Opinion No. 90-25

December 20, 1990

OPINION OF: HAL STRATTON, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney; General Andrea R. Buzzard, Assistant Attorney General

TO: Honorable Don Silva, State Representative, 8328 Cherry Hills Drive, N.E., Albuquerque, New Mexico 87111

QUESTIONS

Is the workers' compensation legislation enacted in 1990 constitutional?

CONCLUSIONS

We have analyzed specifically those portions of the legislation that create and fund the employers mutual company and conclude:

1. Under existing New Mexico case law, the legislation creating the employers mutual company appears to be an unconstitutional special law chartering or licensing an insurance company. Because the company is intended to be operated as a private entity, it is not clear that the exemption from the prohibition against special laws created by other states' courts for public corporations would save the legislation.

2. The latest pronouncements of the New Mexico Supreme Court indicate that a loan of state funds to the employers mutual company, as authorized by the workers' compensation law, violates the antidonation clause of Article IX, Section 14 of the New Mexico Constitution.

3. The workers' compensation legislation is constitutionally infirm under N.M. Const. art. VIII, § 10, to the extent the legislature intends to supplant its judgment for that of the state investment council and the state investment officer in determining whether to invest the severance tax permanent fund in bonds issued by the employers mutual company and to direct that the severance tax permanent fund purchase those bonds. To that extent also, the legislation may constitute a prohibited loan guaranty arrangement under N.M. Const. art. IX, § 14. However, the legislature has not clearly and unequivocally mandated that purchase. Consequently, we may not conclude that the legislation is patently unconstitutional on those grounds.

4. Whether the state investment council and state investment officer may purchase bonds issued by the employers mutual company consistent with those officers' fiduciary obligations to invest the severance tax permanent fund in a prudent manner is a judgment they must make in the exercise of their sound and informed discretion.

Authority in the area of trust investments reflects that a purchase of those bonds is impermissibly speculative and imprudent.

ANALYSIS

Prohibition Against Special Laws.

The new legislation includes the Employers Mutual Company Act ("EMC Act"), 1990 N.M. Laws ch. 2, §§ 121 to 144 (2d Spec. Session). The EMC Act raises questions under the New Mexico Constitution's provisions governing special laws.

Two constitutional provisions limit the legislature's ability to regulate insurance companies by special legislation. N.M. Const. art. XI, § 13 states that "[t]he legislature shall provide for the organization of corporations by general law," and N.M. Const. art. IV, § 24 provides, in pertinent part:

The legislature shall not pass local or special laws in any of the following cases:... chartering or licensing... insurance companies.... In every other case where a general law can be made applicable, no special law shall be enacted.

According to judicial interpretation, the subjects specifically listed in Article IV, Section 24, including licensing insurance companies, must be regulated by general laws. State ex rel. Dow v. Graham, 33 N.M. 504, 515, 270 P. 897 (1928). The last sentence applies to cases not specified, and permits the legislature to determine whether a special law is appropriate. Id. See also Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 491, 394 P.2d 998 (1964) (at least in the absence of a clear abuse of discretion, legislature's judgment is conclusive that a general law cannot be made applicable).

New Mexico courts have held that a "general law" contemplated by the constitution "is one that relates to a subject of a general nature, or that affects all of the people of the state, or all of a particular class." Scarborough v. Wooten, 23 N.M. 616, 619, 170 P. 743 (1918). Special laws relate to particular persons or things of a class, or are made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances. City of Raton v. Sproule, 78 N.M. 138, 152, 429 P.2d 336 (1967); State v. Atchison, Topeka & Santa Fe Rwy. Co., 20 N.M. 562, 567, 151 P. 305 (1915).

The EMC Act was enacted "to create an insurance entity" to provide competitively priced workers' compensation and occupational disease disablement insurance to employers, particularly small and medium sized employers. EMC Act § 122(B), (C). The legislature determined that legislation was necessary because "the cost, service, and benefits of workers' compensation and occupational disease disablement insurance are of utmost importance to the health, welfare and economic well-being of all the citizens of New Mexico" and because small and medium sized employers "can face serious

obstacles in securing insurance at reasonable rates in the private voluntary market." Id. § 122(A), (B).

