

Opinion No. 69-07

February 7, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General David R. Sierra, Assistant Attorney General

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

QUESTIONS

FACTS

A New York based mutual insurance company has a contract with the University of New Mexico to provide a group major medical insurance plan for the benefit of the University's employees. The company does not now have, nor has it ever had, a license to transact insurance business in the State of New Mexico. The company employs no paid agents nor are commissions paid to anyone in connection with the solicitation of this insurance business. Further, the company maintains no offices or paid representatives in the state. The company was organized in New York for the purpose of providing retirement and insurance benefits through fixed and variable annuity contracts, life insurance policies, and health and accident contracts to staff members and other eligible employees of educational and scientific institutions.

The University has received detailed instructions from the company as to the procedures to be followed in accepting applications for the program. When a participant becomes eligible an employee of the university explains the program through the use of booklets, bulletins and correspondence previously received from the company. An application form is then completed, sometimes with the assistance of an employee of the university, and is forwarded to the company for acceptance or rejection in New York. If the application is accepted, the policy of insurance is mailed to the participant in New Mexico.

The contract with the university provides that upon acceptance of an application the university will deduct the premiums for the policy from the participant's salary.

QUESTIONS

1. Based upon the above facts, is the New York based insurance company transacting an insurance business in the State of New Mexico in violation of Sections 58-9-1, and 58-18-6, New Mexico Statutes Annotated, 1953 Compilation?
2. Based upon the above facts, are the employees of the university, who assist the insurance company in administering the program, acting as agents for the company if they receive and transmit to staff members and eligible employees of the university any

advertising material or applications for life insurance, annuity contracts, health and accident insurance, or collect the premium payments from an employee of the university either directly or by payroll deductions and then transmit such funds of money as premium payments to the insurance company?

CONCLUSIONS

1. Yes
2. Yes

OPINION

{*12} ANALYSIS

The insurance laws of the State of New Mexico require that a license be obtained prior to transacting insurance business in the state, Section 58-18-6 New Mexico Statutes Annotated, 1953 Compilation. Transacting an insurance business without first obtaining a license is punishable as a misdemeanor. Section 58-9-1 New Mexico Statutes Annotated, 1953 Compilation provides as follows:

"Any person, partnership or corporation **transacting any business of insurance** in the state of New Mexico without having first received a license to transact such business, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not to exceed \$ 500.00. The transaction of insurance business in this state is by this act limited to corporations except in so far as other types of organizations or individuals may be specially authorized either by this act or by other special statutory authority to transact such insurance business." (Emphasis added.)

Your first question is concerned with whether the insurance company, by contracting for insurance contracts as stated in the facts above, is in violation of Section 58-9-1, supra. The determining factor is whether their method of doing business can be considered as "transacting any business of insurance". If their activities are to be so considered then that company has violated the insurance laws of New Mexico.

Some states have held that the mere solicitation of insurance applications by mail by a foreign insurance company not licensed in the state where the solicitation is made and then delivering the policy to the applicant and subsequently accepting his premiums in the same manner does constitute doing an insurance business in the particular state. See e.g. **Iowa {*13} State Travelers Mutual Ass'n v. Cadwell**, 133 Ga App. 128, 147 S.E.2d 461 (1966). The term "any business" as contained in the above cited statute was construed in **Taggart v. George D. Booker**, 42 Del. 222, 35 A.2d 499 (1943). That case involved the solicitation of insurance contracts in Delaware by a Pennsylvania company which was not authorized to transact business in Delaware. The applicable Delaware statute contained language similar to our Section 58-9-1, supra. In construing that language the Court stated "the phrase 'any business' is more comprehensive in

meaning than carrying on or engaging in business generally, and is generally construed as prohibiting the making of a single contract in the exercise of a corporate function . . ." At 35 A.2d 501.

The obvious intent of the Legislature in enacting Section 58-9-1, supra, was to prohibit the unlicensed sale of insurance within the state regardless of the means used to make such sales. Obviously the Legislature's purpose was to protect the citizens of the state from sales by those companies not meeting the minimum standards and requirements of our insurance laws.

Similar language to that above is found in Section 58-18-6 New Mexico Statutes Annotated, 1953 Compilation which is applicable to stock and mutual insurance companies. That provision in pertinent part reads as follows:

(a) "No person, firm, association, or corporation **shall do an insurance business** in this state unless authorized so to do by a license issued and in force pursuant to provisions of this act, except as to such transactions as are expressly otherwise provided by law. (Emphasis added.)

Both Sections 58-9-1 and 58-18-6 (a), supra, pronounce the same general intent and we are of the opinion that the language "transacting any business of insurance" and "do an insurance business" are to be given similar application. Thus, in a situation as presented here in which a foreign, non-licensed insurance company contracts with a New Mexico domiciled institution for the purpose of soliciting insurance business from New Mexico residents, we are of the opinion that the New York company is transacting or doing insurance business in the state. Consequently, the company is violating our licensing provisions, Sections 58-9-1 and 58-18-6, supra.

Your second question asks whether the employees or staff members of the university are acting as **agents** for the New York company when they are provided with sales material, application forms and other materials necessary for soliciting insurance, assist in preparing applications, and then collect the premiums from the participating employee's salary. The statutory provisions applicable to licensing of insurance agents is Section 58-9-2 New Mexico Statutes Annotated, 1953 Compilation. See **State v. Loveless** 39 N.M. 142, 42 P.2d 211 (1935). Section 58-9-2, supra, provides in pertinent part as follows:

"Any person writing or attempting to **write, solicit, or procure insurance** within the state of New Mexico without a license properly issued in accordance with the requirements of this act, . . . shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum of not less than fifty dollars, nor more than two hundred dollars, or imprisonment in the county jail of not less than thirty days, nor more than sixty days, in the discretion of the court; . . ." (Emphasis added.)

The meaning of the pertinent wording in the above provision is clear and unambiguous. "Solicit" means "to act as solicitor or legal agent for or with reference to **{*14}** . . ."

Webster's New International Dictionary, 2nd Ed. (1954). By attempting to encourage another to subscribe to the insurance program of the New York company, the employees and staff members of the university are, in effect, attempting to solicit business for that New York company. The fact that no direct commission is paid to either the university or the staff members and employees is not necessarily a determining factor.

When a person actively engages in explaining to another the details and benefits of an insurance program and then proceeds to assist that person in applying for that program, the conclusion is inescapable that he is in effect soliciting insurance business. It is exactly this type of conduct that the insurance licensing and regulating laws seek to avoid. Licensing of insurance agents is required primarily for the purpose of protecting innocent citizens from the dangers inherent in the sale of insurance by those persons not familiar with or knowledgeable about the policy they are promoting.

We, therefore, conclude that it is illegal for a foreign unlicensed insurance company to attempt to sell insurance contracts to New Mexico residents by contracting with or obtaining assistance from the University of New Mexico and its staff. Further, those employees and staff members who assist in obtaining contracts of insurance for the company from other employees and staff members are acting as agents and must be licensed as such.