C.S., s. 3518; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

Cross References. — As to venue of actions against railroads, see § 1-81. As to rates of public utilities, see § 62-130 et seq.

CASE NOTES

As to constitutionality of former section, see Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907); Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909); Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

Former Section Not Cumulative. — Former section imposed only one penalty for the refusal of the railroad company to deliver freight upon demand and tender of charges, and it was not cumulative upon more than one demand for the same offense. Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907).

Where a railroad corporation chartered by another state leases a railroad chartered by this State, it is bound to observe and obey all laws of this State regulating the business of transportation. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

Intrastate Rebilling of Interstate Shipment. — Where an interstate shipment of goods was missent and the bill of lading was lost, and the shipment was rebilled from one point in the State to another therein, in an intrastate shipment, upon the carrier's violating former similar section, the penalty therein accrued. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Consignee must produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

Insufficient Notice to Consignee. — Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot was not of itself sufficient notice to the consignee. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Burden of Proving Reason for Refusal to Deliver. — Where the consignee brings his action to recover the value of a shipment of goods from the carrier and shows that the shipment was addressed to him, was prepaid, and was in the carrier's possession at destination, and that a demand for delivery was made, the burden is on the carrier to show a valid reason for its refusal to deliver the shipment. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

No Liability for Unlawful Shipment. — A druggist who has not received a valid license to sell intoxicating liquors for the purposes and in the manner indicated may not recover of the carrier the penalty provided for failure to deliver such liquors to him for the purposes of sale, for such are unlawful and prohibited. Smith v. Southern Express Co., 166 N.C. 155, 82 S.E. 15 (1914).

Agent's Ignorance of Amount of Charges No Defense. — It is no defense to an action to recover a penalty for refusing to deliver a shipment upon tender of freight charges by the consignee for the defendant company to show that its agents did not know the correct amount of the charges because of the defendant's failure to file its schedule of rates. Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907).

Rate When Smaller Cars Furnished. — Where a consignor requested two cars of a certain standard size and the carrier furnished four cars of a smaller size, the rate for the shipment must be the same. Yorke Furn. Co. v. Southern Ry., 162 N.C. 138, 78 S.E. 67 (1913).

Carrier cannot collect storage charges arising from wrongful refusal to deliver goods to consignee. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Applied in Atlantic Coast Line R.R. v. West Paving Co., 228 N.C. 94, 44 S.E.2d 523 (1947).

§ 62-202. Baggage and freight to be carefully handled.

All common carriers shall handle with care all baggage and freight placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight while the same is under their control. Upon proof of injury to baggage or freight in the possession or under the control of any such carrier, it shall be presumed that the injury was caused by the negligence of the carrier. This section shall not apply to motor carriers of passengers. (1897, c. 46; Rev., s. 2624; C.S., s. 3523; 1963, c. 1165, s. 1.)

Cross References. — As to conveying livestock in a cruel manner, see § 14-363.

CASE NOTES

Delivery of Baggage to Carrier. — To fix the responsibility for lost baggage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and when baggage is taken by others to the station, and to places where baggage is usually received, some kind of notice must be given to the agent authorized to receive it. Williams v. Southern Ry., 155 N.C. 260, 71 S.E. 346 (1911).

The requisites of the general rule requiring delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modified by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice. Williams v. Southern Ry., 155 N.C. 260, 71 S.E. 346 (1911).

Effect of Stipulations Attempting to Limit Liability. — Stipulations upon a railroad ticket, limiting the liability of the carrier in a specified sum "unless a greater value has been declared by the owner and excess charge paid thereon at the time of taking passage," and similar provisions in a bill of lading for the transportation of freight, are void as an attempt on the part of the carrier to contract against its own negligence. Cooper v. Norfolk S.R.R., 161 N.C. 400, 77 S.E. 339 (1913).

A common carrier cannot contract with a passenger against the loss of baggage by its negligence. Thomas v. Southern Ry., 131 N.C. 590, 42 S.E. 964 (1902).

Liability for Articles Not Properly Baggage. — While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. Trouser Co. v. Railroad, 139 N.C. 382, 51 S.E. 973 (1905).

When Liability as Carrier Ceases. — When baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. Trouser Co. v. Railroad, 139 N.C. 382, 51 S.E. 973 (1905).

Liability When Passenger Not Carried. — When there is no partnership arrangement between connecting lines of railroads, and a passenger buys a through ticket from a carrier to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon the road of the connecting lines, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return is requested and then forwarding it to the junctional point, without compensation. Kindley v. Seaboard Air Line Ry., 151 N.C. 207, 65 S.E. 897 (1909).

Liability When Baggage Not on Same Train. — The passenger's right to a limited amount of baggage as a part of the consideration for the price of his ticket is upon condition that the baggage accompany the passenger on the same train; and where, without any default on the part of the carrier, its agent, without further charge, has the baggage forwarded on a later train, the carrier's liability is not that of an insurer, but of a gratuitous bailee, under the rule of the prudent man, and attaches only in instances of gross negligence. Perry v. Seaboard Air Line Ry., 171 N.C. 158, 88 S.E. 156 (1916).

Cited in Flexlon Fabrics, Inc. v. Wicker Pick-Up & Delivery Serv., Inc., 39 N.C. App. 443, 250 S.E.2d 723 (1979).

§ 62-203. Claims for loss or damage to goods; filing and adjustment.

(a) Every common carrier receiving property for transportation in intrastate commerce shall issue a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it, or by any carrier participating in the haul when transported on a through bill of lading, and any such carrier delivering said property so received and transported shall be liable to the lawful holder of said bill of lading or to any party entitled to recover thereon for such loss, damage, or injury, notwithstanding any contract or agreement to the contrary; provided, however, the Commission may, by regulation or order, authorize or require any such common carrier to establish and maintain rates related to the value of shipments declared in writing by the shipper, or agreed upon as the release value of such shipments, such declaration or agreement to have no effect other than to limit liability and recovery to an amount not exceeding the value so declared or released, in which case, any tariff filed pursuant to such regulation or order shall specifically refer thereto; provided further, that a rate shall be afforded the shipper covering the full value of the goods shipped; provided further, that nothing in this section shall deprive any lawful holder of such bill of lading of any remedy or right of action which such holder has under existing law; provided further, that the carrier issuing such bill of lading, or delivering such property so received and transported, shall be entitled to recover from the carrier on whose route the loss, damage, or injury shall have been sustained the amount it may be required to pay to the owners of such property.

(b) Every claim for loss of or damage to property while in possession of a common carrier, including every express company or person doing an express business within the State, shall be adjusted and paid within 90 days after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee or at the point of origin by the consignor, when it shall appear that the consignee was the owner of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

(c) In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars ($50.00) for each and every such failure, to be recovered by any consignee aggrieved (or consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved), in any court of competent jurisdiction: Provided, that unless such consignee or consignor recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

(d) A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of a common carrier, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf. If such check be refused on demand, the common carrier shall pay to such passenger the sum of ten dollars ($10.00),

to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the carrier.

(e) If a passenger, whose bag has been checked, shall produce the check and his baggage shall not be delivered to him, he may by an action recover the value of such baggage.

(f) Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint.

(g) This section shall not deprive any consignee or consignor of any other rights or remedies existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers.

(h) This section shall not apply to motor carriers of passengers and only subsection (a) of this section shall apply to motor carriers of property. (1871-2, c. 138, s. 36; Code, s. 1970; 1905, c. 330, ss. 2, 4, 5; Rev., ss. 2623, 2634, 2635; 1907, c. 983; 1911, c. 139; C.S., ss. 3510, 3524, 3525; 1947, c. 781; c. 1008, s. 27; 1963, c. 1165, s. 1.)

Cross References. — As to venue of actions against railroads, see § 1-81.

CASE NOTES

I. In General.
II. Connecting Carriers.
III. Filing of Claim.
IV. Actions.

I. IN GENERAL.

Penalty Inapplicable to Interstate Shipments. — The entire regulation of interstate commerce is under federal control, and the penalty provided for by former provision similar to subsection (c) of this section for failure of a carrier to pay a claim in the time prescribed does not apply to interstate shipments. See Morphis v. Southern Express Co., 167 N.C. 139, 83 S.E. 1 (1914).

As to strict construction of former provisions similar to subsections (b) and (c), see Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925). See also, B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

The common-law remedies of shippers and passengers were not taken away by former similar Chapter. Bell v. Norfolk S.R.R., 163 N.C. 180, 79 S.E. 421 (1913), and cases there cited.

Action May Be Brought in Contract or Tort. — A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains may bring an action on contract, or in tort, independent of the statute. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891); Virginia-Carolina Peanut Co. v. Atlantic Coast Line R.R., 155 N.C. 148, 71 S.E. 71 (1911).

Parol Agreement to Reship Sufficient. — When a carrier has received goods for transportation over its own and a connecting line which were not delivered, and upon consignor's parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, is sufficient in an action for damages to the goods occurring while in the carrier's possession. Lyon v. Atlantic Coast Line R.R., 165 N.C. 143, 81 S.E. 1 (1914).

Carrier Cannot Contract against Own Negligence. — A common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence. Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899); Everett v. Railroad, 138 N.C. 68, 50 S.E. 557 (1905).

Owner Cannot Generally Refuse Damaged Goods. — Damage to a shipment of goods by a railroad company, caused by the carrier's negligence, does not justify the owner in refusing to accept them on that account, unless the damages are sufficient to render the goods practically worthless. He must accept the goods and sue for the damages upon the refusal of the carrier to pay them. Whittington v. Southern Ry., 172 N.C. 501, 90 S.E. 505 (1916).

II. CONNECTING CARRIERS.

Duty Assumed by Carrier. — Where a carrier accepts goods for transportation, in the absence of a special contract, it assumes the duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to the connecting carrier. Meredith v. Railroad Co., 137 N.C. 478, 50 S.E. 1 (1905).

Duration of Duty of Safe Carriage. — The duty of safe carriage attaches as the goods pass into the custody of each company and ceases only when they are safely delivered to its successor. Lindley v. Richmond & D.R.R., 88 N.C. 547 (1883).

Burden of Proof as to Safe Delivery. — On proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, such proof being peculiarly within its power. Meredith v. Railroad Co., 137 N.C. 478, 50 S.E. 1 (1905).

Admissibility of Evidence as to Condition of Freight. — To show that freight was in good condition when it was delivered by the defendant to a connecting line, evidence that it was the custom of agents of such lines to examine freights before receiving them, and if found in good condition to forward them, and that such examination was made and forwarding was done, was admissible. Knott v. Raleigh & G.R.R., 98 N.C. 73, 3 S.E. 735 (1887).

Prima Facie Case. — Where a shipment of goods is received by the consignee from the final carrier in bad condition, and there is evidence that this carrier received the goods from its connecting carrier in good condition, a prima facie case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it. Lyon v. Atlantic Coast Line R.R., 165 N.C. 143, 81 S.E. 1 (1914).

Presumption of Damage. — Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption. Morganton Mfg. Co. v. Ohio River & Charleston Ry., 121 N.C. 514, 28 S.E. 474 (1897); Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899); Gwyn Harper Mfg. Co. v. Carolina Cent. R.R., 128 N.C. 280, 38 S.E. 894 (1901).

Goods Found Damaged at Destination. — When goods are shipped over several connecting lines of carriers and are found in a damaged condition at destination, there is a rebuttable presumption that the injury was negligently inflicted by the last carrier. Boss v. Atlantic Coast Line R.R., 156 N.C. 70, 72 S.E. 93 (1911); Beville v. Atlantic Coast Line R.R., 159 N.C. 227, 74 S.E. 349 (1912).

Liability for Negligence of Connecting Carrier. — A railroad company whose line is one of several connecting roads between places from and to which freight is shipped, in the absence of a special contract, or proof of copartnership by which each of the connecting lines will become liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. Knott v. Raleigh & G.R.R., 98 N.C. 73, 3 S.E. 735 (1887).

Where two or more common carriers unite in forming an association creating a through line for the transportation of freight, payment of tariff charges to be made at the beginning or end of the transportation, with through bills of lading, the freight charges to be divided according to the respective mileage of the companies, they become a copartnership and each line is liable for any damage resulting from delay or otherwise on any part of the through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line. Rocky Mount Mills v. Wilmington & W.R.R., 119 N.C. 693, 25 S.E. 854 (1896).

Effect of Court Order Relieving Initial Carrier. — While the initial carrier may also be held liable for damages to a shipment made over connecting lines, a direction of the court relieving it from liability does not necessarily relieve the carrier whose negligence caused the damages. Gilikin v. Norfolk S.R.R., 174 N.C. 137, 93 S.E. 469 (1917).

Interstate Shipments by Connecting Carriers. — While federal laws make the initial carrier liable for damages to a shipment over connecting lines, this does not relieve the intermediate or delivering carrier of responsibility for its own negligence, or prevent the State court from requiring the carriers to show which is responsible for the damage. Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 1000 (1916).

Notice as to damages to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier. Gilikin v. Norfolk S.R.R., 174 N.C. 137, 93 S.E. 469 (1917).

III. FILING OF CLAIM.

Filing of Claim Prerequisite to Penalty. — A consignor of a shipment of goods is required to file his claim with the agent of the common carrier at the point of its origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle for its loss, or damage thereto, within 90 days. Hamlet Grocery Co. v. Southern Ry., 170 N.C. 241, 87 S.E. 57 (1915).

In order to recover the penalty, the consignee must file his claim with the agent as the statute directs, and the filing thereof

with another of the carrier's agents is insufficient. B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

Regulation of Time of Filing by Carrier. — A stipulation in a bill of lading denying the carrier's liability for damages unless written notice of such claim be filed within a specified period is in derogation of the common law, and while it will be upheld if reasonable, the burden of proof is on the carrier to show that it is. Phillips v. Seaboard Air Line Ry., 172 N.C. 86, 89 S.E. 1057 (1916).

Stipulation that claims must be filed in four months is reasonable. Culbreth v. Atlantic Coast Line R.R., 169 N.C. 723, 86 S.E. 624 (1915).

An allowance of 60 days is reasonable, but 30 days is unreasonable. Gwyn Harper Mfg. Co. v. Carolina Cent. R.R., 128 N.C. 280, 38 S.E. 894 (1901).

Waiver of Stipulation. — The stipulation in a livestock bill of lading requiring that notice in writing be given the carrier's agent at destination of claim for damages to the animals shipped before they were removed or mingled with other animals, could be waived by the carrier's agent at the delivering point. T.W. Newborn & Co. v. Louisville & N.R.R., 170 N.C. 205, 87 S.E. 37 (1915).

As to necessity of written demand to enforce penalty, see Thompson v. Southern Express Co., 147 N.C. 343, 61 S.E. 182 (1908).

Failure to file a formal written demand is no bar to recovery of actual damages sustained. Hinkle, Craig & Co. v. Southern Ry., 126 N.C. 932, 36 S.E. 348 (1900); Kime v. Southern Ry., 153 N.C. 398, 69 S.E. 264 (1910).

Filing Claim by Mail. — The essential things necessary for the proper filing of the claim against the common carrier for damages, and for the penalty, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to its manual delivery, but the same may be done through the agency of the United States mail. The delivery of the mail will be presumed. B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

It is not required that a claimant state the amount of his loss in his claim for damages against a carrier. McRary v. Southern Ry., 174 N.C. 563, 94 S.E. 107 (1917).

Notice to Negligent Connecting Carrier. — Where the second carrier in the connected line of shipment causes damages to the shipment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applicable here. Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 1000 (1916).

Notice as to Interstate Shipments. — The federal statutes, while recognizing the right of the carrier to stipulate for the filing of claims within a reasonable period, provide that if loss or damage is due to a delay in transit by negligence, no notice shall be required as a condition precedent to recovery. Mann v. Fairfield & Elizabeth City Transp. Co., 176 N.C. 104, 96 S.E. 731 (1918).

IV. ACTIONS.

Who May Bring Action. — Ordinarily the title to a shipment of goods by common carrier passes to the consignee upon acceptance by the carrier, and he may sue for damages thereto in transit; but when it is shown that the consignee refused to accept the damaged goods, and that the sale was cancelled by consent, the consignor may maintain his action against the carrier for damages. Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 1000 (1916).

Joinder of Causes of Action. — A recovery of the value of a shipment of goods and the penalties for the refusal of the carrier to deliver and for the failure to settle the claim within the statutory period may be united in the same action. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

Separate and Distinct Issues. — In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial. Hussey v. Atlantic Coast Line R.R., 183 N.C. 7, 110 S.E. 599 (1922).

Prima Facie Case. — In an action against the carrier for damages for the destruction of a shipment of freight by fire, a prima facie case is made out when the plaintiff shows the receipt of the freight for transportation and its nondelivery. Everett v. Railroad, 138 N.C. 68, 50 S.E. 557 (1905); Osborne v. Southern Ry., 175 N.C. 594, 96 S.E. 34 (1918).

Plaintiff Must Prove Failure to Settle. — The burden is on plaintiff to show that the common carrier has failed to settle his claim in 90 days, after written demand under statutory provisions, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment is not sufficient. Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925).

Burden on Carrier When Prima Facie Case Made. — In cases of limited liability, proof of shipment and loss or injury makes a prima facie case for the shipper, and then the burden is upon the carrier to show that the circumstances of the loss bring it within the

excepted causes; when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899).

Recovery Must Equal Claim. — In order to recover the penalty for failure to settle a claim for damages within 90 days, the burden is on plaintiff to show that the amount of his recovery is at least equal to the amount of his written demand. Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925).

Effect of Settlement after Penalty Accrues. — The proviso that the consignee must first recover the full amount claimed is only to protect the carrier against excessive demands and not to discourage settlements for losses, and plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for the full amount claimed after the penalty accures. Rabon v. Atlantic Coast Line R.R., 149 N.C. 59, 62 S.E. 743 (1908).

Measure of Damages for Delay. — In the trial of an action against a railroad company for loss occasioned by its delay in transporting machinery shipped over its line by plaintiff, which was engaged in equipping a cotton factory, where it appeared that workmen employed by the plaintiff were forced to remain idle, though under pay of plaintiff, the measure of plaintiff's damages was the interest on the unemployed capital, the wages paid to its workmen and such other costs and expenses incurred by plaintiff in consequence of the delay. Rocky Mount Mills v. Wilmington & W.R.R., 119 N.C. 693, 25 S.E. 854 (1896).

§ 62-204. Notice of claims, statute of limitations for loss, damage or injury to property.

Any claim for loss, damage or injury to property while in the possession of a common carrier shall be filed by the claimant with the carrier in writing within nine months after the same occurred, and the cause of action with respect thereto shall be deemed to have accrued at the expiration of 30 days after the date of such notice, and action for the recovery thereon may be commenced immediately thereafter or at any time within two years after notice in writing shall have been given to the claimant by the adverse party that the claim or any part thereof specified in such notice has been disallowed, and neither party shall by rule, regulation, contract, or otherwise, provide for a shorter time for filing such claims or for commencing actions thereon than the period set out in this section. Provided, however, that this section shall not apply to motor carriers of passengers. (1947, c. 1008, s. 21; 1963, c. 1165, s. 1.)

§ 62-205. Joinder of causes of action.

To expedite the settlement of claims between shippers and common carriers, a shipper may join in the same complaint against a common carrier any number of claims for overcharges, or a common carrier may join in the same complaint any number of claims against a shipper for undercharges, whether such claims arose at the same time or in the course of shipments at different times; provided, that each such claim shall be so identified that the same and the allegations with respect thereto may be distinguished from other claims so joined in the complaint, and in cases in which the right of subrogation may be invoked the judgment shall specify the amount of recovery, if any, on each such claim. For the purpose of jurisdiction under this section the aggregate amount set out in the complaint shall be deemed the sum in controversy. Provided, however, that this section shall not apply to motor carriers of passengers. (1947, c. 1008, s. 20; 1963, c. 1165, s. 1.)

§ 62-206. Carrier's right against prior carrier.

Any common carrier shall have all the rights and remedies herein provided for against a common carrier from which it received the freight in question. Provided, however, that this section shall not apply to motor carriers of passengers. (1905, c. 330, s. 3; Rev., s. 2636; C.S., s. 3526; 1963, c. 1165, s. 1.)

Cross References. — As to power of Utilities Commission to act as arbitrator in disputes between carriers, see § 62-40.

§ 62-207. Regulation of demurrage.

(a) The Commission shall make rules and fix, establish or allow rates governing demurrage and storage charges by common carriers and shall make rules governing railroad companies in the placing of cars for loading and unloading.

(b) No common carrier doing business in the State shall make any charge on account of demurrage while a car or other equipment, whether the same be refrigerated or not, is being loaded for shipment, until such car or such other equipment has remained at the place of loading for a period of time in excess of that approved by the Commission as free time for such car or such other equipment.

(c) This section shall not apply to motor carriers of passengers. (1903, c. 342; Rev., s. 1100; Ex. Sess. 1913, c. 55; C.S., ss. 1057, 3527; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-208. Common carriers to settle promptly for cash-on-delivery shipments; penalty.

Every common carrier which shall fail to make settlement with the consignor of a cash-on-delivery shipment, either by payment of the moneys stipulated to be collected upon the delivery of the articles so shipped or by the return to such consignor of the article so shipped, within 20 days after demand made by the consignor and payment or tender of payment by him of the lawful charges for transportation, shall forfeit and pay to such consignor a penalty of twenty-five dollars ($25.00), where the value of the shipment is twenty-five dollars ($25.00) or less; and, where the value of the shipment is over twenty-five dollars ($25.00), a penalty equal to the value of the shipment; the penalty not to exceed fifty dollars ($50.00) in any case: Provided, no penalty shall be collectible where the shipment, through no act of negligence of the common carrier is burned, stolen or otherwise destroyed: Provided further, that the penalties here named shall be cumulative and shall not be in derogation of any right the consignor may have under any other provision of law to recover of the common carrier damages for the loss of any cash-on-delivery shipment or for negligent delay in handling the same. Provided, however, that this section shall not apply to motor carriers of passengers. (1909, c. 866; C.S., s. 3530; 1963, c. 1165, s. 1.)

§ 62-209. Sale of unclaimed baggage or freight; notice; sale of rejected property; escheat.

(a) Any common carrier which has had in its possession on hand at any destination in this State any article whether baggage or freight, for a period of 60 days from its arrival at destination, which said carrier cannot deliver because unclaimed, may at the expiration of said 60 days sell the same at public auction at any point where in the opinion of the carrier the best price can be obtained: Provided, however, that notice of such sale shall be mailed to the consignor and consignee, by registered or certified mail, if known to such carrier, not less than 15 days before such sale shall be made; or if the name and address of the consignor and consignee cannot with reasonable diligence be ascertained by such carrier, notice of the sale shall be published once a week for two consecutive weeks in some newspaper of general circulation published

at the point of sale: Provided, that if there is no such paper published at such point, the publication may be made in any paper having a general circulation in the State: Provided further, however, that if the nondelivery of said article is due to the consignee's and consignor's rejection of it, then such article may be sold by the carrier at public or private sale, and at such time and place as will in the carrier's judgment net the best price, and this without further notice to either consignee or consignor, and without the necessity of publication.

(b) Where the article referred to in this section is live freight, or perishable freight, or freight of such low value as would not bring the accrued transportation and other charges if held for 60 days as provided in this section, the common carrier may, with or without advertisement, sell the same in such manner and at such time and place as will in its judgment best protect the interests of the carrier, the consignor and the consignee, and whenever practicable the consignor and consignee shall be notified of the proposed sale of such freight.

(c) The common carrier shall keep a record of the articles sold and of the prices obtained therefor, and shall, after deducting all charges and the expenses of the sale, including advertisement, if advertised, pay the balance to the owner of such articles on demand therefor made at any time within five years from the date of the sale. If no person shall claim the surplus within five years, such surplus shall be paid to the Escheat Fund of the Department of State Treasurer.

(d) This section shall not apply to motor carriers of passengers. (1871-2, c. 138, s. 50; Code, s. 1987; Rev., s. 2639; 1921, c. 124, ss. 1, 2, 3; C.S., s. 3534; 1963, c. 1165, s. 1; 1981, c. 531, s. 17.)

Cross References. — As to unclaimed personalty escheating to the University of North Carolina, see § 116B-4.

Effect of Amendments. — The 1981 amendment, substituted "Escheat Fund of the Department of State Treasurer" for "University of North Carolina" at the end of the second sentence of subsection (c).

CASE NOTES

For decisions under former statute relating to sale of unclaimed freight, see Norfolk S.R.R. v. New Bern Iron Works & Supply Co., 172 N.C. 188, 90 S.E. 149 (1916); Holloman v. Southern Ry., 172 N.C. 372, 90 S.E. 292 (1916).

§ 62-210. Discrimination between connecting lines.

