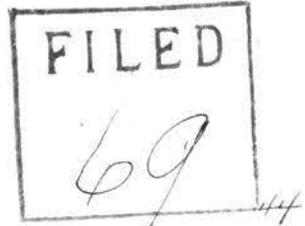


INSURANCE:

When insurance company liable for premium tax - Mutual Benefit Health and Accident Association of Omaha, Nebraska.

9-23.
September 12, 1933

Honorable R. E. O'Malley
Superintendent of the Insurance Department
Jefferson City, Missouri



Dear Mr. O'Malley:

By letter dated May 22, 1933, your predecessor in office Joseph B. Thompson, Esquire, submitted to this office the following inquiry:

"A controversy has arisen between the Mutual Benefit Health & Accident Association of Omaha, Nebraska and this Department as to whether that Association is liable for a premium tax on its business transacted in Missouri under section 8779 or section 5979, R.S. Mo. 1929.

I enclose herewith statement and brief prepared by Mr. Fred Drexley of Kansas City on behalf of the Association contending against the tax; an opinion by Mr. Weatherby holding that said Association is taxable under Section 5979, supra; also Mr. Drexley's reply to Mr. Weatherby's opinion.

Up until 1932 this Association has been licensed in Missouri as an assessment company. In 1932 shortly before their license was renewed the question arose as to the character and form of policy they were selling in Missouri and after considerable discussion, more as a matter of compromise than anything else, it was agreed that they should be licensed as a stipulated premium company thereafter and that they should pay a premium tax of 1% under said section 8779.

This year, however, the association through Mr. Boxley protested against the payment of any tax whatever and thus the question is before us again.

It will very likely result in a suit unless your office is of the opinion that Mr. Weatherby is wrong in his conclusion. It is almost certain that they will refuse to pay any tax and will drive the Department to an action for its recovery. This being true I feel that the matter should be submitted to you for your opinion. Will you therefore kindly give us your opinion on the subject involved."

From time to time various briefs have been submitted for the consideration of this office and we now give you our final conclusions thereon. In determining a question such as is now presented the Supreme Court of this state speaking of an assessment company having a license, laid down the following rule:

"Its measure of authority for legitimate business in Missouri is our statute. The test of the character of the policy it issues is the statute, and not the license it may have obtained."

Ordelheide v. Modern Brotherhood of America, 268 Mo. 339.

So that the character of license issued to the Mutual Benefit Health and Accident Association is immaterial so far as this state is concerned, except as that fact may be useful in determining whether or not the contract issued by the company is an assessment contract. On that point in *Westerman v. Supreme Lodge K. of P.* 196 Mo. 670, 707, the Supreme Court said:

"We take it that in assigning reasons upon which to rest the conclusions reached in this case the practical construction of the statutes applicable to the insurance laws of this State, given by the department of state government, which has the direct supervision of the Insurance Department

of the State, as well as the manner of all insurance companies and other associations in conducting the business of insurance in which they are engaged in this State, should not be ignored."

In *Lee v. Missouri State Life Insurance Company*, 303 Mo. 492, 501, Division No. 2 of the Supreme Court, in a suit involving an assessment insurance contract, said:

"It is not material that the word 'assessment' was not used in the certificate. It means nothing more as applied to the facts here under consideration than an apportioning of amounts required to be paid."

The Supreme Court of this state in *Westerman v. Supreme Lodge K. of P. supra*, at page 716 of the opinion, and quoting from 104 Fed.718, approved the following language:

"While the premium at first reserved is a definite sum, yet by further provisions the executive committee of the company can require the holders of such policies to pay a greater or less sum than that stipulated to be paid on the face of the policies, if the condition of the defendant company at any time renders such action necessary . . . When all the provisions of the contract are considered, it seems to retain all the essential features of assessment insurance."

The same principle is announced in *Hanford v. Massachusetts Benefit Association*, 122 Mo. 50.

Section 5745 of Article III of Chapter 37, Revised Statutes of Missouri 1929 covering insurance on the assessment plan, provides as follows:

"Every contract whereby a benefit is to accrue to a person or persons named therein, upon the death or physical disability of a person also named therein, the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan, and the business involving the issuance of such contracts shall be carried on in this state only by duly organized corporations which shall be subject to the provisions and requirements of this article."

Section 5754 provides in part:

"* * * Provided, always, that nothing herein contained shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this state, except as distinctly herein set forth and provided."