To meet the needs identified by the legislature, the EMC Act establishes an "employers mutual company,"

created as a nonprofit, independent, public corporation for the purpose of insuring employers against the risk of liability for payment of benefits claims to workers. The company shall be organized as a domestic mutual insurance company and shall be domiciled in a class A county.

EMC Act, § 124. The company's directors are initially appointed by the governor, with the consent of the senate. § 125(C). As the terms of the initial appointees expire, the legislation gradually reduces the number of directors appointed by the governor to two, with the remaining four directors elected by the company's policyholders. § 125(D). Ultimately, the legislation terminates the governor's authority to appoint directors once revenue bonds issued by the company are no longer held by the state. § 125(F). Directors' compensation is limited to $2,500 annually. § 125(J).

As noted, the company is a "public corporation." Its directors are "appointed officials of the state while carrying out their duties and activities under the Employers Mutual Company Act." § 126.[1] Otherwise, the legislature apparently intended the company to be treated like a private insurance company:

The company shall not be considered a state agency for any purpose....The insurance operations of the company are subject to all of the applicable provisions of the Insurance Code in the same manner as those provisions apply to a private insurance company. The company is subject to the same tax liabilities and assessments as a private insurance company.[2]

§ 141. The statute further provides that the company's money and property are not state money or state property, and that the company shall not receive any state appropriation. §§ 139, 140.[3]

Based solely on existing New Mexico law, the EMC Act appears to be a special law chartering or licensing an insurance company or organizing a corporation. Cf. United States v. State of New Mexico, 536 F.2d 1324, 1328 (10th Cir. 1974) ("licensing" a hospital refers to authorization from a state or other governmental unit for the operation of the hospital); Black's Law Dictionary 306 (5th ed. 1979) ("corporate charter" issued by state agency grants corporation legal existence and right to function as a corporation). The legislation relates to one particular entity, not to all of a class of entities. It is analogous to legislation establishing the Albuquerque Metropolitan Arroyo Flood Control Authority, about which the New Mexico Supreme Court asserted, "[m]anifestly, an act which creates and establishes a flood control district by legislative act, fixing its boundaries by specific description so as to constitute a single compact geographic area, is a special law." Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne, 74

N.M. at 490. See also Arizona Downs v. Arizona Horsemen's Fdn., 130 Ariz. 550, 637 P.2d 1053 (1981) (if a statute is plainly intended for a particular case and looks to no broader application in the future, it is a special law); State ex rel. Eckles v. Woolley, 302 Or. 37, 726 P.2d 918 (1986) (declining to hold that statute creating a public corporation by name was not a "special law").

Other states' courts have upheld the legislature's authority to create entities like the employers mutual company despite constitutional provisions, similar to N.M. Const. art. XI, § 13, prohibiting special laws creating corporations. Those courts reason that the prohibition was intended to apply only to private, not public, corporations. For example, the Oregon Supreme Court held that the state constitution's prohibition against the creation of a corporation by special law did not preclude the legislature from establishing a State Accident Insurance Fund Corporation ("SAIF Corporation") to provide workers' compensation insurance. State ex rel. Eckles v. Woolley, 302 Or. 37, 726 P.2d 918 (1986). According to the court, the prohibition did not apply to a public corporation, "an instrument of the government with certain delegated powers, subject to the control of the legislature, and its members officers or agents of the government for the administration or discharge of public duties." 726 P.2d at 923 (quoting Cook v. Port of Portland, 20 Or. 580, 583, 27 P. 263 (1891)). The court acknowledged that

[t]he mere fact that a corporation serves as an instrumentality for a governmental objective does not place it beyond Article XI, Section 2. Such a claim could be made for any utility company, bank, or other financial or producing enterprise chartered as the state's "chosen instrument," a practice that the constitutional restrictions were meant to prevent.

726 P.2d at 924. It found, however, that

SAIF Corporation... does not have the questionable characteristics of mixed private and governmental investment or management. It has no stockholders, and its board of directors is appointed by the governor, subject to confirmation by the Senate, and serves at the governor's pleasure.... SAIF Corporation's exclusively governmental management and the absence of private investment or objective to operate for private profit suffice to exclude it from the class of corporation to which the prohibition of Article XI, Section 2 was addressed.

