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1. "INSURANTS OF THE SAME CLASS"—SHOULD NOT BE CONSTRUED TO MEAN "INSURANTS OF THE SAME EXPECTATION OF LIFE"—SECTIONS 9403, 9404 G. C.—OPINION 1205, O. A. G. 1939, PAGE 1785 OVERRULED.

2. NO PROHIBITION AGAINST CLASSIFICATION OF INSURANTS ON BASIS UNRELATED TO EXPECTATION OF LIFE.

3. PAYROLL DEDUCTION PLAN—INSURANTS MAY LAWFULLY BE PLACED IN DIFFERENT CLASSIFICATION THAN NON-MEMBERS WHO PAY MONTHLY, ONE-TWELFTH OF ANNUAL PREMIUM PLUS OTHER LOADING CHARGES.

SYLLABUS:

1. The term 'insurants of the same class" as used in Sections 9403 and 9404, General Code, should not be construed to mean "insurants * * * of the same expectation of life" within the meaning of such term as the same appears in said sections. Opinions of the Attorney General for 1939, page 1785, No. 1205, overruled.

2. While discrimination between insurants of the same class and equal expectation of life is prohibited under Sections 9403 and 9404 of the General Code, said sections do not prohibit the classification of insurants on a basis unrelated to expectation of life.

3. Insurants who pay on the payroll deduction plan, that is, where the employer once each month makes aggregate remittance to the insurance company for premiums collected by paying monthly one-twelfth of the annual premium, may lawfully be placed in a different classification than non-members who pay monthly but not on the payroll deduction plan, one-twelfth of the annual premium plus other loading charges.

Columbus, Ohio, May 25, 1946

Hon. Walter Dressel, Superintendent of Insurance
State House Annex, Columbus 15, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "Some time ago, I requested an opinion from your office on the following subject matter, to wit: Salary Savings Endorse-

ment. In reply to that letter, you advised me that your Predecessor, under date of September 19, 1939, in Opinion No. 1205, had rendered an opinion upon the same subject. Since your communication to my request, I have endeavored to enforce the statute as suggested in your opinion. However, a number of life insurance companies writing this type of insurance are objecting to confining their operations within the limitations of your opinion.

In view of the underwriting practices now being used by the companies, it might be well to reconsider Opinion No. 1205 at this time. This particular opinion deals with 'wholesale insurance'. The companies contend there is a distinction between 'wholesale insurance' and 'Salary Savings Plan' (also known as Payroll Deduction).

For your information, the Salary Savings insurance plan (also known as Payroll Deduction) is a simplified premium collection system which is used where several employees of one employer are insured in the same insurance company. Instead of paying their premiums individually to the insurance company in cash or by check, the insured employees authorize the employer to make deductions from their salaries in the amounts of the respective premiums. Once each month, the employer makes an aggregate remittance to the insurance company for the premiums so deducted.

While 'wholesale insurance', such as was considered in Opinion 1205, is issued to a group of employees of a common employer only on the one-year annually renewable term plan and at an annual premium rate charged for one year annually renewable term policies sold to applicants which are not members of such a group. Policies sold on the Salary Savings plan are on the same annual premium as those sold to other applicants. There is attached to said policies, a so-called Salary Savings Endorsement, similar to the one previously submitted to you, and which you considered in your recent opinion. This endorsement provides that if the insured ceases to be a member of the Salary Savings group, the premiums thereafter shall be payable as provided in the policy itself. In some respects, company practices differ when dealing with Salary Savings business from the practices followed in other lines of business. These differences may be enumerated as follows:

1. The evidence of insurability required of Salary Savings applicants is usually less comprehensive than that required of other applicants. Frequently this takes the form of underwriting the business on the basis of a non-medical application even though the

amount applied for exceeds the normal maximum for non-medical consideration.

2. Some of the companies which do not accord the privilege of making payments of monthly installments of premium to policyholders who pay their premiums individually, nevertheless, do allow policyholders to pay monthly if they pay on the Salary Savings plan.

3. Most companies which accept premiums from individual policyholders in monthly installments accord the privilege of payment on that basis to only those policyholders whose policies are large enough to require a monthly installment at least equal to a fixed minimum. Yet when these same companies write policies on the Salary Savings plan, the privilege of paying monthly is granted with either a much lower minimum or with no minimum at all.

4. The monthly installment of premium charge on Salary Savings policyholders is usually calculated by a formula which gives a lower cost than that which applies to other policyholders. Some companies charge 1/12th of the annual, others 1/6 of a semi-annual or 1/3rd of a quarterly premium; a few add a cent or two as a token of surcharge. However, the exact charge is not material since the principle is the same wherever it is lower than that for other (non-Salary-Savings) policyholders.

