

INSURANCE: It is not mandatory for insurance companies or associations doing business on the stipulated premium plan, (under section 5885, Article IV, Chapter 37, R. S. Mo. 1939,) to obtain an application for insurance before issuing the policy, or to attach an application to a policy when issued.

March 10, 1948

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Honorable Owen G. Jackson
Superintendent of Insurance
Department of Business and Administration
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly,
Counsel

Dear Mr. Jackson:

This will acknowledge your letter requesting an opinion from this department, construing the terms of Section 5885, Article 4, Chapter 37, R. S. Mo. 1939, as to whether said section is mandatory in requiring every insurance company doing business under said Article 4, to obtain an application for insurance before such company may issue a policy. The letter requesting an opinion on the subject comes from Mr. Ralph C. Lashly, Counsel for your department.

The letter is as follows:

"Will you please advise this Division of your opinion on the following question:

"Does Section 5885, Article IV, Chapter 37, Revised Statutes of Missouri, 1939, make mandatory upon every company or association doing business under and by virtue of this Section to obtain an application for insurance before the company or association may issue a policy?"

The inquiry in the letter requesting this opinion is, whether said section makes it mandatory upon every company or association doing business under Article 4 of Chapter 37, to obtain an application for insurance before a company or an association may issue a policy. The terms of the statute are, as will be readily observed, that such a company shall, upon the issuance of every policy, attach to such policy or endorse thereon, the substance of the application upon which such policy was issued. Said Section 5885 nowhere uses language requiring or directing that an application shall be obtained before a policy may be issued. We take it, then, that the request for the opinion is directed more to the question of whether a copy of an application shall be

attached to the policy upon the issuance of a policy, rather than whether it is mandatory that an application be obtained before a policy is issued. We shall, however, answer both questions.

It will be observed that said Section 5885 provides no penalty for failure to comply with the terms of said section. Neither is there any provision rendering the contract illegal or void for failure to observe the requirement of said section that a copy of the application shall be attached to each policy issued by a company operating under said Article 4, Chapter 37.

It has been held in many decisions by our Courts of Appeals that the terms of said Section 5885 apply only to insurance companies doing business on the stipulated premium plan. In the case of Craig et al. vs. Insurance Co., 220 Mo. App. 913, our St. Louis Court of Appeals had before it the question of whether the terms of the statute, then Section 6184, R. S. Mo. 1919, now Section 5885, applied to old line insurance companies or solely to companies doing an insurance business on the stipulated premium plan. The Court in its decision, and holding that said section requiring a copy of the application to be attached to a policy when issued applied only to stipulated premium companies, l.c. 918, said:

"In light of the fact that the case may be re-tried, we note that the court erred in holding that section 6184, Revised Statutes of Mo. 1919, the alleged defense of misrepresentation made by the insured in his application was not available to the defendant, because the application for the insurance was not attached to the policy of insurance itself. The policy in suit being issued upon a level or flat rate premium, or in other words, being an old line policy and not a policy issued upon the stipulated premium plan, said section has no application.* * *"

It thus appears that the intention of the Legislature in enacting said Section 5885 requiring a copy of the application for insurance issued under the stipulated premium plan was to provide for a truthful statement of the condition of health of an applicant for insurance, and for the availability of such statements as a defense to the insurer upon an action on a policy to show fraud or misrepresentation of the condition of health of the applicant at the time or before the making of the application, if it were revealed that there were false statements concerning the applicant's health made in the application. 32 C.J. 1104 states the following text on the purpose and office of a written

application for insurance as follows:

"* * *The purpose of signing an application is to bind the applicant to the truth of the statements therein; and the fact that he signed a particular paper tends to show that it is not a mere memorandum for the convenience of an agent of the company, but rather that the applicant adopted it as an application.* * *"

This feature of said statute, was for the benefit of the insurer. The availability of misrepresentation as a defense being for the benefit of the insurer, such defense may be waived, and the effect of such waiver is to deny the right to the insurer to introduce evidence showing misrepresentation or false statements by an applicant in the application, unless the copy of the application be attached to a policy upon its issuance. The case of Hicks vs. Insurance Co. was considered by our St. Louis Court of Appeals, and is reported in 196 Mo. App. Rep. 162. The case, among other issues, presented the question for the decision of the Appellate Court, the action of the trial court in overruling the demurrer to the evidence by the appellant Insurance Co., the demurrer being based upon alleged misrepresentations of the health of the insured in the application prior to the issuance of the policy sued on. In affirming the decision in the lower court, and in holding that the defense of misrepresentation was not available to the insurer because a copy of the application was not attached to the policy, the Court of Appeals, l.c. 171, said:

"As to this it should be stated at the outset that the defense predicated upon alleged misrepresentations made by the insured in obtaining the policy of insurance, consisting of alleged false answers in the written application therefore, was not available to defendant under the circumstances of the case, and that the trial court should have excluded this application upon plaintiff's objection thereto. This is for the reason that the record discloses that neither the application nor the substance thereof was attached to or indorsed upon the policy as required by section 6978, Revised Statutes 1909. By failing to comply with the statute, the defendant lost the right to avail itself of the application as a means for invalidating the policy. This we have but recently held in Schuler v. Metropolitan Life Ins. Co., 191 Mo. App. 52,

176 S.W. 274, where, in an opinion by REYNOLDS, P. J., the question is fully considered and the authorities cited and discussed."

