

NEW YORK NEW YORK 10017
757 THIRD AVENUE
TELEPHONE (212) 230-3700
TELECOPIER (212) 406-4213

LOS ANGELES, CALIFORNIA 90067-3004
2029 CENTURY PARK EAST
TELEPHONE (213) 556-5800
TELECOPIER (213) 556-1358
WUI TELEX PLASTROCK LSA 677190

000067

WASHINGTON, D.C. 20036-4852
1150 SEVENTEENTH ST., N.W.
TELEPHONE (202) 452-9250
TELECOPIER (202) 293-2293
WUI TELEX STRCK DC 64238

MIAMI, FLORIDA 33131-2385
SOUTHEAST FINANCIAL CENTER
SUITE 3300
200 SOUTH BISCAYNE BOULEVARD
TELEPHONE (305) 358-9900
TELECOPIER (305) 371-7486
WUI TELEX STRCK MIA 803133

WRITER'S DIRECT DIAL NUMBER

212-806-6050

Securities Act of 1933/Section 3(a)(10)

October 16, 1987

William E. Morley, Esq.
Office of the Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

RECEIVED
PUBLIC AVAILABILITY DATE: 12-21-87
ACT SECTION RULE
1933 3(a)(10) ---

Re: Empire Mutual Insurance Company

Dear Mr. Morley:

On behalf of the Empire Mutual Insurance Company ("Empire Mutual" or the "Company"), we request your advice that the Staff will not recommend that the Securities and Exchange Commission (the "Commission") take enforcement action with respect to the issuance, without registration under the Securities Act of 1933, as amended (the "1933 Act"), of common stock by Empire Mutual, a mutual property/casualty insurance company organized under the laws of the State of New York, pursuant to its plan to convert to a stock property/casualty insurance company under Section 7307 of the New York Insurance Law (the "Insurance Law").

DESCRIPTION OF TRANSACTION

Empire Mutual was organized in New York in 1925 as Red Cab Mutual Insurance Company. The Company conducts a multiple line insurance business with particular emphasis on automobile, commercial multiple peril and workers' compensation insurance.

Empire Mutual proposes to convert from a mutual property/casualty insurance company to a stock property/casualty insurance company as authorized by Section 7307 of the Insurance Law

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pursuant to a Plan of Conversion (the "Plan") unanimously adopted by the Board of Directors of the Company (the "Board of Directors") on December 30, 1985, amended on December 29, 1986 and clarified in certain technical respects on August 11, 1987.

Under the Plan, 25.5% of the policyholders' equity in the Company will be distributed to those with policies in effect at any time during the three-year period ended December 19, 1985 (the "Eligible Policyholders"). Eligible Policyholders will, depending upon the value of their equitable shares in the Company, each be entitled to either (i) a number of shares of the Company's common stock, par value \$1.00 per share (the "Common Stock") or (ii) in the case of Eligible Policyholders entitled to 15 shares of Common Stock or less, cash in lieu of such Common Stock. The number of shares of Common Stock to be distributed to each Eligible Policyholder will be determined by dividing the Eligible Policyholder's equitable share in the Company by the value of \$5.31 assigned to each share of Common Stock and rounding the quotient of such division to the nearest whole share. Eligible Policyholders thus entitled to a distribution of 15 shares or less will receive cash in lieu of Common Stock without the effect of the rounding; however, those Eligible Policyholders who would be entitled to a cash distribution of less than \$1.00 must submit a written request to the Company within 12 months of the effective date of the conversion in order to receive such distribution. The Plan provides for a distribution to Eligible Policyholders of (i) 2,662,047 shares of Common Stock, or approximately 23.0% of the Company's issued and outstanding shares, and (ii) cash in lieu of Common Stock totalling \$2,123,121 (including an aggregate cash distribution of \$1,481 to a total of 3,027 Eligible Policyholders who are entitled to cash distributions of less than \$1.00).

The remaining 74.5% of the policyholders' equity will be offered in the form of shares of Common Stock to certain subsidiaries of PHLCORP, Inc., a Pennsylvania corporation (the "Surplus Noteholders"), which hold surplus notes (the "Surplus Notes") issued in exchange for \$25,000,000 advanced to the Company as of January 1, 1980 pursuant to Section 1307 of the Insurance Law. In exchange for their Surplus Notes, the Surplus Noteholders will be offered 8,940,000 shares of Common Stock, or approximately 77% of the Company's issued and outstanding shares.

Pursuant to Section 7307(g) of the Insurance Law, the Superintendent of Insurance of the State of New York ("Superintendent") has scheduled a Public Hearing on the Plan to be held on October 27, 1987. As required by Section 7307(g) of the Insurance Law, the Company will (i) mail notice of the Public

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Hearing to each person who was a policyholder on December 19, 1985, accompanied by a copy of the Plan and a Proxy Statement approved by the Superintendent and (ii) give notice of the Public Hearing, to be accompanied by a summary of the Plan approved by the Superintendent, in a newspaper of general circulation in New York City (the county in which it has its principal office and the largest city in New York State) and the City of Buffalo (the second largest city in New York State).

