

**OPINION
68-105**

January 15, 1968 (OPINION)

Honorable K. O. Nygaard

Commissioner of Insurance

RE: Insurance - Variable Annuities - Regulation

The question presented for resolution is whether variable annuities, which are issued or delivered in the State of North Dakota, are subject to the jurisdiction of the Commissioner of Insurance, and, if so, in what manner and to what extent. The question as stated assumes that variable annuities may be issued or delivered in this State. As appears hereinafter, this assumption is untenable, and we therefore deem the question modified in accordance with the conclusions reached in this opinion.

We begin with the well recognized principle that the business of life insurance is affected with the public interest and subject to legislative regulation designed to protect the public. *Man v. Policyholders' National Life Insurance Company*, 78 N.D. 724, 51 N.W. 2d. 853. In pursuance of this objective, our legislature has enacted insurance laws over a period of years which are embodied at Title 26 of the North Dakota Century Code. Under these laws the Commissioner of Insurance has been delegated broad regulatory and supervisory authority over the business of insurance transacted in this state in order to effectuate the will of the legislature. This is not to suggest, however, that the authority vested in the Commissioner is unbridled or that he may exercise it capriciously. *Dakota National Insurance Company v. Commissioner of Insurance*, 79 N.D. 97, 54 N.W. 2d. 754. Rather, it is a clear recognition of the time-honored doctrine of separation of powers. Under its police power, the legislature determines what the laws of this state shall provide insofar as the transaction of insurance is concerned and delegates to the Commissioner of Insurance the authority to see that these laws are faithfully executed. It is from within this matrix, then, that we must approach a resolution of the question presented.

The corpus of insurance laws contains no express statutory provisions relating to variable annuities. This absence derives from the fact that the variable annuity did not appear in the United States until about 1952 (*Securities and Exchange Commissioner v. Variable Annuity Life Insurance Company of America*, 359 U.S. 65) and could not, therefore, have conceivably been within the contemplation of legislative assemblies responsible for the enactment of insurance laws which antedate its advent by a number of years.

Furthermore, it can hardly be gainsaid that the variable annuity injects problems which our insurance laws were neither designed nor are they presently equipped to solve. Prescribed contractual provisions, solvency adequacy of reserves to meet a company's fixed obligations, permissible categories of investments, and periodic examinations characterize our regulatory system. On the other hand, the underlying theory of the

variable annuity - investment in a portfolio consisting largely of equity securities designed to hedge against paying annuitant in depreciated dollars - renders traditional functions of state regulation meaningless. We deal here with a product which for all practical purposes is the same as ownership in a conventional, open-end investment company. To this extent, traditional regulatory measures become irrelevant, whereas full disclosure of investment policy, regulation of changes of that policy, capital structure, conflicts of interest, and investment advisers - matters historically under the regulatory control of blue sky law administrators and the Securities and Exchange Commission - loom into prominence. There simply is no adequate substitute for these protections under our insurance laws.

Nevertheless, it is urged by interested parties that by fair implication present statutory provisions may be extended to encompass variable annuities.

Proponent's of variable annuities call our attention to section 26-03-09 of the North Dakota Century Code, which provides that "(a)n insurance upon life may be made payable on the death of the person or on his surviving a specified period, or periodically so long as he shall live, or otherwise contingently on the continuance or termination of life." It is their contention that the quoted language would include annuity payments within the definition of the type of policy that may be issued by a life insurance company doing business in North Dakota. Our attention is also directed to Section 26-08-02 of the North Dakota Century Code, which provides for the formation of domestic stock insurance companies and permits such companies to carry insurance "(u)pon the lives of persons, including every kind of insurance pertaining thereto," and "(a)gainst accidental injuries including the granting, purchasing, and paying of annuities and indemnities. . ." Finally, we are directed to section 26-03-42 of the North Dakota Century Code, which prohibits the issuance or delivery of a "life insurance policy of any kind" until the form thereof has been filed with the Commissioner. Briefly, then, proponents contend that the above cited provisions may be extended by implication to include variable annuities and that such annuities, in turn, are subject to the supervisory jurisdiction of the Commissioner of Insurance.

The difficulty with this approach and the danger inherent in its application is that it completely ignores the functional relationship between the legislature and the Commissioner of Insurance. For it is within the prerogative of the legislature under its police power to determine what the public health, safety, and welfare of our citizenry demand in the area of insurance, and that prerogative is in no manner alterable at the whim or caprice of the Commissioner. Were it otherwise, the Commissioner would be arrogating to himself powers reserved exclusively to the legislature, thus obliterating and undermining the principle of separation of powers. It is with the myriad details of executing the laws, not with the determination of overriding public policy considerations, which the Commissioner should be concerned.