726 P.2d at 925.

Similarly, in Utah Farm Bureau Ins. Co. v. Utah Ins. Guar. Ass'n, 564 P.2d 751 (Utah 1977), the court determined that a public corporation was not subject to Utah's constitutional prohibition against creating corporations by special acts. The entity in issue, the Utah Insurance Guaranty Association, was legislatively created, nonprofit and unincorporated. 564 P.2d at 752. It was created to pay the claims of persons with insolvent insurers and to assess its members to make the payments. Most of the insurers in the state were required to be members, and the members selected the association's governing board, subject to the commissioner of insurance's approval. The

commissioner also was required to approve the association's plan of operation and procedures and, if the association failed to submit such a plan, to promulgate reasonable rules. Members aggrieved by the association's actions or decisions had the right to appeal to the commissioner. Id.[4] See also Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976) (constitutional provisions prohibiting the creation of corporations by special acts do not apply to a public corporate body if private parties have no right to control or manage the corporation and no ability to change the corporation's fundamental structure and specified public purpose); State ex rel. Douglas v. Nebraska Mortgage Fin. Fund, 204 Neb. 445, 283 N.W.2d 12 (1979) (law creating a governmental corporate body controlled by government officials and appointees to assist private mortgage lenders in providing mortgage financing for low and moderate income families was a permissible general law); Queen v. West Virginia Univ. Hosp., Inc., 365 S.E.2d 375 (W. Va. 1987) (holding that constitutional requirement that corporations be created under general laws was not violated by act establishing a nonprofit corporation whose directors were mainly public officers to operate the state university's medical facilities and distinguishing private corporations with no official duties or concern with the affairs of government, voluntarily organized and not bound to perform any act solely for government benefit).

By contrast, the Arizona Supreme Court held unconstitutional an act creating an insurance guaranty association like those upheld in Oregon and Utah. Fireman's Fund Insurance Co. v. Arizona Ins. Guar. Ass'n, 112 Ariz. 7, 536 P.2d 695 (1975). The statutory provisions governing the association were essentially identical to those described in the Utah case. In addition, the Arizona court noted that the association was exempt from the payment of taxes and that persons associated with the business were immune from suit. 536 P.2d at 696. In holding the statute unconstitutional, the court relied on the plain terms of the Arizona constitution's proscription against creating corporations by special laws, observing that the "provision does not specify the nature of the corporation which shall not be created by special acts; no distinction is made between public corporations and private corporations." 536 P.2d at 695. The court also noted that the legislature was authorized to create boards, commissions, departments and agencies governed and controlled by public officials to carry out public purposes, and it was persuaded that "[t]he worthy objectives sought by the legislature can be attained through normal governmental structure and without doing violence to the constitution." 536 P.2d at 697.

The apparent trend in the case law, Arizona notwithstanding, is to find that constitutional provisions prohibiting corporations established by special law do not apply to public corporations. If faced with legislation like the EMC Act, therefore, a New Mexico court might apply similar reasoning and determine that the prohibition against special laws chartering or licensing insurance companies does not apply to public insurance companies. The New Mexico Supreme Court has taken a step in this direction by holding that N.M. Const. art. XI, § 13 does not prevent the legislature from establishing state agencies in corporate form. In re Gibson, 35 N.M. 550, 570-72, 4 P.2d 643 (1931) (statute creating board of commissioners of state bar did not contravene N.M. Const. art. XI, § 13 whether or not board was called a corporation; the board "is a mere

governmental agency without corporate status created for the regulation of the bar"). Whether the company created by the EMC Act qualifies as a public corporation, however, is problematic.

