

## Opinion No. 60-137

July 21, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Mr. Joe E. Haymes Commissioner of Securities State Banking Department Santa Fe, New Mexico

### QUESTION

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Is "Variable Annuity Life Insurance" subject to regulation by the Superintendent of Insurance or the Commissioner of Securities?

#### CONCLUSION

Commissioner of Securities.

### OPINION

#### {\*516} ANALYSIS

The variable annuity is a comparatively recent innovation in this country. It is an attempt to devise a system whereby annuitants are not paid in depreciated dollars. Under this system, the annuitant receives not a fixed monthly sum but rather a sum dependent upon the investments of the issuing company. The investments of the issuing company are made predominantly in equity securities; the theory being that this type of investment will tend to overcome the inflation risk to the holders of annuity contracts. The problem of which pigeonhole to fit this type of contract into has been presented to the United States Supreme Court in the case of **S.E.C. v. Variable Annuity Company**, 359 U.S. 65 (1959). The question in that case was whether the Securities and Exchange Commission had authority to regulate this type of contract. The Court speaking through Mr. Justice Douglas decided that variable annuity was in reality a security rather than a policy of insurance and in so doing distinguished the variable annuity from the normal fixed annuity. The Court therein stated at page 71:

". . . We realize that life insurance is an evolving institution. Common knowledge tells us that the forms have greatly changed even in a generation and we would not undertake to freeze the concepts of 'insurance' or 'annuity' into the mold they fitted when these federal acts were passed but we conclude that the concept of 'insurance' involves some investment risk taking on the part of the company. The risk of mortality, assumed here, gives these variable annuities an aspect of insurance yet it is apparent, not real, superficial, not substantial. In hard reality, the issuer of a variable annuity that has no element of a fixed return assumes no true risk in an insurance sense . . . For in common

understanding 'insurance' involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts . . . (T)hey guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities . . ."

{\*517} While not necessary to decision, it should be noted that the definition of "securities" found in the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. 77, is almost identical with the definition of "securities" in Section 48-18-16, N.M.S.A., 1953 Comp. (PS).

While the decisions of the Supreme Court of the United States are not binding upon this State in this regard, we have been unable to find a more concise and analytical examination of this problem than the one found in the case above cited. As always, that highest court supplies light where there is darkness; eloquent wisdom where there is need and we do not hesitate to adopt the position taken by that Honorable Body in this regard. We are of the opinion that variable annuities are subject to regulation by the Commissioner of Securities rather than by the Superintendent of Insurance inasmuch as they are not "insurance" within the meaning of Section 58-1-1, N.M.S.A., 1953 Comp., but rather are "securities" within the meaning of Section 48-18-16, supra.

By: Boston E. Witt

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