

December 22, 1961



Honorable Jack L. Clay
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

This letter of advice is in lieu of a formal opinion in answer to the inquiry of your immediate predecessor forwarded on June 13, 1961, with respect to his authority under applicable statutes to prohibit the use of "good health" or "sound health" clauses in accident and health policy forms.

Before discussing Missouri's statutes particularly applicable to accident and sickness insurance policies it is necessary to take notice of the legal character of the insurance contract. At 44 C.J.S., Insurance, Sec. 223, we find the following text:

"A contract of insurance is a commercial or mercantile contract. While it has some features which distinguish it from an ordinary commercial contract, in general respects it is like any other contract and is governed by the same rules. Being a voluntary contract, as long as the terms and conditions made therefor are not unreasonable or in violation of legal rules and requirements, the parties may make it on such terms, and incorporate such provisions and conditions as they see fit to adopt."

In *Winters v. Reserve Loan Life Insurance Company*, 221 Mo. App. 519, the Kansas City Court of Appeals was construing the provisions of a life insurance contract and spoke as follows at 221 Mo. App. 519, 1.c. 524:

Honorable Jack L. Clay

"There is no evidence as to how the amount of the initial premium of \$1194.25 on the substituted policy was arrived at or what it was made up of. Of course it was quite immaterial as to how the amount was computed for the reason that the parties were at liberty to enter into any sort of a contract they desired without interference by the courts, except for fraud, mistake, or the like, or lack of consideration."

It is of interest to note that the Winters case, cited above, did have a "good health" clause in the insurance contract, though it was not in issue.

Judicial approval of "sound health" clauses in life insurance contracts is to be noted in the following language from *Kirk v. Metropolitan Life Insurance Company*, 336 Mo. 765, 1.c. 783, 784, 81 S.W. 2d 333:

"We think also that the Kern case correctly construes the statute as making no distinction between innocent and fraudulent misrepresentations, especially when the statute is applied to a sound health condition in the policy itself such as in the instant case. That stipulation is a part of the contract which the parties had a right to and did make. The insurer agreed to assume liability only upon condition that the insured should be, not merely believe herself to be, in sound health when the policy was issued, and the premium was fixed upon that basis."

Kirk v. Metropolitan Life Insurance Company, supra, is quoted approvingly in *Lipel v. General American Life Insurance Company*, 192 S.W. 2d 871.

With reference to the general rule that contracts of insurance are to be governed by the same rules as other contracts, the following language is cited from *Howard v. Aetna Life Insurance Company*, 346 Mo. 1062, 1.c. 1067, 145 S.W. 2d 113:

"Respondent cited a number of cases in support of its contention that contracts of insurance must be governed by the same rules as other contracts. That is fundamental law."

Honorable Jack L. Clay

In discussing the power of the Legislature as distinguished from the power of the Insurance Commissioner to prescribe a form of insurance contract to be written, the following language is not to be overlooked from *Nalley v. Home Insurance Company*, 250 Mo. 452, 1.c. 466:

"So that we repeat that there can be no question (owing to the intricacies of insurance contracts) that the Legislature can prescribe a form for such contracts to be used in this State, but in our judgment it cannot delegate this important task to either the Insurance Commissioner or to the insurance companies, or to both combined. If public policy demands that the public be protected in these contracts the police power is no doubt broad enough to authorize legislative action, but it yet remains a legislative duty, which cannot be delegated."

The case of *Nalley v. Home Insurance Company*, supra, decided in 1913, was followed by *Swinney v. Connecticut Fire Insurance Co.*, 8 S.W. 2d 1090, decided by the Springfield Court of Appeals in 1928. In this latter case the Court was discussing Section 6239 RSMo 1919, now found at Section 379.160 RSMo 1959, such statute being commonly referred to as the standard fire policy form law. That statute continues to provide that "said policy form may be approved by the insurance commissioner [superintendent of insurance] of this [the] state." With reference to said statute the Springfield Court of Appeals spoke as follows at 8 S.W. 2d 1090, 1.c. 1092:

"This standard form is recognized by our statutory law, and is required to be filed by all old line insurance companies doing business in this state with the state insurance commissioner and by him approved. Section 6239. In so far as this particular statute attempts to permit the insurance commissioner and insurance companies to write the terms of an insurance policy, it is unconstitutional and void."

