

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date November 1, 1972

To Robert A. Brown, Acting Commissioner Banks and Banking
Frank M. Hogerty, Jr., Commissioner Dept. Insurance
From Craig Nelson, Assistant Attorney General
Charles Larouche, Assistant Dept. Attorney General

Subject Variable Annuities

You have inquired as to whether the "sole authority" powers granted to the Insurance Commissioner in 24 M.R.S.A., § 2537, sub-§ 11, in effect, supersede the authority of this State's Securities Division concerning the registration of variable annuities under the Maine Securities Act.

The pertinent language of the Maine Insurance Code, which was enacted by P.L. 1969, C. 132 and which became effective on January 1, 1970, provides as follows:

"The commissioner shall have sole authority to regulate the issuance and sale of the contracts or agreements authorized by subsection 1, and to promulgate such rules and regulations as may be necessary for the effectuation of this section."
24-A M.R.S.A. § 2537, sub-§ 11. (Emphasis supplied).

Furthermore, one of the "contracts or agreements authorized by subsection 1 (of section 2537)" is a variable annuity contract.

The Maine Securities Act provides, as part of its definition of the term "security," that,

"...The term 'securities' does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some other specified period."
32 M.R.S.A. § 751. (Emphasis Supplied)

It would appear that the Legislature by expressly directing itself to the issue of fixed annuities has, at least impliedly, indicated its intention that a variable annuity should be included in the general language of the definition of a security.

The legislative records are silent as to the intent of the Legislature in adopting the above language.

The above-quoted language is, however, substantially verbatim, the language which appears in section 401 (1) of the Uniform Securities Act which was approved and adopted by the National Conference of Commissioners on Uniform State Laws on August 25, 1956.

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A study of the Official Comments by the drafters of that Act, although not conclusive, provides insight into the reasoning and intent of the drafters of that language.

Section 401(1) of the Uniform Securities Act provides that,

" * * * Security does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay [a fixed sum of] money either in a lump sum or periodically for life or for some other specified period."

The official code comment regarding the above-quoted language appears at page 730 of the cited publication wherein it provides,

"The last sentence has been explicitly phrased so as not to exclude from the definition the so-called 'variable annuities' which have recently been developed. See also the comment under § 402(a)(5). If it is desired to exclude variable annuities along with orthodox annuities on the ground that the former are sufficiently regulated by the insurance authorities in the particular state, the bracketed language should be deleted."

In view of the language of section 751 and the above-quoted language of the Uniform Act, it would seem that the only reasonable conclusion is that this State's definition of the term "security" includes variable annuities.

Since the variable annuity contract is a security, it is, unless otherwise exempted, subject to the registration requirements of this State, under 32 M.R.S.A. § 871 and further, any individual engaged in ". . . the business of selling or offering for sale securities. . . ." is considered a dealer in securities as defined in 32 M.R.S.A. § 751 and must register as such under 32 M.R.S.A. § 851.

The question to be resolved is, what effect, if any, does the new insurance code have on the above registration requirements for securities and for dealers in securities.

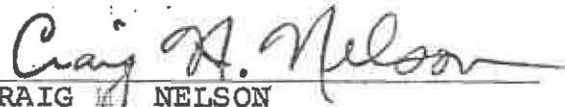
The phrase in the insurance code which provides that the ". . . commissioner shall have sole authority to regulate the issuance and sale of [variable annuity] contracts. . . ." does not expressly exempt this form of security from regulation under

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the security laws. To render this security exempt from the security laws, the above-quoted language must be interpreted as impliedly amending the security law by engrafting an exception thereon to the effect that all securities are subject to regulation thereunder except those which are subject to regulation by the insurance code and such an implied amendment must be strictly limited to instances where, and only to the extent that, "... a consistent body of laws cannot be maintained without the abrogation of a previous law." Sutherland, Statutory Construction, Vol. 1, 3d Ed., § 2012, p. 462 (1943).

The legislative records offer no indication as to the intent of the Legislature in enacting the subject provision of the insurance code; therefore, it must be presumed, for the purposes of construction, that the Legislature was aware of the existence of the above-quoted language in the definition of "security" in the Security Act when it gave the Insurance Commissioner "... sole authority to regulate the issuance and sale of variable annuity contracts..." Furthermore, the word "sole" is commonly defined as meaning, to have no companion or no sharer, to be the only one and to function independently without interference or assistance.

It would, therefore, appear that, in view of the foregoing observations and discussion, the only reasonable, consistent and non-contradictory conclusion that can be made is that the Legislature, by enacting the "sole authority" provision of the insurance code, has amended, by necessary implication, the Security Law so as to exempt variable annuity contracts and those engaged in issuing and selling them, from the jurisdiction of the State's Security Division and the registration requirements of sections 851 and 871 of the Securities Law.



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