All common carriers subject to the provisions of this Chapter shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freight to and from their several lines and those connecting therewith, and shall not discriminate in their rates, routes and charges against such connecting lines, and shall be required to make as close connection as practicable for the convenience of the traveling public. Common carriers shall obey all rules and regulations made by the Commission relating to trackage. Irregular route motor carriers shall interchange traffic only with the approval of the Commission. Provided, however, that this section shall not apply to motor carriers of passengers. (1899, c. 164, s. 21; Rev., s. 1088; C.S., s. 1107; 1933, c. 134, s. 8; 1935, c. 258; 1941, c. 97; 1963, c. 1165, s. 1.)

Legal Periodicals. — As to the practice of specifying in published tariffs particular routes formed with connecting carriers, see 13 N.C.L. Rev. 364.

CASE NOTES

For case holding former similar section in the act creating the former Railroad Commission merely declaratory of the common law, see Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892).

Authority to Require Trains to Make Connection. — The Commission has power to require a railroad company to have a train arrive at a certain station on its road at a certain schedule time, so as to connect with the train of another company. Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

A railroad company is not compelled to furnish express facilities to another to conduct an express business over its road the same as it provides for itself or affords to any other express company. Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892).

§ 62-211. Regulating shipment of flammable substances.

The Commission is authorized and empowered to adopt and promulgate rules for the shipment of flammable and explosive articles, cotton which has been partially consumed by fire, and such other like articles as in its opinion may render transportation dangerous. After the promulgation of such rules, no common carrier shall be required to receive or transport any such articles except when tendered in accordance with the said rules; nor shall such common carrier be liable for any penalty for refusal to receive such articles for shipment until all the rules prescribed by the Commission in regard to the shipment of the same shall be complied with. Provided, however, that this section shall not apply to motor carriers of passengers. (1907, c. 471, s. 1; C.S., s. 1056; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

The Commission is particularly authorized to regulate the carriage of inflammable articles as freight. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

§§ 62-212 to 62-219: Reserved for future codification purposes.

Article 11.

Railroads.

§ 62-220. Powers of railroad corporations.

Every railroad corporation shall have power:

(1) To Survey and Enter on Land. — To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

As between two railroad companies, firs location belongs to company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. Fayetteville St. Ry. v. Railroad, 142 N.C. 423, 55 S.E. 345 (1906).

(2) To Condemn Land under Eminent Domain. — To appropriate land and rights therein by condemnation, as provided in the Chapter Eminent Domain.

Legal Periodicals. — For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

CASE NOTES

A railroad corporation has the power of eminent domain. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

When a railroad corporation obtains land in condemnation proceedings, it procures merely an easement, to be used only for railroad purposes. Condemnation is not to be used as a means of acquiring property for the benefit of the corporation, and the corporation has no right or authority to use or let the property for private or nonrailroad purposes. Such a right-of-way is an easement for railroad purposes and does not deprive the owner of the fee or its use for purposes not inconsistent with its use for railroad purposes. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Land May Be Taken from Another Railroad. — Land acquired by one railroad company under a legislative grant of the right of eminent domain, and not necessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina & R. & D.R.R. v. Carolina Cent. Ry., 83 N.C. 489 (1880).

(3) To Take Property by Grant. — To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

CASE NOTES

Acquisition of Real Property Generally. — A railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute. The authority must be conferred by legislation or it does not exist. It is, however, not necessary that the authority should be expressly conferred. It may be implied. Wallace v. Moore, 178 N.C. 114, 100 S.E. 237 (1919).

Extending Use of Right-of-Way. — While a railroad can use only the part of its right-of-way actually occupied, whenever the necessities of the company require it, it can extend its use of the right-of-way to the extent of the statutory right for additional tracks or other railroad purposes. Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Atlantic Coast Line R.R. v. Bunting, 168 N.C. 579, 84 S.E. 1009 (1915); Tighe v. Seaboard Air Line R.R., 176 N.C. 239, 97 S.E. 164 (1918).

(4) To Purchase and Hold Property. — To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, the stations and other accommodations necessary to accomplish the object of its incorporation.

Cross References. — As to adverse possession of property owned by a railroad, see § 1-44. As to presumption of abandonment of railroad right-of-way, see § 1-44.1.

CASE NOTES

A railroad corporation is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the powers contained in the charter or arising to it under the general laws. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

A conveyance of land for use as a railroad right-of-way by deed in regular form of bargain and sale, reciting a valuable consideration, is presumptively a deed of purchase within the meaning of this section and must be interpreted as an ordinary deed, so that when the granting clause is sufficient in form to convey the fee simple and the habendum and warranties are in harmony therewith, it conveys the fee and not a mere easement. McCotter v. Barnes, 247 N.C. 480, 101 S.E.2d 330 (1958).

(5) To Grade and Construct Road. — To lay out its road, not exceeding 100 feet in width, and to construct the same; to take, for the purpose of cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the Chapter Eminent Domain.

CASE NOTES

Change of Grade. — A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right-of-way. Brinkley v. Railroad, 135 N.C. 654, 47 S.E. 791 (1904).

(6) To Intersect with Highways and Waterways. — To construct its road across, along or upon any stream, watercourse, street, highway, turnpike, railroad or canal which the route of its road shall intersect or touch; but the company shall restore the stream, watercourse, street, highway or turnpike, thus intersected or touched, to its former state or to such state as not unnecessarily to impair its usefulness. Nothing in this Chapter shall be construed to authorize the erection of any bridge or any other construction across, in or over any stream or lake navigated by motor boats commensurate in size to sailboat, or sailboats or vessels, at the place where any bridge or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any streets in any municipality without the assent of such municipality.

Cross References. — As to duty to provide cattle guards, see § 62-226. As to the power of the Utilities Commission to regulate crossings, see § 62-237. As to the duty of railroads constructing bridges over watercourses to provide draws, see § 136-78.

Legal Periodicals. — For note on misuse of railroad right-of-way, see 29 N.C.L. Rev. 312.

CASE NOTES

Duty to Maintain Safe and Convenient Crossing. — While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900).

Duty When Railroad Changes Grade of Street. — Where a railroad accepts the benefits of statutory authorization and changes the grade of a street or highway, it must assume and comply with the burden imposed and restore the street to a useful condition. If, to meet the burden so imposed, it becomes necessary to go beyond the railroad right-of-way and change the grade of a street, thereby impairing access of an abutting property owner, compensation must be paid for the diminution in value resulting from the denial of access. Thompson v. Seaboard Air Line R.R., 248 N.C. 577, 104 S.E.2d 181 (1958).

Whole Street Cannot Be Appropriated. — It is doubtful whether the statute can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road across, along, or upon a street, always of much greater width than a railroad track and the crossties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power. Seaboard Air Line Ry. v. City of Raleigh, 219 F. 573 (E.D.N.C. 1914), aff'd, 242 U.S. 15, 37 S. Ct. 8, 61 L. Ed. 121 (1916).

Assent of City as Essential Power. — The assent to the use of the street by a railroad company is often a most essential power, necessary to be used for the benefit of the people of the city. Griffin v. Southern Ry., 150 N.C. 312, 64 S.E. 16 (1909).

Reviewability of City's Action. — The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, such as the laying and use of tracts, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. Griffin v. Southern Ry., 150 N.C. 312, 64 S.E. 16 (1909).

(7) To Intersect with Other Railroads. — To cross, intersect, join and unite its railroad with any other railroad at any point on its route and upon the grounds of such other railroad, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the object of its connections. Every company whose railroad is or shall be hereafter intersected by any other railroad shall unite with the owners of such other railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by the Commission.

CASE NOTES

Railroad Decides Necessity of Intersection. — Where a railroad company has a right to condemn a way across the track of another company to manufacturing plants for a spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff's cars on its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. Virginia & C.S.R.R. v. Seaboard Air Line R.R., 161 N.C. 531, 78 S.E. 68 (1913), rehearing denied, 165 N.C. 425, 81 S.E. 617 (1914).

A railroad company having the power of condemnation across the road of another company should exercise this right with regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience. But the courts cannot restrict this right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. Virginia & C.S.R.R. v. Seaboard Air Line Ry., 165 N.C. 425, 81 S.E. 617 (1914).

Agreement or Condemnation Necessary

for Entry on Right-of-Way of Another Railroad. — Under this section one road cannot enter on the right-of-way of another for the purpose of connecting therewith without previous agreement or condemnation proceedings. Richmond & D.R.R. v. Durham & N. Ry., 104 N.C. 658, 10 S.E. 659 (1889).

Effect of Parol Agreement. — A parol agreement to allow one railroad company to extend its track on the right-of-way of another, for the purpose of connecting therewith, is a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered and made valuable improvements. Richmond & D.S.R.R. v. Durham & N. Ry., 104 N.C. 658, 10 S.E. 659 (1889).

One railroad company will not be allowed to preclude competition by another in a particular area by arbitrarily refusing such other railroad reasonable use of its right-of-way and trackage. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Use of Common Trackage. — The right of each of two railroads to equal use of common trackage does not mean identical use, and where one of them constructs a spur from its independent line to serve a certain area adjacent to such line, but the common trackage is used by it in its operation serving such spur, the other has the right to construct and use a spur from the common trackage when this is the sole feasible means it has to serve industries in the same area, provided such operations will not impair the use of the common trackage by the other. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Railroad companies forming corporation to provide common trackage held entitled to equal use of such trackage. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Turnouts, Sidings and Switches. — In the absence of express statutory or charter authorization, the power to construct a railroad includes authority to construct such spur, industrial, switching and other auxiliary tracks as may be necessary to serve the public needs along or near the main line. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Railroads have authority under this section to provide "turnouts, sidings, and switches" to serve industrial plants along or near their main lines. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

(8) To Transport Persons and Property. — To take and convey persons and property on its railroad or by water by the power or force of steam, electricity, or by any other power, and to receive compensation therefor.

Cross References. — As to power of Utilities Commission to prevent discrimination in service and charges, see § 62-140. As to railroad's duty to transport, see § 62-234.

CASE NOTES

Conferral of Right to Lease by Charter. — Charter of a railroad company conferring the right to transport passengers and freight and giving the power to "farm out" the right of transportation authorized the company to execute a valid lease of its property and franchises to another railroad company. Hill v. Railroad, 143 N.C. 539, 55 S.E. 854 (1906).

(9) To Erect Stations and Other Buildings. — To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

(10) To Borrow Money, Issue Bonds and Execute Mortgages. — From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, to issue and dispose of its bonds for any amount so borrowed, to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal

due or owing thereon into stock of such company at any time under such regulations as the directors may see fit to adopt.

Cross References. — As to control of Utilities Commission over pledge of assets, issuing securities, etc., see § 62-160 et seq.

CASE NOTES

Power to Issue Bonds. — A railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, i.e., to make and issue its bonds. Commissioners of Craven v. Atlantic & N.C.R.R., 77 N.C. 289 (1877).

(11) To Lease Rails. — To lease iron rails to any person for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

(12) To Establish Hotels and Eating Houses. — To purchase, lease, hold, operate or maintain eating houses, hotels and restaurants for the accommodation of the traveling public along the line of its road. (1871-2, c. 138, s. 29; Code, s. 1957; 1887, c. 341; 1889, c. 518; Rev., ss. 2567, 2575; C.S., s. 3444; 1953, c. 675, ss. 6, 7; 1963, c. 1165, s. 1.)

Cross References. — As to administration of federal railroad revitalization programs by the Department of Transportation, see § 136-44.35.

§ 62-221. Engaging in unauthorized business.

(a) It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

(b) Any railroad company violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in the discretion of the court. (Ex. Sess. 1924, c. 80; 1963, c. 1165, s. 1.)

§ 62-222. Agreements for through freight and travel.

The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads and the rolling stock of such corporations or companies on such terms as may be agreed upon by them. (1866-7, c. 105; Code, s. 1995; Rev., s. 2640; C.S., s. 3447; 1963, c. 1165, s. 1.)

§ 62-223. Intersection with highways.

Whenever the track of a railroad shall cross a highway or turnpike, such highway or turnpike may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway or turnpike desirable, then the railroad company may take such additional lands for the construction of the road, highway or turnpike on such new line as may be deemed requisite. Unless the

land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in the Chapter Eminent Domain, and duly made by such corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway or turnpike in such manner and by such tenure as the adjacent parts of the same highway or turnpike may be held for highway purposes. (1871-2, c. 138, s. 26; Code, s. 1954; Rev., s. 2568; C.S., s. 3448; 1963, c. 1165, s. 1.)

Cross References. — As to power of railroads to intersect with highways and waterways, see § 62-220(6). As to obstruction of highways and defective crossings, see § 62-224. As to the power of Utilities Commission to regulate crossings, see § 62-237.

Legal Periodicals. — For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

CASE NOTES

Stated in City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

§ 62-224. Obstructing highways; defective crossings; notice; failure to repair after notice misdemeanor.

(a) Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same.

(b) The notice may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given, or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by registered or certified mail addressed to either of such persons.

(c) If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within 30 days from and after the service of the notice, it shall be guilty of a misdemeanor and shall be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense.

(d) This section shall in nowise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (R.C., c. 61, s. 30; 1874-5, c. 83; Code, s. 1710; Rev., s. 2569; 1915, c. 250, ss. 1, 2; C.S., ss. 3449, 3450; 1963, c. 1165, s. 1.)

Cross References. — As to venue in actions against railroads, see § 1-81. As to the power of Utilities Commission to regulate crossings, see § 62-237. As to duty of railroads to provide drawbridges, see § 136-78.

CASE NOTES

A railroad grade crossing is in itself a warning of danger. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

"Negligent Construction" Defined. — By "negligent construction" is meant such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the public highway. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900).

The mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. Edwards v. Atlantic Coast Line R.R., 129 N.C. 78, 39 S.E. 730 (1901).

Duty to Maintain Safe and Convenient Crossing. — While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900).

The duty of a railroad company with respect to the maintenance of a crossing over its track, where its track has been constructed over an established road, whether public or private, is well settled. The duty is prescribed by this section and has been recognized and enforced by the Supreme Court in numerous decisions. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

Duty Not Restricted to Public Highways. — The statute does not restrict the railroad's duty to crossings of "public highways," but uses the broader and generic term "highways," which might include any road used by the public as a mill and church road and in going to town. Goforth v. Southern Ry., 144 N.C. 569, 57 S.E. 209 (1907).

An "established road or way" which a railroad company may not obstruct in crossing it with its tracks includes those whose use is of a private nature, and not necessarily only those dedicated to a public use, and in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter. Tate v. Seaboard Air Line Ry., 168 N.C. 523, 84 S.E. 808 (1915).

Duty When Railroad Changes Grade of Street. — Where a railroad accepts the benefits of statutory authorization and changes the grade of a street or highway, it must assume and comply with the burden imposed and restore the street to a useful condition. If, to meet the burden so imposed, it becomes necessary to go beyond the railroad right-of-way and change the grade of a street, thereby impairing access of an abutting property owner, compensation must be paid for the diminution in value resulting from the denial of access. Thompson v. Seaboard Air Line R.R., 248 N.C. 577, 104 S.E.2d 181 (1958).

In approaching a grade crossing, both the trainmen and travelers upon the highway are under a reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident at the crossing. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

Duty of Traveler to Exercise Due Care. — A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery when such failure is a proximate cause of the injury. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

Right to Assume That Crossing Is Safe. — One has the right to assume that a railroad company has discharged its duty to the public by keeping the crossing in safe condition. Tankard v. Roanoke R.R. & Lumber Co., 117 N.C. 558, 23 S.E. 46 (1895).

Yielding Right-of-Way. — Where a railroad track crosses a public highway, though a traveler and a railroad have equal rights to cross, the traveler must yield the right-of-way to the railroad company in the ordinary course of its business. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

As to right of former Highway Commission to require railroad to widen crossings upon the widening of a highway, under former § 60-43, see Atlantic Coast Line R.R. v. State Hwy. Comm'n, 268 N.C. 92, 150 S.E.2d 70 (1966).

Indictments. — An indictment charging a railroad company with obstructing a public road by the use of plank at a crossing is fatally defective if it does not charge the manner of the misuse of the plank. State v. Roanoke R.R. & Lumber Co., 109 N.C. 860, 13 S.E. 719 (1891).

It is a fatal variance in an indictment for obstructing a highway at a railroad crossing, to

prove that the defendant permitted for some time a dangerous hole to remain in the crossing. State v. Roanoke R.R. & Lumber Co., 109 N.C. 860, 13 S.E. 719 (1891).

Nonsuit Held Error. — It was error for the trial court to sustain a motion of nonsuit on competent evidence from which the jury could have found that if defendant's crossing over a neighborhood road had not been negligently left in a dangerous condition, plaintiff would not have been injured by the slipping and falling thereon of the mule upon which he was riding. Goforth v. Southern Ry., 144 N.C. 569, 57 S.E. 209 (1907).

Applied in Bundy v. Powell, 229 N.C. 707, 51 S.E.2d 307 (1949).

§ 62-225. Joint construction of railroads having same location.

Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. (1871-2, c. 138, s. 46; Code, s. 1983; Rev., s. 2602; C.S., s. 3473; 1963, c. 1165, s. 1.)

§ 62-226. Cattle guards and private crossings; failure to erect and maintain misdemeanor.

Every company owning, operating or constructing any railroad passing through and over the enclosed land of any person shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from such enclosed land and shall also make and keep in constant repair crossings to any private road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a misdemeanor and fined in the discretion of the court. Any cattle guard approved by the Commission shall be deemed a good and sufficient guard under this section. (1883, c. 394, ss. 1, 2, 3; Code, s. 1975; Rev., ss. 2601, 3753; 1915, c. 127; C.S., s. 3454; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

CASE NOTES

Adoption of the stock law did not abrogate former similar section in a locality. Shepard v. Railroad, 140 N.C. 391, 53 S.E. 137 (1906).

Applicability to Town Lot. — The statute requiring railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands applies to a town lot as well as one in the county. Shepard v. Railroad, 140 N.C. 391, 53 S.E. 137 (1906).

Improper Joinder of Actions. — Where plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by defendant's ponding water back on plaintiff's land and the other to recover damages for a breach of duty on the part of defendant in not putting up sufficient cattle guards, there was an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty. Hodges v. Wilmington & W.R.R., 105 N.C. 170, 10 S.E. 917 (1890).

§ 62-227. Change of route of railroad.

The directors of any railroad corporation may by a vote of two thirds of their whole number at any time alter or change the route, or any part of the route, of their road, if it shall appear to them that the line can be improved thereby, and they shall have the same right and power to acquire title to any lands required for the purpose of the company in such altered or changed route, as if the road had been located there in the first instance; but no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two thirds of the corporate authorities of such city or town. In case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. When any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or material contributed to the construction of the roadbed or its superstructure by those so interested by their contributions in the abandoned route or line. All the provisions of this Chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route. (1871-2, c. 138, s. 25; Code, s. 1953; 1889, c. 391; 1893, c. 396, s. 3; Rev., s. 2573; C.S., s. 3455; 1963, c. 1165, s. 1.)

CASE NOTES

Authority to Change Route. — While a railroad company has no power to change its route without legislative authority, it is not necessary that this power should be given in the charter or a direct amendment thereto, but it may be given by charter or by special enactment or by the general railroad laws of the State. Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

Right to Change Grade. — A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right-of-way. Brinkley v. Railroad, 135 N.C. 654, 47 S.E. 791 (1904).

Retention of Original Charter Rights. — Variations in a route over which a railroad may run do not affect the identity of the corporate body that builds it, where subsequent acts are amendatory of the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter is retained unimpaired. Cheraw & S.R.R. v. Commissioners of Anson, 88 N.C. 519 (1883).

Change Ordered by Commission. — Section requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the aldermen only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Corporation Commission (now Utilities Commission), acting under express legislative authority and direction, requires the railroad to make the change for the convenience of the general public. Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

§ 62-228. Obtaining temporary track across railroad.

Whenever any railroad line, track and right-of-way shall lie between any body of merchantable timber, quarry or other kind or class of heavy property requiring machinery for transportation and any body of navigable water over which such property could be floated or shipped, and the owner of such timber or property shall desire to transport such property to water for purposes of floating or shipping, such property owner shall have the right to file petition before the Commission for a right to cross such railroad with any other railroad track or tramway. The procedure for the hearing of the petition shall be the same as other proceedings of the Commission. The Commission shall hear the facts and if it be found reasonably necessary that the railroad track and right-of-way shall be crossed by a temporary railroad track, the Commission

shall so order and prescribe the payment of the expense and the cost. (1931, c. 448; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s.-1.)

§ 62-229. Shelter at division points required; failure to provide a misdemeanor.

(a) It shall be the duty of every person that may now or hereafter own, control, or operate any line of railroad in this State, to erect and maintain at every division point where cars are regularly taken out of trains for repairs or construction work, or where other railroad equipment is regularly made, repaired, or constructed, a building or shed with a suitable and sufficient roof over the repair and construction track or tracks so as to provide that all men or employees permanently employed in the construction and repair of cars, trucks, or other railroad equipment of whatever description shall be under shelter and protected during snows, rains, sleets, hot sunshine, and other inclement weather: Provided, the Commission shall have the power to direct the points at which sheds shall be erected, and the character of the sheds: Provided further, that such order shall only be made after a hearing of which public notice shall have been given.

(b) Any person failing to comply with the requirements of this section shall be guilty of a misdemeanor, and for each offense shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). Each day of such failure shall constitute a separate offense. (1913, cc. 65, 117; C.S., s. 6557; 1933, c. 134; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-230. Maximum working hours and continuous service of employees; penalty; Commission to enforce.

(a) It shall be unlawful for any railroad company, its officers or agents, subject to this Article, to require or permit any employee, subject to this Article, to be or remain on duty for a longer period than 16 consecutive hours, and whenever any such employee of such railroad company shall have been continuously on duty for 16 hours he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; and no such employee who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a period longer than nine hours in any 24-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than 13 hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a 24-hour period or not exceeding three days in any week: Provided further, the Commission may, after a full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

(b) Any such railroad company, or any officer or agent thereof, requiring or permitting any employee to go, be or remain on duty in violation of this section shall be liable to a penalty of not to exceed five hundred dollars ($500.00) for each and every violation, to be recovered in suit or suits to be brought in the name of the State of North Carolina on relation of the Commission in the Superior Court of Wake County or of the county in which the violation of this

Article occurred; and it shall be the duty of the said Commission to bring such suits upon satisfactory information lodged with it; but no such suit shall be brought after the expiration of one year from date of such violation; and it shall be the duty of said Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Article the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this Article shall not apply to any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the said employee left a terminal, and which could not have been foreseen: Provided further, that the provisions of this Article shall not apply to the crews of wrecking or relief trains.

(c) It shall be the duty of the Commission to execute and enforce the provisions of this Article, and all powers granted to the Commission are extended to it in the execution thereof. (1911, c. 112, ss. 2, 3, 4; C.S., ss. 6565, 6566, 6567; 1933, c. 134; 1941, c. 97; 1963, c. 1165, s. 1; 1973, c. 47, s. 2.)

§ 62-231. Union depots required under certain conditions.

The Commission is empowered and directed to require, when practicable, and when the necessities of the case, in its judgment, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of the traveling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such union passenger depot, commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions and conditions as the Commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the Commission to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the Commission, are adequate and convenient and offer suitable accommodations for the traveling public. (1903, c. 126; Rev., s. 1097; C.S., s. 1042; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Legal Periodicals. — For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

CASE NOTES

As to liberal construction of former similar section, see Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

As to the power of the legislature to enact statutes of this character, see Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905); Corporation Comm'n v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905); Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

When Union Stations May Be Required. — The Commission is empowered to direct the establishment of union stations under certain conditions. When these conditions are found to exist, then two railroads may be compelled to unite in erecting, constructing, and maintaining a union passenger depot commensurate with the business and revenues of such railroad companies, on such terms, regulations, provisions and conditions as the Commission shall prescribe. State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

The remedy was intended to apply to all the towns and cities in the State where, in the legal discretion of the Commission, the move is practicable, the convenience of the traveling public requires it, and the existing facilities, in the judgment of the Commission, are inadequate.

Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

Union Station Must Be "Practicable." — The only restriction as to when the Commission requires and orders a union station to be built is that it be when "practicable." The other matters as to the security, accommodation, and convenience of the public are simply reasons addressed to the judgment of the Commission. When there is an appeal from its order, the sole query for a jury, under the statute, is whether the execution of the order is "practicable." State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S. E. 554 (1912).

Finding of the Commission that a union station is practicable is prima facie correct; and the burden is upon the defendant to show evidence to the contrary. State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

Power to Require Construction of New Union Station When Present Station Inadequate. — The Commission has the power to require railroad companies subject to its jurisdiction, which have constructed or maintained a union passenger station in a city or town of the State, to construct or equip a new union passenger station in such city or town upon its finding that the present station is inadequate. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Powers Given by Necessary Implication. — The statute authorizing the Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, the laying of tracks, etc., necessary to that end. Griffin v. Southern Ry., 150 N.C. 312, 64 S.E. 16 (1909).