An early New Mexico case defines a "public corporation" as "created for public purposes only, connected with the administration of government, and the interests and franchises of which are the exclusive property and domain of the government itself". State v. Sunset Ditch Co., 48 N.M. 17, 21, 145 P.2d 219 (1944). At least initially, the employers mutual company arguably qualifies under this definition and shares certain characteristics with the public corporations found permissible in other states: its duties are specified by statute, its purposes are described as public, it has no shares, is nonprofit, and its directors are appointed by the governor. One significant difference, however, is that the government's initial control over the company's management is not permanent. Once the governor's power to appoint directors is terminated, the government's remaining oversight of the business is minimal. The company must submit a copy of its annual audit report to the superintendent of insurance, is subject to the recommendations of the superintendent if the superintendent determines the company's financial condition renders its business hazardous to the public or policyholders, and it must submit an annual report to the governor, the legislative finance committee and any other appropriate legislative committee. EMC Act §§ 137, 138, 143. These requirements are not substantially different from those applicable to private insurers. See, e.g., NMSA 1978, §§ 59A-3-1 (insurance board must file an annual report with the legislature); 59A-4-5 (authorizing the superintendent to examine insurers); 59A-5-29 (insurer must file annual statement with superintendent); 59A-41-25 (authorizing the superintendent to order an insurer in hazardous financial condition to take various actions). Essentially, what remains is a nonprofit insurance company established by special statute to provide workers compensation insurance to employers. Even assuming that providing such insurance is a public purpose, the absence of government control weakens the argument that the company is an instrument of the government or is connected with the administration of government. We believe that this could prove fatal to the EMC Act's constitutionality, based on the significance given to government control in cases upholding special laws creating public corporations.

Antidonation Clause.

N.M. Const. art. IX, § 14 provides, in pertinent part:

Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or **public or private corporation**.

(Emphasis added). This provision is implicated by the enactment appropriating one million dollars to "the employers mutual company loan fund" and authorizing the state treasurer to make a loan in the same amount to the employers mutual company. N.M. Laws, ch. 3, § 9 (2d Spec. Session). The loan bears interest and is to be repaid in two years. Proceeds from the company's sale of revenue bonds are to be used to repay the

loan. Id. § 7(E). The severance tax permanent fund may be invested in the bonds the company issues in an amount up to $10 million. Id. § 2.

Because it is to be repaid with interest, the loan probably would not be considered a "donation." See Village of Deming v. Hosdreg Co., 62 N.M. 18, 28, 303 P.2d 920 (1956)("donation" as used in Art. IX, § 14 means a ""gift,' an allocation or appropriation of something of value, without consideration"). The loan may, however, amount to the lending or pledging of the state's credit to a public corporation.[5] This office has issued one opinion approving a plan for lending state funds to residents enrolled in colleges and universities in the state where the funds were to be repaid with interest. AG Op. No. 70-23 (1970). The opinion relied on the New Mexico Supreme Court's decision in City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 161 P.2d 878 (1945), which held that a city did not impermissibly lend or pledge its credit when it sold its utility properties to a private company under an agreement providing that $130,000 of the purchase price would be paid in twenty-four annual installments. According to the Court,

Nothing in this phase of the transaction possessed any element of guaranty, suretyship or pledge by the City of Clovis whereby the City became liable to do or perform any act or thing, or to incur any obligation, or pay any sum of money, in behalf of, or for the benefit of, the utility company, or to become liable for, or assure the performance of, any obligation, or the discharge of any liability of the utility to any third person.

49 N.M. at 275-76. This rationale is similar to that applied in other states with constitutions prohibiting the lending or pledging of public credit. See, e.g., Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972)(loaning of credit clause does not prohibit the lending of state funds); Common Cause v. State, 455 A.2d 1 (Me. 1983)(constitutional prohibition against lending credit of state was intended only to proscribe suretyship or loan guarantee arrangements); Petrus v. Dickinson County Bd. of Comm'rs, 457 N.W.2d 359 (Mich. Ct. App. 1990) (constitutional prohibition against lending of credit is violated only when the state creates an obligation legally enforceable against it for the benefit of another).