The Supreme Court of this state in *Masonic Aid Association v. Waddill*, 138 Mo. 628, 638, construed the above sections and held insurance companies doing business upon the assessment plan not liable for the insurance premium tax provided for in the general insurance law, the court said,

"So that when in 1895, the legislature determined to impose a license or occupation tax on insurance companies as evidenced by the passage of the act 'approved March 20, 1895,' they could, without infringing upon this constitutional requirement, have imposed such tax upon both or either of these classes. That they intended to impose it upon the premium life and casualty insurance companies only, and not upon the life and casualty insurance companies doing business upon the assessment plan, is plainly evident from the act which left

article 3 intact, and section 5869 of that article containing the exemption aforesaid unrepealed, while specifically repealing other sections of the general insurance law, and by its terms imposing the tax upon 'premiums' only and not upon 'assessments'."

Young v. Life Insurance Company, 277 Mo. 694, involved the question of the liability of an assessment company for premium tax in this state. The court at page 699 of the opinion said:

"No such tax was demandable, under the statutes and decisions of this state, by any company doing business on the assessment plan."

In Hartford Life Insurance Company v. Blincoe, 255 U. S. 129, 65 L. Ed. 549, the Supreme Court of the United States speaking of the decisions of the Supreme Court of this state, at page 135 of the opinion said:

"~~was~~The court decided that the tax was not applicable to companies doing business on the assessment plan ~~was~~."

Section 5979 Revised Statutes Missouri 1929 as amended by Missouri Laws 1931, at page 242, reads as follows:

"Every insurance company or association, not organized under the laws of this state, shall, as hereinafter provided, annually pay tax upon the premiums received, whether in cash or in notes, in this state or on account of business done in this state, for insurance of life, property or interest in this state at a rate of two per cent. per annum in lieu of all other taxes, except as in this article otherwise provided, which amount of taxes shall be assessed and collected as hereinafter provided: Provided, that 'Fire and casualty' insurance companies or associations shall be credited with canceled or

return premiums, actually paid during the year in this state, and with premiums on reinsurance with companies, authorized and licensed to transact business in Missouri, which reinsurance shall be reported by the company reinsuring such business; but no credit shall be allowed any such insurance company or association for reinsurance in companies not licensed to transact business in Missouri."

The above section is found under the general provisions regulating the business of insurance companies in this state.

Section 5779 provides that all foreign insurance companies doing business in this state on the stipulated premium plan shall pay a tax on gross premiums at the rate of one per centum per annum.

While the Mutual Benefit Health and Accident Association was organized as an assessment company under the laws of the State of Nebraska, yet, from the foregoing statutes and decisions, and since this state has the right to make any regulations or restrictions it desires as to the conduct of business by foreign insurance companies in this state, we think the real question at issue in this matter is whether or not the company is or has been doing business in this state on the assessment insurance plan. That question is to be determined by a construction of the form of contract issued by the company to its policy-holders and to the form of such contract we next give our attention.

Section 5750 R. S. 1929, provides:

"Any company organized under the authority of another state or government to issue certificates or policies of life or casualty or life and casualty insurance on the assessment plan * * * * * shall deposit with the Superintendent of the Insurance Department * * * * * a copy of its policy of certificate and application which must show that the liabilities of the members are not limited to fixed or artificial premiums."

The copies of policies of the association in question on deposit with the Superintendent of the Insurance Department of this state require the first payment to be made in advance and thereafter quarterly or annual premiums are payable in advance. The Westerman case above quoted from shows that the fact that fixed premiums are required does not, in and of itself, make the contract an old line policy. We quote further from Lee v. Missouri State Life Insurance Company, supra, at page 500,

"The question necessary to be solved in this proceeding is the character of the contract. If upon its face it clearly indicates that the payments, by the insured necessary to continue the life of the policy were to be gathered in whole or in part from the assessments upon the holders of certificates of a like class, then the certificate or policy may be classified as upon the assessment plan (Williams v. Ins.Co. 189 Mo. 1. c. 81; Andrups v. Accdt.Assn. 283 Mo. 1. c. 449); if, however, it provides for the payment of fixed premiums at stated intervals without condition, then it is to be classified as a level-premium or old-line policy."

The sample form of policy on deposit in the office of the Superintendent of the Insurance Department contain the following provision:

"Should the premium provided for herein be insufficient to meet the requirements of the association, it may call for the difference as required."