The jurisdiction of the Commission with respect to the construction of passenger stations is original, and may be exercised either upon its own motion or upon petition of interested parties. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Two or More Railroads as Parties Sufficient. — The Commission is not without jurisdiction of a proceeding with respect to the erection, construction, and maintenance of a new union passenger station in a city or town merely because one or more railroad companies entering such city or town are not made parties in the proceeding. The presence of two or more railroad companies as parties is sufficient. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Lessor Railroad Not Necessary Party. — Where three railroad companies used a union station in a city in connection with the operation of their railroads, two as owners, and the other as lessee of a fourth road, it was not jurisdictional before the Commission or the superior court on appeal that the lessor railroad be a party to the proceedings before the Commission to compel the railroads to build and maintain an adequate station, but it was not error for the trial judge to order that the lessor road be made a party and the cause proceeded with therein. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Order of the Commission for the joint erection by an intrastate carrier and an interstate carrier of a union station at a junction could not be regarded as objectionable so far as it related to the intrastate carrier, as a burden on interstate commerce, when it appeared that the Commission was passing upon the petition of only a few cities or towns in the State separately and not as a part of a statewide scheme, and the expenditures required were in amount too small to affect such commerce. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

The Federal Transportation Act was held prospective in its enforcement, and did not relate back to a final order of the Commission, not appealed from, for the erection of a union station where the lines of an intrastate and interstate carrier crossed each other, the execution of which had been stayed by the Commission until after the passage of the federal statute solely for the advantage of the carriers at their request. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

§ 62-232. Construction of sidetracks.

The Commission is empowered and directed to require the construction of sidetracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the Commission authority to require railroad companies to construct sidetracks more than 500 feet in length. (1899, c. 164, s. 2, subsec. 15; Rev., s. 1097; C.S., s. 1044; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Purpose. — The General Assembly, while not prohibiting the carrier from continuing to establish sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the Commission to require the establishment of such sidings in proper cases. Corporation Comm'n v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905).

No Interference with Interstate Commerce. — The establishment of an industrial siding under the authority of the Commission is not an interference with interstate commerce. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 153 N.C. 559, 69 S.E. 621 (1910); Missouri Pac. Ry. v. Kansas ex rel. Taylor, 216 U.S. 262, 30 S. Ct. 330, 54 L. Ed. 472 (1910).

The Commission cannot confer the power of eminent domain, and when the legislature has not conferred such power upon a nonresident railroad company respecting the construction of a sidetrack over the lands of others, an order of the Commission for the railroad to build such a track is void. Butler v. F.R. Penn Tobacco Co., 152 N.C. 416, 68 S.E. 12 (1910); State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 153 N.C. 559, 69 S.E. 621 (1910).

Restriction upon Power. — The Commission can require a railroad company to build a sidetrack to an industrial plant only upon the company's right-of-way or when the right-of-way is tendered. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 153 N.C. 559, 69 S.E. 621 (1910).

Restriction as to Revenue. — The power conferred upon the Commission to order a railroad company to build a sidetrack is with the restriction that the revenue from such sidetrack shall be sufficient within five years to pay the expenses of construction. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 153 N.C. 559, 69 S.E. 621 (1910).

Restriction as to Length. — Power is conferred upon the Commission to establish sidings under certain conditions, and the exercise of such a right is restricted to 500 feet in length. Hales v. Atlantic Coast Line R.R., 172 N.C. 104, 90 S.E. 11 (1916).

Rights of Intervening Owners. — A railroad company, of its own initiative or by virtue of a contract with private persons, can acquire no right to construct and use sidetracks to private industries off their right-of-way and over the lands of intervening owners against the will of such owners. When they have once permanently located their line, they are, as a rule, restricted to that and the right-of-way incident to it. Hales v. Atlantic Coast Line R.R., 172 N.C. 104, 90 S.E. 11 (1916).

§ 62-233. Operation according to public schedule; certain trains and connections may be required.

(a) Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises.

(b) The Commission is empowered and directed to require, when practicable and when the necessities of the traveling public, in the judgment of the Commission, demand, that any railroad in this State shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: Provided, that no order under this section shall be made unless the business of the railroad justifies it. (1871-2, c. 138, s. 35; Code, s. 1963; Rev., s. 2611; 1907, c. 469, s. 3; C.S., ss. 1045, 3475; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to rate regulation, see § 62-130 et seq. As to powers of Utilities Commission to prevent discrimination in transportation facilities, see § 62-140. As to ejection of passenger refusing to pay fare or violating rules, see § 62-151.

CASE NOTES

I. Duty to Provide Transportation.
II. Additional Trains and Close Connections.

I. DUTY TO PROVIDE TRANSPORTATION.

Reaffirmance of Common-Law Rule. — The requirement to furnish accommodations within a reasonable time is but a reaffirmance of the common law, leaving the courts to say what time is reasonable. Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Duty to Provide Transportation. — It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891).

When Contract of Carriage Begins and Ends. — The contract of carriage by a common carrier begins when a passenger comes up on the carrier's premises or conveyance with the purpose of buying a ticket within a reasonable time or after having purchased a ticket; and the relation, once constituted, continues until the journey contracted for is concluded and the passenger has left or has had reasonable time to leave such premises. Hansley v. Jamesville & W.R.R., 115 N.C. 602, 20 S.E. 528 (1894), rehearing denied, 117 N.C. 565, 23 S.E. 443 (1895).

Trains Need Not Stop at All Stations. — It is a reasonable regulation of a railroad that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel. Hutchinson v. Railroad, 140 N.C. 123, 52 S.E. 263 (1905).

The printed schedule of trains is an offer, which is accepted by a person when he asks for a ticket, and he has the right to be transported by the first train stopping at his destination. Coleman v. Railroad, 138 N.C. 351, 50 S.E. 690 (1905).

Carrier May Demand Prepayment of Freight. — A common carrier has a right to demand prepayment of charges for transportation before receiving freight for shipment to one individual, although it may have an established custom to accept shipments to its other patrons without such prepayment. Allen v. Cape Fear & Y.V.R.R., 100 N.C. 397, 6 S.E. 105 (1888).

A common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though this is not required of others. It should appear, however, that a plaintiff had notice of such regulation. Randall v. Richmond & D.R.R., 108 N.C. 612, 13 S.E. 137 (1891).

Failure to Take Passenger Aboard. — Where plaintiff purchased a ticket from defendant's agent at a regular station before the time advertised for the arrival and depature of its train at that place, and was in readiness to get aboard, but the train ran by, making no effort to stop, although it had room in its cars for plaintiff, plaintiff was entitled to punitive damages, in the absence of sufficient excuse shown by defendant. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891).

Where plaintiff went to a flag station on a railroad a reasonable time before the arrival of a train on which he intended to take passage and, by reason of absence of the agent and the failure of the engineer to see his signal, the train did not stop for him, the railroad was liable for the actual damages sustained by the plaintiff. Thomas v. Southern Ry., 122 N.C. 1005, 30 S.E. 343 (1898).

Carrier under No Duty to Delay Trains. — A common carrier of passengers is under no obligation to delay the departure of its trains, or to look after the safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark. Browne v. Raleigh & G.R.R., 108 N.C. 34, 12 S.E. 958 (1891).

But a railroad may be liable for injuries to one who, by invitation or command of persons in charge of the trains, attempts to get on or off while the cars are in motion. Browne v. Raleigh & G.R.R., 108 N.C. 34, 12 S.E. 958 (1891).

Where a train on which plaintiff was a passenger did not stop at the station to which he had paid his fare, and the conductor agreed that he would slow up the train at a safe place for plaintiff to alight, and the plaintiff consented to jump off and went upon the platform as the train slowed up, but seeing a "go ahead" signal from the rear, did not step for that reason; and then, feeling the increased motion of the train, he stepped off believing he was at a safe place and relying upon the conductor's promise to put him off at a safe place, and was injured, the evidence of the defendant's negligence was

sufficient to be submitted to the jury. Cable v. Southern Ry., 122 N.C. 892, 29 S.E. 377 (1898).

Duty to Stop Train at Passenger's Station. — A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag station at which the train fails to stop owing to the neglect of the conductor in failing to take up the passenger's ticket in time, the railroad company is answerable for the consequent damages. Elliot v. Norfolk S. Ry., 166 N.C. 481, 82 S.E. 853 (1914).

It is the duty of the railroad to have an agent at the gate to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into the train, without objection, with a ticket calling for a regular station as her destination, and nothing on its face to show it was not good on that train, and she not knowing that that train did not stop there, it was the duty of the defendant to stop the train at that point for her. Hutchinson v. Railroad, 140 N.C. 123, 52 S.E. 263 (1905).

Damages Where Passenger Carried by Station. — When a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damages. If it is done recklessly or willfully he is entitled to punitive damages. Hutchinson v. Railroad, 140 N.C. 123, 52 S.E. 263 (1905), overruling Smith v. Wilmington & W.R.R., 130 N.C. 304, 41 S.E. 481 (1902).

A railroad company is liable for nominal damages for its negligence in failing to stop its train and conveying a passenger beyond the destination to which he had paid his fare, it being a regular station on the line. Cable v. Southern Ry., 122 N.C. 892, 29 S.E. 377 (1898).

Ejection of Passenger Without Making Sufficient Inquiries as Negligence. — Where plaintiff purchased through transportation to a destination to reach which it was necessary to change, but the conductor on the first train neglected to return plaintiff's ticket, and when the conductor of the second train asked for his fare, plaintiff, having no money, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part not to have satisfied himself by inquiring of such men whether plaintiff had been on the train with them prior to reaching the changing point, before ejecting plaintiff. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Passenger Need Not Pay Additional Fare to Prevent Ejection. — Where a passenger is about to be wrongfully ejected from a train, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, as he is not required to buy again his right to remain on the train to his destination. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Right of Action of Ejected Passenger. — A passenger ejected from a train for failure to pay again fare which he had paid once upon purchasing a ticket has a right of action. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Ejection of Passenger on Baggage Car. — A person who got on a blind baggage car, having a ticket, but not having told the conductor that he had it, where the conductor had not seen it, was not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Railroad, 135 N.C. 264, 47 S.E. 758 (1904).

Injury Caused by Misdirection of Agent. — Plaintiff who missed his train by misdirection of the defendant's agent and his refusal to sell him a ticket could recover for any injury proximately caused by being put out of the station into the cold weather while waiting for the next train. Coleman v. Railroad, 138 N.C. 351, 50 S.E. 690 (1905).

Action May be Brought in Tort or Contract. — A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by statute may bring an action on contract, or in tort, independent of the statute. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891).

Compensation for Loss of Time and Actual Expenses. — If a train arrives after its schedule time, or misses connection, or delays a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for the loss of time and actual expenses. Coleman v. Railroad, 138 N.C. 351, 50 S.E. 690 (1905).

Basis of Exemplary Damages. — The true ground for allowing exemplary damages in an action against a railroad company for damages on account of its negligence is personal injury, or, in the absence of personal injury, insult, indignity, contempt, etc., to which the law imputes a bad motive towards the plaintiff. Hansley v. Jamesville & D.R.R., 117 N.C. 565, 23 S.E. 443, 53 Am. St. R. 600, 32 L.R.A. 551 (1895).

When Punitive Damages Allowed. — If a tort is the result of simple negligence, damages will be restricted to such as are compensatory; but if it was willful, or committed with such circumstances as show gross negligence, punitive damages may be given. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891), explained in Hansley v. Jamesville & W.R.R., 117 N.C. 565, 23 S.E. 443, 53 Am. St. R. 600, 32 L.R.A. 551 (1895).

Where a railroad company, negligently and by reason of defective and inadequate equipment, failed to carry a passenger to whom it had sold an excursion ticket back to its starting point, but no personal injury or indignity was inflicted upon him, the passenger's right of action is ex contractu and not in tort, and hence exemplary or punitive damages cannot be recovered. Hansley v. Jamesville & W.R.R., 117 N.C. 565, 23 S.E. 443, 53 Am. St. R. 600, 32 L.R.A. 551 (1895).

Punitive Damages for Failure to Pick Up Passenger at Flag Station. — It is only when the railway engineer actually sees the signal of an intended passenger at a flag station and willfully passes him by that punitive damages will be allowed in an action for damages, and the burden of showing the reckless disregard of plaintiff's rights is upon the latter. Thomas v. Southern Ry., 122 N.C. 1005, 30 S.E. 343 (1898).

II. ADDITIONAL TRAINS AND CLOSE CONNECTIONS.

Private Persons May Not Maintain Action to Force Continuing Operation. — Persons asserting past and prospective unliquidated damages resulting to them as consignees and consignors from the abandonment of the operation of a railroad may not in their individual capacities maintain an action to force continuing operation of the railroad by the appointment of a permanent operating receiver, since such damages, though possibly different in degree, are not different in kind from those sustained by the public generally, and since the power to require continuous operation in the public interest of the State is vested exclusively by statute in the Utilities Commission. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Running of Additional Train. — It is within the power of the Commission to compel a railroad company to make reasonable connections with other roads so as to promote the convenience of the traveling public, and an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Connection of Trains as Well as Tracks Contemplated. — The connection required by former provision similar to subsection (b) of this section is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a train without a track. Both are required for traveling at all, and close connection of both to secure the convenience of the traveling public. Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

§ 62-234. Commission may authorize operation of fast mail trains; discontinuance of passenger service.

The Commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall stop only at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train such railroad company shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday. The Commission shall have the power in any case in which the convenience and necessity of the traveling public do not require the running of passenger trains upon its railroad to authorize such railroad company to cease the operation of passenger trains as long as the convenience and necessity of the traveling public shall not require such operation. (1893, c. 97; Rev., s. 2614; C.S., s. 3481; 1933, c. 134, s. 8; c. 528; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

Legal Periodicals. — For note on abandonments and partial discontinuances of passenger service by railroads, see 31 N.C.L. Rev. 137 (1952).

CASE NOTES

As to discretionary nature of Commission's power, see State ex rel. Utilities Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

§ 62-235. Commission to inspect railroads as to equipment and facilities, and to require repair.

The Commission is empowered and directed, from time to time, to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the safety and convenience of the public and the railroad employees; and if any are found by it to be unsafe, it shall at once notify and require the railroad company to put the same in repair. (1907, c. 469, s. 3; C.S., s. 1046; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-236. To require installation and maintenance of block system and safety devices; automatic signals at railroad intersections.

(a) The Commission is empowered and directed to require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road unless at least eight trains each way per day are operated on that part.

(b) The Commission is empowered and directed to require, when public safety demands, where two or more railroads cross each other at a common grade, or any railroad crosses any stream or harbor by means of a bridge, to install and maintain such a system of interlocking or automatic signals as will render it safe for engines and trains to pass over such crossings or bridge without stopping, and to apportion the cost of installation and maintenance between said railroads as may be just and proper. (1907, c. 469, s. 1b; 1911, c. 197, s. 2; Ex. Sess. 1913, c. 63, s. 1; C.S., ss. 1047, 1049; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Lack of a "block system," when required, is negligence per se. Gerringer v. North Carolina R.R., 146 N.C. 32, 59 S.E. 152 (1907). See also Stewart v. Railroad, 137 N.C. 687, 50 S.E. 312 (1905); Stewart v. Railroad, 141 N.C. 253, 53 S.E. 877 (1906).

§ 62-237. To regulate crossings and to abolish grade crossings.

The Commission may require the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State highway system and designate who shall pay for the same by partitioning the cost of said work and the maintenance of such crossing among the railroads and municipalities interested in accordance with the formula provided for grade crossing alterations or eliminations on the State highway system in G.S. 136-20(b). (1899, c. 164, s. 2, subsec. 13; Rev., s. 1097; 1907, c. 469, s. 1c; 1911, c. 197, s. 1; C.S., ss. 1041, 1048; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to intersection with highways, see § 62-223. As to obstructing highways and maintaining defective crossings, see § 62-224. As to cattle guards and private crossings, see § 62-226. As to the power of the Board of Transportation to require the installation of signals and other safety devices, see § 136-20.

CASE NOTES

Applicability of Section. — This section does not apply where "the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State Highway System" is not involved. Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

The General Assembly can make the abolition of grade crossings by railroads imperative instead of leaving it, as now, unexercised in the discretion of the Commission, and can place the cost of doing so upon the corporation whose duty it is to remove them. Northern Pac. Ry. v. Minnesota ex rel. City of Duluth, 208 U.S. 583, 28 S. Ct. 341, 52 L. Ed. 620 (1908); Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

Commission's Authority Supplementary to Police Powers. — The statute authorizing the Commission to require railroads to raise or lower their tracks at a crossing is supplementary to and not in derogation of the exercise by the State, or an incorporated town authorized by it, of such police powers. Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

Commission Vested with Full Power. — The Commission is vested with full and complete power to compel the raising and lowering of the track, to remove all danger to those using the public roads. Gerringer v. North Carolina R.R., 146 N.C. 32, 59 S.E. 152 (1907).

Authority to Abolish Dangerous or Inconvenient Grade Crossings. — Authority is conferred by statute upon the Commission to abolish grade crossings by a railroad company when by the operation of the railroad they become dangerous or inconvenient to the public traveling along the highways or private ways. Tate v. Seaboard Air Line Ry., 168 N.C. 523, 84 S.E. 808 (1915).

State Policy in Allocating Cost of Grade Crossing Improvements. — Although § 136-20 and this section may indicate a legislative trend in the field of allocating costs of grade crossing improvements, these statutes fall short of establishing a State policy applicable to factual situations other than those to which they relate in express and specific terms. Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

As to permissibility of imposing entire expense of change of grade at a railroad crossing on a railroad company, see Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

§ 62-238. To require extension or contraction of railroad switching limits.

(a) The Commission may require, after notice and hearing to affected persons, the extension or contraction of the switching limits of any railroad or of any terminal or junction served by more than one railroad, in order to prevent discrimination or to serve the public convenience and necessity.

(b) The boundaries of switching limits which have been or may be established hereunder shall be boundaries to be observed by the railroad company, carrier or carriers whether or not the traffic moving into said boundaries or out of said boundaries is either interstate or intrastate in character.

(c) The failure or refusal of any railroad company, carrier or carriers to conform to or obey any decision, rule, regulation or order made by the Commission under the provisions of this section shall subject said railroad company, carrier or carriers refusing or failing to comply herewith to a penalty of five hundred dollars ($500.00); and each day that such failure or refusal to conform to or obey any decision, rule, regulation or order of the Commission shall subject said railroad company, carrier or carriers to a separate and distinct penalty of five hundred dollars ($500.00), the same to be certified to and prosecuted by the Attorney General. (1947, c. 1075, ss. 1-4; 1963, c. 1165, s. 1.)

§ 62-239. To fix rate of speed through municipalities; procedure.

(a) If a railroad company is of the opinion that an ordinance of a municipality through which a line of its railroad passes regulating the speed at which trains may run while passing through said municipality is unreasonable or oppressive, such railroad company may file its petition before the Commission, setting forth all the facts, and asking relief against such ordinance, and that the Commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, by registered or certified mail, to the mayor or chief officer of the town or municipality, together with a notice from the Commission, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the municipality named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the Commission shall hear the petition, but any hearing granted by the Commission shall be had at the municipality where the conditions complained of are alleged to exist, or some member of the said Commission shall take evidence, both for the petition and against it, at such municipality, and report to the full Commission before any decision is made by the Commission.

(b) If the Commission finds that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall be taxed with the cost. If the Commission is of the opinion that the ordinance is unreasonable, it shall prescribe the maximum rates of speed for passing through such municipality. Thereafter, the railroad company may run its trains through such municipality at speeds not greater than those prescribed by the Commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

(c) If the judgment of the Commission is in favor of the petitioner, the Commission may make such order as to the payment of the costs as shall seem just. It may require either party to pay the same or it may divide the same. (1903, c. 552; Rev., ss. 1101, 1102, 1103; C.S., s. 1058; 1933, c. 134, s. 8; 1941, c. 97; 1957, c. 1152, s. 5; 1963, c. 1165, s. 1.)

Local Modification. — Cumberland, Rockingham, Union, Wayne: C.S. § 1058.

CASE NOTES

As to regulation of train's speed being within the police power of the state, see Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

§ 62-240. Injury to passenger while in prohibited place.

If any passenger on any railroad is injured in any portion of a train where passengers are prohibited by notice conspicuously posted in its passenger cars, such railroad shall not be liable for the injury, provided the railroad has furnished sufficient room within its passenger cars for the proper accommodation of all passengers on the train. (1871-2, c. 138, s. 42; Code, s. 1978; Rev., s. 2628; C.S., s. 3509; 1963, c. 1165, s. 1.)

CASE NOTES

Effect of Posting Notice. — When notice provision has been complied with, a rule of a railroad company prohibiting passengers from going on the platform while the train is in motion is given the force and effect of a State law, barring a recovery for injuries sustained under such circumstances. Shaw v. Railroad, 143 N.C. 312, 55 S.E. 713 (1906).

Notice Need Be Only in English. — This section requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in English, and the fact that a passenger cannot read that language is immaterial. Bane v. Norfolk S.R.R., 176 N.C. 247, 97 S.E. 11 (1918).

Inapplicability When Passenger Alighting. — Former similar section was for the protection of passengers and had no application when the injury complained of was received as the passenger was alighting at a regular station after the train had stopped for that purpose, though he may have ridden in violation of the statute before the train had stopped. Kearney v. Seaboard Air Line Ry., 158 N.C. 521, 74 S.E. 593 (1912).

Riding on Platform Prima Facie Negligence. — It is a prima facie negligence for a passenger to voluntarily ride on the platform of a rapidly moving train. Wagner v. Atlantic Coast Line R.R., 147 N.C. 315, 61 S.E. 171 (1908).

Person on Passenger Platform at Station. — One who is on the passenger platform of a railroad company at its station, with the purpose of becoming a passenger on its expected train, is entitled to the protection due a passenger from dangerous conditions and usage there. Thomas v. Southern Ry., 173 N.C. 494, 92 S.E. 321 (1917).

§ 62-241. Negligence presumed from killing livestock.

When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the railroad company in any action for damages against such company: Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued. (1856-7, c. 7; Code, s. 2326; Rev., s. 2645; C.S., s. 3482; 1963, c. 1165, s. 1.)

Cross References. — As to venues of actions against railroads, see § 1-81.

CASE NOTES

There is no exception in the statute. It is in terms general and applies alike to all cases of killing stock by railroad. Hardison v. Atlantic & N.C.R.R., 120 N.C. 492, 26 S.E. 630 (1897).

Presumption Applies When Facts Known. — The presumption of negligence in killing livestock, when the action is brought within six months, applies where the facts are known. Hanford v. Southern Ry., 167 N.C. 277, 83 S.E. 470 (1914).

Applicability of Presumption When Animal Hitched to Vehicle or Running at Large. — The statutory presumption of negligence of a railroad company in killing livestock, when the action is brought within six months, applies whether a horse, the subject of the action, was hitched to a buggy at the time or running at large. Hanford v. Southern Ry., 167 N.C. 277, 83 S.E. 470 (1914).

Where it is proven or admitted that cattle have been killed by the train of a railroad company within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing, where the animal is hitched to a wagon or cart, as well as where it is straying at large when killed. Randall v. Richmond & D.R.R., 107 N.C. 748, 12 S.E. 605 (1890).

Presumption Does Not Apply to Fowl. — No presumption of negligence against a railroad company is raised by the mere fact of killing fowl, etc., upon its track in the operation of its trains. The term "cattle or other livestock," does not include geese or other fowl within its terms. James v. Atlantic Coast Line R.R., 166 N.C. 572, 82 S.E. 1026 (1914).

Nor to Dogs. — The killing of a dog by a street railway is not prima facie evidence of negligence. Moore v. Electric Co., 136 N.C. 554, 48 S.E. 822 (1904).

"Prima facie evidence of negligence" means no more than evidence sufficient to carry case to the jury, and to justify, but not compel, a verdict as for a negligent wrong. Ferrell v. Norfolk S.R.R., 190 N.C. 126, 129 S.E. 155 (1925), modifying Carlton v. Wilmington & W.R.R., 104 N.C. 365, 10 S.E. 516 (1889) and Bethea v. Raleigh & A.R.R., 106 N.C. 279, 10 S.E. 1045 (1890).

Burden of Proving Negligence Is Not Changed. — Where a railroad train runs into, kills or injures livestock, and the owner brings his action for damages within the statutory six months, the prima facie case of negligence raised by the statute is sufficient to take the case to the jury, but does not change the burden of proving the issue of negligence from the plaintiff. Ferrell v. Norfolk S.R.R., 190 N.C. 126, 129 S.E. 155 (1925).