After the Public Hearing, the Superintendent will either (i) approve the Plan as submitted, (ii) refuse to approve the Plan, or (iii) request modification of the Plan before granting approval. Pursuant to Section 7307(h)(1) of the Insurance Law, if the Superintendent finds that the Plan does not violate the Insurance Law, is not inconsistent with law, is fair and equitable and is in the best interest of the policyholders and the public, he shall approve the Plan.

The Plan, if approved by the Superintendent, will be presented to policyholders for adoption at a Special Meeting of Policyholders to be held on November 17, 1987. If the Plan is approved by the required two-thirds (2/3) vote of policyholders voting in person or by proxy at the meeting, the Company will submit a certified copy of the Plan to the Superintendent, together with a certificate setting forth the results of the vote of policyholders. The Superintendent will then issue a new Certificate of Authority to the Company, whereupon the Plan will become effective and the conversion will be completed.

EXEMPTION UNDER SECURITIES ACT OF 1933

Section 3(a)(10) of the 1933 Act exempts from registration those securities which are issued by a corporation

in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.

In Release No. 33-312 (1935), the Commission stated that the availability of the exemption provided by Section 3(a)(10) depends, inter alia, upon satisfaction of the following events:

1. The approving authority must be expressly authorized by law to hold a hearing on the exchange, although it is not necessary that the hearing be mandatory.
2. Adequate notice of the hearing must be given to all persons to whom it is proposed to issue the securities in exchange.
3. If the approval of a governmental agency is involved, that agency must be expressly authorized by law to approve the fairness of the terms and conditions of the proposed issuance.

The Insurance Law provides that:

1. A mutual property/casualty insurance company may not be converted into a stock property/casualty insurance company unless a plan of conversion has been submitted to the Superintendent and has been approved by him following a public hearing on the plan of conversion. (§7307(h)(1)).
2. Adequate notice of the public hearing must be mailed by the mutual insurer to each person who was a policyholder on the day preceding the date of adoption of a resolution by the Board of Directors providing the basis for the insurer's application to the Superintendent to convert. Notice of the hearing must also be published in a newspaper of general circulation in the county in which the insurer has its principal office and in the two largest cities in each state in which the insurer has underwritten insurance within the five years preceding the date of the adoption of the aforementioned resolution. (§7307(g)).
3. The policyholder and public notices must be accompanied by a copy of the plan of conversion and a summary of the plan of conversion approved by the Superintendent, respectively, and any comment the Superintendent considers necessary for the adequate information of the current and former policyholders and the public, respectively. (§7307(g)).
4. The Superintendent, prior to approval, must find that the plan of conversion is fair and equitable and in the best interests of the policyholders and the public. (§7307(h)(1)).

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Thus, the statutory requirements of the Insurance Law, and the procedures being followed by the Company, appear to meet the requirements of Release No. 33-312 (1935). We have also identified No-Action positions taken with respect to factual situations involving the conversion of mutual insurance companies to stock companies which are substantially similar to the proposed conversion of the Company. See California Mutual Insurance Co. (pub. avail. February 14, 1986); Home Service Mutual Insurance Co. (pub. avail. November 9, 1981); Beacon Mutual Indemnity Co. (pub. avail. November 3, 1980).

REQUESTED NO ACTION POSITION

For the reasons discussed above, it is our opinion that the above described applicable provisions of Section 7307 of the Insurance Law satisfy the requirements of Section 3(a)(10) of the 1933 Act.

Accordingly, we would appreciate your advising us that the Staff of the Commission would recommend to the Commission that no action be taken if Empire Mutual issues shares of its Common Stock in connection with its Plan of Conversion as described above, without registering the shares under the 1933 Act.

REQUEST FOR PRIORITY

The Board of Directors of the Company considers it important to effect the proposed conversion as quickly as possible. Accordingly, we respectfully request that you accord priority to this No-Action request.

If any additional information is required, please call the undersigned collect at (212) 806-6050.

Very truly yours,

STROOCK & STROOCK & LAVAN

By: 

Lewis G. Cole

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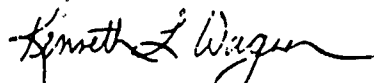
RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE

RE: Empire Mutual Insurance Company
Incoming letter dated October 16, 1987

On the basis of the facts presented, and specifically noting that: (1) Empire's Plan of Conversion must be approved by the Superintendent of Insurance of the State of New York after a public hearing on the Plan of Conversion; (2) all eligible policyholders must receive adequate (as defined by statute) notice of the meeting and are entitled to attend; (3) all policyholders must receive a copy of the Plan of Conversion for their review; and (4) the Superintendent of Insurance must find that the Plan of Conversion is fair, equitable and in the best interest of the policyholders and the public; this Division will not recommend any enforcement action to the Commission if Empire, in reliance upon your opinion as counsel that the exemption provided by Section 3(a)(10) of the Securities Act of 1933 ("1933 Act") is available, issues common stock to policyholders and surplus note holders after approval by the Superintendent of Insurance of the State of New York without compliance with the registration requirements of the 1933 Act.

Because this position is based upon the representations in your letter, it should be noted that any different facts or conditions might require a different conclusion. Further, this response only expresses the Division's position on enforcement action, and does not purport to express a legal conclusion.

Sincerely,



Kenneth L. Wagner
Special Counsel