Undoubtedly the requirements of the association are for such funds as will discharge the liabilities of the association to its members. It is true the policy does not contain any provision as to details in the collection of such requirements but the policy-holder upon acceptance of the policy containing the foregoing provision agrees to its terms and we see no reason why the provision could not be enforced by the association upon making timely and equitable calls against the holders of such contracts. If we are correct in that conclusion, then there can be no doubt

that the payment of benefits under such policies of the association are in a manner or degree dependent upon the collection of a sum of money in addition to the premiums, the amounts of the latter being fixed by the policy.

We have quoted from Section 5750 requiring this association to deposit with the Superintendent of the Insurance Department a copy of its policy or certificate. It has done so. The policies of the association on deposit with the Superintendent of the Insurance Department of this state contain the above quoted provision, and we assume the association has only issued contracts to its policy-holders in this state in the form of the policies on deposit with the Superintendent, therefore, as required by Section 5745 payment of the benefit under the policies issued in this state is dependent upon the collection of an assessment from the persons holding similar contracts. Under the holding in *Lee v. Insurance Company*, supra, this is true even though the quoted provision of the form of policy issued by the association does not contain the word "assessment".

We have not overlooked the case of *State ex rel v. Revelle*, 260 Mo. 112, which was an action in mandamus to compel the State Superintendent of Insurance to issue a license to the relator to write life insurance in this state upon the assessment plan. The controversy arose over the form of the policy desired to be issued by the company. The position of the Superintendent was that the form of policy desired to be issued by the company was deceptive on its face and the main contention centered around the stipulation in the policy set out at page 115 of the opinion. It is similar to the clause in the policy under consideration and is as follows:

"Should the premium be insufficient to meet the requirements of this policy, the company reserves the right, in compliance with the law of its incorporation, to call for the difference necessary to meet the requirements and to fix the time for the payment thereof."

In the latter case, however, on the front page of the policy and above the signatures of the officers of the company, is a requirement for fixed and unchangeable premium payments. The provision of the policy last quoted was to be found on the back of the policy. Passing on the matter the court at page 118 of the opinion said:

"The law does not contemplate that obligations to pay several premiums, some of them fixed and others contingent, may be scattered promiscuously and disconnectedly over all parts of a policy, so that, perchance, the purchaser may overlook some of them and thereby obligate himself to pay more than he intends to pay.

In order that a policyholder may not be deceived, if there is (as in these proposed policies) a definite premium named on the front page, the very paragraph or proviso which designates such stated premium should, in plain words, refer to the fact that under other provisions of the policy additional premiums may be called for and collected. When this is not done the policy fails to show that the premiums are not limited as required by section 6955, supra.

Instead of being so framed as to promote honesty and open fair dealing between the insured and the insurer, all the proposed policies attached to relator's petition are so framed as to deceive the insured."

The court seems to have based its ruling on the arrangement of the respective provisions in the policy. The sample policies of the Mutual Benefit Health and Accident Association containing the provision above quoted from same, sets out the provision with reference to fixed payments and immediately follows with the provision hereinabove set out and both are carried above the signatures of the officers of the association. By this, we do not mean that the Superintendent would not be entirely warranted in requiring the policies of the association to be reformed so that there could be no argument as to whether assessments could be levied under similar contracts in addition to the payment of fixed premiums. We quote again from *Lee v. Insurance Company*, page 501,

"It is true, that for a fixed period, five years, the quarterly payments required of the insured were to be

made at regular intervals and in certain uniform amounts. This requirement, however, was not unconditional, but subject to certain provisions indorsed on and which became a part of the contract. One of these provisions was to include certain quarterly dues on each thousand dollars of insurance and pro rata amounts necessary for mortuary purposes. By this we understand that payments thus required to be made by the insured are to constitute pro rata amounts necessary to meet the death benefits on matured obligations of the Association."

The provision in the policy there under consideration stating that,

"Pro rata amounts necessary for mortuary purposes,"

was the basis of the holding that the policy required payments other than the fixed premiums and therefore was an assessment contract. We fail to see wherein the provision of the policy of the association in question is not at least as strong as the provision in the policy construed in the Lee case. In that regard, we think the decision of the Kansas City Court of Appeals in *Wollums v. Mutual Benefit Health and Accident Association*, 38 S. W. (2nd) 259, is in conflict with the opinion in the Lee case.

It is the opinion of this Department that the Mutual Benefit Health and Accident Association of Omaha, Nebraska, is not liable for premium tax on premiums collected by it under policies issued containing the provision hereinbefore set out.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.