OFFICIAL OPINION NO. 64

December 12, 1963

Mr. Harry E. McClain
Insurance Commissioner
Department of Insurance
509 State Office Building
Indianapolis, Indiana

Dear Mr. McClain:

You have requested my Official Opinion on the following questions:

"1. Are Dependency Coverages which are included in Group Life contracts presently in force and written before the effective date of the Acts of 1953 prohibited?

"2. If in No. 1 above, your Opinion is that such contracts presently in force and written before the effective date of the Acts of 1953 are not prohibited, then:

"a. Can the insurer which insured a group life contract with dependency coverages before the effective date of the Acts of 1953 include new dependents under such contracts?

"b. Can another insurer issue a new group life contract including dependency coverage to a group now having a dependency coverage in its present group life contract issued before the effective date of the Acts of 1953?

"c. Can an insurer with a group life contract containing dependency coverage issued prior to the effective date of the Acts of 1953 issue a group life contract to this same group and retain the dependency coverage that was in the original contract."

Your letter refers to 1953 O. A. G., pages 149, 152, No. 32, and quotes the following from such Opinion:

> "It is, therefore, my opinion, taking into consideration the above quoted excerpts of statutes, cases and authorities that the writing of Dependency Coverage in Group Life Insurance *was and is now prohibited* by the statute authorizing the writing of Group Life Insurance coverage." (Our emphasis)

I have re-examined such Opinion and legislation enacted since that time and find no reason to alter such Opinion. Such Opinion is definite and the conclusion thereof clearly states that such policies are prohibited by law.

Your question concerns the status of policies which may have been issued prior to such Opinion and the answer thereto is clearly set forth in the following case which compiles a number of prior decisions, not all of which are quoted here, on the general subject of such contracts. Said case is Mercantile Commercial Bank, Receiver v. Southwestern Indiana Coal Corporation, *et al.* (1929), 93 Ind. App. 313, 329-330, 169 N. E. 91:

> "Appellee argues that, even if the acts complained of were *ultra vires*, since they had been fully performed, neither the corporation nor the receiver of the corporation can successfully rely upon the defense of *ultra vires*. But such is not the law in Indiana, where, as here, there was an absolute want of capacity to act, such acts being in contravention of the statute, and of its charter, of which the act was a part. The following Indiana cases announce the rule by which we are controlled.
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> "In *Board, etc.* v. *LaFayette, etc., R. Co.* (1875), 50 Ind. 85, an Indiana railroad company had leased the western division of its road to an Illinois company for a period of 99 years. This lease was made by the directors without the consent of the stockholders. The plaintiffs, as stockholders in the Indiana company, sued to annul the lease. The court held that the lease was *ultra vires* and void, saying: 'It is also claimed by the appellees that, if the contract was originally *ultra vires* the corporation, the parties complaining of it have acquiesced in its terms such a length of time, received

benefits under it, and confirmed it by so many acts, that they are now estopped from questioning its validity. A contract *ultra vires* the charter is void, and cannot be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it. What they could not make, they cannot confirm. A void act cannot ever become valid, merely because it remains unquestioned.'

"In *Leonard* v. *American Ins. Co.* (1884), 97 Ind. 299, the insurance company was authorized to issue fire insurance policies in cases where the insured had a title in fee simple and unincumbered. The company insured plaintiff's property against fire. There was a judgment lien on his property at that time. A suit was brought on the policy and the company set up the answer that it had no authority to execute a policy on insured's property, as it was incumbered by these judgment liens, and its charter only authorized it to insure unincumbered property. The insured replied that the company knew of these liens and, therefore, waived this provision. The court held that a corporation cannot waive a provision in its charter, and that the policy was void.

"In *Franklin National Bank* v. *Whitehead* (1898), 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302, a corporation had entered into an *ultra vires* contract with a bank. The bank claimed that the corporation was estopped to set up its lack of authority to do the act. The court held that the bank had full knowledge of the corporation's lack of authority, and the doctrine of estoppel did not apply, saying that: 'Besides, the doctrine urged does not apply to contracts where the same are forbidden by statute or are contrary to public policy.' "

If some question were presented that prior acts of the Department of Insurance might in some way affect the status of these policies, the answer to such is contained in the case of the Department of Insurance *et al.* v. Church Members Relief Association (1940), 217 Ind. 58, 60, 26 N. E. (2d) 51, which reads, in part, as follows:

"That the court was in error in its first and second conclusions cannot be doubted. When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, no amount of acquiescence, or consent, or approval of the doing of it by a ministerial officer, can create a right to do the thing which is unauthorized or forbidden. The administrative officers of the state, as well as the appellee, were bound by the statute. The insurance department had no power to authorize or acquiesce in the issuance of policies unauthorized or forbidden by the statute. An estoppel against the state cannot arise out of the unauthorized acts of state officers. *Platter* v. *Board of Com'rs* (1885), 103 Ind. 360, 381, 2 N. E. 544, 556, 557; *Sandy* v. *Board of Com'rs* (1909), 171 Ind. 674, 677, 87 N. E. 131, 132; *Ness* v. *Board of Com'rs, etc., et al.* (1912), 178 Ind. 221, 232, 98 N. E. 33, 1002; 21 C. J. § 193, p. 1191; 19 American Jurisprudence, § 166, p. 818.

"A so-called practical construction, which apparently means a departmental construction, of a statute is not binding or conclusive upon the state or upon the court. Such a construction may be looked to and considered by the court in construing and interpreting an ambiguous statute, but it cannot in any manner affect the operation or construction of a nonambiguous statute * * *"

It is not within the province of this office, nor is it any way intended to determine in any way such policies, but only to advise your department in regard to the legality of these group dependency life insurance contracts.

It is my opinion, as it was in 1953, that dependency coverage in group life insurance contracts were and are prohibited and should be treated by your department as being void.