A more recent decision of the New Mexico Supreme Court, however, casts some doubt on the analysis applied in City of Clovis. In Hotels of Distinction West, Inc. v. City of Albuquerque, 107 N.M. 257, 755 P.2d 595 (1988), the Court addressed the constitutionality of a development agreement between the City of Albuquerque and a private developer for building a hotel primarily funded with a federal grant. Under the agreement, funds advanced to the developer were to be repaid to the city. The Court upheld the agreement in the face of claims that it violated the antidonation clause because the main source of finding was federal money and, to the extent that municipal funds were used, they would be used to construct public improvements on public property. In reaching this conclusion, the Court stated that "[t]he antidonation clause clearly proscribes the lending of public funds for private purposes." 107 N.M. at 259. The Court also observed that, "contracts between municipalities and private enterprises that are beneficial to the community as a whole are not violative of article IX, section 14, when they do not involve municipal investments through the lending of municipal funds,"

and "[t]he antidonation clause prohibits the city to lend or pledge general municipal funds." Id. The Court did not mention City of Clovis, but its statements strongly indicate that, contrary to what the earlier case suggested, New Mexico courts might find a state loan to a public corporation prohibited by the antidonation clause.

Transactions that violate the antidonation clause are allowed if "otherwise provided in this constitution." N.M. Const. art IX, § 14. Under N.M. Const. art. VIII, § 4, all public money not invested in interest-bearing securities is to be deposited in specified banks, savings and loan associations and credit unions. See AG Op. No. 667 (1933)(investments of public funds are limited to such interest-bearing securities as are provided by statute). In the same opinion approving student loans, this office also concluded that a state loan evidenced by promissory note might constitute a permissible investment of public money under N.M. Const. art. VIII, § 4. AG Op. No. 70-23 (1970)(concluding that promissory notes executed by students for state loans provided by law constituted "interest-bearing securities"). See also State v. Sheets, 94 N.M. 356, 610 P.2d 760 (Ct. App.) (promissory notes are securities under the New Mexico Securities Act), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980); Blue River Sawmills, Ltd. v. Gates, 225 Or. 439, 358 P.2d 239, 254 (1960) (term "investment" describes investing money for income or profit and includes a loan).

Applying the reasoning used in the 1970 Attorney General opinion, the loan from the state to the employers mutual company, if evidenced by a note, might escape antidonation clause coverage by qualifying as an investment permitted under N.M. Const. art. VIII, § 4. The New Mexico Supreme Court's decision in Hotels of Distinction, however, presents an apparent obstacle to this conclusion. The decision, issued after the 1970 Attorney General opinion, clearly condemns a loan of public funds because it violates the antidonation clause. It is unlikely that a court applying this prohibition would find a loan of state money permissible simply by characterizing it as an investment. Significantly, as noted above, the Hotels of Distinction decision states that contracts between municipalities and private enterprises are not proscribed "when they do not involve municipal **investments** through the lending of municipal funds." 107 N.M. at 259 (emphasis added). Moreover, there arguably exists the element of "state guaranty," discussed in City of Clovis, to the extent the legislation envisions the required use of the state's severance tax permanent fund to repay the company's indebtedness owed the state. Cf. White v. State, 759 P.2d 971 (Mont. 1988) (law requiring the legislature to deposit severance tax funds into agency's debt service fund and assess taxes to continue such deposits as needed effectively pledges the credit of the state to secure the agency's bonds, the proceeds of which are to be used to benefit private businesses).

Article VIII, § 10 of the New Mexico Constitution.

The EMC Act authorizes the employers mutual company to issue revenue bonds. 1990 N.M. Laws, ch. 2, § 135(E) (2d Spec. Session). The state is not liable for the company's obligations. Id. § 128. Based on the EMC Act's purpose, "to stimulate the state's economy, including the critical [oil and gas] industries," the legislature finds that

"investment of the severance tax permanent fund in revenue bonds issued by the employer's mutual company is a prudent investment." Id. § 122(D).

A companion measure to the EMC Act, 1990 N.M. Laws, ch. 3 (2d Spec. Session), authorizes the employers mutual company to issue up to $10 million in revenue bonds "payable solely from premiums received from insurance policies and other revenues generated by the company," permits the bonds to be sold at a public sale or at a private sale to the state investment officer or to the state treasurer, and provides that "[t]he bonds shall be legal investments for any person or board charged with the investment of public funds." Id. § 7. Chapter 3 enacts a new section authorizing a $10 million investment of the severance tax permanent fund in revenue bonds issued by the employers mutual company and requiring that the bonds bear interest at a market rate not less than the existing rate of return for a ten-year treasury bond. Id. § 2.

