Opinion No. 36-1382

June 10, 1936

BY: FRANK H. PATTON, Attorney General

TO: Mr. George M. Biel, Superintendent of Insurance, Santa Fe, New Mexico.

*{*122}* In your letter of May 28th you have enclosed a specimen form of insurance policy used by the General Insurance Company of America in writing fire insurance policies in this state. You have also enclosed a certified copy of the Standard Fire Insurance Policy in force in the State of New York. It appears that the form used by the General Insurance Company is identical with the New York Standard form except that it contains the following endorsement:

"The Board of Directors, in accordance with Paragraph 7 of Article III, of the Company's Articles of Incorporation, may from time to time distribute equitably to the holders of the participating policies issued by said Company such sums out of its earnings as in its judgment is proper."

You request our opinion as to whether or not the form of policy of the General Insurance Company containing the above endorsement is inconsistent with Section 71-166, 1929 Compilation, as well as Section 71-148 of said Compilation. You refer to an opinion of the Supreme Court of Wyoming, handed down May 5, 1936, in the case of General Insurance Company vs. Ham and enclose a copy of the opinion in said case.

I am of the opinion that the form of policy used by the General Insurance Company in this state does not violate Section 71-166, 1929 Compilation. It will be noted that this section provides that a company licensed to transact an insurance business in this state shall not issue a policy against loss by fire and lighting other than the form of policy legalized as standard by the State of New York, provided "that no riders, endorsements, clauses, permits, forms or other memoranda shall be used which are inconsistent with said standard form of this Act."

I have carefully read the New York standard form of policy which you have submitted to me and I can find nothing in it which, in my opinion, is inconsistent with the endorsement hereinabove referred to. Indeed the standard form contains this clause:

"The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss or damage, and **any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy,** may be provided for by agreement in writing added hereto."

The decision of the Supreme *{*123}* Court of Wyoming referred to does not in any manner change my views on this question since the Wyoming statute is entirely different from the New Mexico statute. The Wyoming statute is Section 57-218 of the

Wyoming Revised Statutes, 1931. It defines "the Standard Fire Insurance Policy of the State of Wyoming" and provides that "no other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy, or endorsed thereon, or added thereto, or delivered therewith except as follows, to-wit:

* * * The exceptions named in the Wyoming statute are set out at length and it was contended by the General Insurance Company of America in the case above referred to that it was authorized to issue its policy by reason of the exception contained in the fifth subparagraph of the Wyoming statute. The Supreme Court of Wyoming held that this exception did not cover the kind of policy proposed to be issued. That seems to be the extent of the decision in that case.

I am also of the opinion that the inclusion of the endorsement refered to in the policy form does not constitute a violation of Section 71-148, 1929 Compilation. The pertinent part of this statute provides that:

"Nor shall any such company, officer or agent thereof, make any contract of insurance other than as plainly expressed in the policy itself."

Since the provision for paying dividends is expressed in the policy, I can see no violation of this part of the statute. There is no question yet of whether the company allows rebates since you do not state whether or not dividends have actually been paid. However, it is my opinion that the payment of such dividends would not, of itself, constitute the giving of a rebate provided the company does not discriminate between individuals in the same class. The statute provides that insurance companies in this state shall not "make or permit any variation in favor of any insured in the amount of premiums or rates charged for any contract of insurance from the forms and published rates covering the risk or hazard insured under said contract of insurance, or in the dividends or benefits payable thereunder."

It seems to me that this language contemplates the payment of dividends and instead of prohibiting the payment of dividends, by inference at least, permits it, provided that no variation from the dividends allowed by the contract of insurance is made in favor of any insured. In this connection see State ex rel Merchants vs. Conn., 144 N.E. 130 (O.) and State vs. Schwarzchild, 22 Atl. 164 (Me.).

Trusting that the above fully covers the questions raised in your letter, I am

By QUINCY D. ADAMS,

Asst. Atty. General