We are re-enforced in our conviction by section 26-03-25 of the North Dakota Century Code, which provides as follows:

"No policy of life insurance shall be issued or delivered in this state unless the form thereof is authorized by the provisions of this chapter."

This section is, in effect, a mandate from the legislature to the Commissioner of Insurance forbidding the issuance or delivery in North Dakota of life insurance policies unless the forms thereof are authorized under specific provisions established by the legislature. It is not for the Commissioner to usurp the function of the legislature by declaring that variable annuities may be issued and delivered in this State. This the legislature has expressly commanded him not to do. Until such time as the legislature either repeals this law or expressly authorizes variable annuities, the Commissioner of Insurance has no choice but to execute the law as enacted.

By proponent's contention, the variable annuity would fall within the ambit of a "life insurance policy of any kind." This admission, however, is hardly dispositive of the question of whether variable annuities may be issued or delivered in this State. For even a perfunctory examination of relevant provisions contained in chapter 26-03 of the North Dakota Century Code, demonstrates the futility of any attempt to imply that variable annuities are authorized thereunder.

Sections 26-03-26 through 26-03-31 of the North Dakota Century Code establish, respectively, the standard forms of ordinary life or limited life insurance policies, of endowment life policies, of ordinary or limited payment life policies with fixed survivorship annuity, of endowment life policies with fixed survivorship annuity, of term insurance policies, and of term life insurance policies with the right to renew and change such kind of insurance which may be issued and delivered in North Dakota.

Sections 26-03-32 through 26-03-34 of the North Dakota Century Code relate to single premium and nonparticipating life insurance policies, term life insurance, and preliminary life insurance policies, term life insurance, and preliminary term life insurance policies.

Section 26-03-35 of the North Dakota Century Code provides that no policy of life insurance in form other than a standard form prescribed in Chapter 26-03 shall be issued or delivered in North Dakota unless it shall contain certain enumerated provisions. Section 26-03-36 prohibits certain provisions in life insurance policies issued or delivered in North Dakota, and Section 26-03-37 pertains to life insurance policies of domestic companies which are issued or delivered outside of North Dakota.

We would be stretching the law, in fact, legislating, were we to conclude that Chapter 26-03 of the North Dakota Century Code, impliedly authorizes the issuance or delivery of variable annuities in North Dakota.

Moreover, we are not unmindful that several of our sister states have recently enacted special legislation designed specifically to cope with problems engendered by the appearance of the variable annuity. An examination of representative legislation indicates a general recognition by the states involved that enabling legislation was necessary before variable annuities could be issued or delivered within their borders and that traditional

regulatory controls were either immaterial, inadequate, or both. For example, on July 12, 1967, the Illinois General Assembly approved Senate Bill 1325 which authorizes domestic life companies to establish separate accounts to provide for the future payment of retirement benefits in fixed or variable dollar amounts. Under this Bill, provision is made whereby beneficial owners of contracts may be accorded special voting rights and procedures relating to investment policy, investment advisory services, and selection of certified public accountants in relation to the administration of the assets in any separate account. Further, the Director of Insurance is thereunder given sole authority to regulate the issuance and sale of such contracts and to promulgate rules and regulations to that end. Any company seeking authority to issue or deliver contracts payable in variable dollar amounts must first satisfy the Director that its conditions and methods of operations in connection with such contracts will not be such as to render its operation hazardous to the public or Illinois policyholders. In determining the qualification of a company, the Directors must consider, among other things, the history and financial conditions of the company; the character, responsibility and general fitness of the officers and directors of the company; and, in the case of a foreign or alien company, whether the regulation under the laws of its domicile provides a degree of protection to policyholders and the public substantially equal to that provided under Illinois law. In addition, permissible investments of contributions to the separate accounts, while freed from certain restrictions generally applicable to life companies not engaging in separate accounts business, are limited and otherwise circumscribed. See also S.D. Laws, Chapter 131 (1967).

In summary, were we to accept proponent's contentions, we would in effect be ratifying an intrusion by the Commissioner of Insurance into the province reserved to the legislature. This we refuse to do. The legislature has not spoken in regard to the question of variable annuities; until it does so, the variable annuity may be neither issued or delivered in this State.

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