Fiscal impact reports prepared by the legislative finance committee state:" "The company is established as a private firm except that the company is capitalized by state money.... The bill authorizes the investment of the Severance Tax Permanent Fund in the bonds of the company.... The bonds are declared a prudent investment.... With respect to the investment of the Severance Tax Permanent Fund in the revenue bonds of the company, the potential for a loss exists, as with any other investment. However, the company probably will not be able to provide any collateral thus making the investment an unsecured risk."[6]

N.M. Const. art. VIII, § 10 creates the severance tax permanent fund as a "permanent trust fund" and provides:

Money in the severance tax permanent fund shall not be expended but shall be invested as provided by law. The income from investments shall be appropriated by the legislature as other general operating revenue is appropriated for the benefit of the people of the state.[7]

The duty and power to invest the severance tax permanent fund resides in the state investment council ("SIC"). NMSA 1978, § 7-27-3.1 (Repl. Pamp. 1990). The state investment officer, "[f]or the purposes of the investment of the severance tax permanent fund... shall manage the fund in such a prudent manner as to insure a reasonable diversification and reasonable yield." NMSA 1978, § 6-8-7 (Repl. Pamp. 1988). Investment standards that the SIC and the state investment officer employ are stated at NMSA 1978, § 6-8-10 (Repl. Pamp. 1988):

Investments made pursuant to this act [6-1-8 to 6-8-16 NMSA 1978] shall be made with the exercise of that degree of judgment and care, under circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not for speculation but for investment, considering the probable safety of their capital as well as the probable income to be derived.

SIC Rule 90-3 (adopted November 28, 199) embodies the SIC's investment policy for the Severance Tax Permanent Fund:

The purpose of the State of New Mexico Severance Tax Permanent Fund is to hold in trust that part of state revenues derived from excise taxes which have been or shall be designated severance taxes.... Since the Fund is a permanent trust fund, it shall be invested in accordance with the Prudent Man Rule with the State Investment Officer and Council acting as fiduciaries.

The State Investment Council, as a fiduciary, has the responsibility and authority to establish policies for the investment of the Severance Tax Permanent Fund. The objective of the market rate portfolio in the Severance Tax Permanent Fund is to provide a steady stream of income that maintains its value in real (inflation adjusted) dollars, while maintaining the real value of the corpus for future generations. The objective of the differential rate portfolio in the Severance Tax Permanent Fund is to stimulate the economy of New Mexico...and [to provide] a reasonable yield, as intended by the differential rate statutes.

Article VIII, § 10 and implementing legislation provide that the SIC and the state investment officer shall act as trustees of the severance tax permanent trust fund. In that regard, the SIC and the state investment officer perform investment duties that require an independent exercise of their judgment, as fiduciaries, in investing the severance tax permanent fund and the other permanent funds under N.M. Const. art. XII, § 7. In State v. Marron, 18 N.M. 426, 137 P. 845 (1913), the New Mexico Supreme Court held that the legislature exceeded its constitutional power when it mandated that the permanent school fund be deposited in New Mexico banks paying the highest interest rate for the deposit.[8] Under Article XII, Section 7, as it existed in 1913, the legislature could provide that the funds "may be invested" in interest-bearing securities, but all investments required the approval of the governor, attorney general, and secretary of state. In holding the mandatory legislation void, insofar as it required the deposit of those funds in banks, the court stated:

The Constitution has conferred upon the [state officials] the power to approve or disapprove any proposed investment of these funds.... This discretion is in no way limited, but is absolute.... [W]e know of no authority, neither legislative nor judicial, to control this discretion. The grant of legislative power in the section of the constitution is not a grant of power to direct the investment in any particular form of security. The selection of the investment is not a legislative function under the provisions of the constitution.

