

Opinion No. 15-1694

December 3, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Hon. Jacobo Chavez, Superintendent of Insurance, Santa Fe, New Mexico.

Merger or consolidation of corporations.

OPINION

{*263} I have to acknowledge receipt of your letter of even date herewith enclosing papers with reference to the proposed merger of the Interstate Casualty and Guaranty Company of Albuquerque, New Mexico, with the Southern Surety Company of Muskogee, Oklahoma, with principal office at St. Louis, Missouri, and in which you desire my opinion as to whether there is anything to prevent your Department from approving the merger and releasing the deposit now held by your Department in the sum of \$ 110,305.00, for the protection of the policy-holders of the Interstate Casualty and Guaranty Company.

The general rule of law appears to be that legislative authority is requisite to the merger or consolidation of corporations. The author of Taylor on Corporations says that the reasons why legislative authority is requisite are two-fold: in the first place, since a consolidation ordinarily brings a new corporation into existence, the authority of the legislature is as necessary for the incorporation of a company out of pre-existing corporation as it is under other circumstances; and in the second place, the rights of dissenting shareholders would be impaired.

Neither of these reasons appear to be applicable to the present case. The Southern Surety Company is a corporation of Oklahoma and its identity is not destroyed by the proposed agreement of merger between it and the other corporation. No such merger or consolidation in New Mexico could possibly have the effect of creating a new corporation in Oklahoma, the state where the Southern Surety Company originated, and it certainly would not create a new corporation here. The Southern Surety Company, in order to do any business in New Mexico, must come in like any other foreign corporation, and by compliance with our statutory requirements, obtain authority to exist and to do business within our limits.

{*264} The other reason as to the impairment of rights of dissenting shareholders, has no application so far as we are concerned, as all of the shareholders, not only of our domestic corporation, the Interstate Casualty and Guaranty Company, but also of the Southern Surety Company, have agreed to the proposed consolidation.

In this particular matter it is contended by the representatives of the Interstate Casualty and Guaranty Company that there is legislative authority for this proposed merger or

consolidation to be found in Sections 993 to 999 of the codification of 1915, and there is room for some argument in support of this contention, and I am not entirely clear that these sections of the statutes would not be held applicable to the consolidation of these companies. The objection to their applicability is to be found in Section 889, which is a part of the same article about corporations and declares that the article shall apply to corporations exercised for insurance and surety purposes, to the extent provided by Section 1016, and Section 1016 has no reference to insurance or surety companies.

The language of Section 993, however, is so broad that it might be held to apply to the consolidation of insurance and surety companies as it speaks of corporations "organized under any law or laws of this state for the purpose of carrying on any kind of business of the same or a similar nature."

Everything considered, and in view of the fact that the agreement for merger which has been submitted to you conforms to the requirements of the sections referred to on this subject and for the other reasons hereinbefore expressed, I advise that you give such approval as may seem necessary to carry out the proposed consolidation; but as to the proposition to withdraw the deposit now held by your department for the protection of the policy-holders of the Interstate Casualty and Guaranty Company, I do not think that that should be permitted until the consolidation agreement is fully carried out and the charter of the Interstate Company surrendered in accordance with paragraph (g) of the first division of the agreement submitted to you. When the agreement in all other particulars is fully carried out and the Interstate Company is disincorporated, in conformity with the requirement of our statute, that deposit, being a part of the assets of that company, will, according to the terms of paragraph (e) in said agreement, be transferred and delivered to the Southern Surety Company.

I return the papers submitted to me by you.