



**THE ATTORNEY GENERAL  
OF TEXAS**

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**AUSTIN 11, TEXAS**

Board of Insurance Commissioners  
Austin, Texas

Gentlemen: Attention of Mr. George Van Fleet

Opinion No. 0-1364

Re: Is the phrase "any reinstatement of this policy shall be incontestable after the same period following reinstatement and with the same conditions and exceptions," a permissible inclusion in the incontestable clause in a life insurance policy to be issued in Texas?

Your letter of August 30, 1939, requesting this department's opinion on the above question, has been received.

A foreign insurance corporation is subject to the statutes of Texas governing such subjects, Article 5068, Vernon's Annotated Texas Statutes, 1925. This, regardless of the import of Article 4734, the latter granting merely a permissive right which falls before regulatory measures. Therefore, among other such regulatory statutes, the policies of such company must conform to Article 4732, subdivision 3 thereof, which provides:

"That the policy, or policy and application, shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non-payment of premium; and which provision may or may not, at the option of the company, contain an exception for violation of the conditions of the policy relating to naval and military services in time of war."

A life insurance policy is a contract between the parties thereto, the insurer and the insured, subject only to the regulatory statutes such as Article 4732, subdivision 3, supra. It is the accepted rule that the parties can make such contract as they desire, in the way of conditions, penalties, etc., with reference to the reinstatement of a lapsed policy. Bankers Life and Loan Ass'n. vs. Chase, 114 SW (2d) 374; Lowry vs.

Etna Life Insurance Company, et al, 120 SW (2nd) 505; Southwestern Life Insurance Company vs. Houston, 121 SW (2nd) 619; Freedman vs. Mutual Benefit Health & Accident Ass'n; 119 SW (2nd) 1017; Burchfield vs. Home Benefit Association, 73 SW (2nd) 559; and Texas Prudential Insurance Company vs. Wiley, 80 S.W. (2nd) 1024. Of course such contracts cannot contravene the existing statutes.

In the reinstatement transaction, there may be one of two situations; that is, the right to reinstatement may be a matter of right under the original contract of insurance, or, it may be a matter of grace. If the original contract of insurance provides for reinstatement, upon certain named conditions, which is the usual situation, such is a matter of right to the insured, which, when complied with, automatically entitles him to reinstatement. In this connection we quote from the case of Burchfield vs. Home Benefit Ass'n., supra, as follows:

"There is a very well-established rule that where a lapsed policy contains provisions authorizing the insured to renew same upon his furnishing proof satisfactory to the insurer that he is in good health and upon his performing other specified conditions, and the insured, after the lapse of his policy, makes the necessary application for reinstatement and meets the other requirements of the policy and is actually in good health at the time of the making of the application for reinstatement, and there then exists no valid objection to the form or substance of such application, his policy thereby in effect becomes automatically reinstated, and his beneficiary is entitled to recover under said policy in the event of his death from causes arising subsequent to the filing of said application for reinstatement even though said application was never acted upon nor accepted by the insurer prior to the death of the applicant. See, in this connection, Prudential Ins. Co. v. Union Trust Co. 56 Ind. App. 418, 105 N. E. 505; Muckler v. Guarantee Fund Life Ass'n, 50 S.W. 140, 208 N.W. 787; Leonard v. Prudential Ins. Co., 128 Wis. 348, 107 N. W. 646, 116 AM. St. Rep. 50; Hinchcliffe v. Minnesota Commercial Men's Ass'n. 142 Minn. 204, 171 N. W. 776."

Also see the case of Missouri State Life Insurance Company vs. Hearne, 226 SW 789. We therefore shall treat at this point of

the situation where the matter of reinstatement is, under the contract, a matter of right to the insured.

Under this situation we have the following questions:

If reinstatement is a matter of right under the original contract, when the insured shall have complied with the conditions prerequisite thereto, is there a new contract between the parties? Or, is the old contract merely restored? Or, are there two contracts, the original one and a contract of reinstatement? Furthermore, would the incontestable period run as of the original date? Or, as of the date of reinstatement? Or, may there be two incontestable periods, to-wit, one from the date of the original contract, and one from the date of reinstatement, the former applying only to those matters relating to the original transaction, the latter only to the matters relating to the reinstatement? And, finally, what effect does Article 4732, subdivision 3 thereof, supra, have on the conclusions reached?

