

Opinion No. 36-1265

January 14, 1936

BY: FRANK H. PATTON, Attorney General

TO: Hon. Geo. M. Biel, Superintendent of Insurance, Santa Fe, New Mexico.

{*94} In your letter of January 8th, 1936, you refer to Section 71-127 of the 1929 Code and ask our opinion upon the following two questions, which depend upon the proper interpretation of said statute.

"Can dividends paid by mutual life insurance companies, which includes not only excess premiums collected from the policy holders but also earnings from lapses, forfeitures and other sources, be considered as "return premiums"?"

"Can dividends paid by stock insurance companies to policy holders, on participating policies which constitute a participation of certain profits that the stock company has designated by its board of directors or in the insurance contract itself, be considered as returned premiums?"

The first question may be at once answered in the affirmative since the question has been expressly decided by the Supreme Court of New Mexico in *New York Life Insurance Company vs. Chavez*, 21 N.M. 264.

The second question, in my opinion, should likewise be answered in the affirmative although the question, so far as I have been able to determine, has not been expressly decided by our Supreme Court. It appears that in the State of Indiana a distinction is made between companies operating upon the "stock" plan and mutual companies. The Supreme Court of that state in *Metropolitan Life Insurance Company vs. State*, 116 N.E. 579, held that where stock insurance companies, such as you refer to, issuing participating policies, declare dividends on such policies that such dividends cannot be considered as "return premiums." The same court in a case bearing the same title, reported in 144 N.E. 421, holds with reference to mutual insurance companies the same as the Supreme Court of this state held in *New York Life Insurance Company vs. Chavez*, supra. Personally, I do not see any valid distinction between the two cases.

It appears to me that whether the insurance company be what is known as stock insurance company or a mutual insurance company, if it issues policies upon what is sometimes called the "level premium" plan and returns to policyholders a portion of their premium in the form of so-called dividends such dividends should be considered as "return premiums" within the meaning of our statute. See *Conn. General Life Insurance Company vs. Eaton*, 218 Federal 188.

It will be noted also that in the case of *State ex rel. Brewster vs. Wilson* (Kans.) 172 P. 41, the Supreme Court of Kansas cites numerous cases supporting the majority view

and states that "the case of Metropolitan Life Insurance Company vs. State (Ind.) 116 N.E. 579, is largely at variance with the prevailing view of the cases cited above."

There is very little doubt in my mind that the Supreme Court of New Mexico, if it was presented with the second question in your letter, would answer it in the same way that it answered the first question in New York Life Insurance Company vs. Chavez, supra, notwithstanding the Indiana case above cited.

If you are interested in examining the cases upon the general subject of your letter, I refer you to the following: Herold vs. Mutual Benefit Life Insurance Company, 201 Fed. 918; Eaton vs. Conn. General Life Insurance Company, 223 Fed. 1022; Mutual Benefit Life Insurance Company vs. Commonwealth, 128 Ky. 174, 107 S.W. 802; Commonwealth vs. Pa. Mutual, 252 Pa. 512, 97 Atl. 677; Commonwealth vs. Metropolitan Life, 254 Pa. 510, {*95} 98 Atl. 1072; New York Life vs. Styles, 59 Law J. Rep. Q.B. 291; Mutual Benefit Life vs. Herold, 198 Fed. 199; cases cited under American Digest System title -- "Taxation" Key No. 140.

By: QUINCY D. ADAMS,

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