The prima facie case is rebutted where the undisputed facts show there was no negligence on the part of the defendant. Hardison v. Atlantic & N.C.R.R., 120 N.C. 492, 26 S.E. 630 (1897), modifying Doggett v. Richmond & D.R.R., 81 N.C. 459 (1879) and Durham v. Wilmington & W.R.R., 82 N.C. 352 (1880).

This rule can only be rebutted by showing that the agents of the railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence. Battle v. W. & W.R.R., 66 N.C. 343 (1872).

In an action against a railroad company for killing certain mules of the plaintiff, where negligence was established by force of the statutory presumption it could only be rebutted by showing that by the exercise of due diligence the stock could not have been seen in time to save them. Pippen v. Wilmington, C. & A.R.R., 75 N.C. 54 (1876).

Presumption Not Rebutted by Showing that Stock Were Under Person's Control. — The statutory presumption of negligence for killing livestock, when the action is brought within six months, is not rebutted by showing that the livestock were under the control of a person at the time. Randall v. Richmond & D.R.R., 104 N.C. 410, 10 S.E. 691 (1889), rehearing denied, 107 N.C. 748, 12 S.E. 605 (1890).

Presumption Held Not Repelled. — Where plaintiff's horse had been injured on a railroad by the running of a train against it, and it was doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on the track, the prima facie case of negligence was not repelled. Clark v. Western N.C.R.R., 60 N.C. 109 (1863).

Liability Where Owner Permits Cattle to Stray on Tracks. — If the owner of cattle permits them to stray off and get upon the track of a railroad and they are killed or hurt, the railroad company is not liable unless the train was being carelessly run, or by the exercise of proper care after the animals were discovered the injury could have been avoided or prevented. Doggett v. Richmond & D.R.R., 81 N.C. 459 (1879).

Injury of Horses by Running into Trestle. — In an action against a railroad company for damages for injuries to horses, where the evidence showed that the horses were injured by running into a trestle, and that the train was 100 yards from the trestle when they were injured, and stopped 100 feet from the trestle, the statutory presumption did not apply. Ramsbottom v. Railroad, 138 N.C. 38, 50 S.E. 448 (1905).

No Duty to Cut Down Weeds. — A railroad company is not negligent in failing to cut down bushes or weeds on the right-of-way beyond the portion over which it is exercising actual control for corporate purposes, even though a horse is killed as a result of the engineer's inability to see him on account of the weeds. Ward v. Wilmington & W.R.R., 109 N.C. 358, 13 S.E. 926 (1891).

Effect of Local Stock Law. — The prima facie evidence of negligence on the part of a railroad company in a suit for damages for killing stock is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury. Roberts v. Richmond & D.R.R., 88 N.C. 560 (1883).

Instructions. — Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so. Baker v. Roanoke & T.R.R.R., 133 N.C. 31, 45 S.E. 347 (1903).

Measure of Damages for Killing of Cow. — The measure of damages when a cow is killed by a train is the difference in the value of the cow and that of the beef. Roberts v. Richmond & D.R.R., 88 N.C. 560 (1883).

When Judge May Direct Verdict. — The statutory presumption applies to all cases of killing stock by a railroad, and while the presumption of negligence arising from the killing may be rebutted, it is only where the undisputed facts show there was no negligence that the trial judge should direct a verdict for the defendant. Hardison v. Atlantic & N.C.R.R., 120 N.C. 492, 26 S.E. 630 (1897).

Defendant Not Entitled to Nonsuit. — Where plaintiff made a prima facie case by suing for the killing of a cow within six months, the defendant was not entitled to nonsuit on the ground that such prima facie case was rebutted by the evidence of the defendant. Davis v. Railroad Co., 134 N.C. 300, 46 S.E. 515 (1904).

Applied in Aycock v. W. & W.R.R., 51 N.C. 231 (1858); Wilson v. Norfolk & S.R.R., 90 N.C. 69 (1884); Snowden v. Norfolk & S.R.R., 95 N.C. 93 (1886); Carlton v. Wilmington & W.R.R., 104 N.C. 365, 10 S.E. 516 (1889); Coburn v. Atlantic Coast Line R.R., 227 N.C. 695, 44 S.E.2d 200 (1947); Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 62-242. Liability of railroads for injuries to employees; fellow-servant rule; defective machinery; contributory negligence; assumption of risk; contracts void.

(a) Any servant or employee of any railroad company operating in this State who shall suffer injury to his person or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void.

(b) Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or in the case of the death of such employee, to his or her personal representative, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(c) In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(d) In any action brought against any common carrier under or by virtue of any of the provisions of this section to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence.

(e) Any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier by railroad to exempt itself from any liability created by this section, shall to that extent be void: Provided, that in any action brought against such common carrier, under and by virtue of any of the provisions of this section, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which such action was brought.

(f) The provisions of this section relating to liability for damages shall also apply to logging roads and tramroads.

(g) The term "common carrier" as used in this section shall include the receiver or receivers, or other persons or corporations charged with the duty of

the management of the business of a common carrier. The term "employee" or "servant" as used in this section shall include any person carried on the payroll of such railroad company and required to be on its property regardless of whether such person is receiving compensation at the time or not. (1897 (Pr.), c. 56; Rev., s. 2646; 1913, c. 6, ss. 1, 2, 3, 4, 5; 1915, c. 256; 1919, c. 275; C.S., ss. 3464, 3465, 3466, 3467, 3468, 3469, 3470; 1947, c. 916; 1963, c. 1165, s. 1.)

Cross References. — As to venue of actions against railroads, see § 1-81. As to action for death by wrongful act generally, see § 28A-18-2.

Editor's Note. — The statutes now combined in this section, regulating the liability of railroads for injuries to employees, were enacted prior to the adoption of the Workmen's Compensation Act, §§ 97-1 to 97-122. Section 97-13 expressly provides that the Workmen's Compensation Act is not applicable to railroads or railroad employees and that this section is not repealed. Under § 97-13, however, the exemption as to railroads does not apply to electric street railroads and their employees.

CASE NOTES

I. In General.
II. Fellow-Servant Rule.
III. Contributory and Comparative Negligence.
IV. Assumption of Risk.
V. Logging Roads and Tramroads.

I. IN GENERAL.

The statutory language is both comprehensive and explicit. It embraces injuries sustained by any servant or employee of any railway company in the course of his services or employment with said company. Mott v. Southern Ry., 131 N.C. 234, 42 S.E. 601 (1902).

Applicability. — Former provisions from which this section was derived applied only to employees who were engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mfg. Co., 204 N.C. 525, 168 S.E. 833 (1933).

For case holding former section that is now subsection (b) applicable only to common carriers by railroad, see Williams v. Kinston Mfg. Co., 175 N.C. 226, 95 S.E. 366 (1918).

"Common Carrier" Defined. — A common carrier is one who, by virtue of his calling, undertakes for compensation to transfer personal property from one place to another for all persons who choose to employ him. Williams v. Kinston Mfg. Co., 175 N.C. 226, 95 S.E. 366 (1918).

Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Fitzgerald v. Railroad, 141 N.C. 530, 54 S.E. 391 (1906).

Applicability of Federal Statute Dependent or Whether Employee Was Engaged in Interstate Commerce. — The federal and state courts have concurrent jurisdiction and the question of which statute will apply depends upon whether or not the employee was engaged in interstate commerce. Renn v. Seaboard Air Line Ry., 170 N.C. 128, 86 S.E. 964 (1915), aff'd, 241 U.S. 290, 36 S. Ct. 567, 60 L. Ed. 1006 (1916); West v. Atlantic Coast Line R.R., 174 N.C. 125, 93 S.E. 479 (1917). See also, Capps v. Atlantic Coast Line R.R., 178 N.C. 558, 101 S.E. 216 (1919), cert. denied, 252 U.S. 580, 40 S. Ct. 345, 64 L. Ed. 726 (1920).

Recovery of Beneficiaries Under State and Federal Statutes. — Under the State statute the jury assesses the value of the life of the decedent in solido, and the recovery is disbursed under the statute of distributions. Under the federal statute, the jury must find, as to each plaintiff, what pecuniary benefit he had reason to expect from the continued life of the deceased, and the recovery must be limited to compensation of those relatives in the proper class who are shown to have sustained such pecuniary loss. Horton v. Seaboard Air Line R.R., 175 N.C. 472, 95 S.E. 883 (1918), appeal dismissed, 251 U.S. 566, 40 S. Ct. 180, 64 L. Ed. 417 (1920).

Under the State statute the damages are based upon the present worth of the net pecuniary value of the life of the deceased. Ward v. North Carolina R.R., 161 N.C. 179, 76 S.E. 717 (1912).

Under the federal statute, the damages are based upon the pecuniary loss sustained by the beneficiary. North Carolina R.R. v. Zachary,

232 U.S. 248, 34 S. Ct. 305, 58 L. Ed. 591 (1914).

Interstate Question Held Immaterial. — In an action brought by a switchman of the defendant's train crew to recover damages for alleged negligence of the defendant in providing an improper coupler on a train made up and ready to start for a destination beyond the State, questions whether the train was an interstate one or whether the plaintiff was at the time engaged in interstate commerce were not material, since the state and federal statutes were in this respect substantially identical. Sears v. Atlantic Coast Line R.R., 169 N.C. 446, 86 S.E. 176 (1915).

Effect of Nonsuit in Action under Federal Act. — A judgment as of nonsuit upon the merits of an action brought by the administratrix of an injured employee of a railroad company under the Federal Employers' Liability Act would not operate as a bar to the same cause brought under the laws of this State, the law and facts applicable to the first not being identical with those applicable to the second. Fuquay v. A. & W. Ry., 199 N.C. 499, 155 S.E. 167 (1930).

Contract Held Invalid. — Relief department for providing hospital care for employees, contributed to by the employees and the company and under the control and management of the company, was but an agency of the company; and a stipulation in the contract with employee that in the case of accident he must accept the benefit of the contract and release the company from liability, was prohibited by the provisions of the statute that is now subsection (e) of this section. Barden v. Atlantic Coast Line Ry., 152 N.C. 318, 67 S.E. 971 (1910), overruled on other grounds, 269 N.C. 1, 152 S.E.2d 485 (1967); Herring v. Atlantic Coast Line R.R., 168 N.C. 555, 84 S.E. 863 (1915).

Applied in Byers v. Boice Hardwood Co., 201 N.C. 75, 159 S.E. 3 (1931); Bateman v. Brooks, 204 N.C. 176, 167 S.E. 627 (1933); Graham v. Atlantic Coast Line R.R., 240 N.C. 338, 82 S.E.2d 346 (1954).

II. FELLOW-SERVANT RULE.

Abrogation of Fellow-Servant Rule. — Statute which is now subsection (a) of this section was an unconditional abrogation of the kindred doctrines of fellow servant and assumption of risk as applied to railroad companies. Coley v. North Carolina R.R., 129 N.C. 407, 40 S.E. 195 (1901).

The law relating to the doctrine of fellow servants has been abrogated in regard to its application to those employed by railroad companies operating in this State. Robinson v. J.B. Ivey & Co., 193 N.C. 805, 138 S.E. 173 (1927).

As to constitutionality of abrogation of fellow-servant rule insofar as it applied to railroad employees, see Hancock v. Norfolk & W. Ry., 124 N.C. 222, 32 S.E. 679 (1899).

Applicability to Any Department of Railroad. — The provisions of the statute that is now subsection (a) of this section applied to an injury negligently inflicted by a fellow servant in any department of a railroad being operated. Buckner v. Madison County R.R., 164 N.C. 201, 80 S.E. 225 (1913).

Applicability to Manufacturing Company Operating Spur Track. — The statute that is now subsection (a) of this section applied to a manufacturing corporation which owned and operated a spur track on its grounds as incidental to its main business, with respect to servants employed in such service. Hairston v. Leather Co., 143 N.C. 512, 55 S.E. 847 (1906); United States Leather Co. v. Howell, 151 F. 444 (4th Cir. 1907).

As to applicability of statute that is now subsection (a) to street railways, before enactment of the Workers' Compensation Act, see Hemphill v. Lumber Co., 141 N.C. 487, 54 S.E. 420 (1906); Brookshire v. Asheville Elec. Co., 152 N.C. 669, 68 S.E. 215 (1910).

Railroad Must Be Operating and Not Merely Under Construction. — To come within the provisions of the statute that is now subsection (a), a railroad must be "operating" and not "under construction." See Nicholson v. Railroad, 138 N.C. 516, 51 S.E. 40 (1905); Bailey v. Meadows Co., 152 N.C. 603, 68 S.E. 11, on rehearing, 154 N.C. 71, 69 S.E. 746 (1910).

Statute that is now subsection (a) of this section did not apply to an employee engaged in building a trestle for the extension of a railroad, at a point some miles from the track on which trains were being operated. Nicholson v. Railroad, 138 N.C. 516, 51 S.E. 40 (1905); Bailey v. Meadows Co., 152 N.C. 603, 68 S.E. 11, on rehearing, 154 N.C. 71, 69 S.E. 746 (1910).

Operation of Statute on All Employees. — Statute that is now subsection (a) of this section operated on all employees of the company, whether in superior, equal, or subordinate positions. Fitzgerald v. Railroad, 141 N.C. 530, 54 S.E. 391 (1906); Bloxham v. Stave & Timber Corp., 172 N.C. 37, 89 S.E. 1013 (1916).

Regardless of Kind of Employment. — The provisions of the statute that is now subsection (a) did not require that the servant, at the time of the injury, should be engaged in the running or operation of a train, but applied to any other kind of service, whether more or less dangerous. Mincey v. Atlantic Coast Line R.R., 161 N.C. 467, 77 S.E. 673 (1913).

Statute to Be Read into Contract of Service. — Where a contract of service with the defendant railroad was made in this State, the provisions of the statute that is now subsection (a) of this section had to be read into the contract, and there being no evidence that the service was to be performed altogether in an-

other state, it would seem that the relative rights and disabilities of the parties were fixed by the terms of the contract. Miller v. Railroad, 141 N.C. 45, 53 S.E. 726 (1906).

Liability When Duty Delegated to Another Company. — Where a railroad company delegated its duty of loading a car to a lumber company making a shipment, it was liable for any injury to its own employee caused by negligence of the employees of the lumber company in loading the car. Britt v. Carolina & N.R.R., 144 N.C. 242, 56 S.E. 910 (1907).

Defective Ladder. — Where two employees of a railroad company were instructed to do certain work requiring the use of a ladder, and a discarded ladder, which proved defective, was selected from several supplied by the company, the others being sound, and one of the employees sustained a fall because of the defect and sued for damages therefor, the statute that is now subsection (a) of this section applied. Mincey v. Atlantic Coast Line R.R., 161 N.C. 467, 77 S.E. 673 (1913).

Flagman at Crossing. — Where the plaintiff was employed by a railroad to warn pedestrians of approaching trains at a public crossing and to signal the engineer, and the plaintiff was injured by the defendant's negligence when he had crossed the platform on a train and was on the lowest step of the car for the performance of his duty on the other side, the evidence was sufficient upon the question of employment to sustain a verdict in plaintiff's favor. West v. Atlantic Coast Line R.R., 174 N.C. 125, 93 S.E. 479 (1917).

Engineer Injured by Assistant's Negligence. — It is the duty of a railroad company to furnish a competent person to assist its engineer in fixing his locomotive, when such assistance is necessary from the character of the work being done; and the company is liable in damages when the assistant fails to exercise ordinary care to prevent an injury, such failure being the proximate cause of the injury. Horton v. Seaboard Air Line Ry., 145 N.C. 132, 58 S.E. 993 (1907).

Employee Negligently Shot by Fellow Servant. — Where a baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage room, removed a pistol which he knew to be loaded, took it in his hand, and in a careless manner opened another drawer to the desk, and in doing so caused the pistol to fire and killed his assistant, his negligent acts were attributable to the company employing him. Moore v. Southern R.R., 165 N.C. 439, 81 S.E. 603 (1914).

Accident in Doing Work of a Simple Nature. — Where the plaintiff was employed by a railroad to replace the crossties under the rails of the road, and while a tie was being depressed into position by his fellow servant his hand was caught between the end of the tie and the rail and injured, it was held that the injury was the result of an accident in doing work of a simple nature, and a recovery should have been denied as a matter of law. Lloyd v. Southern Ry., 168 N.C. 646, 85 S.E. 10 (1915).

III. CONTRIBUTORY AND COMPARATIVE NEGLIGENCE.

Contributory Negligence and Assumption of Risk Distinguished. — Assumed risk is founded upon the knowledge of the employee, either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely matter of conduct. Seaboard Air Line Ry. v. Horton, 233 U.S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914).

Applicability. — Section that is now subsection (c) of this section applied only to employees engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mfg. Co., 204 N.C. 525, 168 S.E. 833 (1933).

Recognition of Doctrine of Comparative Negligence. — The doctrine of comparative negligence has only been recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act and the statute that is now subsection (c) of this section, and then only for the purpose of mitigating the damages or as partial defense. Moore v. Chicago Bridge & Iron Works, 183 N.C. 438, 111 S.E. 776 (1922).

Contributory Negligence No Longer a Bar. — Under the statute that is now subsection (c) of this section, the plaintiff was entitled to have his cause submitted to the jury, for contributory negligence is no longer a bar to an action by an employee against a railroad for injuries sustained during his employment, and the question of assumption of risk was for the jury, the burden of proof being upon the defendant. Hines v. Atlantic Coast Line R.R., 185 N.C. 72, 116 S.E. 175 (1923).

It is not the mere working in the presence of an obvious defect in an appliance furnished by the master that will constitute contributory negligence on the part of the servant; and assurances on the part of the former that needed repairs will be made will frequently relieve the latter of this charge. Bissell v. Greenleaf-Johnson Lumber Co., 152 N.C. 123, 67 S.E. 259 (1910).

Negligence in Obtaining Improper Ladder. — The failure of a railroad company to furnish to an employee engaged in the scope of his employment in painting a station house a

proper ladder or appliance, which failure caused the injury in suit, came within the provisions of the statute that is now subsection (c) of this section, and the contributory negligence of the plaintiff was not a complete bar to his recovery, but was only to be considered by the jury in diminution of the damages. Jones v. Atlantic Coast Line R.R., 194 N.C. 227, 139 S.E. 242 (1927).

Coupling of Car. — Where plaintiff, while performing his duty, coupled a car attached to defendant's locomotive, while not in motion, and his injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to practice, even though there was evidence of contributory negligence, its establishment would not be a complete defense, under the section that is now subsection (c) of this section, and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee would not be considered. Lamm v. Atlantic Coast Line R.R., 183 N.C. 74, 110 S.E. 659 (1922).

Jury Issue Raised by Evidence. — In an action for a deceased employee's negligent death, the fact that it was caused by a head-on collision on defendant railroad company's trestle, in broad daylight, with another of its cars, was some evidence that the defendant's negligence proximately caused the employee's death, and raised the issue for the determination of the jury, even though the intestate might have been guilty of contributory negligence. Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924).

Verdict Upheld. — Where the plaintiff's complaint demanded damages in a certain amount in his action involving issues of negligence and contributory negligence and the application of the rule of comparative negligence under the provisions of the statute that is now subsection (c) of this section, the fact that the jury rendered a verdict for damages in the full amount demanded in the complaint under a proper instruction did not alone show that the jury had failed to follow the rule of damages prescribed in such instances, and the verdict would not on that ground be disturbed on appeal. Brooks v. Suncrest Lumber Co., 194 N.C. 141, 138 S.E. 532 (1927).

As to the rule under the federal statute, see Moore v. Atlantic Coast Line R.R., 185 N.C. 189, 116 S.E. 409 (1923); Ballew v. Asheville & E.T.R.R., 186 N.C. 704, 120 S.E. 334 (1923); Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924); Cobia v. Atlantic Coast Line R.R., 188 N.C. 487, 125 S.E. 18 (1924).

IV. ASSUMPTION OF RISK.

Doctrine of Assumption of Risk Explained. — The doctrine of assumption of risk is that an employee assumes the risk of accidents and injuries incident to the business properly operated. He does not assume the risk caused by the negligence of the company, in not furnishing proper appliances or in any other respect. Horton v. Seaboard Air Line R.R., 175 N.C. 472, 95 S.E. 883 (1918); appeal dismissed, 251 U.S. 566, 40 S. Ct. 180, 64 L. Ed. 417 (1920).

As to nonavailability of defense of assumption of risk, see Moore v. Rawls, 195 N.C. 125, 144 S.E. 552 (1928).

Defense of Assumption of Risk in Working with Defective Appliance or Machine Eliminated. — In an action for negligence against a railroad company operating in this State, the defense of working on in the presence of a defective appliance or machine, usually dealt with under the head of assumption of risk, has been eliminated. Biles v. Railroad, 143 N.C. 78, 55 S.E. 512 (1906).

Employee assumes no risk in the proper use of defective appliances after notifying the employer, who promises to remedy the defect; but the employee must use the appliances with proper regard to their known condition, and, failing in this, he would be guilty of contributory negligence. Britt v. Carolina & N.R.R., 144 N.C. 242, 56 S.E. 910 (1907).

The use of obviously defective machinery will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference to probable consequences. Coley v. North Carolina R.R., 129 N.C. 407, 40 S.E. 195 (1901).

Duty of Employer to Furnish Safe Tools. — It is the master's duty to furnish the servant such tools as are reasonably safe and suitable for the work in which he is engaged, and in general use. Bissell v. Greenleaf-Johnson Lumber Co., 152 N.C. 123, 67 S.E. 259 (1910); Eplee v. Southern Ry., 155 N.C. 293, 71 S.E. 325 (1911). See also, Moore v. Railroad, 141 N.C. 111, 53 S.E. 745 (1906).

Acquiescence in Use of Inappropriate Appliance. — The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose. Wallace v. Railroad, 141 N.C. 646, 54 S.E. 399 (1906).

Liability Not Affected by Act of Shipper. — The duty of the railroad company to have a crosspiece used to keep steady lumber on flat cars secured in a reasonably safe manner for the use to which its servants customarily put it was not affected by the fact that the shipper put it on in loading the car. Wallace v. Railroad, 141 N.C. 646, 54 S.E. 399 (1906).

No Recovery When Plaintiff Caused Own Injury. — When, under instructions from his superior officer, the plaintiff, in repairing a piece of machinery, with knowledge of its defects, negligently caused an injury to himself

in such manner as it was his duty in repairing to prevent, he could not recover, and this section has no application. Mathis v. Atlantic Coast Line R.R., 144 N.C. 162, 56 S.E. 864 (1907).

Failure to Equip Car with Automatic Couplers. — Where the jury found that the plaintiff was injured by the negligence of the defendant in failing to have its cars equipped with automatic couplers, the only defense open to the defendant, in the absence of any evidence of recklessness, was whether plaintiff was injured in the course of his service and employment. Hairston v. Leather Co., 143 N.C. 512, 55 S.E. 847 (1906).

Defective Coupler. — In an action for an injury alleged to have been sustained from a defective coupler, the use of such defective coupler was a violation of a positive duty, and, in connection with an express order of the superintendent to make the coupling, was continuing negligence, and the causa causans of the injury. Liles v. Lumber Co., 142 N.C. 39, 54 S.E. 795 (1906); Sears v. Atlantic Coast Line R.R., 169 N.C. 446, 86 S.E. 176 (1915).

Engine without Handhold along Pilot Beam. — Where the plaintiff's evidence showed that he was at the time of the injury at the usual position provided for the purpose on the pilot of the engine by order of his superiors and in the necessary performance of his duties, and that he was thrown and injured because the engine did not have the usual handhold along the pilot beam, and that he did not know the handhold was lacking when he got on, and was guilty of no carelessness, his right of action was established. Biles v. Railroad, 143 N.C. 78, 55 S.E. 512 (1906).

Exposed Screw on Power Drill. — A power drill furnished by a master to a servant for boring holes in iron plates, having an exposed set-screw thereon which was usually covered or countersunk, was not a proper tool for the purpose, and the master was liable for damages proximately caused by the defect. Eplee v. Southern Ry., 155 N.C. 293, 71 S.E. 325 (1911).

Improper Ladder. — Where it was the custom of a railroad company to furnish ladders to its painters, and the plaintiff, a painter, had not been furnished with a proper ladder, but with an ordinary ladder that extended beyond the steep roof of the building upon which he was at work, and the ladder fell over and struck the plaintiff, causing him to fall, and the injury would not have occurred if a proper ladder or appliance had been furnished, the evidence was sufficient to take the case to the jury upon the issue of the company's actionable negligence. Jones v. Atlantic Coast Line R.R., 194 N.C. 227, 139 S.E. 242 (1927).

Defective Handcar. — Where plaintiff was injured in consequence of using a defective handcar, which he had theretofore repeatedly reported to his employer as defective, and for which a replacement had been promised, the employer was liable. Boney v. Atlantic & N.C.R.R., 145 N.C. 248, 58 S.E. 1082 (1907).

