

Opinion No. 47-4983

February 5, 1947

BY: C. C. McCULLOH, Attorney General

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

{*10} This opinion is given in answer to your request, after several hearings pertaining to Opinion No. 4736, June 15, 1945, for a clarification on the subject of participating and nonparticipating life insurance contracts under the following statute:

"60-601.

(6) If it be a participating policy, a provision that the policy shall participate in the surplus of the company and that, beginning not later than the end of the third policy year, the company will annually determine the portion of the divisible surplus accruing on the policy, and that the owner of the policy shall have the right each year to have the correct dividend arising from such participation in the case of term policies of insurance paid in cash or in the case of other policies of insurance paid in cash or applied to the purchase of paid-up additions, and the policy may provide other dividend options, and it shall further provide which option shall become effective if the owner of the policy shall not elect any option within the time limited by the policy.

This provision shall not apply to any form of insurance issued or granted in consideration of lapsed or surrendered policies or to non-participating policies."

Opinion No. 4736, mentioned above, made reference to Opinion No. 1512, January 28, 1937. I am now informed that Opinion No. 1512 related to a policy in a mutual company and therefore there was {*11} no question about the policy referred to therein being a participating policy. I find no authority in conflict with the following statement:

"The excess premiums collected from them (policy holders) belongs, in a mutual company, to them alone". U. S. Life Ins. Co. vs. Spinks, 103 S. W. 335.

Therefore, the first paragraph of subsection (6) applies to all policies written by mutual companies and to all stock company policies written on the mutual basis, to-wit: participating policies, as hereinafter defined. The last paragraph of subsection (6), exempting non-participating policies, refers to stock company contracts which do not participate, or which participate to a limited extent, as hereinafter defined.

Givens v. Rettew, 29 Atl. 703 at 704:

"A stock policy is issued solely upon the credit of the capital stock of the company, to one who may be an entire stranger to the corporation, who acquires no right of

membership by reason of his policy, no right to **participate** in its profits, and who subjects himself to no liability by reason of its losses. * * * Mutual companies, on the other hand, are somewhat of the nature of a partnership. The insured becomes a member of the incorporation by virtue of his policy, is entitled to a share of the profits, and is responsible for the losses to the extent of his premiums paid or agreed to be paid."

Fry v. Providence Sav. Life Assur. Soc. of N. Y., 38 S. W. 116:

"State whether or not the terms or words, "participate", "participate in premium", "participating policy", are among life insurance people words of art; and, if so, have they any technical significance or meaning? * * *' Answer: 'The words, terms and phrases specified in the above question are among insurance people terms of art, and have a technical significance or meaning. The word "participate", when used in connection with a life insurance premium or policy, means a sharing of any and all profits accruing to the company or class to which the individual or policy belongs. The phrase or term "participating premiums", when used in connection with life insurance, means to share in all profits arising from the premiums paid, by himself and by all others belonging to his class, and in all profits arising from the payment or derived from such payments of premiums. The words "participating policy" mean the same as "participating in premiums". All of said terms mean practically the same thing, and when not qualified by some clear and positive provision of the policy mean that the holder of a policy containing such terms as (is) a sharer of and partaker in all profits of the business in which he is by or through his policy connected, and shall share these profits in proportion to his holding equally with all others."

From the foregoing, it is my opinion that each stock company contract form must be examined to ascertain if the contract entitles the insured to participate, as defined above in insurance terminology. If the participation is limited, the contract would come within the exemption in paragraph two, subsection (6).

It is my further opinion that the contract, as outlined in Opinion No. 4736, comes within the exemption, paragraph 2, subsection 6. See also 37 C. J. p. 369, Sec. 21 to 35 inclusive.

By THOS. C. McCARTY,

Asst. Atty. General