It appears to be the almost universal practice for a written application to be made for insurance on the stipulated premium plan, and all other kinds of life, health and casualty insurance for that matter, and the assumption is that such applications are made and that they are made in writing. But it is conceivable that if a policy were issued by an insurer and delivered without an application to a person and such person accepted the policy, and paid his premium, the policy would be in force. In other words, the policy would not be invalid in such case by reason of there being no application, and forfeiture or avoidance of the policy could not be urged by the insurer for such cause. 32 C.J. 1102, on that principle, states the following:

"* * *The agreement is usually affected by an offer or application by insured and its acceptance by the company, or else by the tender of a policy by the company and its acceptance by insured. Where the latter method is employed, the fact that the policy is issued without prior application by insured does not prevent its going into effect.* * *"

32 C.J. 1119 again treats of this principle with the following text:

"* * *Generally, however, the statutes expressly prescribe the effect of non-compliance therewith, such as that the application shall not be considered a part of the policy or contract, and that it shall not be pleaded or received in evidence; but they also sometime expressly provide that the omission shall not render the policy invalid. By the weight of authority, the failure of the company to comply with the statute precludes it from showing that statements of insured in the application are false and fraudulent.* *"

As hereinabove stated, there is no penalty provided in Section 5885 for its non-observance with respect to failing to attach a copy of the application to a policy of insurance under the stipulated premium plan upon the issuance of the policy.

A penal statute is defined in 59 C.J. 1110 in the following text:

"* * *In common use, however, this sense has been enlarged to include under the term 'penal statutes' all statutes which command or prohibit certain acts, and establish penalties for their violation, * * *"

The provision in said Section 5885 requiring the application to be attached to a policy under the stipulated premium plan of insurance being for the benefit of the insurer may be waived by the insurer. 32 C.J. 1316, 1317, states the rule on this principle as follows:

"In the absence of statutory inhibition, as a general rule doctrines of waiver and estoppel may be applied to preclude the company from asserting any ground upon which it might be entitled to avoid the policy or dispute its liability thereunder. The company is entitled to waive provisions inserted in the contract for its benefit, and this even where the policy, according to its express terms, is under the circumstances to be void."

In the case of Bersche et al. vs. Insurance Co., 31 Mo. 546, our Supreme Court considered the question and principle of waiver as it applied to misrepresentation by the insured as a defense by the insurer. The Court, l.c. 554, on the point said:

"Misrepresentation is therefore put by the contract upon the same footing with all other things which may happen to increase the risk, and the courts have frequently held that such defences may be waived.* * *".

It is apparent that the terms of said Section 5885 in failing to provide a penalty for the non-observance of the statute, and failing to provide that the statute shall be void upon its non-observance, renders the statute directory rather than mandatory.

59 C.J. 1072, Section 630, in discussing the rules of construction of statutes states, in part, the following:

"A mandatory provision in a statute is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding; * * *".

Our Supreme Court in the case of State vs. Brown, 33 S.W. (2d) 104, discussed the distinction between a mandatory provision and a directory provision of statutes involving the election laws of the State. The Court adopted in its decision, and as its definition and construction of mandatory and directory provisions in a statute, a text statement of law, and in so doing, i.e. quoting R.C.L., Sec. 14, pages 766, 767, said:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequence of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' * * *".

We believe the above text authorities and decisions by our Courts make it reasonable to assume that the insurer company should obtain an application for insurance before such company or association may issue a policy, but it is not mandatory under said Section 5885 to obtain an application before the company may issue a policy, or that such company attach an application for insurance to a policy at the time of the issuance of such policy.

CONCLUSION

It is, therefore, the opinion of this Department that:
1. Section 5885, Article 4, Chapter 37, R. S. Mo. 1939, does not make it mandatory upon companies or associations doing

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business under and by virtue of said Section 5885 to obtain an application for insurance before such companies or associations may issue a policy.

2. It is further the opinion of this Department that it is not mandatory under said Section 5885 that a company doing business on the stipulated premium plan under Article 4, Chapter 37, R. S. Mo. 1939, attach to the policy at the time of the issuance thereof, an application for insurance.

Respectfully submitted,

GEORGE W. CROWLEY.
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JB*
Attorney General

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