The questions raised are these:

1. Is there a discrimination as to premiums paid between the member of the salary savings plan and the non-member?

2. Do the company practices now being followed, with relation to salary savings plan, conflict with Ohio General Code Sections 9403 and 9404?

The companies contend there is no discrimination in premiums because the only 'premium' is the annual premium and the expense charge to installment payers not in the salary savings plan does not, as a matter of law, result in any distinction or discrimination.

Five companies have submitted to me their brief in opposition to the former rulings of your Department in your Opinion 1205. For your convenience, I enclose herewith that brief.

Will you kindly let me have your opinion at your earliest convenience."

I shall direct my attention to your first question which is as follows:

> "1. Is there a discrimination as to premiums paid between the member of the salary savings plan and the non-member?"

That there is such a discrimination is apparent on the face of the request, and was so pointed out in the Opinions of the Attorney General for 1939, No. 1205, for it is clear that an employee under the salary savings plan where he pays monthly pays only one-twelfth the annual premium while a non-member pays one-twelfth the annual premium plus other loading charges which may include interest and costs of collection.

The pertinent question, it seems to me, is not whether there is discrimination, for discrimination is permitted under the Ohio statutes, but whether there is an illegal discrimination between insurants of the *same class and equal expectation of life.* This question is involved in your second question which reads as follows:

> "2. Do the company practices now being followed, with relation to salary savings plan, conflict with Ohio General Code Sections 9403 and 9404?

Section 9403, General Code, reads as follows:

> "No life insurace company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between the insured of the *same class and equal expectation of life* in the amount of payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon." (Emphasis added.)

Section 9404, General Code, reads in part as follows:

> "No life insurance company, doing business in this state, whether on the group insurance plan or any other plan, shall make or permit any distinction or discrimination in favor of individuals *between insurants of the same class and equal expectation of life* in the amount or payment of premiums or rates charged for policies of insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor, except as otherwise ex-

pressly provided by law, shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon. * * *" (Emphasis added.)

The answer to your second question, it would seem, is to be found in the meaning of the phrase "no life insurance company shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and equal expectation of life." In other words, can you make a separate class of those who are employees and pay on the salary deduction plan from those who do not so pay? If such classification is proper, then so long as there is no discrimination between the members of that class, the statutes of Ohio above noted are not violated.

Similar statutes are in force and effect in a large number of the states, with this variation—"class and equal expectation of life" is sometimes written "class or equal expectation of life". See Vol. III Couch on Insurance, Section 584 and Vol. XII, Appleman on Insurance, Section 7017.

There has been submitted to me decisions of the Departments of Insurance of Virginia, Tennessee, Washington and California, in which states the right to make such classification has been questioned, to the effect that such classification is permitted. As far as I can determine, no state department of insurance has refused insurance companies the right to make such classification, with the exception of Ohio as indicated in the opinion of the Attorney General for 1939, No. 1205. In that opinion the phrase "class and equal expectation of life" was read together giving the word "class" a meaning referring to hazard, or that classification necessarily had to be based on hazard which affected expectation of life. That reasoning is now being questioned. It is proposed that "class" does not have reference to hazard or expectation of life, that it has no technical meaning within the insurance trade, but is used in its ordinary meaning, that is, a group of insurants with common characteristics or in like circumstances based on real distinctions reasonably and justly made.

Let us examine the facts set forth in your request to see whether there is a reasonable basis for a classification of insurants who pay on the salary deduction plan from others.

It is pointed out in your request that the annual premium is the basic premium considered; that those who pay on the payroll deduction plan and those who do not pay on such a plan pay this premium; that those who pay on the salary deduction plan monthly pay one-twelfth the annual premium; those who do not pay on this plan but who do pay monthly, pay one-twelfth the annual premium plus certain loading, among which is the costs of collection of the premium; that under the salary savings plan the employer in one check pays the premiums thus eliminating practically all of the collection costs. It would seem that to compel such insurants to pay a collection cost when one does not exist would, in fact, be a discrimination against them and in favor of the non-members who have in fact a collection charge.

It is also pointed out that evidence of insurability required on the salary savings plan is less comprehensive than that required of other applicants.

In attempting to determine what the term "class" means in the Ohio statutes, some help is found in Section 9401, General Code, which provides in substance that no life insurance company shall make any distinction or discrimination between white persons and colored persons as to premiums or rates charged where age, sex, general conditions of health and hope of longevity are the same. This indicates that classification on the basis of color might have been made, but for this statute. In other words, this statute recognizes that "class means something other than hazard which affects expectation of life."

