

Opinion No. 43-4415

November 27, 1943

BY: EDWARD P. CHASE, Attorney General

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

We are in receipt of your letter of November 20, 1943, in which you state that an insurance company has filed with your department a classification for the purpose of rating risks belonging to different nationalities of this state. In your letter you proceed to outline the various classifications that this company proposes to make with respect to Chinese, Japanese, Filipinos, Indians and Mexicans. You ask our opinion as to whether or not classification of this nature is contrary to the provisions of Article 2, Section 18 of the New Mexico Constitution and Section 60-704 of the 1941 Compilation.

The above referred to article of the Constitution can have no bearing on this matter, since the constitutional provision applies only to laws, while the proposed plan is a matter of contract.

Section 60-704 of the 1941 Compilation provides, in part:

"No insurance company licensed to transact business in the state of New Mexico shall make or permit any variation in favor of any insured in the amount of premiums or rates charged by it for any contract of insurance from the premiums or rates charged other persons against a like hazard or hazards . . . * * * provided, however, that nothing in this section shall prohibit either the filing or use of rating plans which do not result in unfair discrimination as between risks of essentially the same hazard."

The plan mentioned above could not be considered a rating plan, since it applies to a whole segment of the population while the cases defining rating plans consider such plans to be those where the premium is adjusted for a particular insured based on his actual loss experience, but even though it did apply what is said hereinafter would prevail, since it would amount to an unfair discrimination.

Certainly, on the face of what you have said in your letter, the statute will be violated, since, under the proposed classification, peoples belonging to certain races would be charged different premiums than those charged peoples of other races. Even though the company were to submit actuarial statistics showing that the life expectancy of the persons of the above mentioned races was shorter than that of other races, yet a discrimination would exist, since some persons of those races, being in as good physical condition as persons of other races, would individually have a life expectancy equal or greater to those obtaining the standard rates. Thus, if discrimination would result as against any one person by that person being charged any variation in rate, a violation of this statute would occur. It appears to me that the use of the term "hazard" in

this statute cannot be made to apply to a whole race of people, but only to the individual insured, based on his age and physical condition.

It is, therefore, my opinion that the proposed plan is a violation of Section 60-704 and that it is your duty to refuse to authorize the issuance of such policy.

In my research I could not find any cases directly in point on this proposition; however, the reports abound with cases wherein state laws have been held contrary to the 14th amendment of the Federal Constitution where any difference in statutes was made as to persons because of their race, and further, many cases holding discriminatory policies where the discrimination was much less subtle than this.

By ROBERT W. WARD,

Assistant Attorney General