Id. at 439, 137 P. at 849. Although the court in Marron applied Article XII, § 7, its reasoning applies as well to Article VIII, § 10 under the current statutory scheme, in which the SIC and the state investment officer must exercise the judgment and discretion of fiduciaries when investing the severance tax permanent trust fund. See Sgaglione v. Levitt, 37 N.Y.2d 507, 375 N.Y.S.2d 79, 337 N.E.2d 592 (1975) (holding unconstitutional under a constitutional provision protecting pension benefits as

contractual rights legislation that mandated the statutory trustee of a public retirement fund to buy corporate bonds of a corporation created as a financing agency in response to New York City's dire financial condition; stating that the legislature was "powerless in the face of the constitutional nonimpairment clause to mandate that [the trustee] mindlessly invest in whatever securities they direct, good, indifferent or bad"). See also AG Op. 77-10 (1977) (observing that under the statutory provisions implementing Article VIII, Section 10, as they existed in 1977, the state treasurer was required to invest the severance tax permanent fund by depositing the funds in banks or investing the funds in securities approved by the board of finance, and that the state treasurer, under the "prudent man" rule applicable to trusts, should request approval to invest in securities if the treasurer believed investment in securities could produce a greater yield consistent with safety).

Applying Marron, we believe that the EMC Act and Chapter 3 is constitutionally infirm to the extent the legislature intends to supplant its judgment for that of the SIC and the state investment officer in determining whether to invest the severance tax permanent fund in bonds issued by the employers mutual company and to direct that the severance tax permanent fund purchase those bonds. The legislature's declaration that such investment is prudent for investment by the severance tax permanent fund, in conjunction with the other provisions of Chapter 3 authorizing the state investment officer's purchase of the bonds, indicate that the legislature may have exceeded its bounds.[9] Nonetheless, the legislature has not, in clear and unequivocal language, mandated SIC's or the state investment officer's purchase of the bonds issued by the employers mutual company. Accordingly, we may not conclude that the EMC Act and Chapter 3 are patently unconstitutional under the reasoning and facts of Marron. Cf. AG Op. 75-17 (1975) (concluding that S.B. 169 was unconstitutional because it would require the state investment officer to invest ten percent of the permanent school fund in bank deposits; that the legislature lacked the constitutional power under article XII, § 7 to direct investments); AG Op. 71-10 (1971) (concluding that a provision of law was unconstitutional insofar as it purported to provide that officers other than the SIC or state investment officer must make the final determination on the investment of the state permanent funds in interest-bearing time deposits).

Thus, under the EMC Act and Chapter 3, the SIC and the state investment officer may, in their sound and informed discretion, determine whether to buy bonds issued by the employers mutual company. To purchase those bonds, the SIC and state investment officer must be satisfied that the investment is "prudent" under the standards specified in § 6-8-10 (stating the "prudent man" rule applicable generally to trusts). Neither the attorney general nor the legislature may supplant the SIC's and state investment officer's judgment in that regard. However, we direct the attention of those officials to the following treatise material:

[C]ertain kinds of investments are universally condemned. It is improper for a trustee to purchase securities for the purpose of speculation, although the line between what constitutes speculation and what constitutes a prudent investment is drawn in different places by different courts....

A trustee cannot properly purchase securities in new and untried enterprises. This is true not only where he purchases shares of stock but also where he purchases bonds.

(Emphasis added). A. Scott, The Law of Trusts (4th ed. 1988) § 227.6. With respect to bonds, "[i]ssues rated in the four highest categories (AAA, AA, A, BBB) are generally recognized as being investment grade. Securities rated below BBB are generally referred to as "speculative grade' securities." Standard & Poor's Ratings Guide (1979) at 5.[10] Because the employers mutual company is a new company, the authority reflects that a purchase of the company's bonds by the SIC and state investment officer is impermissibly speculative and imprudent.

We have analyzed specifically those portions of the legislation that create and fund the employers mutual company and conclude:

1. Under existing New Mexico case law, the legislation creating the employers mutual company appears to be an unconstitutional special law chartering or licensing an insurance company. Because the company is intended to be operated as a private entity, it is not clear that the exemption from the prohibition against special laws created by other states' courts for public corporations would save the legislation.

