

Opinion No. 42-4206

December 31, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. R. F. Apodaca Superintendent of Insurance State Corporation Commission
Santa Fe, N. Mex.

{*293} We have your letter of December 22, 1942, wherein you request an official opinion of this office concerning the following policy form which has been submitted to your office, to-wit:

{*294} "To pay any loss occurring within the policy period of continuation thereof by certificate;

I. . . .

"OUTSIDE PREMISES WORLD WIDE.

"II. By theft of property belonging to, used or worn, by the insured, and permanent members of his family residing with him (except one who pays board or rent to the insured,) and by his domestic servants while in their custody and actually engaged in his services, outside the premises anywhere in the world;"

You specifically ask whether, in view of the provisions of Section 7, Chapter 138, Laws of 1937 (Section 60-501, New Mexico

Statutes Annotated, 1941, Class 2 (e), such a clause can be inserted in such a policy.

Section 60-501, supra, provides:

"It shall be lawful, subject to the limitations hereinafter set forth, to transact the following forms of insurance in the state of New Mexico:"

Class 2, sub-section (e) of such section further provides:

"Burglary and Forgery. (1) Insurance against loss or damage by * * * theft * * * and including insurance against all loss of or damage to household and personal property while located **within the insured's residence**, * *"

It is noted that the clause in the above mentioned policy attempted to insure against theft outside the insured's residence. The question is strictly one of statutory interpretation, and depends solely on whether the last cited phrase of such section restricts the first part of such sub-section (e). The first clause of such sub-section provides for insurance against loss by theft without any restriction concerning whether

the property be in or out of the insured's premises. Therefore, to determine whether the last clause of such section restricts such first clause, it is necessary to determine what meaning our Supreme Court may be expected to attach to the second clause. This question will depend on the meaning attached to the phrase, "and including, etc."

In my opinion this latter phrase was not intended to limit or restrict the first part of such subsection, but was intended to be illustrative only.

"* * * a provision that a word shall 'included' a certain thing does not exclude other meanings. In re Harper, 175 F. 412, 423."

"Statute authorizing distraint of delinquent taxpayer's goods, 'including' stocks, securities, bank accounts, and evidences of debt, held not intended to exempt intangible property not listed, such as annuity policy, although 'bank accounts' was added in 1924, rule that expression of one thing is exclusion of another being unavailable. 'Including' has various shades of meaning, sometimes of restriction and sometimes of enlargement, and as used in 26 U.S.C.A. Section 1580 evidences caution to point out certain classes of property which Congress was fearful a collector might overlook, and was not intended to limit distraint classes of intangibles. Moreover, in a true if not a colloquial sense, an annuity policy is an 'evidence of debt.' Cannon v. Nicholas, C.C.A. Colo., 80 F.2d 934, 936."

In the case of Helvering v. Morgan's, Inc., 55 S. Ct. 60, 293 U.S. 121, 79 L. Ed. 232, the court said:

"* * * provision that the {*295} term 'taxable year' 'includes' a period of less than twelve months for which separate return is made does not mean that term 'taxable year' must under all circumstances be construed as only a fractional part of year to the exclusion of alternative definitions of calendar or fiscal year, especially since word 'includes,' although sometimes synonymous with 'means,' is also used as equivalent of 'comprehends' or 'embraces'."

In the case of In re Goetz, 75 N.Y.S. 750, 751, it was held:

"In a bequest 'of all my personal property,' including furniture, plate, etc., the word 'including' was not held to limit the bequest to the property enumerated after the wording, but to cover all of testator's personal property."

In view of the above authorities, it is my opinion that the clause "and including" in no way restricts the general power to write insurance against loss or damage by theft as to whether such loss is within or without the insured's residence.

Trusting that the foregoing sufficiently answers your inquiry, I am

By HARRY L. BIGBEE,

Asst. Atty. General