In determining whether Section 9403 and Section 9404, General Code, should be strictly or liberally construed, I must keep in mind that these are statutes which act as restraints upon a lawful business and that our Supreme Court in the case of State, ex rel. v. Dauhen, 99 O. S. 406, has said that:

> "Statutes or ordinances of a penal nature, or which restrain the exercise of any trade or occupation or the conduct of any lawful business, * * * will be strictly construed and their scope cannot be extended to include limitations not therein clearly prescribed; * * *"

A classification having nothing to do with hazard or expectation of

life was approved in the case of Dailey v. Chappell, 12 O. C. C. (n. s.) 561, where the court on page 563 says the following:

> "He does not show that if a special privilege or benefit is sought to be extended to him as a member of the firm of H. S. Walbridge & Co., that a like privilege is not extended to all members of firms soliciting insurance where policies are issued to the members of such firms. For aught that appears in this answer, he is not favored as against others of the same class; nor does he say that it is not the custom of the company to make precisely the same favorable proposition to all of its policyholders of every class. * * *"

And in the case of Gillespie v. Security Mutual Life Insurance Company, 18 O. App., 164, the court favored a liberal construction of Section 9403, General Code, when it held that:

> "A policy of insurance will not be so construed as to make it violative of Section 9403, General Code, prohibiting discriminations between policyholders of the same class, if such construction can be fairly avoided by all the terms of the policy."

I have been unable to find a case either in Ohio or out of the state in which this question has been squarely presented to a court and answered. I do, however, find that outside Ohio, under similar statutes, classes have been permitted without relation to hazard or expectation of life in the following situations:

1. Between borrowing and non-borrowing policyholders.

Trapp v. Metropolitan Life Insurance Co., 70 Fed. 2nd, 976, where the court indicated that if this be discrimination, it is a reasonable one and not contrary to the spirit of anti-discrimination acts. Greer v. Aetna Life Insurance Co., 142 So. 393, 225 Ala. 121; Neal v. Columbian Mutual Life Assurance Society, 138 So. 353, 161 Miss. 814.

2. Classification as to dividend payments.

Rothschild v. New York Life Insurance Co., 97 Ill. App. 547; Rhine v. New York Life Insurance Co., 273 N. Y. 1.

The only opinion by Attorneys General dealing with this subject which I have found was given by the Attorney General of Florida and is

found in Biennial Report of the Attorney General of Florida for 1929-1930 in which he says at page 243:

> "Section 6225, Compiled General Laws, prohibits life insurance companies making or permitting any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged.
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> There are several stated provisos contained in the latter part of the Section, one of which deals with group insurance taken out by employers for groups of not less than fifty persons who may pay their premiums through a secretary or the employer. While certain exceptions or provisos are stated in the statute it is obvious that there are possibly other exceptions which are not stated, but which nevertheless exist because they are not within the terms of the denunciatory part of the act which is found in the first paragraph. So long as there are no discriminations or distinctions in favor of individuals Section 6225 is not violated.
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> Classes of insurants are expressly permitted but discrimination in favor of individuals in the same class and situation is prohibited. This gives the insurance companies power to make as many reasonable classes of insurants as the ingenuity of insurance managers may be able to suggest, so long as these classes are reasonable classes and do not by way of subterfuge or evasion create distinctions between individuals of one and the same class of insurants."

It would seem that the Ohio statutes, while they prohibit discrimination between insurants of the same class, permit classification; that classification may be based on any reasonable difference; that there is a reasonable basis for a difference between the employees who pay upon the salary deduction plan and others who do not so pay; that the phrase "class and equal expectation of life" should not necessarily be read together but that each has in and of itself a distinct and separate meaning not depending upon the other and that the term "class" does not necessarily have reference to hazard or expectation of life and in this respect the Attorney General's opinion of 1939, No. 1205, is overruled.

I am therefore of the opinion that:

1. The term "insurants of the same class" as used in Sections 9403 and 9404, General Code, should not be construed to mean "insurants * * * of the same expectation of life" within the meaning of such

term as the same appears in said sections. Opinions of the Attorney General for 1939, page 1785, No. 1205, overruled.

2. While discrimination between insurants of the same class and equal expectation of life is prohibited under Sections 9403 and 9404 of the General Code, said sections do not prohibit the classification of insurants on a basis unrelated to expectation of life.

3. Insurants who pay on the payroll deduction plan, that is, where the employer once each month makes aggregate remittance to the insurance company for premiums collected by paying monthly one-twelfth of the annual premium, may lawfully be placed in a different classification than non-members who pay monthly but not on the payroll deduction plan, one-twelfth of the annual premium plus other loading charges.

Respectfully,

HUGH S. JENKINS
Attorney General