Opinion No. 44-4528

June 13, 1944

BY: EDWARD P. CHASE, Attorney General

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

We are in receipt of your letter of June 9, 1944 and the enclosed correspondence between your office and the Lincoln National Life Insurance Company of Indiana. In your letter you do not ask an opinion upon any specific question and so I have reviewed the questions raised in the various letters and give you my opinion as to such questions.

(1) Does the fact that no New Mexico life insurance company is doing business or seeks to do business in Indiana prevent Sec. 2, Chap. 110 of the Laws of 1943 (Sec. 60-403 of the New Mexico 1941 Compilation), being our retaliatory statute, from applying?

This question was adequately covered in Opinion No. 4308, dated June 2, 1943, wherein we ruled that our retaliatory statute became operative immediately upon the passage of a law by any foreign state imposing greater fees or taxes than those imposed by New Mexico on foreign insurance companies. This opinion was based upon substantial authority and I take this opportunity to affirm the position taken by me in this former opinion.

(2) It is suggested by the Lincoln National Life Insurance Company that the Indiana retaliatory law has not been interpreted as mandatory so that the Indiana Insurance Department may make agreements with other insurance departments with respect to whether or not the retaliatory statute shall apply. The Indiana Attorney General, in 1935 Opinions of the Attorney General, 389, has held that the Indiana Insurance Commissioner may make such agreements. However, our statute appears to be mandatory on its face and does not vest any discretion whatsoever in the Insurance Commissioner to make agreements. It is, therefore, my opinion that you have no authority to enter such an agreement as is suggested.

(3) Should Sec. 2, Chap. 110 of the Laws of 1943 be brought into operation as against insurance companies domiciled in Indiana?

Sec. 39-4802 of Burns' Indiana Statutes provides in part as follows:

"Every insurance company not organized under the laws of this state and doing business within this state shall * * * report to the department * * * the gross amount of all premiums received by it on policies of insurance covering risks within this state * * *. From the amount of gross premiums shown as above provided shall be deducted (1) **losses actually paid within this state,** (2) considerations received for reinsurance of risks within this state from companies authorized to transact an insurance business in this state, (3) the amount of dividends paid or credited to resident insurance, or used to

reduce current premiums of resident insureds, (4) the amount of premiums actually returned to residents on account of applications not accepted or on account of policies not delivered, and (5) the amount of unearned premiums returned on account of the cancelation of policies covering risks within this state. At the time of making the report required above every such insurance company shall pay into the treasury of this state for the privilege of doing business in this state, an amount equal to three (3) per cent of the excess, if any, of the gross premiums over the deductions allowed herein."

Sec. 1, Chap. 110 of the Laws of 1943 (Sec. 60-401 of the 1941 Compilation) requires foreign insurance companies to pay 2% of the gross premiums received by them from policies covering risks within this state less all the return premiums and the premiums received for reinsurance on New Mexico risks.

When these two statutes are compared, it is noted that they are different in the following respects: New Mexico imposes a tax of 2% of the gross premiums while Indiana charges, not 3% of the gross premiums, but 3% after deducting the amount of the losses paid.

Turning now to Sec. 2, Chapter 110, it is seen that:

"Whenever by the **laws** of any other state any taxes in excess of those imposed by the laws of this state upon foreign insurance companies * * * doing business in this state are imposed on insurance companies * * * of this state doing business in such other state * * *, the same taxes * * * shall be imposed upon **every similar** insurance company of such other state."

The test laid down is not what the report of any individual insurance company shows but whether the laws of such state impose a greater tax than New Mexico. Certainly, under the provision above quoted, you are not authorized to impose one rate as to an Indiana company and another rate as to another company since this section provides that it "shall be imposed upon every similar insurance company of such other state." Nor are you authorized to impose the local rate one year and the foreign rate another since the test is not the amount of losses suffered by each company or other matter disclosed by its report, but what the law of its home state provides.

The Supreme Court of Indiana has twice had similar questions before it and in those cases the Insurance Commissioner made the converse contention by seeking to impose the 2% rate without deducting losses to New York and New Jersey companies respectively. In both of those cases the Court found that it could not be stated as an ultimate fact that the 2% rate of the home state of these companies was greater than the 3% rate less losses imposed by Indiana. Having made such finding the Court held that the primary tax law should be imposed. These cases are State vs. Continental Insurance Company of New York, 116 N. E., 929, and State vs. American Insurance Company, 137 N. E., 338.

Thus, the ultimate question is whether it can be said, as a fact, that the Indiana rate of 3% of the gross premiums less losses is greater than the New Mexico 2% without considering losses. If this question can not be answered in the affirmative then Sec. 1, Chap. 110 will control. This is so since this section is our primary statute relating to fees and taxes of foreign insurance companies, and is all inclusive by its terms. It is only when the laws of the other state imposes greater fees that Sec. 2, Chap 110 has any application.

In view of the foregoing, it is my opinion that unless it can be said that in the ordinary course of events an insurance company would have less than 1% of its gross premiums as losses so that the 3% of the gross premiums less losses charged by Indiana is more than the 2% charged by New Mexico, that Sec. 1, Chap. 110 of the Laws of 1943 should be applied.

Trusting that the above may prove of assistance to you, I am

By ROBERT W. WARD,

Asst. Atty. General