Question for Jury. — Where the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish him a truck for the service, the use of which would have avoided the injury, it was for the jury to determine whether the defendant was negligent in failing to supply the truck, or whether the plaintiff assumed the risk on attempting to lift the trunk. Hines v. Atlantic Coast Line R.R., 185 N.C. 72, 116 S.E. 175 (1923). See also, Horton v. Seaboard Air Line R.R., 175 N.C. 472, 95 S.E. 883 (1918), appeal dismissed, 251 U.S. 566, 40 S. Ct. 180, 64 L. Ed. 417 (1920); Wallace v. Tallahassee Power & Light Co., 176 N.C. 558, 97 S.E. 611 (1918).

V. LOGGING ROADS AND TRAMROADS.

Applicability of Provisions to Logging Roads and Tramroads. — For cases holding the provisions of the statutes that are now subsections (a) and (c) applicable to tramroads or logging roads under the provisions of the statute that is now subsection (f), see Sampson v. Jackson Bros. Co., 203 N.C. 413, 166 S.E. 181 (1932). See also, Lilley v. Interstate Cooperage Co., 194 N.C. 250, 139 S.E. 369 (1927); Moore v. Rawls, 196 N.C. 125, 144 S.E. 552 (1928).

For cases holding the statute that is now subsection (a), by judicial construction, to apply to logging roads and tramroads, decided prior to 1919 enactment of the statute that is now subsection (f), see Roberson v. Greenleaf-Johnson Lumber Co., 154 N.C. 328, 70 S.E. 630 (1911), and Buckner v. Madison County R.R., 164 N.C. 201, 80 S.E. 225 (1913).

For case holding that a logging road was not a common carrier within the meaning of the statute that is now subsection (c), and that the doctrine of comparative negligence was not applicable to actions for injuries sustained by employees of such roads, decided prior to 1919 enactment of the statute that is now subsection (f), see Williams v. Kinston Mfg. Co., 175 N.C. 226, 95 S.E. 366 (1918).

Applicability of Comparative Negligence to Logging Roads. — Contributory negligence is no longer a bar to injuries received in the operation of a logging road, but such negligence mitigates damages. In other words, comparative negligence is now, under the law, applicable to logging roads. Moore v. Rawls, 196 N.C. 125, 144 S.E. 552 (1928). See also McKinish v. Norwood Lumber Co., 191 N.C. 836, 133 S.E. 163 (1926).

The employee must be engaged in duties connected with or incidental to the operation of such roads. Gurganous v. Camp Mfg. Co., 204 N.C. 525, 168 S.E. 833 (1933).

Narrow-Gauge Logging Road. — A small narrow-gauge road running through the woods and used only for transporting logs to the defendant's sawmill, with the cars loaded with logs pulled up a grade by means of a steam skidder, the wire cables operating around a drum upon the skidder, was a logging road within the intent and meaning of the statute that is now subsection (f) of this section, and an employee negligently injured by such company was not barred of his right to recover damages when caused by a fellow servant; contributory negligence would only be considered in determining the amount of damages the injured employee had sustained. Stewart v. Blackwood Lumber Co., 193 N.C. 138, 136 S.E. 385 (1927); Brooks v. Suncrest Lumber Co., 194 N.C. 141, 138 S.E. 532 (1927).

Injury in Loading Logs. — Where a tram railroad was engaged in loading logs and a fellow servant of the plaintiff, acting in the scope of his employment in loading the logs, negligently caused one of the logs to drop upon the plaintiff and injure him, the employer was liable in damages for the negligent injury proximately caused thereby. Lilley v. Interstate Cooperage Co., 194 N.C. 250, 139 S.E. 369 (1927).

Injury by Falling Tree. — Statute that is now subsection (a) of this section applied where an employee was injured by a tree falling upon him as he was riding on the car of defendant's logging road in the performance of his duties, a change of wind having deflected the tree from its expected course, so that it struck the tops of smaller trees and thence fall upon the plaintiff, for the engineer should reasonably have seen the danger in time to have stopped the train and avoided the injury, after the course of the falling tree had been unexpectedly deflected. Bloxham v. Stave & Timber Corp., 172 N.C. 37, 89 S.E. 1013 (1916).

§ 62-243. Violation of rules causing injury; damages.

If any railroad company doing business in this State shall, in violation of any rule or regulation provided by the Commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this Chapter shall be brought within one year after the commission of the alleged wrong or injury. (1899, c. 164, s. 16; Rev., s. 1091; C.S., s. 1110; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-244. Certain employees to wear badges.

Every conductor, baggagemaster, engineer, brakeman or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office. (1871-2, c. 138, s. 30; Code, s. 1958; Rev., s. 2604; C.S., s. 3414; 1963, c. 1165, s. 1.)

Cross References. — As to badge of railroad police, see § 74A-3.

§ 62-245. Duty to receive and forward freight tendered; penalty; regulations; charges.

(a) Agents or other officers of railroad companies whose duty it is to receive freight shall receive all articles of the nature and kind received by such carriers for transportation whenever tendered at a regular depot, station, terminal or boat landing, and every loaded car tendered at a sidetrack, or any warehouse

connected with the railroad by a siding. The railroad company shall forward such freight or cars by the route selected by the person tendering the freight under the existing laws. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment.

(b) The Commission shall make reasonable and just rules:

(1) For the handling of freight and baggage at stations of all railroad companies.

(2) As to charges by any person engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations.

(c) The railroad company represented by any person unlawfully refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars ($50.00) for each day such carrier refuses to receive such shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. (Code, s. 1964; 1899, c. 164, s. 2, subsecs. 2, 7; 1903, cc. 444, 693; Rev., ss. 1094, 2631; C.S., ss. 1053, 3515; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to venue of actions against railroads, see § 1-81. As to power of Utilities Commission to prevent discrimination, see § 62-140. As to penalty for failure to deliver freight upon tender of payment for carriage, see § 62-201. As to regulation of shipments of inflammable substances and explosives, see § 62-211.

CASE NOTES

As to constitutionality of former similar section, see Corbett v. Atlantic Coast Line R.R., 205 N.C. 85, 170 S.E. 129 (1933).

As to inapplicability of former similar section to interstate shipments, see Southern Ry. v. Reid, 222 U.S. 424, 32 S. Ct. 140, 56 L. Ed. 257 (1912), and Southern Ry. v. Reid, 222 U.S. 444, 32 S. Ct. 145, 56 L. Ed. 263 (1912).

Statutory penalty is not a burden upon interstate commerce when shipments are intrastate. Wampum Cotton Mills v. Carolina & N. Ry., 150 N.C. 608, 64 S.E. 586 (1909).

Strict Construction. — Former similar section was a penal statute and had to be strictly construed. Cox v. Atlantic Coast Line R.R., 148 N.C. 459, 62 S.E. 556 (1908).

Meaning of "Whenever Tendered". — The words "whenever tendered" can only be qualified by supplying the ellipsis "within the usual hours adopted by the public for the transaction of such business at the place where the tender is made." Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Meaning of "Under the Existing Laws". — The words "under the existing laws" qualify the word "forward," and are used in reference to the rules governing the legal relations of consignor, consignee and the connecting lines. Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Requisites of Valid Tender. — Tender must be made at a regular station and the articles tendered be of the nature and kind received by the carrier for transportation; moreover, it is necessary in an action for the penalty to show that the character of the shipment and place of tender are such as fall within the statutory provisions. Olive v. Atlantic Coast Line R.R., 152 N.C. 279, 67 S.E. 583 (1910).

Effect of Carrier's Regulation as to Time of Tender. — Where money was tendered to the agent of an express company at a regular station for shipment at 2 o'clock P.M., and the trains carrying express freight in the direction of the place to which it was to be consigned passed only at 12:55 o'clock P.M. each day, a regulation of the company that money would be received for shipment only on the morning before the train on which it was to be transported passed would not protect the company in an action brought to recover penalty incurred by statutory violation. Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Tender of Freight Eight Minutes before Train. — Where the plaintiff tendered to the defendant 30 crates of strawberries at a small station requiring only one agent to attend to the various duties of express, telegraph, and railroad agent, and the tender was made at the time the train for which the shipment was intended was seen approaching the depot, about eight minutes before its arrival, a charge of the

court that it was for the jury to determine whether, under the circumstances, the tender of the shipment for that train was in time was not open to plaintiff's objection. Shaw v. Southern Express Co., 171 N.C. 216, 88 S.E. 222 (1916).

Tender of Perishable Goods for Train Not Carrying Accommodations Therefor. — An express company is not liable for damages and statutory penalties for refusing to receive a shipment of 30 crates of strawberries for a certain train not carrying accommodations for shipments of this character, even though it had taken, on occasion, a few berries thereon for the shipper, where the lack of accommodations was known to the public, and to the shipper, and accommodations on other daily trains were specially provided. Shaw v. Southern Express Co., 171 N.C. 216, 88 S.E. 222 (1916).

Refusal to Accept Loose Hay. — Where the Commission had authorized, fixed and approved the charges for the transportation of baled hay, without expressly requiring its acceptance by the carrier when unbaled or loose, and by express provision it did not require the carrier to receive "cotton or other merchandise and warehouse the same unless the articles offered are in good shipping condition, etc.," the carrier was not liable for the statutory penalty for refusing to receive for shipment a carload of loose hay, such shipments evidently being of such a character as to endanger not only the property of the carrier, but that of others received by the carrier for shipment. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

Embargo on Consignee's Freight. — A railroad company may show, in defense to an action for refusal to receive goods for shipment when tendered, such matters as would excuse its failure to do so at common law, and unavoidable conditions then existing, over which it had no control; however, when a carrier has refused a shipment of the nature and kind it was its business to receive, and which it could have received at the point tendered without working a hardship or oppression, it is no defense for it to show that, for the reason of the consignee's blocking the freight yards at destination, an embargo had been placed by the railroad on shipments tendered to be forwarded to him there. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

Embargo by Connecting Carrier. — The statutory penalty is enforceable against a railroad company refusing to receive freight when tendered, even though to reach the destination it was necessary for another road to receive and transport the freight beyond the junctional point; and it is no valid excuse that the connecting line had laid an embargo on the consignee, for it was the duty of the initial carrier to transport the goods and make a tender to the connecting line to be relieved of the penalty. Wampum Cotton Mills v. Carolina & N. Ry., 150 N.C. 608, 64 S.E. 588 (1909).

Duty When Rate Unknown to Carrier. — Where the defendant carrier refused to receive for shipment goods tendered to it, basing its right to refuse upon the ground that it was necessary for the shipment to go over lines of connecting carriers in order to reach its destination and that no joint rate had been made, and the plaintiff offered to prepay the freight, and asked for a bill of lading, it was the duty of the defendant to accept the shipment, to forward it to its connecting line, and to use reasonable means of ascertaining the rate of freight, by wire if necessary, for the issuance of a through bill of lading. Reid v. Southern Ry., 153 N.C. 490, 69 S.E. 618 (1910), rev'd on other grounds, 222 U.S. 424, 32 S. Ct. 140, 56 L. Ed. 257 (1912).

In an action to recover statutory penalties alleged to have been incurred for refusing to receive freight for transportation, where the plaintiff delivered freight for shipment at the defendant's station and tendered the charges, and an agent received the freight for storage, but refused to give a bill of lading because he did not know the freight rates, and kept the freight 12 days, there was a refusal "to receive for transportation." Twitty v. Southern Ry., 141 N.C. 355, 53 S.E. 957 (1906).

Mismarking of Part of Shipment. — In an action to recover a penalty against a carrier for failing to ship one of four packages consigned for shipment under a single bill of lading, the defendant was estopped to claim as a defense that the mismarking of three of the packages was a sufficient excuse for failing to ship the fourth. Grocery Co. v. Railroad, 136 N.C. 396, 48 S.E. 801 (1904).

Freight Not Consigned to Regular Station. — Refusal of the carrier's agent to receive, at its depot, freight and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, was wrongful, and subjected the carrier to the statutory penalty, when the refusal was on the ground that the agent did not know where the given destination was, but it appeared that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom. Reid v. Southern Ry., 149 N.C. 423, 63 S.E. 112 (1908).

Requisites for Daily Penalty. — In order for the daily penalty to attach to the carrier for continually refusing to accept freight for shipment, it is necessary for actual or constructive tender of the freight to be made to the carrier each day; and where cattle are the subject of shipment, evidence that the shipment had been refused and that the shipper kept the cattle near the depot and told the defendant's agent thereof, and that he would deliver them

when notified that the company would receive them, was insufficient except as to the first penalty. Bane v. Atlantic Coast Line R.R., 171 N.C. 328, 88 S.E. 477 (1916).

Loading Goods in Car. — When common carrier permits a shipper to load a car with his goods but refuses to receive it for shipment or to issue a bill of lading, it is a refusal to receive the goods for shipment, under the statute; and when the shipper leaves the goods in the car, with request for shipment, and by his conduct, understood by the railroad, makes his tender continuous, each day's delay is a separate refusal, within the meaning of the statute, to which the penalty will apply. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

Placing Goods in Depot. — Placing a shipment of goods in the depot of the carrier, prepared for and with request for shipment, and leaving them there, makes tender continuous, and the carrier, thus refusing, is responsible for the penalty. Burlington Lumber Co. v. Southern Ry., 152 N.C. 70, 67 S.E. 167 (1910), rev'd on other grounds, 225 U.S. 99, 32 S. Ct. 657, 56 L. Ed. 1001 (1912).

Shipper as "Party Aggrieved". — The shipper of the goods is the "party aggrieved," and is the one entitled to sue for the statutory penalty which arises from the wrongful refusal of the carrier's agent to accept the goods for transportation. Reid v. Southern Ry., 149 N.C. 423, 63 S.E. 112 (1908).

Consignee of Goods Shipped on Approval as Aggrieved Party. — A consignee to whom goods are shipped on approval owes a duty to the consignor to return them if they are unsatisfactory, and he must do so to relieve himself of liability to the consignor; hence, he is the party aggrieved under the statute, and may maintain his action thereunder for the penalty prescribed upon the refusal of the carrier to accept the goods for shipment. Burlington Lumber Co. v. Southern Ry., 152 N.C. 70, 67 S.E. 167 (1910), rev'd on other grounds, 225 U.S. 99, 32 S. Ct. 657, 56 L. Ed. 1001 (1912).

Agent of Attaching Creditor. — The statutory penalty is for the person who is interested in having the goods shipped, and whose legal right in respect thereto is denied; and a person may not maintain an action for the penalty, as the party aggrieved, who has no right or interest in the goods tendered by him for shipment, except as agent or attorney for an attaching creditor and surety on his attachment bond, after the debt has been paid and the goods released. McRackan v. Atlantic Coast Line R.R., 150 N.C. 331, 63 S.E. 1042 (1909).

Sufficiency of Allegations. — A complaint alleging that plaintiff tendered to a carrier at a certain station a certain quantity of loose lumber for shipment, etc., which the defendant wrongfully and unlawfully refused to receive, stated a good cause of action, since it would be inferred, to be thereafter shown by proof, that the station referred to was a regular station, and that loose lumber was an article usually received by the carrier. Olive v. Atlantic Coast Line R.R., 152 N.C. 279, 67 S.E. 583 (1910).

Sufficiency of Evidence to Support Damage Finding. — Evidence that the shipper's contract to deliver certain merchandise was canceled because of the carrier's wrongful refusal to accept the merchandise for shipment was sufficient to support the referee's finding of actual damages, profits which would have been certainly realized but for the carrier's wrongful refusal of the shipment being recoverable under the statute. Corbett v. Atlantic Coast Line R.R., 205 N.C. 85, 170 S.E. 129 (1933).

Nonsuit Held Proper. — Where the plaintiff did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but carried them back and shipped them the next day, a nonsuit should have been allowed. Cox v. Atlantic Coast Line R.R., 148 N.C. 459, 62 S.E. 556 (1908).

Conclusiveness of Referee's Findings on Appeal. — Where, in an action to recover prescribed statutory penalties, referee found upon ample evidence, in a hearing in which no error of law was committed, that the shipment came within a certain classification, and that the shipper tendered the correct amount for such classification, and the finding was approved by the trial court, such finding was conclusive on appeal, and the carrier could not successfully contend that the shipment came within another classification for which higher freight charges were prescribed, and where a higher tariff was charged on one shipment the shipper was entitled to recover the excess paid. Corbett v. Atlantic Coast Line R.R., 205 N.C. 85, 170 S.E. 129 (1933).

§ 62-246. Partial charges for partial deliveries.

Whenever any freight of any kind shall be received by any railroad company in this State to be delivered to any consignee in this State, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for such carrier to demand any part of the charges for freight or transportation due for such portion of the shipment as shall not have reached the place of destination. Such carrier shall be required to deliver to the consignee

such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interfering with or depriving a consignor, or other person having authority, of his rights of stoppage in transit. (1893, c. 495; Rev., s. 2641; C.S., s. 3521; 1963, c. 1165, s. 1.)

§ 62-247. Commission to establish and regulate stations for freight and passengers; abandonment of station or other facility or diminution of accommodations.

(a) The Commission is empowered and directed to require, where the public necessity demands, and it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations or terminals by any railroad company, to require the erection of depot accommodations commensurate with such business and revenue, and to require the erection of accommodations for loading and unloading livestock and for feeding, sheltering and protecting the same in transportation. The Commission shall not require any railroad company to establish any station nearer to another station than five miles.

(b) The Commission is empowered and directed to require a change of any station or terminal or the repair, addition to, or change of any station or terminal by any railroad company in order to promote the security, convenience and accommodation of the public.

(c) A railroad company which has established and maintained for a year or more a passenger station, freight depot, team track, or other facility for serving the public at a point upon its road or route shall not abandon such station, depot or team track or other facility for serving the public nor substantially diminish the accommodations at said station, depot or team track by the stopping of trains or otherwise except by approval of the Commission which may be sought by the filing of an appropriate petition seeking the necessary authority. Freight or passenger depots may be relocated upon the written approval of the Commission. (1899, c. 164, s. 2, subsecs. 12, 13, ss. 19, 20; Rev., ss. 1097, 1098; 1913, c. 155; C.S., ss. 1040, 1041, 1051; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971 c. 552, s. 2.)

Cross References. — As to power of Utilities Commission to regulate building of shelters at railroad division points, see § 62-229.

CASE NOTES

As to liberal construction of the section that is now subsection (b), see State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923). See also State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Power to Require and Regulate Depots. — The Commission can order new depots established wherever they are needed, and has the lesser power to require proper facilities at those already established. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

Authority to Require Track Scales. — The Commission is empowered to require "depot accommodations commensurate with such business and revenue," which justifies the Commission in requiring "track scales" at points along the line. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

Railroad Not Released from Private Contract. — The limitation on the powers of the Commission to require common carriers to establish stations within five miles of each other does not release the carriers from a contract with an individual to maintain a flag stop within the bounds of his plantation. Parrott v. Atlantic & N.C.R.R., 165 N.C. 295, 81 S.E. 348 (1914).

Orders Subject to Review by the Courts. — The power of the Commission cannot be

unreasonably exercised, and the Commission's orders are subject to review by the superior court and the Supreme Court. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

The court, or the jury upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Commission requiring track scales to be put in. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

§§ 62-248 to 62-258: Reserved for future codification purposes.

Article 12.

Motor Carriers.

§ 62-259. Additional declaration of policy for motor carriers.

In addition to the declaration of policy set forth in G.S. 62-2 of Article 1 of Chapter 62, it is declared the policy of the State of North Carolina to preserve and continue all motor carrier transportation services now afforded this State; and to provide fair and impartial regulations of motor carriers in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; to encourage and promote harmony among all carriers and to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers; to foster a coordinated statewide motor carrier service; and to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce. (1947, c. 1008, s. 1; 1949, c. 1132, s. 2; 1963, c. 1165, s. 1.)

Local Modification. — Cabarrus: 1947, c. 532; 1949, c. 1132, s. 39.

Cross References. — As to ridesharing arrangements, see §§ 136-44.21 through 136-44.26.

Editor's Note. — This Article combines the Bus Act of 1949, Session Laws 1949, c. 1132, and the North Carolina Truck Act, Session Laws 1947, c. 1008.

Legal Periodicals. — For a discussion of the Bus Act of 1949, see 27 N.C.L. Rev. 467.

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

Purpose of Former Truck Act. — The North Carolina Truck Act was enacted to preserve and continue motor carrier transportation services. State ex rel. Utilities Comm'n v. Frederickson Motor Express, 232 N.C. 178, 59 S.E.2d 580 (1950).

Policy of Former Bus Act Stated. — The policy of the law controlling the granting of bus franchises is to provide adequate, economical and efficient bus service at reasonable cost to all communities of the State, without discrimination, undue privileges or advantages or unfair or destructive competitive practices, all to the end of promoting the public interest. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951).

As to application of former article of similar import, see City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947).

This section does not require the Utilities Commission to adopt a rule of the Interstate Commerce Commission. The Commission must make its own independent investigations, determinations and findings of fact based upon the evidence presented to it. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612, cert. denied, 281 N.C. 612, 188 S.E.2d 364 (1972).

Equal Treatment Required. — All who ship goods with common carriers are required to be treated equally with respect to the same

category of service. State ex rel. Utilities Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838, rev'd on other grounds, 302 N.C. 14, 273 S.E.2d 232 (1980).

Stated in State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Cited in State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

§ 62-260. Exemptions from regulations.

(a) Nothing in this Chapter shall be construed to include persons and vehicles engaged in one or more of the following services by motor vehicle if not engaged at the time in the transportation of other passengers or other property by motor vehicle for compensation:

(1) Transportation of passengers or property for or under the control of the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State;

(2) Transportation of passengers by taxicabs when not carrying more than nine passengers or transportation by other motor vehicles performing bona fide taxicab service and not carrying more than nine passengers in a single vehicle at the same time when such taxicab or other vehicle performing bona fide taxicab service is not operated on a regular route or between termini; provided, no taxicab while operating over the regular route of a common carrier outside of a municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the Commission as provided in (8) of this subsection, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers;

(3) Transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations;

(4) Transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft;

(5) Transportation of passengers by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service;

(6) Transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services or transportation of pupils and employees to and from private or parochial schools or transportation to and from functions for students and employees of private or parochial schools;

(7) Transportation of any bona fide employees to and from their place(s) of regular employment;

(8) Transportation of passengers when the movement is within a municipality exclusively, or within contiguous municipalities and within a residential and commercial zone adjacent to and a part of such municipality or contiguous municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone;

(9) Transportation in bulk of sand, gravel, dirt, debris, and other aggregates, or ready-mixed paving materials for use in street or highway construction or repair;

(10) Transportation of newspapers;

(11) Transportation of insecticides, fungicides and the ingredients thereof; transportation of farm, dairy or orchard products from farm, dairy or orchard to warehouse, creamery, or other original storage or market;

(12) Transportation for and under the control of cooperative associations organized and operating under the Federal Agricultural Marketing Act, U.S.C.A. Title 12, § 1141(j), or under the State Cooperative Marketing Act, Chapter 54, Subchapter V, General Statutes of North Carolina, as amended, or for any federation of such cooperative associations; provided, such federation possesses no greater powers or purposes than such cooperative associations;

(13) Transportation of livestock, or fish, including shellfish and shrimp, but not including manufactured products thereof;

(14) Transportation of raw products of the forest, including firewood, logs, crossties, stave bolts, pulpwood, and rough lumber, but not including manufactured products therefrom;

(15) Pickup, delivery, and transfer service for railroads, express companies, water carriers and motor carriers in connection with their respective line-haul services within the commercial zone of any municipality, as defined by the Commission between their terminals and places of collection or delivery of freight;

(16) Transportation by a bona fide private carrier, as defined in G.S. 62-3(22);

(17) Transportation of any commodity anywhere of a character not hauled in the ordinary course of business by a common carrier by motor vehicle.

(18) Charter parties, as defined by this subdivision when such charter party is sponsored or organized by, and used by, any organized senior citizen group whose members are sixty (60) years of age or older. Such charter party shall be subject to subsections (f) and (g) of this section. "Charter party", for the purpose of this subdivision, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.

(b) The Commission shall have jurisdiction to fix rates of carriers of passengers operating as described in (5) and (8) of subsection (a) of this section in the manner provided in this Chapter, and shall have jurisdiction to hear and determine controversies with respect to extensions and services, and the Commission's rules of practice shall include appropriate provisions for bringing such controversies before the Commission and for the hearing and determination of the same; provided nothing in this paragraph shall include taxicabs.

(c) The Commission may conduct investigations to determine whether any person purporting to operate under the exemption provisions of this section is, in fact, so operating, and make such orders as it deems necessary to enforce compliance with this section.

(d) The venue for any action commenced to enforce compliance with the terms of this Article against any person purporting to operate under any of the exemptions provided in this section shall be in one of the counties of the judicial district wherein the violation is alleged to have taken place and such person shall be entitled to trial by jury.

