



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**WAGGONER CARR
ATTORNEY GENERAL**

August 24, 1964

Honorable Jesse James
State Treasurer
Austin, Texas

Opinion No. C- 297

Re: Where the special trust fund created by Section 9 of Article 4.08, Texas Insurance Code, contains insufficient funds to pay for publication of notices required under Section 5 of such Article, may the cost of such publication be paid out of the general appropriation to the State Treasurer's office, and if not, may the expense of publication be incurred and paid from the special trust fund as money accrues to such fund?

Dear Mr. James:

You have requested an opinion of this office involving the following questions:

Where the special trust fund created by Section 9 of Article 4.08, Texas Insurance Code, contains insufficient funds to pay for publication of notices required under Section 5 of such Article:

"(1) Whether the cost of such publications can be paid from regular appropriations from the General Revenue Fund made to this office for general operating expenses.

"(2) If we are prohibited from paying the expense of such publication from the above referred to General Revenue Fund appropriations, is there any prohibition against incurring the expenses of publication as required by Section 5 and later making payment from the special trust fund provided for in Section 9 of said Article 4.08, Texas Insurance Code."

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Texas Insurance Code (Vernon's 1948) Article 4.08, Section 5 reads in part:

". . .The expenses of publication shall be charged against the special trust fund provided for in Section 9."

Article 4.08, Section 9 reads in part:

". . .The remaining one-fourth shall be administered by him as a special trust fund for the purposes of this Article, and deposited in the manner provided by law for the deposit of said funds. . . ."

The ordinary meaning of the word "shall" is mandatory and equivalent to "must." Also, when the intent clearly indicates that the word "shall" as used in a statute is intended to be mandatory, it is inconsistent with any idea of discretion and is mandatory. McLaren v. State, 92 Tex.Crim. 449, 199 S.W. 811 (1917); Mitchell v. Hancock, 196 S.W. 694, 700 (Tex.Civ.App. 1917); Jaynes v. Lee, 306 S.W.2d 182 (Tex.Civ.App. 1957). No cases have involved the terms of Article 4.08 or the intent of the Legislature within this Article. Initiated hereunder is a new and separate administration of funds subject to escheat held by life insurance companies

The Austin Court of Civil Appeals in the case of Lawson v. Baker, 220 S.W. 260 (Tex.Civ.App. 1920, error ref.) considered a special state revolving fund and the intent of the Legislature in administration of that fund. The Court said at page 266:

"It is a paramount rule of statutory construction that in case of doubt the intention of the Legislature is to be ascertained if possible. . . ."

"The emergency clause of a statute is often an important aid in determining the legislative purpose, and in this case we think it peculiarly so. . . ."

The Emergency Clause, Section 3 of Article 4.08, reads in part:

"The fact that the present laws providing for the escheat of abandoned funds held by life insurance companies and due and payable under any life or endowment insurance policy or annuity

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contract which has matured or terminated are indefinite, inadequate and confusing, creates an emergency"

Article 4.08, Section 9 creates a special trust fund from specific unclaimed funds of life insurance companies. To provide expenses of publication and administration of the act is the specific purpose of the special trust fund of Section 9. The Emergency Clause clearly states that the Legislature intended to eliminate indefinite and confusing laws applicable to life insurance companies. Interpretation of mandatory language in Section 5 should resolve doubt or confusion as to the fund from which money originates in Article 4.08 for expenses of publication. The Legislature intended to eliminate confusion through mandatory designation in Section 5 of the Section 9 special trust fund as the only fund to be charged with expenses of publication. We are of the opinion that the cost of publication may not be paid out of the general appropriation to the State Treasurer's office.

Your second question is whether the expense of publication may be incurred and paid from the special trust fund as money accrues to such fund. Section 6 of Article VIII of the Constitution of Texas provides that no money may be drawn from the treasury unless a specific appropriation has been made therefor. Article 4.08, Section 9 reads in part:

"Upon receipt of any unclaimed funds from such life insurance companies by the State Treasurer, he shall pay forthwith three-fourths of the amount thereof into the general funds of the state for the use of the state. The remaining one-fourth shall be administered by him as a special trust fund for the purposes of this Article, and deposited in the manner provided by law for deposit of said funds.
"

Essential elements required in a valid appropriation were discussed in Atkins v. State Highway Department, 201 S.W. 226 (Tex.Civ.App. 1918). The Court considered contingent amounts to be deposited to a special fund in Acts, 35th Legislature, Ch. 190, § 23 which read in part:

"All funds coming into the hands of the highway commission, derived from the registration fees herein before provided for, or from other sources, as collected, shall be deposited with the state treasurer to the credit of a special fund

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designated as the 'state highway fund' and shall be paid ~~out~~ only 'in the manner provided in the act and For purposes stated.'

The Courts held that this provision allocating contingent amounts to a special fund constituted a valid appropriation within the meaning of Article VIII, Section 6 of the Constitution of Texas. An appropriation occurs when an act of the Legislature sets apart and specially designates the money derived from a particular source of revenue to a particular purpose. Atkins v. State Highway Department, supra. Article 4.08, Section 9 designates one-fourth of all the unclaimed funds from life insurance companies which, as collected, are deposited with the State Treasurer to the credit of a special trust fund to administer the purposes of the Act. A valid appropriation of money within the meaning of Article VIII, Section 6 of the Constitution of Texas was made by the Legislature in Article 4.08, Section 9 for the purposes stated in the Act.

After the Legislature has appropriated money for a state agency to its use and maintenance, that agency may incur debts and pay those debts as money accrues to the administering fund. See our Opinion No. O-1544. In the case of Ferguson v. Johnson, 57 S.W.2d 372 (Tex.Civ.App. 1933, error dismissed), contractual power of a state agency to bind a special fund containing insufficient funds was considered. The Court said at pages 378 and 379:

" . . . All general legislative appropriations for the support of the state government and its various departments and activities are made for a future biennium, the revenues to meet which are prospective and possess an element of uncertainty equally as great as that incident to those we are considering. We know of no instance in which the accumulation of such revenues in the treasury is a prerequisite to incurring government liability. The Legislature itself creates such liability in advance of covering treasury receipts in cases of specific appropriations, and authorizes creation of such liability by its contracting agencies.

"The departmental construction evidenced by the uniform practice of contracting against anticipated revenues stands unchallenged in the record. . . ."

We are of the opinion that the appropriation by the Legislature for funds collected through escheat procedures from

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life insurance companies allows expenses of publication to be incurred and paid from the special trust fund as money accrues to such fund.

S U M M A R Y

Where the special trust fund created by Section 9 of Article 4.08, Texas Insurance Code, contains insufficient funds to pay for publication of notices required under Section 5 of such Article, the cost of such publication may not be paid out of the general appropriation to the State Treasurer's office, but the expense of publication may be incurred and paid from the special trust fund as money accrues to such fund.

Very truly yours,

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