2. The latest pronouncements of the New Mexico Supreme Court indicate that a loan of state funds to the employers mutual company, as authorized by the workers compensation law, violates the antidonation clause of Article IX, Section 14 of the New Mexico Constitution.

3. The workers' compensation legislation is constitutionally infirm under N.M. Const. art. VIII, § 10, to the extent the legislature intends to supplant its judgment for that of the state investment council and the state investment officer in determining whether to invest the severance tax permanent fund in bonds issued by the employers mutual company and to direct that the severance tax permanent fund purchase those bonds. To that extent also, the legislation may constitute a prohibited loan guaranty arrangement under N.M. Const. art. IX, § 14. However, the legislature has not clearly and unequivocally mandated the purchase. Consequently, we may not conclude that the legislation is patently unconstitutional on those grounds.

4. Whether the state investment council and state investment officer may purchase bonds issued by the employers mutual company consistent with those officers' fiduciary obligations to invest the severance tax permanent fund in a prudent manner is a judgment they must make in the exercise of their sound and informed discretion. Authority in the area of trust investments reflect that a purchase of those bonds by the state investment council and state investment officer is impermissibly speculative and imprudent.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

n1. Because of the phrase "appointed officials of the state" used in Section 126, it is not clear that the provision is intended to apply to those directors elected by the company's policyholders after the initial board is appointed by the governor.

n2 This provision subjecting the company to the same tax liabilities as a private insurance company may conflict with 1990 N.M. Laws, ch. 3, § 7(I) (2d Spec. Session), exempting the bonds and interest thereon from taxation by the state and any political subdivision.

n3 But see 1990 N.M. Laws, ch. 3 § 7(E) (2d Spec. Session) (appropriating to company revenue bond proceeds for repayment of loan, development and operation of company and costs associated with the bonds).

n4 The Washington Supreme Court also upheld the creation of an insurance guaranty association against the contention that the legislation creating it was a special law. Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wash. 2d 523, 520 P.2d 162 (1974). The court did not characterize the association created by the act, but relied on the rule that a law was general "[i]f the only limitation contained in [the] law is a legitimate classification of its objects." 520 P.2d at 171. It concluded that because the legislative classifications in the act among insurers and insurance coverage were reasonable and legitimate, the act was "not a special act and grants no corporate powers or privileges by special act to any entity." Id. The court's logic is difficult to follow, and we agree with the Oregon Supreme Court that a law creating a corporate entity by name is a special law. State ex rel. Eckles, 726 P.2d at 923.

n5 The EMC Act provides unequivocally that the employers mutual company is not a state agency. Accordingly, the judicially-created exception to the antidonation clause for funds transfers among state agencies and political subdivisions does not apply. See Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952) (city could properly mortgage its property to secure state university's debt); City of Gallup v. New Mexico State Park and Recreation Comm'n, 86 N.M. 745, 527 P.2d 786 (1974) (upholding lease of state park to a city for $1.00 per year).

n6 See LFC fiscal impact report concerning HB 2 dated September 14, 1990 at 1-3 of attachment. See also LFC fiscal impact report dated September 16, 1990 regarding HB 3 at 2 (stating that the prudent man rule shall be applied to the severance tax fund investment); LFC fiscal impact report dated September 20, 1990 regarding SB 1 and HB 3 at 17, 18, and 19 (reciting the same material quoted above).

n7 In 1982, the voters approved an amendment to Article VIII, Section 10 that eliminated the ability of the legislature to appropriate money in the severance tax permanent fund.

n8 The flawed legislation considered in Marron provided:

It is hereby made the duty of the Governor, State Treasurer, Attorney General and Secretary of State, to ascertain which bank or banks in the State will pay the highest rate of interest for the deposit of the said permanent school fund and deposit the same therein upon said bank or banks giving a bond as hereinafter required.

n9 See also EMC Act at § 125(F) stating that "[w]hen the state no longer holds the revenue bonds," the governor's power to appoint directors terminates.

n10 We have no information whether the revenue bonds of the employers mutual company have been rated, are capable of rating or what rate may be given if rated.