(e) None of the provisions of this section nor any of the provisions of this Chapter shall be construed so as to prohibit or regulate the transportation of property by any motor carrier when the movement is within a municipality or within contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities, as defined by the Commission. The Commission shall have the power in its discretion, in any particular case, to fix the limits of any such zone. Nothing herein shall be

construed as an abridgment of the police powers of any municipality over such operation wholly within any such municipality. Nothing in this Chapter shall be construed to prohibit or regulate the transportation of household effects of families from one residence to another by persons who do not hold themselves out as being, and are not generally engaged in the business of transporting such property for compensation.

(f) Notwithstanding the exemptions for transportation of passengers and property provided under subsections (a) through (e) of this section, all motor carriers transporting passengers for compensation under said exemptions or under any special exemptions granted by the Utilities Commission under G. S. 62-261 shall be subject to the same requirements for security for protection of the public as are established for regulated motor common carriers by the rules of the Utilities Commission pursuant to G. S. 62-268, and all such motor carriers transporting for hire under said exemption provisions shall further be subject to the same requirements for safety of operation of said motor vehicles as are required of regulated motor common carriers under the provisions of this Chapter and the regulations of the Commission adopted pursuant thereto. The Commission is authorized to promulgate rules and regulations for the enforcement of said requirements in the case of all such exempt operations, and the officers and agents of the Commission shall have full authority to inspect said exempt vehicles and to apply all enforcement regulations and penalties for violation of said security regulations and safety regulations as in the case of regulated motor carriers.

(g) The owners of all motor vehicles used in any transportation for compensation which is declared to be exempt under this section shall register such operation with the Utilities Commission and shall secure from the Utilities Commission a certificate of exemption. (1947, c. 1008, s. 4; 1949, c. 1132, s. 5; 1951, c. 987, s. 1; 1953, c. 1140, s. 2; 1955, c. 1194, ss. 1, 2; 1959, c. 102, c. 639, s. 14; 1963, c. 1165, c. 1; 1967, cc. 1135, 1203; 1969, c. 681; 1971, cc. 856, 1192; 1973, c. 175; 1977, c. 217; 1979, c. 204, s. 1.)

CASE NOTES

Rate Scheme Held Unconstitutional. — The state regulatory scheme by which the Utilities Commission set rates for franchised carriers to charge the U.S. Army in transportation of household goods violated the national procurement policy and was an unconstitutional burden on the United States in the exercise of its constitutional powers. United States v. North Carolina Util. Comm'n, 352 F. Supp. 274 (E.D.N.C. 1972).

The Utilities Commission is not vested with power to require the operators of services enumerated in subdivisions (1) to (8) of subsection (a) to obtain a franchise from it and does not have any supervision or jurisdiction over such operation, except the operations set forth in subdivisions (5) and (8) of subsection (a), and as to them it retains jurisdiction to fix rates and "to hear and determine controversies with respect to extensions and services." City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

Commission Has Jurisdiction to Determine Exemptions. — The Commission has jurisdiction to determine whether or not the actual operations of a carrier fall under the exemptive provisions. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Jurisdiction of Commission over City Bus Lines. — The Commission has been given specific authority to fix city bus fares. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

An intracity carrier, holding a certificate of exemption issued by the Commission and a franchise from the city or town in which it operates, is exempt from control of the Commission, except as to rates and controversies with respect to extensions and services. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Any provisions with respect to rates and services contained in a franchise contract between a utilities company and a municipal corporation, authorizing the utilities company to transport passengers over its streets, are subject to the orders of the Utilities Commission in respect thereto. City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

Dispute as to Curtailment of Services by Bus Carrier. — Where a municipality has granted a franchise to a utilities company to operate passenger buses over its streets, the parties may mutually agree upon extensions and services, changes in routes, or curtailment of services, when in the opinion of the governing board of the municipality such changes are, under the existing conditions, for the best interest of all concerned, including the public. However, when the parties are unable to agree to a proposed curtailment of existing services, the matter is within the exclusive jurisdiction of the Utilities Commission and the municipality may not enjoin the utility from the proposed curtailment of services, although the utility may not change its schedules or curtail its services unless given authority to do so by the Utilities Commission. City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

No Territorial Limitations on Intracity Carrier When Subsections (a)(1) and (a)(6) Apply. — An exempted intracity carrier under subsection (a)(8) has no territorial limitations as to the transportation of passengers under subsections (a)(1) and (a)(6) of this section, where the request for such services arises within the area for which such carrier holds a certificate of exemption from the Commission and a franchise from the municipality in which it operates or within any additional zone or zones adjacent thereto which have been fixed by the Commission. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Operations Devoted Exclusively to Transportation of Employees to and from Work. — The North Carolina Utilities Commission does not have regulatory supervision of operations devoted exclusively to the transportation by motor vehicle of the bona fide employees of industrial plants to and from the places of their employment, even in cases where the persons conducting such operations are engaged at the same time or at other times in carrying on the callings of common carriers by motor vehicle. State ex rel. Utilities Comm'n v. Carolina Coach Co., 236 N.C. 583, 73 S.E.2d 562 (1952).

Transportation to and from Federal Military Reservation. — Carriers in intrastate commerce transporting passengers for hire to and from federal military reservations or bases are exempted from regulation of the Utilities Commission only if such carriers have been procured by the United States government to carry passengers for it, or the transportation of such passengers is under the control of the United States. Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953).

Transportation of Athletic Teams and School Bands. — While it is true that the statute which governs the operation of school buses makes no provision one way or the other for the transportation of athletic teams or school bands, it is equally true that school bands and athletic teams are under the control of the school authorities. Therefore, the board controlling such activities would have the inherent right to contract for such transportation as might be necessary to transport its athletic teams and its bands to and from events which have been scheduled under the supervision of school authorities, and such transportation would be exempt under subsection (a)(1) of this section. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Municipal Franchise for Limousine Service to Airport. — The provisions of §§ 63-2, 63-49, 63-50, 63-53, and this section authorize a municipal corporation to award a franchise contract granting the right to provide limousine service to a municipal airport upon certain terms and conditions set forth in the franchise ordinance. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

Action by Competing Carrier against Exempted Carrier Violating Section. — When an exempted carrier is operating in violation of the exemptive provisions of this section, any other carrier adversely affected thereby may institute an action in the superior court against such exempted carrier, pursuant to subsection (d) of this section and § 62-279. State ex rel. North Carolina Util. Comm'n v. McKinnon, 256 N.C. 1, 118 S.E.2d 134 (1961).

As to motor vehicles carrying mail under former statute, see Winborne v. Browning, 206 N.C. 557, 174 S.E. 579 (1934).

Cited in State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972); State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

§ 62-261. Additional powers and duties of Commission applicable to motor vehicles.

The Commission is hereby vested with the following powers and duties:

(1) To supervise and regulate common carriers of passengers by motor vehicle and to that end the Commission may establish reasonable

requirements with respect to continuous and adequate service, transportation of baggage, newspapers, mail and light express, uniform systems of accounts, records and reports and preservation of records.

(2) To supervise the operation of passenger bus stations in any manner necessary to promote harmony among the carriers using such stations and efficiency of service to the traveling public.

(3) To prescribe qualifications and maximum hours of service of drivers and their helpers, and rules regulating safety of operation and equipment; and in the interest of uniformity of intrastate and interstate rules and regulations applicable within the State with respect to maximum hours of service of vehicle drivers and their helpers, and safety of operation and equipment, the Utilities Commission may adopt and enforce the rules and regulations adopted and promulgated by the United States Department of Transportation with respect thereto, insofar as the Utilities Commission finds the same to be practical and advantageous for application in this State and not in conflict with this article. In order to promote safety of operation of motor carriers, the Utilities Commission may avail itself of the assistance of any other agency of the State having special knowledge of such matters and it may make such investigations and tests as may be deemed necessary to promote safety of equipment and operation of vehicles upon the highways.

(4) For the purpose of carrying out the provisions of this Article, the Utilities Commission may avail itself of the special information of the Board of Transportation in promulgating safety requirements and in considering applications for certificates or permits with particular reference to conditions of the public highway or highways involved, and the ability of the said public highway or highways to carry added traffic; and the Board of Transportation, upon request of the Utilities Commission, shall furnish such information.

(5) The Commission may, without prior notice and hearing, make and enter any order, rule, regulation, or requirement, not affecting rates, upon unanimous finding by the Commission of the existence of an emergency and make such order, rule, regulation or requirement effective upon notice given to each affected motor carrier by registered mail, or by certified mail pending a hearing thereon as provided in this subdivision. It shall not be necessary for the Commission to give notice to the carriers affected or to hold a hearing prior to a revision in the rules regarding procedures to be followed in filing rates. Any such emergency order, rule, regulation or requirement shall be subject to continuation, modification, change, or revocation after notice and hearing and all such emergency orders, rules, regulations and requirements shall be supplanted and superseded by any final order, rule, regulation or requirement entered by the Commission.

(6) The Commission shall regulate brokers and make and enforce reasonable requirements respecting their licenses, financial responsibility, accounts, records, reports, operations and practices.

(7) The Commission and its duly authorized inspectors and agents shall have authority at any time to enter upon the premises of any motor carrier, subject to the provisions of this Article for the purpose of inspecting any motor vehicles and equipment used by such motor carriers in the transportation of passengers and property, and to prohibit the use by any motor carrier of any motor vehicle or parts thereof or equipment thereon adjudged by such agents and inspectors to be unsafe for use in the transportation of passengers and property upon the public highways of this State; and when such agents or inspectors shall discover any motor vehicle of such motor carrier in actual use

upon the highways in the transportation of passengers and property to be unsafe or any parts thereof or any equipment thereon to be unsafe, such agents or inspectors may, if they are of the opinion that further use of such vehicle, parts or equipment are imminently dangerous, stop such vehicle and require the operator thereof to discontinue its use and to substitute therefor a safe vehicle, parts or equipment at the earliest possible time and place, having regard for both the convenience and the safety of the passengers and property. When an inspector or agent stops a motor vehicle on the highway, under authority of this section, and the motor vehicle is in operative condition and its further movement is not dangerous to the passengers and property and to the users of the highways, it shall be the duty of the inspector or agent to guide the vehicle to the nearest point of substitution or correction of the defect. Such agents or inspectors shall also have the right to stop any motor vehicle which is being used upon the public highways for the transportation of passengers and property by a motor carrier subject to the provisions of this article and to eject therefrom any driver or operator who shall be operating or be in charge of such motor vehicle while under the influence of intoxicating liquors. It shall be the duty of all inspectors and agents of the Commission to make a written report, upon a form prescribed by the Commission, of inspections of all motor equipment and a copy of each such written report, disclosing defects in such equipment, shall be served promptly upon the motor carrier operating the same, either in person by the inspector or agent or by mail. Such agents and inspectors shall also make and serve a similar written report in cases where a motor vehicle is operated in violation of the laws of this State or of the orders, rules and regulations of the Commission.

(8) To determine, upon its own motion, or upon motion by a motor carrier, or any other party in interest, whether the transportation of property in intrastate commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation in this State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in intrastate commerce. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this Article, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in intrastate commerce performed by the carrier or class of carriers designated in such certificate will be, or shall have become, or is reasonably likely to become, or such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of intrastate transportation by motor carriers in effectuating the policy declared in this Chapter. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in intrastate commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this paragraph, except after reasonable opportunity for hearing to interested parties.

(9) To inquire into the management of the business of motor carriers and into the management of business of persons controlling, controlled by or under common control with, motor carriers to the extent that such persons have a pecuniary interest in the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this Article.

(10) To relieve the highways of all undue burdens and safeguard traffic thereon by promulgating and enforcing reasonable rules, regulations and orders designed and calculated to minimize the dangers attending transportation on the highways of all commodities including explosives or highly inflammable or combustible liquids, substances or gases.

(11) The Commission may from time to time establish such just and reasonable classifications of groups of carriers included in the term "common carrier by motor vehicle" or contract carrier by motor vehicle as the special nature of the service performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this Article, to be observed by such carriers so classified or grouped, as the Commission deems necessary or desirable in the public interest. (1947, c. 1008, s. 5; 1949, c. 1132, s. 6; 1953, c. 1140, s. 5; 1957, c. 65, s. 11; c. 1152, s. 7; 1961, c. 472, s. 9; 1963, c. 1165, s. 1; 1969, c. 723, s. 2; c. 763; 1973, c. 507, s. 5.)

Cross References. — As to revocation of license plates for violation of Chapter, see § 62-278.

CASE NOTES

Power to Promulgate Rules and Regulations. — The Commission may impose upon the holder of a permit any reasonable rules and regulations with respect to the operations thereunder which are now in effect or which may be adopted hereafter for the regulation of motor vehicle carriers performing similar service. State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Duty to Require Certificate Holder to Render Services Contemplated. — The Truck Act of 1947 and the amendments thereto placed upon the Commission the responsibility of requiring the holder of the certificate to render the service contemplated. State ex rel. Utilities Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

A substantial rather than a simulated performance is required to support a bona fide carrier operation. State ex rel. Utilities Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

Contracts Subject to Commission's Authority. — Contracts between carriers affecting service to the public are subject to the Commission's regulatory authority. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Approved Contract as Order of Commission. — A contract between public utilities, when formally approved by the Commission, is in effect an order of the Commission binding on each of the parties. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The interchange of freight between an intrastate and an interstate carrier, even though the property is being moved in interstate commerce, is left to the state commissions. State ex rel. Utilities Comm'n v. Fox, 239 N.C. 253, 79 S.E.2d 391 (1954).

§ 62-262. Applications and hearings.

(a) Except as otherwise provided in G.S. 62-260 and 62-265, no person shall engage in the transportation of passengers or property in intrastate commerce unless such person shall have applied to and obtained from the Commission a certificate or permit authorizing such operations, and it shall be unlawful for any person knowingly or wilfully to operate in intrastate commerce in any manner contrary to the provisions of this Article, or of the rules and regulations of the Commission. No certificate or permit shall be amended so as to enlarge or in any manner extend the scope of operations of a motor carrier without complying with the provisions of this section.

(b) Upon the filing of an application for a certificate or a permit, the Commission shall, within a reasonable time, fix a time and place for hearing such application. For bus applications, the Commission shall cause notice of the time and place of hearing to be given by mail to the applicant, to other motor carriers holding certificates or permits to operate in the territory proposed to be served by the application, and to other motor carriers who have pending applications to so operate. The Commission shall from time to time prepare a truck calendar containing notice of such hearings, a copy of which shall be mailed to the applicant and to any other persons desiring it, upon payment of charges to be fixed by the Commission. The notice or calendar herein required shall be mailed at least 20 days prior to the date fixed for the hearing, but the failure of any person, other than applicant, to receive such notice or calendar shall not, for that reason, invalidate the action of the Commission in granting or denying the application.

(c) The Commission may, in its discretion, except where a regular calendar providing notice is issued, require the applicant to give notice of the time and place of such hearing together with a brief description of the purpose of said hearing and the exact route or routes and authority applied for, to be published not less than once each week for two successive weeks in one or more newspapers of general circulation in the territory proposed to be served. The Commission may in its discretion require the applicant to give such other and further notice in the form and manner prescribed by the Commission to the end that all interested parties and the general public may have full knowledge of such hearing and its purpose. If the Commission requires the applicant to give notice by publication, then a copy of such notice shall be immediately mailed by the applicant to the Commission, and upon receipt of same the chief clerk shall cause the copy of notice to be entered in the Commission's docket of pending proceedings. The applicant shall, prior to any hearing upon his application, be required to satisfy the Commission that such notice by publication has been duly made, and in addition to any other fees or costs required to be paid by the applicant, the applicant shall pay into the office of the Commission the cost of the notices herein required to be mailed by the Commission.

(d) Any motor carrier desiring to protest the granting of an application for a certificate or permit, in whole, or in part, may become a party to such proceedings by filing with the Commission, not less than 10 days prior to the date fixed for the hearing, unless the time be extended by order of the Commission, its protest in writing under oath, containing a general statement of the grounds for such protest and the manner in which the protestant will be adversely affected by the granting of the application in whole or in part. Such protestant may also set forth in his protest its proposal, if any, to render either alone or in conjunction with other motor carriers, the service proposed by the applicant, either in whole or in part. Upon the filing of such protest it shall be the duty of the protestant to file three copies with the Commission, and the protestant shall certify that a copy of said protest has been delivered or mailed to the applicant or applicant's attorney. When no protest is filed with the Commission within the time herein limited, or as extended by order of the

Commission, the Commission may proceed to decide the application on the basis of testimony taken at a hearing, or on the basis of information contained in the application and sworn affidavits, and make the necessary findings of fact and issue or decline to issue the certificate or permit applied for without further notice. Persons other than motor carriers shall have the right to appear before the Commission and give evidence in favor of or against the granting of any application and with permission of the Commission may be accorded the right to examine and cross-examine witnesses.

(e) If the application is for a certificate, the burden of proof shall be upon the applicant to show to the satisfaction of the Commission:

(1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and

(2) That the applicant is fit, willing and able to properly perform the proposed service, and

(3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis.

(f) No certificate for the transportation of passengers shall be granted to an applicant proposing to serve a route already served by a previously authorized motor carrier unless and until the Commission shall find from the evidence that the service rendered by such previously authorized motor carrier or carriers on said routes is inadequate to meet the requirements of public convenience and necessity; and if the Commission shall find that the service being rendered by such certificate holder or holders on said routes is inadequate to meet the requirements of public convenience and necessity, such certificate holder or holders who have protested the application as provided in subsection (d) of this section, shall be given reasonable time to remedy such inadequacy before any certificate shall be granted to an applicant proposing to operate on such routes, unless the Commission finds that the previously authorized carrier, filing such protest, is either financially unable, or otherwise unqualified, or is unwilling to render, on a continuing basis, the service applied for or the service found by the Commission to meet the requirements of public convenience and necessity. In all cases in which applications affect local intracity bus service, the Commission shall give consideration to all interests involved and make appropriate provision for the protection thereof, and to that end local intracity operators shall have the right to be heard as protestants, or intervenors.

(g) A certificate for the transportation of passengers may include authority to transport in the same vehicle with passengers the baggage of such passengers, newspapers, express parcels or United States mail when authorized so to do by the government of the United States of America; or to transport baggage of passengers in a separate vehicle. The Commission, in its discretion, may require through joint routes and rates for the transportation of newspapers and express parcels.

(h) Common carriers by motor vehicle transporting passengers under a certificate issued by the Commission may operate to any place in this State, pursuant to charter party or parties, trips originating on such common carrier's authorized routes or in the territory served by its routes under such reasonable rules and regulations as the Commission may prescribe.

(i) If the application is for a permit, the Commission shall give due consideration to:

(1) Whether the proposed operations conform with the definition in this Chapter of a contract carrier,

(2) Whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates, or rail carriers,

(3) Whether the proposed service will unreasonably impair the use of the highways by the general public,

(4) Whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier,

(5) Whether the proposed operations will be consistent with the public interest and the policy declared in this Chapter, and

(6) Other matters tending to qualify or disqualify the applicant for a permit.

(j) After the issuance of a certificate or permit for the transportation of passengers, as provided in this section, such certificate or permit may thereafter be amended, changed or modified, by requiring the holder to furnish more or less transportation service, or by changing the routes over which service has been authorized, or by imposing other reasonable terms, conditions, restrictions, and limitations as public convenience and necessity or reasonable regulation of traffic upon the highways may require; provided, that the procedure in all such cases as to notice and hearing shall be the same as provided in this section for the issuance of a certificate or permit.

(k) The Commission shall by general order, or rule, having regard for the public convenience and necessity, provide for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate. (1947, c. 1008, s. 11; 1949, c. 1132, s. 10; 1953, c. 825, s. 3; 1957, c. 1152, ss. 8, 9; 1959, c. 639, s. 11; 1963, c. 1165, s. 1; 1965, c. 214; 1981, c. 193, s. 4.)

Effect of Amendments. — The 1981 amendment, in the fourth sentence of subsection (d), substituted "decide the application on the basis of testimony taken at a hearing, or on the basis of information contained in the application and sworn affidavits," for "hear the application."

Legal Periodicals. — For a survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

CASE NOTES

I. In General.
II. Procedure.

I. IN GENERAL.

"Route" Not Synonymous with "Territory". — "Route" means the highway or road traveled in serving communities, districts, or territories adjacent to it, and is not synonymous with "territory." State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951); State ex rel. Utilities Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

As to what constitutes a contract carrier, see State ex rel. Utilities Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968).

Requirements for Permit to Operate as Contract Carrier. — In addition to the statutory requirements of § 62-3 and this section, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission in Rule R2-15(b). State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

Grant of Franchise to Be Predicated on Public Convenience and Necessity. — The granting of franchise authority for the operation of buses over the highways of this State, for the transportation of persons and property for compensation, must be predicated upon public convenience and necessity. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

The convenience and necessity required are those of the public and not of an individual or individuals. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The doctrine of convenience and necessity is a relative or elastic theory. The facts in each case must be separately considered, and from those facts it must be determined whether public convenience and necessity require a given service to be performed or dispensed with. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

"Necessity" means reasonably necessary and not absolutely imperative. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Any service or improvement which is desirable for the public welfare and highly important to the public convenience may be properly regarded as necessary. State ex rel.

Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

What constitutes "public convenience and necessity" is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service, whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utilities Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969); State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

If a new service is necessary, and there are carriers already in the field, there is always the vital question, in determining convenience and necessity, whether the new service should be rendered by the existing carriers or by the new applicant. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Burden upon Applicant to Show Public Convenience and Necessity. — The burden of proof is upon the applicant for franchise authority to show public convenience and necessity. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Special Rule for Relocation of Existing Routes. — The Utilities Commission has developed a special rule for applications that seek only to relocate an existing route over a new highway. In these cases the Commission does not require such an extensive demonstration of public convenience and necessity as in other cases. Instead, the applicant is only required to show that the proposed route, as it now exists and with future improvements, will provide a much safer, quicker and improved service. State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

By encouraging bus companies to make use of new and improved highways soon after they are opened, the special rule for relocation of existing routes serves "to promote, in the interest of the public, the inherent advantages of highway transportation," which is one of the stated purposes of the motor carriers statute. State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

Test of "Public Need" Not Applicable to Transfer Proceedings. — The showing of public need which subsection (e)(1) of this section requires of an application for a new authority is not applicable in a transfer proceeding under § 62-111 and was not written into it by § 62-111(a). State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Subsection (e) of § 62-111 does not indicate a policy change toward protecting existing certificate holders from lawful competition. Like the subsection (a) "public convenience and necessity" test, the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the new certificate test of public need in subsection (e)(1) of this section. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Where Carrier's Authority Is Not Dormant. — The criteria "if justified by the public convenience and necessity" in subsection (a) of § 62-111 is interpreted as a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in subsection (e)(1) of this section. Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights are under no burden to show through shipper witnesses that a demand and need exist. The rationale is that public convenience and necessity were shown to exist when the authority was granted or acquired, and the rebuttable presumption of law is that it continues. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Where the issue of dormancy under § 62-112(c) has been raised, if the Commission finds that the franchise is not dormant, it must then determine if the criteria required by § 62-111 for approval of the transfer has been met. If the Commission finds that the franchise is dormant under § 62-112(c), the application for transfer must be denied, because approval would in effect constitute the granting of a new franchise without satisfying the new authority test and other requirements of subsection (e) of this section. State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

The factors denominated as imponderables, namely, whether the existing carriers can reasonably meet the need for the service, and whether the granting of the application would endanger or impair the operations of existing carriers contrary to the public interest, are not solely determinative of the right of the Commission to grant the application. Both are directed to the question of public convenience and necessity. Nevertheless, if the proposed operation under the certificate sought would seriously endanger or impair the operations of existing carriers contrary to the public interest, the certificate should not be issued. State ex rel. Utilities Comm'n v. Queen City

Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

There is no public policy condemning competition as such, between contract carriers, in the field of public utilities; the public policy only condemns unfair or destructive competition. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Grant of Application Not Prohibited by Fact That Competing Carrier's Business Would Be Adversely Affected. — The fact that the granting of a proposed application would adversely affect the business of a carrier corporation is not a sufficiently compelling reason to prohibit the entrance of other contract carriers into the field of transporting bank documents and other commodities. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Applications to Serve Communities Served by Another Carrier and to Duplicate Routes Distinguished. — Application by carrier to serve communities being served by another carrier, who intervenes and protests the application, as distinguished from an application for duplication of routes, does not require the Utilities Commission to find that the existing carrier's service is inadequate and to afford such existing carrier opportunity to remedy the inadequacy. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951).

Protection as to Duplication in Route. — Granting of a franchise over any part of the route of an existing carrier is prohibited except upon prescribed conditions, and not merely a duplication of the same route from terminus to terminus, but the application to serve communities being served by the intervening carrier need not be denied in toto because there would be a duplication of routes along a short distance, since the existing carrier may be protected as to the duplication in route by proper restrictions in the certificate. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951).

