

## Opinion No. 45-4736

June 15, 1945

**BY:** C. C. McCULLOH, Attorney General

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

{\*88} Replying to your letter of June 8, 1945, requesting an opinion on the question whether or not capital stock life insurance companies may issue in this state ordinary life insurance contracts by adding thereto and making the following provisions a part of the entire policy:

"Upon the payment in cash, of the second full annual premium, the Company will deposit in a Policyholder's Persistency Fund a sum equal to one-fourth of such premiums. Upon the payment, in full, of the third full annual premium, the Company will deposit in said fund one-half of such premium. A deposit of a like amount will be made in said fund upon the payment in full of each of the two subsequent annual premiums; with the result that after five full annual premiums have been paid, there will have been deposited in the fund four separate amounts; one equal to one-fourth the annual premium and the other three each equal to one-half the annual premium.

"In like manner, deposits will be made in this fund for all policies of the same kind issued {\*89} during the same calendar year upon which said premiums are paid in full. The fund will be increased annually by compound interest at the rate of 3% per annum and will be distributed only in the following manner:

"If the insured be living on the 20th anniversary of this policy and all premiums have been paid by the insured in full, the policy's proportionate share of the fund will be paid the insured in cash.

"The Company agrees that no deduction shall be made from said fund for any purpose whatsoever."

For convenience, I will refer to the quoted provisions above as the "Persistency Fund Provisions." These provisions clearly place the policy in the category of tontine insurance. 14 Ruling Case Law, Insurance, Section 4, page 842 reads as follows:

"Tontine Policies -- When applied to insurance, it seems to have an opposite effect from the real matter of the subject, the latter being to pay if one dies, the former to pay if one does not die. Tontine insurance, therefore, was an agreement to divide the 'surplus' which all of that class had contributed among those who outlived the term agreed upon, and who persisted as paying members. \* \* \* The plan has met with much criticism, and it is forbidden altogether by the laws of some states."

Gourley v. Northwestern Nat. Life Ins. Co., 220 Pac. Reporter, Sections 9/10, page 646 states:

"The distinctive features of a 'tontine policy' are: That the dividends of a certain group of policies shall be collected and placed into a particular fund during a given number of years, and distributed to the policy holders, at the expiration of the time named. The years during which the fund is accumulated is known as the 'tontine period.' Those who die or lapse their policies lose the benefit of the accumulated dividends which go to the benefit of those who completed the tontine period. Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; Pierce v. Equitable Life Ins. Society, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433."

Some law writers, Crouch -- Insurance, Vol. I, Section 50, have referred to policies within the above class as lotteries.

It is the opinion of the writer that the Legislature intended to prevent the writing of the above type of insurance when it enacted Section 60-601 of the 1941 Compilation, as amended by the Laws of 1943, Chapter 109, the opposite portion being as follows:

"If it be a participating policy, a provision that the policy shall participate in the surplus of the company and that \* \* \* the company will annually determine the portion of the divisible surplus accruing on the policy, and that the owner of the policy shall have the right each year to have the correct dividend arising from such participation \* \* \* paid in cash, etc."

"The object of all participating policies is to provide a method whereby the policy holders, being equitably entitled to the surplus, may have that surplus paid or credited to them. Our statute specifically provides one method of dividing that surplus and this method must be included in all participating policies. It thereby, in my opinion, prohibits any other method of distributing that surplus." (Opinion No. 1512.)

"Dividend" as used in Section 60-601, amended by Chapter 109, Laws of 1943, appears to be broad enough to cover the question whether "Policyholder's {90} Persistency Fund" is included within the term "dividend."

The Collegiate Law Dictionary defines "dividend" as follows:

"A distributive sum, share, or percentage arising from some joint ventures." 18 C.J. 1406.

The interpretation of the above section is further fortified by the case of United States Life Ins. Co. v. Spinks, 126 Ky. 405, 103 S. W. 335, 13 L. R. A. (N.S.) 1053:

"It would be inexplicable that the Legislature could have intended to protect policy holders from the forfeiture of their reserves, and additions to their insurance bought by a part of the "surplus", and yet allow that their "surplus" which had not been so applied

could be forfeited for the same cause which was deemed inequitable and unjustifiable, and which experience has demonstrated was in truth so."

In view of the foregoing section of our statute, and authorities quoted, the "persistence fund provisions" are "unlawful for any life insurance" policy issued in the State of New Mexico except "other than industrial insurance, annuities, or pure endowments," as set forth in Section 60-601 as amended in 1943.

It is, therefore, my opinion that a capital stock life insurance company cannot legally issue an ordinary life insurance contract which includes the provisions as set forth in the above persistence fund provisions quoted.

By THOS. C. McCARTY,

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