

Opinion No. 49-5223

June 21, 1949

BY: JOE L. MARTINEZ, Attorney General

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

Re: Special Participation Provision, Southern States Life Insurance Co.

OPINION

{*51} In reply to your inquiry for an opinion as to the legality of the special participation provisions of an endorsement or rider attached to and forming a part of life insurance policies, proposed to be written by the Southern States Life Insurance Company and sold or offered for sale by said company in the State of New Mexico, a copy of the participation feature in question having been submitted to this office for study and an opinion, your attention is directed to the first paragraph of the participation feature which reads as follows:

"This policy shall participate in the surplus earnings of the Company as apportioned by the Board of Directors, beginning not later than the end of the second policy year and annually thereafter while this policy is in full force. Such dividends shall accrue from Mortality Savings, reserves released on lapsed policies, excess interest earnings and other profits on the Company's participating insurance as permitted by the Laws of the State of Texas."

Paragraph 6 of Section 60-601 of the New Mexico 1941 Compilation, as amended, which section sets forth the standard provisions that shall be contained in life insurance policies issued and sold in the State of New Mexico, reads as follows:

{*52} "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."

The law pertaining to participating policies as contained in Paragraph 6 quoted above states that there shall be a provision in the policy wherein it is stated "that the policy

shall participate in the surplus of the company." This participation is made mandatory by the use of the word "shall" without qualification in the statute.

Paragraph 1 of the special participation part of the policy submitted by the Southern States Life Insurance Company does not conform to the standard provisions as is required under paragraph 6 of Section 60-601 above quoted, in that paragraph 1 makes participation discretionary at the wish or will of the Board of Directors of said company because of the discretionary power conferred on the Board of Directors by inserting the phrase "as apportioned" qualifying the words "shall participate in the surplus earnings" etc. The use of the phrase "as apportioned" gives to the Board of Directors the authority to apportion or not to apportion at their pleasure, thereby qualifying and modifying the first four words of the first line which reads: "This policy shall participate," to the extent that the affirmative statement loses its mandatory force and effect.

It is therefore my opinion that paragraph 1 of the special participation part of the company's policy fails to comply with paragraph 6 of Section 60-601 of the New Mexico 1941 Compilation, as amended, and is directly in violation of said statute.

Permit me to call your attention to the second paragraph of the special participation feature of the policy which reads as follows:

"ANY SUCH ANNUAL DIVIDEND APPORTIONED TO THIS POLICY IN ANY CALENDAR YEAR, SHALL BE NOT LESS THAN THE CASH DIVIDEND DECLARED BY THE BOARD OF DIRECTORS AND PAID TO THE STOCKHOLDERS OF THE SOUTHERN STATES LIFE INSURANCE COMPANY IN SUCH YEAR ON * * TWELVE & ONE HALF * * (12 1/2) SHARES OF THE COMMON STOCK OF THE SOUTHERN STATES LIFE INSURANCE COMPANY."

This paragraph attempts to promise to the new policy holder a cash dividend equal to the cash dividend paid in the same year to the holders of 12 1/2 shares of the common stock of the Southern States Life Insurance Company, there creating an inducement for insurance of the company by tying up said insurance sold or to be sold with stock contracts. Let us quote to you paragraph 6 of Section 60-715 of the New Mexico 1941 Compilation, { *53 } as amended, entitled "Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined."

"(6) Stock Operations and 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 advisory board contracts or **other contracts of any kind promising returns and profits as an inducement to insurance.**"

It is my opinion that the second paragraph of the special participation feature of the policy submitted is in violation of paragraph 6 of Section 60-715 of the New Mexico 1941 Compilation, as amended, for the reason stated above, namely, that the company

is attempting to sell life insurance by promising cash dividends based upon other contracts as an inducement to insurance.

Trusting the foregoing sufficiently answers your inquiry, I am