A traversing of the same highways for certain distances by competing carriers may readily become necessary in the public interest and, in such an instance, more than one certificate may be granted, subject to such restrictions as will protect the authorized carrier in respect of that part of the highway to be traversed by both. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Subsection (f) of this section does not forbid authority to two or more carriers to traverse the same segment of a highway so long as they do not render duplicate service. The mere fact that the two carriers will use the same highway for a distance does not require a denial of the application. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When Duplicate Service Permitted. — Under former article of similar import, it was held that the Commission might, in its discretion, grant a franchise which would duplicate in whole or in part a previously authorized similar class of service; and when it was shown to the satisfaction of the Commission that the existing operations were not providing sufficient service reasonably to meet the public convenience and necessity and the existing operators, after 30 days' notice, failed to provide the service required by the Commission, it would be the duty of the Commission to do so. State ex rel. Utilities Comm'n v. Carolina Coach Co., 224 N.C. 390, 30 S.E.2d 328 (1944); State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

This section does not purport to protect against all competition, but is designed to protect authorized carriers against ruinous competition, and does not prohibit service of the same points by different carriers over separate routes when such duplicate service is in the public interest. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951); State ex rel. Utilities Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

Question of duplication of service must be determined under statute in effect at the time the order of the Commission was entered. State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

Commission May Grant "Closed Door" Authority Though Application Seeks Authority to Duplicate Service. — Since the Utilities Commission is not confined to the immediate scope of the pleadings filed, and may enlarge the scope of the inquiry, it may grant a "closed door" authority even though the application is for authority to duplicate service. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When "Closed Door" Authority Proper. — Where the principal business of a carrier is the transportation of passengers between two cities of the State along a route serving a number of other cities, and the improvement and construction of highways makes feasible a new and more direct route between the termini, the Utilities Commission, upon appropriate findings of fact, may grant such carrier "closed door" authority along the new route, notwithstanding that other carriers, respectively, serve segments of the route in "open door" operations. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Grant of Application Upheld. — The Utilities Commission properly granted an application for a contract carrier permit authorizing the applicant to transfer bank documents and other commodities between banks in the State, notwithstanding the protest by an existing contract carrier of bank documents that the granting of the application would adversely affect its business, where there were findings, supported by competent and substantial evidence, that banks needed the services offered by the applicant and that their need could not be met by any existing means of transportation. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

As to charter service, see State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

For case holding scope of operation of carrier not enlarged by amendment, see State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Applied in Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953); State ex rel. Utilities Comm'n v. Home Transp. Co., 28 N.C. App. 340, 220 S.E.2d 871 (1976); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 488 (1980); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980).

Stated in State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972).

Cited in State ex rel. Utilities Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

II. PROCEDURE.

The procedure before the Commission is more or less informal, and is not as strict as in civil cases, nor is it confined by technical rules; substance and not form is controlling. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The power of the Commission is not restricted to the proceedings as commenced, but it may enlarge the scope of the inquiry beyond the issue raised by the pleadings where the parties to be affected are before the Commission, participate in the proceedings, have full opportunity to be heard, and are not misled as to the purpose of the hearing. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The Commission is not confined to the immediate scope of the pleadings on file. It may enlarge the scope of the inquiry, and where the parties to be affected are before it, participate in the inquiry and make defense, they cannot complain of a departure from the pleadings. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Treatment of Application for New Authority as Motion in Prior Cause. — An application for a new authority to carry passengers between two municipalities of the State along a new route made feasible by the improvement or construction of highways could be treated by the Utilities Commission as a motion in a prior cause in which the Commission approved an agreement of the carriers in regard to their respective services between the cities provided the carriers affected were given notice and an opportunity to be heard. The question of whether the prior order of approval could be collaterally attacked was thus obviated. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Findings of fact by the Commission are conclusive and binding upon the reviewing court when supported by competent, material and substantial evidence in view of the entire record. State ex rel. Utilities Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970); State ex rel. Utilities Comm'n v. Kenan Transp. Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971).

Procedure Held Contrary to Statutory Requirements. — Where the Commission issued its directive without any notice or hearing whatever, simply instructing the parties peremptorily that they must enter into an agreement, such a procedure was entirely contrary to the statutory requirements, and any such order was invalid. State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

§ 62-263. Application for broker's license.

(a) No person shall engage in the business of a broker in intrastate operations within this State unless such person holds a broker's license issued by the Commission.

(b) The Commission shall prescribe the form of application and such reasonable requirements and information as may in its judgment be necessary.

(c) Upon the filing of an application for license the Commission may fix a time and place for the hearing of the application and require such notices, publications, or other service as it may prescribe by the general rule or regulation.

(d) A license shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this Article and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the license, is or will be consistent with the public interest and policy declared herein.

(e) The Commission shall have the same authority over persons operating under and holding a brokerage license as it has over motor carriers under this Article, and shall require a broker to furnish bond or other security approved by the Commission and sufficient for the protection of travelers by motor vehicle. (1949, c. 1132, s. 13; 1963, c. 1165, s. 1.)

§ 62-264. Dual operations.

Unless the Commission, in its discretion, finds that the public interest so requires, no person or any person controlling, controlled by, or under common control with such person, shall hold both a certificate as a common carrier and permit as a contract carrier. (1947, c. 1008, s. 16; 1949, c. 1132, s. 16; 1963, c. 1165, s. 1.)

§ 62-265. Emergency operating authority.

To meet unforeseen emergencies, the Commission may, upon its own initiative, or upon written request by any person, department or agency of the State, or of any county, city or town, with or without a hearing, grant appropriate authority to any owner of a duly licensed vehicle or vehicles, whether such owner holds a certificate or permit or not, to transport passengers or property, baggage, mail, newspapers and light express between such points, or within such area during the period of the emergency and to the extent necessary to relieve the same, as the Commission may fix in its order granting such authority; provided, that unless the emergency is declared by the General Assembly or under its authority, the Commission shall find from such request, or from its own knowledge or conditions, that a real emergency exists and that relief to the extent authorized in its order is immediate, pressing and necessary in the public interest, and that the carrier so authorized has the necessary equipment and is willing to perform the emergency service as prescribed by the order. In all cases, under this section, the Commission shall first afford the holders of certificates or permits operating in the territory affected an opportunity to render the emergency service. Upon the termination of the emergency, the operating privileges so granted shall automatically expire and the Commission shall forthwith withdraw all operating privileges granted to any person under this section. (1947, c. 1008, s. 17; 1949, c. 1132, s. 17; 1963, c. 1165, s. 1.)

§ 62-266. Interstate carriers.

(a) This Article shall apply to persons and vehicles engaged in interstate commerce over the highways of this State, except insofar as the provisions of this Article may be inconsistent with, or shall contravene, the Constitution or laws of the United States, and the Commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority or register their exempt operation and registration of their vehicles operated in the State, and to observe such reasonable rules and regulations as the Commission may deem advisable in the administration of this Article and for the protection of persons and property upon the highways of the State.

(b) The Commission or its authorized representative is authorized to confer with and to hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives, or any other federal or State agency in connection with any matter arising under this Chapter, or under the Federal Motor Carrier Act, or under any other federal law which may directly or indirectly affect the interests of the people of this State or the policy declared by this Chapter or by the Interstate Commerce Act.

(c) Any person operating a for-hire motor vehicle in interstate commerce over the highways of this State without having properly registered with the Utilities Commission, its respective exempt operation, or a copy of its interstate authority and each vehicle operated in this State shall be subject to a penalty of twenty-five dollars ($25.00), which shall be added to the registration fees provided in G.S. 62-300, and said penalty shall be collected with said registration fee from any carrier operating on the highways of North Carolina without registering his interstate authority by inspectors and investigators of the Utilities Commission in accordance with rules and regulations duly adopted by the Utilities Commission before said vehicle shall be permitted to operate further upon the highways of North Carolina.

(d) No motor carrier, whether operating as a regulated carrier or exempt for-hire carrier, shall operate or cause to be operated in interstate commerce in this State any vehicle until he has filed evidence of required insurance with the Utilities Commission and has been issued an identification stamp for such vehicle, which stamp must be attached to the approved uniform cab card and carried in the vehicle at all times. The identification stamp herein provided for shall be issued on an annual basis as of January 1st each year and shall be valid through February 1st the next succeeding year. When any person is discovered in this State, operating a vehicle in violation of this section, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle until he shall pay to the Utilities Commission a penalty of twenty-five dollars ($25.00). Any person denying his liability for such penalty may pay the same under protest. He may apply to the Utilities Commission for a hearing, and said hearing will be granted before a member of the Commission or a hearing examiner within 30 days after receipt of the request of such a hearing. If after said hearing the Commission determines that the person was not liable for the penalty, the amount collected shall be refunded to him. If after said hearing the Commission determines that the person was liable for said penalty, the person paying the penalty may bring an action in the Superior Court of Wake County against the Utilities Commission for refund of the penalty. No restraining order or injunction shall issue from any court of the State to restrain or enjoin the collection of the penalty or to permit the operation of said vehicle without payment of the penalty prescribed herein. (1947, c. 1008, s. 35; 1949, c. 1132, s. 32; 1963, c. 1165, s. 1; 1969, c. 645; c. 721, s. 1; 1971, c. 736, s. 3; 1975, c. 447, s. 2.)

§ 62-267. Deviation from regular route operations.

(a) A common carrier of passengers by motor vehicle operating under a certificate issued by the Commission may occasionally deviate from the routes over which it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(b) Any common carrier by motor vehicle, now or hereafter holding a certificate issued by the Commission authorizing the transportation of general commodities over regular routes between fixed termini, may, under such rules and regulations as the Commission may prescribe:

(1) Transport from origin to destination, over any convenient highway or highways, shipments in truck loads originating at or destined to points on the regular routes of such carrier, and

(2) Move shipments in truck loads from any point on its regular routes to any other points on its regular routes over any convenient highway or highways between such points, whether over the routes of another carrier or not, where such movement over the carrier's own routes would otherwise be unnecessarily circuitous.

(c) In no event shall the operation of empty equipment by any carrier over any route or highway be construed as a violation of the rights of any carrier. (1947, c. 1008, s. 18; 1949, c. 1132, s. 18; 1963, c. 1165, s. 1.)

§ 62-268. Security for protection of public; liability insurance.

No certificate, permit or broker's license shall be issued or remain in force until the applicant shall have procured and filed with the Commission such security bond, insurance or self-insurance for the protection of the public as the Commission shall by regulation require. The Commission shall require that every motor carrier for which a certificate, permit, or license is required by the provision of this Chapter, shall maintain liability insurance or satisfactory surety of at least fifty thousand dollars ($50,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, one hundred thousand dollars ($100,000) because of bodily injury to or death of two or more persons in any one accident, and fifty thousand dollars ($50,000) because of injury to or destruction of property of others in any one accident; and the Commission may require any greater amount of insurance as may be necessary for the protection of the public. Notwithstanding any rule or regulation to the contrary, the Commission shall not require that any insurance procured and filed be provided in any single policy of insurance or through a single insurer, if the insurers involved are otherwise qualified. A motor carrier may satisfy the requirements of the Commission by procuring insurance with coverage and limits of liability required by the Commission in one or more policies of insurance issued by one or more insurers. (1947, c. 1008, s. 19; 1949, c. 1132, s. 19; 1963, c. 1165, s. 1; 1973, c. 1206; 1977, c. 920.)

CASE NOTES

Applied in Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

Cited in American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

§ 62-269. Accounts, records and reports.

The Commission may prescribe the forms of any and all accounts, records and memoranda to be kept by motor carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors, to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, stubs, correspondence, or documents of motor carriers, brokers, or lessors, as may after a reasonable time be destroyed, and prescribing the length of time they shall be preserved. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers, brokers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, and lessors, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, brokers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this section, and motor carriers, brokers, and lessors, shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, auditor, inspector, or examiner of the Commission upon demand and the display of proper credentials. (1947, c. 1008, s. 28; 1949, c. 1132, s. 25; 1959, c. 639, ss. 5, 6, 9, 10; 1961, c. 472, s. 10; 1963, c. 1165, s. 1.)

§ 62-270. Orders, notices, and service of process.

It shall be the duty of every motor carrier operating under a certificate or permit issued under the provisions of this Article to file with the Commission a designation in writing of the name and post-office address of a person upon whom service of notices or orders may be made under this Article. Such designation may from time to time be changed by like writing similarly filed. Service of notice or orders in proceedings under this Article may be made upon a motor carrier by personal service upon it or upon the person so designated by it, or by registered mail, return receipt requested, or by certified mail with return receipt requested, addressed to it or to such person at the address filed. In proceedings before the Commission involving the lawfulness of rates, charges, classifications, or practices, service of notice upon the person or agent who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier. (1947, c. 1008, s. 29; 1949, c. 1132, s. 26; 1957, c. 1152, ss. 6, 11; 1963, c. 1165, s. 1.)

§ 62-271. Collection of rates and charges of motor carriers of property.

No common carriers of property by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in intrastate commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice; provided, that the provisions of this

section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for the State, or political subdivision thereof. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (i) is an agent only and had no beneficial title in the property, and (ii) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper and consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. (1947, c. 1008, s. 31; 1963, c. 1165, s. 1.)

§ 62-272. Allowance to shippers for transportation services.

If the owner of property transported under the provisions of this Article directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs or schedules filed in the manner provided in this Article and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. (1947, c. 1008, s. 32; 1963, c. 1165, s. 1.)

§ 62-273. Embezzlement of C.O.D. shipments.

Property received by any motor carrier to be transported in intrastate commerce and delivered upon collection on such delivery and remittance to the shipper of the sum of money stated in the shipping instructions to be collected and remitted to the shipper, and the money collected upon delivery of such party, is hereby declared to be held in trust by any carrier having possession thereof or the carrier making the delivery or collection, and upon failure of any such carrier to account for the property so received, either to the shipper to whom the collection is payable or the carrier making delivery to any carrier handling the property or making the collection, within 15 days after demand in writing by the shipper, or carrier, or upon failure of the delivering carrier to remit the sum so directed to be collected and remitted to the shipper, within 15 days after collection is made, shall be prima facie evidence that the property so received, or the funds so received, has been wilfully converted by such

carrier to its own use, and the carrier so offending shall be guilty of a felony and upon conviction shall be punished by fine or imprisonment, or both, in the discretion of the court, and such carrier may be indicted, tried, and punished in the county in which such shipment was delivered to the carrier or in any other county into or through which such shipment was transported by such carrier. (1947, c. 1008, s. 33; 1963, c. 1165, s. 1.)

CASE NOTES

The lessor-holders of a certificate of convenience and necessity are liable and answerable jointly with the lessee-operator to the shipper for losses sustained by reason of wrongful conversion of C.O.D. moneys collected by the lessee-operator company. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

§ 62-274. Evidence; joinder of surety.

No report by any carrier of any accident arising in the course of the operations of such carrier, made pursuant to any requirement of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose in any suit or action for damages growing out of any matter mentioned in such report or investigation; nor shall the discharge by any carrier of any truck driver or other employee after any such accident be offered or admitted in evidence for any purpose, in any suit or action against such carrier for damages arising out of any such accident; nor shall any insurance company or surety executing any insurance policy, bond, or other security for the protection of the public, as provided in G.S. 62-268, or as provided in G.S. 62-112, be joined with the assured carrier in any action or suit for damages, debt, or claim thereby secured; nor shall evidence of any such policy, bond, or other security be offered or received in any such action or suit against the carrier, but the surety or insurer shall be obligated within the amount of such policy, bond or other security to pay any final judgment against the carrier. (1947, c. 1008, s. 34; 1949, c. 1132, s. 31; 1963, c. 1165, s. 1.)

CASE NOTES

No North Carolina statute other than this section authorizes or prohibits suit against a liability insurer alone or jointly with its insured by a person allegedly injured by the negligence of the insured. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

§ 62-275. Depots and stations.

Upon notice and hearing and upon a finding by the Commission that public convenience and necessity so requires, the Commission is authorized and empowered to compel any common carrier of passengers by motor vehicle operating under the provisions of this Article and serving any municipality to establish and maintain a passenger depot or station for the security, accommodation and convenience of the traveling public. When two or more such carriers operating under the provisions of this Article shall serve any municipality, the Commission is authorized and empowered to require such carriers to establish and maintain a union passenger depot or station for the security, accommodation and convenience of the traveling public, and to unite in the joint undertaking and expense of securing, erecting, constructing and maintaining such union passenger depot or station, commensurate with the business and

revenue of such motor carriers, on such terms, regulations, provisions and conditions as the Commission shall prescribe; and all union passenger depots or stations shall provide impartially all services incident to the comfort and convenience of the traveling public, including but not limited to the following basic union services: waiting rooms, comfort stations and rest rooms; loading and unloading of passengers; selling, changing and adjusting of tickets; furnishing information about tickets, schedules, routes, arrivals and departures; handling, checking and storage of baggage; receiving, handling, and delivering express: Provided that nothing herein shall be construed as limiting the right of any motor carrier operating under the provisions of this Article to sell its own tickets and furnish its own information about tickets, schedules, routes, arrivals and departures at any place separate, apart and away from the union passenger depot or station, but not upon the premises of the union station, so long as such motor carrier also continues to participate in the union sale of its and all other carriers' tickets and the union information facilities within the station premises under union station management: Provided that any of the aforementioned union services may be provided independently within the union station premises by each carrier utilizing the union passenger depot or station upon the unanimous agreement of all such carriers and the approval of the Utilities Commission: Provided, that whenever the Commission shall require that a union depot or station shall be provided, it shall first allow the carriers required to provide such station an opportunity to submit to the Commission for approval any agreement between or among such carriers for the securing, construction, maintenance and operation of such station or depot. The Commission shall approve such agreement or agreements, if the same be, in the Commission's discretion, reasonable and just and in the public interest. (1949, c. 1132, s. 28; 1963, c. 1165, s. 1.)

CASE NOTES

Commission May Require Establishment of Union Stations. — The Commission has statutory authority to require bus companies to establish union stations. Such stations are unquestionably convenient to passengers who have to change from one bus line to another. They impose no undue burden on interstate commerce. The State may lawfully require all bus companies, both interstate and intrastate, to use such union stations. State ex rel. Utilities Comm'n v. Atlantic Greyhound Corp., 252 N.C. 18, 113 S.E.2d 57 (1960).

But May Not Constitutionally Prohibit Opening of Separate Ticket Office. — A rule of the Commission prohibiting a carrier from opening a ticket office separate and apart from the ticket office at a union station is void as imposing an undue burden on interstate commerce. State ex rel. Utilities Comm'n v. Atlantic Greyhound Corp., 252 N.C. 18, 113 S.E.2d 57 (1960).

§ 62-276. Construction of Article.

Nothing herein contained shall be construed to relieve any motor carrier from any regulation otherwise imposed by law or lawful authority, and this Article shall not be construed to relieve any such motor carrier from any obligation or duty imposed by Chapter 20 of the General Statutes of North Carolina. (1949, c. 1132, s. 35; 1963, c. 1165, s. 1.)

§ 62-277. Commission investigators and inspectors given enforcement authority.

The transportation inspectors and special investigators employed by the Commission shall have the same enforcement authority and police powers as members of the State Highway Patrol in enforcing this Article and other

provisions of this Chapter applicable to motor transportation, and they are empowered to make complaint for the issue of appropriate warrants, informations, presentments or other lawful process for the enforcement and prosecution of violations of the transportation laws against all offenders, whether they be regulated motor carriers or not, and to appear in court or before the Commission and offer evidence at the trial pursuant to such processes. (1963, c. 1165, s. 1.)

§ 62-278. Revocation of license plates by Utilities Commission.

(a) The license plates of any carrier of persons or property by motor vehicle for compensation may be revoked and removed from the vehicles of any such carrier for wilful violation of any provision of this Chapter, or for the wilful violation of any lawful rule or regulation made and promulgated by the Utilities Commission. To that end the Commission shall have power upon complaint or upon its own motion, after notice and hearing, to order the license plates of any such offending carrier revoked and removed from the vehicles of such carrier for a period not exceeding 30 days, and it shall be the duty of the Department of Motor Vehicles to execute such orders made by the Utilities Commission upon receipt of a certified copy of the same.

(b) This section shall be in addition to and independent of other provisions of law for the enforcement of the motor carrier laws of this State. (1951, c. 1120; 1963, c. 1165, s. 1.)

Editor's Note. — This section is in substance a reenactment of § 20-64.1.

§ 62-279. Injunction for unlawful operations.

If any motor carrier, or any other person or corporation, shall operate a motor vehicle in violation of any provision of this Chapter applicable to motor carriers or motor vehicles generally, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall operate in violation of any rule, regulation, requirement or order of the Commission, or of any term or condition of any certificate or permit, the Commission or any holder of a certificate or permit duly issued by the Commission may apply to the resident superior court judge of any judicial district where such motor carrier or other person or corporation so operates, or to any superior court judge holding court in such judicial district, for the enforcement of any provisions of this Article, or of any rule, regulation, requirement, order, term or condition of the Commission. Such court shall have jurisdiction to enforce obedience to this Article or to any rule, order, or decision of the Commission by a writ of injunction or other process, mandatory or otherwise, restraining such carrier, person or corporation, or its officers, agents, employees and representatives from further violation of this Article or of any rule, order, regulation, or decision of the Commission. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1.)

CASE NOTES

Restraining Illegal Operation Along Route. — A franchise carrier may maintain an action in the superior court to restrain another carrier from illegal operation along his route without a certificate or permit from the Utilities Commission, when such illegal operation by such other carrier interferes with its franchise rights. Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953).

As to right of common carrier to apply to

court for injunctive relief against wrongful acts of another carrier under former statute repealed and superseded by Bus Act of 1949, see Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297 (1948).

Cited in State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

§ 62-280: Reserved for future codification purposes.

§ 62-281. Safety regulations applicable to motor carrier vehicles.

(a) The Utilities Commission is hereby authorized to promulgate highway safety rules and regulations for all for-hire motor carrier vehicles engaged in interstate commerce and intrastate commerce over the highways of North Carolina, whether common carriers, contract carriers or exempt carriers. It is the intent of the General Assembly that regulations governing the transportation of hazardous waste and radioactive waste conform as nearly as possible to federal regulations established for the same purposes.

(b) The Utilities Commission is hereby authorized to promulgate highway safety rules and regulations for all private motor carriers engaged in the transportation of hazardous waste and radioactive waste in interstate and intrastate commerce over the highways of North Carolina. It is the intent of the General Assembly that such regulations conform as nearly as possible to federal regulations established for the same purposes. (1969, c. 722, s. 1; 1971, c. 586; 1981, c. 704, s. 21.)

Effect of Amendments. — The 1981 amendment designated the former provisions of this section as subsection (a), and added subsection (b). The amendment also added the second sentence of subsection (a).

Session Laws 1981, c. 704, ss. 1 and 2, provide:

"Section 1. Short title. This act may be referred to as the Waste Management Act of 1981.

"Sec. 2. Purpose. The purpose of this act is to provide for a comprehensive system for management of hazardous and low-level radioactive waste in North Carolina as reflected in the 1981 Report of the Governor's Task Force on Waste Management."

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

§§ 62-282 to 62-289: Reserved for future codification purposes.

Article 12A.

Human Service Transportation.

§ 62-289.1. Short title.

This Article shall be known and may be cited as the "North Carolina Act to Remove Barriers to Coordinating Human Service and Volunteer Transportation". (1981, c. 792, s. 1.)

Editor's Note. — Session Laws 1981, c. 792, s. 5, makes the act effective January 1, 1982.

Session Laws 1981, c. 792, s. 4, contains a severability clause.

§ 62-289.2. Purpose.

In order to promote improved transportation for the elderly, handicapped and residents of rural areas and small towns through an expanded and coordinated transportation network, it is the intent of the General Assembly to recognize human service transportation and volunteer transportation as separate but contributing components of the North Carolina transportation system. Further, it is the intent of the General Assembly to remove barriers to low cost human service transportation. (1981, c. 792, s. 1.)

§ 62-289.3. Definitions.

As used in this Article:

(1) "Human service agency" means any charitable or governmental agency including, but not limited to: county departments of social services, area mental health, mental retardation or substance abuse authorities, local health departments, councils on aging, community action agencies, sheltered workshops, group homes and State residential institutions.

(2) "Human service transportation" means motor vehicle transportation provided on a nonprofit basis by a human service agency for the purpose of transporting clients or recipients in connection with programs sponsored by the agency. The motor vehicle may be owned, leased, borrowed, or contracted for use by the human service agency.

(3) "Nonprofit" as applied to human service transportation means motor vehicle transportation provided at cost.

(4) "Person" means an individual, corporation, company, association, partnership or other legal entity.

(5) "Volunteer transportation" means motor vehicle transportation provided by any person under the direction, sponsorship, or supervision of a human service agency. The person may receive an allowance to defray the actual cost of operating the vehicle but shall not receive any other compensation. (1981, c. 792, s. 1.)

