Opinion No. 54-6056

December 13, 1954

BY: RICHARD H. ROBINSON, Attorney General

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

*{*528}* You have requested an opinion upon the question of whether an insurance company would be violating Laws 1947, Chapter 127, Section 4, (§ 60-715, N.M.S.A., 1941 Compilation, as amended) by selling an insurance policy in the State of New Mexico which contains an endorsement as a part of the contract of insurance that any dividends which may be declared by reason of the participating provision of the policy may, at the option of the insured be either (1) paid in cash; (2) applied toward the payment of premiums; (3) applied to purchase a nonparticipating paid-up addition to the amount of insurance; or (4) applied toward the purchase at par of shares of common stock of a certain named corporation whose ownership or relationship is independent of the insurance company and setting an expiration date for the privilege to so apply the premiums.

The section which you cite deals with the unfair methods of competition or unfair deceptive acts or practices in the sale of insurance in the State of New Mexico as the title to this enactment, passed in 1947, indicates. Of course, Section 6, Laws of 1947, Chapter 17 (§ 60-717, N.M.S.A., 1941 Comp., as amended) requires that the Superintendent of Insurance hold a hearing to determine as a matter of fact whether such practice or practices would violate the spirit or letter of the law. This office, being in an advisory capacity, is not able to provide the Commissioner with an advance opinion which would settle questions of fact. Be that as it may, under the hypothetical stated facts above, it is the opinion of this office that as a point of law a provision in the contract of insurance providing for an optional settlement of accrued dividends would not prima facia be *{*529}* an unfair practice as defined in Section 4, Laws of 1947, Chapter 127.

The specific section applicable is paragraph 6, of Section 4, Chapter 127, Laws of 1947:

"§ 60-715. Unfair methods of competition and unfair or deceptive acts or practices defined. -- (a) The following are hereby defined as unfair methods of competition and unfair and deceptive act or practices in the business of insurance: * * * (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."

The principal question under the hypothetical set of facts is whether the offering of stock at the option of the insured would constitute the delivering of securities or other contract of any kind promising returns and profits as an inducement to insurance. It is clear from reading the endorsement that the insurance company is not itself issuing or delivering an option to purchase a security and therefore this provision would not be repugnant. As to the question of whether the insurance company is issuing or delivering a contract, it would appear apparent that the insurance company is offering a psuedo contractural right in the form of an option to purchase the stock of this separate and independent corporation and that such option is binding upon the insurance company, if the insured would so elect to exercise that option. In this respect then the only remaining question relative to this option is whether the contract or option represents a promise of return and profit. No place in the endorsement does it appear that the stated common stock offered is going to pay dividends or in any manner represent a return **and** a profit. This is a speculative hypothesis which until the actual condition arises, the Insurance Commissioner can not deem that such common stock is in fact a return and profit as an inducement of insurance.

The particular section of the unfair practices in the insurance business act is taken from the Uniform Act and has not yet been interpreted in any Court of the United States that this office can now ascertain. This opinion is not to be considered to mean that the Insurance Commissioner could not properly find, as a matter of fact, that an insurance company with such an endorsement as appears above was or is violating the intents and purposes of the act. These are questions of fact which the Insurance Commissioner could determine from a proper hearing upon the matter. This opinion is also not to be construed as to affect the liability of the insurance company offering such an option to comply with other laws not herein involved relative to the sale of stock and the conduct of an insurance business.

We trust that this is of some assistance to you.