Your authority, if any, to prohibit the inclusion of "sound health" or "good health" clauses in individual accident and health policy forms being used in Missouri must be found in Section 376.770 to 376.795 RSMo 1959, such statutes being titled "Uniform Individual Accident and Sickness Insurance Law," and

enacted by the 70th General Assembly of Missouri (Laws 1959, H.B. No. 252). The general power of the superintendent of insurance to approve policies under this law is found spelled out in language found at Paragraph 7 of Section 376.777 RSMo 1959, reading as follows:

"7. Approval of policies. No policy subject to sections 376.770 to 376.795 shall be delivered or issued for delivery to any person in this state unless such policy, including any rider, indorsement or other provisions, supplementary thereto, shall have been approved by the superintendent of insurance. The superintendent shall have authority to make such reasonable rules and regulations concerning the filing and submission of policies as are necessary, proper or advisable. Such rules and regulations shall provide, among other things, that if a policy form is disapproved, the reasons therefor shall be stated in writing; that a hearing shall be granted upon such disapproval, if so requested; and that the failure of the superintendent of insurance to take action approving or disapproving a submitted policy form within a stipulated time, not to exceed sixty days from the date of filing, shall be deemed an approval thereof until such time as the superintendent of insurance shall notify the submitting company, in writing, of his disapproval thereof. The superintendent of insurance shall approve only those policies which are in compliance with the insurance laws of this state and which contain such words, phraseology, conditions and provisions which are specific, certain and unambiguous and reasonably adequate to meet needed requirements for the protection of those insured." (Underscoring supplied)

The language first underscored in Paragraph 7 of Section 376.777, supra, limits the rule making power of the superintendent of insurance to those rules and regulations he may make pertaining to the "filing and submission" of policies, and cannot be construed as granting authority to the superintendent to order additional contract provisions to be placed in the policy, or to

Honorable Jack L. Clay

order contract provisions deleted. The second underscored portion of Paragraph 7 of Section 376.777, supra, places a duty upon the superintendent of insurance to approve only those policies which are in compliance with the laws of this state, and which contain "such words, phraseology, conditions and provisions which are specific, certain and unambiguous and reasonably adequate to meet needed requirements for the protection of those insured." The duty placed upon the superintendent of insurance by language just referred to, and appearing in Paragraph 7 of Section 376.777, supra, must be read in the light of all provisions found in the Uniform Individual Accident and Sickness Insurance Law (Secs. 376.770 to 376.795 RSMo 1959).

Without discussing in detail the matters required to be expressed in the policy by Section 376.755, and the specific provisions required in the policy by Section 376.777, it will suffice to say that nowhere in this law is there a reference made to inclusion or exclusion of "sound health" or "good health" clauses in policies, or applications which may become a part of such policies.

It is conceivable that a "good health" or "sound health" clause appearing in an application to become a part of an accident and health policy form subject to approval under authority found in Paragraph 7 of Section 376.777 RSMo 1959, may be so worded as to be not specific, uncertain, ambiguous, and not reasonably adequate for the protection of those insured, as such language is used in the statute.

In view of our analysis of the statute and case law related to this subject, as expressed in this letter, it is recommended that until such time as experience in the Division of Insurance has demonstrated that the use of "sound health" or "good health" clauses is working to the detriment of the insurance buying public you should place no obstacles in the way of the use of such clauses.

When experience has demonstrated that the use of "sound health" or "good health" clauses is not to the best interests of the insurance buying public, or that such clauses are on their very face manifestly ambiguous, uncertain and misleading, it is our thought it will then be appropriate for you to consider the advisability of recommending legislative action to correct the situation, or perhaps some other remedy.

Honorable Jack L. Clay

This office stands ready to construe any particular "sound health" or "good health" clause you find necessary to submit for examination.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO 'M:mn:mc