In this connection we quote from the well considered and often cited case of State Mutual Life Insurance Company vs. Rosenberry, 213 SW at page 245:

"After the lapse of the policy on account of the failure to pay the premium no contract of insurance between the parties existed. The insured and the company, however, had the right to make a contract by which the company should waive the forfeiture and reinstate the policy. When thus reinstated, the policy as originally issued became as effective as if no forfeiture had been declared, unless the contract for reinstatement itself was tainted with such fraud as would justify the company in repudiating it. Under the incontestable clause of the policy the company was precluded from any defense which it might otherwise have had based on anything which occurred at the time of or prior to the issuance of the policy, and also of any defense based upon any breach of warranty on the part of the insured contained in the original application or policy. It, however, had the right to assert and prove that the contract by which the policy was reinstated was induced by material false representations or warranties, and thus defeat liability on the policy. As we understand the record, this is what the insurance company attempted to do in this case.

"There is some conflict in the authorities as to the effect of a reinstatement of a policy after lapse for failure to pay the premium. Some courts hold that there is a new contract of insurance as of the date of the reinstatement, but containing all the terms of the original policy, and thus hold that the clause rendering the policy incontestable applies to the new contract and authorizes a contest for the period named after the reinstatement. *Pacific Mutual Life Insurance Co. v. Galbraith*, 115 Tenn. 471, 91 S.W. 204, 112 AM. St. Rep. 862, and cases cited.

"But we think that the better rule and the one that would come nearer doing justice is to regard the contract for reinstatement, not as a new contract of insurance, but as a waiver of the forfeiture, thus restoring the policy and making it as effective as if no forfeiture had occurred, but reserving the right of the company to avoid the effect of the reinstatement by showing, if it can, that the reinstatement was induced by unfair and fraudulent means. *Massachusetts Benefit Life Association v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 274; *Goodwin v. Provident, etc., Life Association*, 97 Iowa, 226, 66 N. W. 157, 32 L.R.A. 473, 59 Am. St. Rep. 411; *Monahan v. Fidelity Mutual Life Insurance Co.*, 242 Ill. 488, 90 N. E. 213, 134 Am. St. Rep. 337; *Mutual Life Insurance Co. v. Lovejoy*, 78 South. 299, L.R.A. 1918D, 864."

To the same effect see the case of *Rosenthal vs. New York Life Insurance Company*, 94 Fed. Rep., 2nd series, 675, in an opinion by the Circuit Court of Appeals of the 8th circuit.

These conclusions, therefore, appear correct:

- (1) The insurer may not contest a policy, other than for non-payment of premiums, as to matters relating to the original transaction, beyond the statutory incontestable period.
- (2) Reinstatement being a matter of contractual right, to which the insured is entitled, such becomes a question only of compliance with the conditions named in the original contract.
- (3) The parties may, in the original contract, agree

upon a period beyond which the insurer cannot contest the matters relating to reinstatement.

The question at hand would thus be answered; namely, that the provision under consideration is merely a period to be agreed upon by the parties in the original insurance contract, relating only to the matter of reinstatement, having no relation to, or effect upon, the statutory incontestable period as of the original contract; provided, we do not find this in contravention of Article 4732, subdivision 3, supra.

Manifestly, if reinstatement is not a new contract, but a restoration and a continuation of the old contract, the regulatory provisions "shall be incontestable not later than two years from its date," if strictly construed, would forbid the provision at hand, since, under such, the policy could be contested on a ground other than for non-payment of premium, at a time more than two years from its date.

However, reinstatement being, as we have pointed out, a matter of compliance or non-compliance with the contractual provisions as to such, and, as said by the court in the case of Texas Prudential Insurance Company vs. Wiley, 80 S.W. (2nd) 1024, at p. 1026, the insurer would not be seeking for any cause to nullify the efficacy of the policy as originally contracted, but would be insisting that the very terms of the policy knowingly contracted, should be enforced, the question not being one of contesting the policy, but of enforcing it according to its specific provisions, it is believed that to construe the statutes as forbidding the insurer from contesting the compliance with the reinstatement requirements, if more than two years have elapsed from the original date of the policy, or after such shall have elapsed, would be placing a construction on the statute not intended by the Legislature, and would result in compelling the insurer to refuse to contract upon the matter of reinstatement as a matter of right. The hardship to the insuring public from such is obvious.

We therefore construe the phrase at hand as relating only to the transaction of reinstatement, and as having no effect on the incontestable period as of the original date of the policy, and as being a valid contractual provision permissible in the incontestable clause of a life insurance policy, to be issued in Texas.

If, however, reinstatement, under the second situation mentioned above, is only a matter of grace, the reasoning would be even stronger to the effect that the phrase at hand would be a valid contractual provision. Indeed, it would seem to be well taken that if the matter of reinstatement is, under the

contract, a matter of grace, the contract of reinstatement would be a new contract, authorizing, without doubt, the contractual provisions at hand.

We trust this answers your inquiry satisfactorily.

Yours very truly

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APPROVED SEP 18, 1939  
s/Gerald C. Mann  
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Approved Opinion Committee by s/EWC Chairman