§ 62-289.4. Classification of transportation.

The forms of transportation defined in G.S. 62-289.3(2) and (5) shall be classified as "human service transportation" and "volunteer transportation" for purposes of regulation, insurance, and general administration. (1981, c. 792, s. 1.)

§ 62-289.5. Inapplicable laws and regulations.

Human services transportation and volunteer transportation shall not be considered as for-hire transportation, commercial transportation or motor carriers, as defined by G.S. 62-3(17). Such transportation shall not be subject to regulation as motor carriers under G.S. 62-261. (1981, c. 792, s. 1.)

§ 62-289.6. Insurance for volunteers.

Human service agencies are authorized to purchase insurance to cover persons who provide volunteer transportation. (1981, c. 792, s. 1.)

§ 62-289.7. Municipal licenses and taxes.

No county, city, town, municipal corporation or other unit of local government may impose a special tax on or require a special license for human service transportation or volunteer transportation other than that customarily used or imposed on private passenger automobiles unless the tax or license is provided for by a statute, ordinance, or regulation specifically addressing human service transportation or volunteer transportation. (1981, c. 792, s. 1.)

Article 13.

Reorganization of Public Utilities.

§ 62-290. Corporations whose property and franchises sold under order of court or execution.

When the property and franchises of a public utility corporation are sold under a judgment or decree of a court of this State, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchises, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates thereupon become a new corporation, by such name as they select, and they are the stockholders in the ratio of the purchase money by them contributed; and are entitled to all the rights and franchises and subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchasing corporation shall succeed to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to alter in any manner the public policy of the State now or hereafter established with reference to trusts and contracts in restraint of trade. (Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99; Rev., s. 1238; 1913, c. 25, s. 1; 1919, c. 75; C.S., s. 1221; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

§ 62-291. New owners to meet and organize; special rule for railroads.

(a) The persons for whom the property and franchises have been purchased pursuant to G.S. 62-290 shall meet within 30 days after the delivery of the conveyance made by virtue of said judgment or decree, and organize the new corporation, 10 days' written notice of the time and place of the meeting having been given to each of said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary.

(b) Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been sold, or may hereafter be sold, by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of persons, and make and acknowledge and file articles of association as prescribed by this Chapter. Such purchaser and his associates shall thereupon be a new corporation, with all the powers, privileges and franchises and subject to all of the provisions of this Chapter.

(c) When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law. (1871-2, c. 138, s. 5; Code, ss. 1936, 2005; 1901, c. 2, ss. 100, 101, 102; Rev., ss. 1239, 1240, 2552, 2565; C.S., ss. 1222, 3462, 3463; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

CASE NOTES

Railroad May Be Sold. — A railroad is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the legislature; not the franchise, but the land itself constituting the road. State v. Rives, 27 N.C. 297 (1844).

A railroad corporation is not dissolved by the sale of its road. State v. Rives, 27 N.C. 297 (1844).

When Sale Effects Dissolution. — In order that the sale of the franchise and property of a railroad corporation under mortgage shall have the effect of a dissolution of such corporation, another corporation must be provided to take its place and assume and discharge the obligations to the public growing out of the grant of the franchise; until that is done the old corporation continues to exist, and when it is done the new corporation will be a domestic corporation. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

Effect of Sale under Second Mortgage. — The sale of a railroad under a second mortgage and a conveyance thereunder, subject to the first mortgage upon its franchise and corporate property, did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which it was operated. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

The effect of the sale of a railroad company's franchises and property under a second mortgage, subject to a first mortgage which was assumed by the purchaser, was to place the purchaser in the place of the mortgagor in its relation to the trustee of the first mortgage, with the right to run and operate the road as agent of the mortgagor; however, the old corporation was not extinguished, but was still in existence and liable for damages caused by the maladministration of its agent, which liability could be enforced against the property which it allowed the purchaser to use. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

Purchaser Takes Rights of Old Company. — On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right-of-way under its charter. Barker v. Railroad, 137 N.C. 214, 49 S.E. 115 (1904).

The legislative purpose is that the property of railroads must be kept in association with their franchises, to preserve value, to give credit to such corporations, to secure creditors, and to keep railroads in operation for the benefit of the public, which was the primary object of the legislature in bestowing such corporate franchises. Bradley v. Ohio R. & C. Ry., 78 F. 387 (W.D.N.C. 1896).

§ 62-292. Certificate to be filed with Secretary of State.

It is the duty of the new corporation provided for by this Article, within one month after its organization, to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the Secretary of State, to be filed and recorded in his office. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the

county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence of the new corporation. (1901, c. 2, s. 103; Rev., s. 1241; C. S., s. 1223; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

§ 62-293. Effect on liens and other rights.

Nothing contained in this Article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under a sale pursuant to this Article when by the terms of the judgment or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person or body politic not a party to the action in which the judgment or decree was made, nor of any party except as determined by the judgment or decree. When a trustee has been made a party to such action and his cestui que trust, for reason satisfactory to the court, has not been made a party thereto, the rights and interest of the cestui que trust are concluded by the decree. (1901, c. 2, s. 103; Rev., s. 1241; C.S., s. 1224; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

§§ 62-294 to 62-299: Reserved for future codification purposes.

Article 14.

Fees and Charges.

§ 62-300. Particular fees and charges fixed; payment.

(a) The Commission shall receive and collect the following fees and charges in accordance with the classification of utilities as provided in rules and regulations of the Commission, and no others:

(1) Twenty-five dollars ($25.00) with each notice of appeal to the Court of Appeals, and with each notice of application for a writ of certiorari.

(2) With each application for a new certificate or new permit for motor and rail carrier rights, the fee shall be two hundred fifty dollars ($250.00) when filed by Class 1 motor and rail carriers, one hundred dollars ($100.00) when filed by Class 2 motor and rail carriers, and twenty-five dollars ($25.00) when filed by Class 3 motor and rail carriers, and twenty-five dollars ($25.00) as filing fee for any amendment thereto so as to extend or enlarge the scope of operations thereunder, and twenty-five dollars ($25.00) for each broker who applies for a brokerage license under the provisions of this Chapter.

(3) With each application for a general increase in rates, fares and charges and for each filing of a tariff which seeks general increases in rates, fares and charges, the fee will be five hundred dollars ($500.00) for Class A utilities and Class 1 motor and rail carriers, two hundred fifty dollars ($250.00) for Class B utilities and Class 2 motor and rail carriers, one hundred dollars ($100.00) for Class C utilities and twenty-five dollars ($25.00) for Class D utilities and Class 3 motor and rail carriers; provided that in the case of an application or tariff for a general increase in rates filed by a tariff agent for more than one carrier, the applicable fee shall be the highest fee prescribed for any motor carrier included in the application or tariff. This fee shall not apply to applications for adjustments in particular rates, fares, or charges for the purpose of eliminating inequities, preferences or discriminations or to applications to adjust rates and charges based solely

on the increased cost of fuel used in the generation or production of electric power.

(4) One hundred dollars ($100.00) with each application for discontinuance of train service, or for a change in or discontinuance of station facilities and with each application by a motor carrier of passengers for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.

(5) With each application for a certificate of public convenience and necessity or for any amendment thereto so as to extend or enlarge the scope of operations thereunder, the fee shall be two hundred fifty dollars ($250.00) for Class A utilities, one hundred dollars ($100.00) for Class B utilities, and twenty-five dollars ($25.00) for Class C and D utilities.

(6) With each application for approval of the issuance of securities or for the approval of any sale, lease, hypothecation, lien, or other transfer of any property or operating rights of any carrier or public utility over which the Commission has jurisdiction, the fee shall be two hundred fifty dollars ($250.00) for Class A utilities and Class 1 motor and rail carriers, one hundred dollars ($100.00) for Class B utilities and Class 2 motor and rail carriers, and twenty-five dollars ($25.00) for Class C and D utilities and Class 3 motor and rail carriers; provided, that in the case of sales, leases and transfers between two or more carriers or utilities, the applicable fee shall be the highest fee prescribed for any party to the transaction.

(7) Ten dollars ($10.00) with each application, petition, or complaint not embraced in (2) through (6) of this section, wherein such application, petition, or complaint seeks affirmative relief against a carrier or public utility over which the Commission has jurisdiction. This fee shall not apply to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations; nor shall this fee apply to applications, petitions, or complaints made by any county, city or town; nor shall this fee apply to applications or petitions made by individuals seeking service from a public utility.

(8) One dollar ($1.00) for the registration with the Commission of each motor vehicle to be put in operation by a motor carrier operating under the jurisdiction of the Commission, and a fee of one dollar ($1.00) for the annual reregistration of each such motor vehicle.

(9) One dollar ($1.00) for each page (8½ x 11 inches) of transcript of testimony, but not less than five dollars ($5.00) for any such transcript.

(10) Twenty cents (20¢) for each page reproduced by photostatic or similar process and for each page of an order which can be made available without the necessity of copying or reproduction.

(11) Twenty-five dollars ($25.00) for the filing with the Commission of the interstate motor carrier operating authority or registration of interstate exempt operation of every motor carrier operating into, from, within, or through North Carolina and filed with the Commission under the provisions of G.S. 62-266 and five dollars ($5.00) for filing all subsequent amendments thereto to maintain said filing in a current status.

(12) One dollar ($1.00) for the registration with the Commission of each motor vehicle operated into, from, within, or through North Carolina by interstate carriers and registered with the Commission under the provisions of G.S. 62-266, and a fee of one dollar ($1.00) for the annual reregistration of each such motor vehicle.

(b) All witness fees, officers' fees serving papers, and cost of serving notice by publication shall be paid by the party at whose instance or for whose benefit such fees and costs are incurred.

(c) No application, petition, complaint, notice of appeal, notice of application for writ of certiorari, or other document or paper, the filing of which requires the payment of a fee under this Article, shall be deemed filed until the fees herein required shall have been paid to the Commission.

(d) The fees and charges as set forth in subdivisions (1), (7), (9) and (10) of subsection (a) of this section shall not apply to the State of North Carolina or to any board, department, commission, institution or other agency of the State; and all applications, petitions or complaints submitted by the State of North Carolina or any board, department, commission, institution or other agency of the State shall be filed without the payment of the fees required by this section. All transcripts, papers, orders, certificates, or other records necessary to perfect an appeal, or to determine whether an appeal is to be taken, shall be furnished without charge to the Attorney General upon his request in cases in which the Attorney General appears in the public interest or as representing any board, department, commission, institution or other agency of the State. (1953, c. 825, s. 1; 1955, c. 64; 1957, c. 1152, s. 15; 1961, c. 472, ss. 2-4; 1963, c. 1165, s. 1; 1967, c. 1039; c. 1190, s. 7; 1969, c. 721, s. 2; 1971, c. 736, s. 2; 1975, c. 447, s. 1; 1977, c. 1003; 1977, 2nd Sess., c. 129, s. 32; 1979, c. 792.)

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

§ 62-301. Fees and charges supplemental; disposition.

All fees and charges received by the Commission under G.S. 62-300 shall be in addition to any other tax or fee provided by law and shall be paid by the Commission to the State Treasurer to be credited to the Commission as an allotment deposit. (1953, c. 825, s. 2; 1963, c. 1165, s. 1.)

§§ 62-302 to 62-309: Reserved for future codification purposes.

Article 15.

Penalties and Actions.

§ 62-310. Public utility violating any provision of Chapter, rules or orders; penalty; enforcement by injunction.

(a) Any public utility which violates any of the provisions of this Chapter or refuses to conform to or obey any rule, order or regulation of the Commission shall, in addition to the other penalties prescribed in this Chapter forfeit and pay a sum up to one thousand dollars ($1,000) for each offense, to be recovered in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the Utilities Commission; and each day such public utility continues to violate any provision of this Chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the Commission shall be a separate offense.

(b) If any person or corporation shall furnish water or sewer utility service in violation of any provision of this Chapter applicable to water or sewer utilities, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall provide such service in violation of any rule, regulation or order of the Commission, the Commission shall apply to the resident superior court judge of any judicial district where such person or corporation so operates, or to any superior court judge holding court in such judicial district, for the enforcement of any provision of this Chapter or of any rule, regulation or order of the Commission. The court shall have jurisdiction to enforce obedience to this Chapter or to any rule, regulation or order of the Commission by appropriate writ, order or other process restraining such person, corporation, or their representatives from further violation of this Chapter or of any rule, regulation or order of the Commission. (1899, c. 164, s. 23; Rev., s. 1087; C.S., s. 1106; 1933, c. 134, s. 8; c. 307, ss. 36, 37; 1941, c. 97; 1963, c. 1165, s. 1; 1973, c. 1073.)

CASE NOTES

Action Ex Contractu. — It would seem that an action against a railroad company for a penalty for a statutory violation is an action ex contractu for breach of an implied contract to perform a statutory duty. State ex rel. Carter v. Wilmington & W.R.R., 126 N.C. 437, 36 S.E. 14 (1900).

Construction of Penal Statute. — The rule that a penal statute must be strictly construed means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

Cited in State ex rel. Utilities Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

§ 62-311. Willful acts of employees deemed those of public utility.

The willful act of any officer, agent, or employee of a public utility, acting within the scope of his official duties of employment, shall, for the purpose of this Article, be deemed to be the willful act of the utility. (1933, c. 307, s. 29; 1963, c. 1165, s. 1.)

§ 62-312. Actions to recover penalties.

Except as otherwise provided in this Chapter, an action for the recovery of any penalty under this Chapter shall be instituted in Wake County, and shall be instituted in the name of the State of North Carolina on the relation of the Utilities Commission against the person incurring such penalty; or whenever such action is upon the complaint of any injured person, it shall be instituted in the name of the State of North Carolina on the relation of the Utilities Commission upon the complaint of such injured person against the person incurring such penalty. Such action may be instituted and prosecuted by the Attorney General, the district attorney of the Wake County Superior Court, or the injured person. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as provided by law in other civil actions. (Code, s. 1976; 1885, c. 221; 1899, c. 164, ss. 8, 15; Rev., ss. 1092, 1113, 2647; C.S., ss. 1062, 1111, 3415; 1933, c. 134, s. 8; c. 307, s. 30; 1941, c. 97; 1963, c. 1165, s. 1; 1973, c. 47, s. 2.)

Cross References. — As to venue of actions against railroads, see § 1-81.

CASE NOTES

The penalty prescribed by § 62-200 for failure to transport within a reasonable time is given directly to the party aggrieved, and an action therefor is not required to be brought in the name of the State. Robertson v. Atlantic Coastline R.R., 148 N.C. 323, 62 S.E. 413 (1908).

As to duty of Attorney General under former statute, see Southern Ry. v. McNeill, 155 F. 756 (E.D.N.C. 1907).

§ 62-313. Refusal to permit Commission to inspect records made misdemeanor.

Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the Commission, or a majority of said Commission, and under the seal of the Commission, to permit the Commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000). (1963, c. 1165, s. 1.)

§ 62-314. Violating rules, with injury to others.

If any public utility doing business in this State by its agents or employees shall be guilty of the violation of the rules and regulations provided and prescribed by the Commission, and if after due notice of such violation given to the principal officer thereof, if residing in the State, or, if not, to the manager or superintendent or secretary or treasurer if residing in the State, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person as may be directed by the Commission shall not be made within 30 days from the time of such notice, such public utility shall incur a penalty for each offense of five hundred dollars ($500.00). (1899, c. 164, s. 15; Rev., s. 1086; C.S., s. 1105; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Validity. — A statute giving authority to the Commission to proceed in the courts to enforce the penalties prescribed for failure of any railroad company to make full and ample recompense for the violation of rules and regulations, after notice, is valid without providing in detail the methods of procedure. Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892).

Duty of Commission to Enforce Rules and Orders. — While the Commission has no power to render a judgment for the payment of money, etc., it is its duty to enforce its rules and orders. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

Right to Investigate Complaint. — The Commission had the undoubted right and it was eminently proper for it to institute an inquiry and inform itself as to whether a complaint was grounded in truth. The Commission was not required to institute an action for the penalty simply because a citizen feeling himself aggrieved had made a complaint before it. It did have the right to investigate the matter for itself, but the end of such investigation was simply to afford it information and enable it to act intelligently in determining whether it would sue for the penalty given by the statute. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

§ 62-315. Failure to make report; obstructing Commission.

Every officer, agent or employee of any public utility, who shall willfully neglect or refuse to make and furnish any report required by the Commission for the purposes of this Chapter, or who shall willfully or unlawfully hinder, delay or obstruct the Commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars ($500.00) for each offense, to be recovered in an action in the name of the State. A delay of 10 days to make and furnish such report shall raise the presumption that the same was willful. (1899, c. 164, s. 18; Rev., s. 1089; C.S., s. 1108; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Under Code of 1883, s. 1960, which provided a similar penalty against corporations for failure to make returns into court, the penalty could only be recovered in an action brought by the State. A private relator could not maintain the action. State ex rel. Hodge v. Marietta & N.G.R.R., 108 N.C. 24, 12 S.E. 1041 (1891).

§ 62-316. Disclosure of information by employee of Commission unlawful.

It shall be unlawful for any agent or employees of the Commission knowingly and willfully to divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of this Chapter, except as he may be directed by the Commission or by a court or judge thereof. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1971, c. 736, s. 1.)

§ 62-317. Remedies for injuries cumulative.

The remedies given by this Chapter to persons injured shall be regarded as cumulative to the remedies otherwise provided by law against public utilities. (1899, c. 164, s. 26; Rev., s. 1093; C.S., s. 1112; 1963, c. 1165, s. 1.)

§ 62-318. Allowing or accepting rebates a misdemeanor.

If any person shall participate in illegally pooling freights or shall directly or indirectly allow or accept rebates on freights, he shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than one thousand dollars ($1,000) or imprisoned not less than 12 months. (1879, c. 237, s. 2; Code, s. 1968; Rev., s. 3762; C.S., s. 3520; 1963, c. 1165, s. 1.)

§ 62-319. Riding on train unlawfully; venue.

If any person, with the intention of being transported free in violation of law, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this State, or on the drawheads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars ($50.00) or imprisoned not more than 30 days. Any person charged with a violation of this section may be tried in any county in this State through which such train may pass carrying such person, or in any county in which such violation may have

occurred or may be discovered. (1899, c. 625; 1905, c. 32; Rev., s. 3748; C.S., s. 3508; 1963, c. 1165, s. 1.)

CASE NOTES

Effect on Liability of Insurance Company. — A policy of accident insurance that excepts from the company's full liability "sickness due to immorality or the violation of law" did not of itself exclude such liability for an injury caused by the plaintiff's stealing a ride on a railway train, made a misdemeanor by statute, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy. Poole v. Imperial Mut. Life & Health Ins. Co., 188 N.C. 468, 125 S.E. 8 (1924).

§ 62-320. Failure to place name on produce a misdemeanor.

Any person, selling or offering for sale or consignment any barrel, crate, box, case, package or other receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or other produce of any kind whatsoever, to be shipped to any point within or without this State, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days: Provided, that this section shall not apply to railroads, express companies and other carriers selling or offering for sale, for transportation or storage charges or any other charges accruing to such railroads, express companies or other carriers, any barrel, crate, box, case, package, or other receptacle containing berries, fruit, melons, potatoes, vegetables, truck or other produce. (1915, c. 193; C.S., s. 3531; 1963, c. 1165, s. 1.)

§ 62-321. Penalty for nondelivery of intrastate telegraph message.

Any telegraph company doing business in this State that shall fail to transmit and deliver any intrastate message within a reasonable time shall forfeit and pay to anyone who may sue for same a penalty of twenty-five dollars ($25.00). Such penalty shall be in addition to any right of action that any person may have for the recovery of damages. Proof of the sending of any message from one point in this State to another point in this State shall be prima facie evidence that it is an intrastate message. (1919, c. 175; C.S., s. 1704; 1963, c. 1165, s. 1.)

CASE NOTES

Transmission of a message through two states is interstate commerce as a matter of fact. The fact must be tested by the actual transmission, not by whether it was necessary to cross the territory of another state in order to reach the final point. Western Union Tel. Co. v. Speight, 254 U.S. 17, 65 L.Ed. 104, 41 S.Ct. 11 (1920).

§ 62-322. Unauthorized manufacture or sale of switch-lock keys a misdemeanor.

It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this State on its switches or switch tracks, except upon the written order of

that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1909, c. 795; C.S., s. 3477; 1963, c. 1165, s. 1.)

§ 62-323. Willful injury to property of public utility a misdemeanor.

If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any public utility, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a misdemeanor. (1871-2, c. 138, s. 39; Code, s. 1974; Rev., s. 3756; C.S., s. 3478; 1963, c. 1165, s. 1.)

Cross References. — As to injury to property of railroads and other carriers, see §§ 14-278, 14-279.

§ 62-324. Disclosure of information as to shipments unlawful.

(a) It shall be unlawful for any common carrier engaged in intrastate commerce or any officer, receiver, trustee, lessee, agent, or employee of such carrier, or for any other person authorized by such carrier, to receive information, knowingly to disclose to, or permit to be acquired by any person other than the shipper or consignee without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for such transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

(b) Nothing in this section shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or any officer or agent of the State or of the government of the United States, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers. (1947, c. 1008, s. 30; 1961, c. 472, s. 8; 1963, c. 1165, s. 1.)

§ 62-325. Unlawful motor carrier operations.

(a) Any person, whether carrier, passenger, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this Chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulations as in this Chapter provided for motor carriers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than five hundred dollars ($500.00) for the first offense and not more than two thousand dollars ($2,000) for any subsequent offense.

(b) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this Article, or other applicable law, or to make specific and full, true, and correct answer to any question within 30 days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this Article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than five thousand dollars ($5,000). As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. It shall be the duty of the Commission to prescribe and enforce such general rules and regulations as it may deem necessary to compel all motor carriers to keep accurate records of all revenue received by them to the end that any tax levied and assessed by the State of North Carolina upon revenues may be collected. Any agent or employee of a motor carrier who shall willfully and knowingly make a false report or record of fares, charges, or other revenue received by a carrier or collected in its behalf shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

(c) Any person who, at any bus terminal, solicits or otherwise attempts to induce any person to use some form of transportation for compensation other than that lawfully using said terminal premises by contract with the terminal operator or by valid order of the Commission shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than fifty dollars ($50.00) or imprisoned not to exceed 30 days, or both, in the discretion of the court. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1.)

§ 62-326. Furnishing false information to the Commission; withholding information from the Commission.

(a) Every person, firm or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall knowingly or willfully file or give false information to the Utilities Commission in any report, reply, response, or other statement or document furnished to the Commission shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.

(b) Every person, firm, or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall willfully withhold clearly specified and reasonably obtainable information from the Commission in any report, response, reply or statement filed with the Commission in the performance of the duties of the Commission or who shall fail or refuse to file any report, response, reply or statement required by the Commission in the performance of the duties of the Commission shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1969, c. 765, s. 1.)

§ 62-327. Gifts to members of Commission, Commission employees, or public staff.

It shall be unlawful for any officer, agent, employee, or attorney of any public utility or any public utility holding company, subsidiary, or affiliated company, to knowingly offer or make to any member of the Commission, Commission staff, or public staff, any gift of money, property, or anything of value. It shall be unlawful for any member of the Commission, Commission staff, or public staff to knowingly accept any gift of money, property, or anything of value from any officer, agent, employee, or attorney of any public utility or any public utility holding company, subsidiary, or affiliated company; provided, however, that it shall not be unlawful for members of the Commission, Commission staff, or public staff to attend public breakfasts, lunches, dinners, or banquets sponsored by such entities. Any person violating this section shall be guilty of a misdemeanor and may be fined in the discretion of the court; provided, further, that any member of the Commission staff, or member of the public staff violating this section shall also be subject to dismissal for cause. (1977, c. 468, s. 16.)

Editor's Note. — Session Laws 1977, c. 468, s. 21, contains a severability clause.

§§ 62-328 to 62-332: Reserved for future codification.

Article 16.

Security Provisions.

§ 62-333. Screening employment applications.

The Chief Personnel Officer or his designee of any public utility franchised to do business in North Carolina shall be permitted to obtain from the State Bureau of Investigation a confidential copy of criminal history record information for screening an applicant for employment with or an employee of a utility or utility contractor where the employment or job to be performed falls within a class or category of positions certified by the North Carolina Utilities Commission as permitting or requiring access to nuclear power facilities or access to or control over nuclear material.

The State Bureau of Investigation shall charge a reasonable fee to defray the administrative costs of providing criminal history record information for purposes of employment application screening. The State Bureau of Investigation is authorized to retain fees charged pursuant to this section and to expend those fees in accordance with the Executive Budget Act for the purpose of discharging its duties under this section. (1979, c. 796; 1979, 2nd Sess., c. 1212, s. 10.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 25, 1982

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina

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