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OPINION	:	No. 81-713
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of	:	<u>MARCH 11, 1982</u>
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THE HONORABLE CAROL HALLETT, MEMBER OF THE ASSEMBLY, has requested an opinion on a question which we have rephrased as follows:

Is a trustee of a Taft-Hartley trust which pays death benefits to an employee's family and other benefits eligible to appointment to the Board of Administration of the Public Employees' Retirement System as "an official of a life insurer"?

CONCLUSION

A trustee of a Taft-Hartley trust which pays death benefits to an employee's family and other benefits is not eligible to appointment to the Board of Administration of the Public Employees' Retirement System as "an official of a life insurer."

ANALYSIS

The Public Employees' Retirement Law is contained in section 20000 et seq. of the Government Code. Under the statutory procedures set forth therein, the system is administered by a board of administration consisting of 11 members provided for in section 20100 of the law. Our focus is upon subdivision (c) thereof which provides for four of the members as follows:

"(c) *An official of a life insurer*, an officer of a bank, and an elective official of a contracting agency, and one person representing the public, appointed by the Governor." (Emphasis added.)

The question presented for resolution herein is whether an individual who is a trustee of several Taft-Hartley employer-employee benefit trusts may be appointed to the position designated above in section 20100, subdivision (c), as "[a]n official of a life insurer."

Section 20100 was added to the Government Code by the Statutes of 1945, chapter 123, section 1. Theretofore, section 42 of the act providing for the creation and establishment of a retirement system for state employees, as amended (Stats. Ex. Sess. 1938, ch. 12, § 9), provided for the appointment by the Governor to the board of administration of "an official of a *life insurance company* and an officer of a bank." (Emphasis added.) While the term "life insurer" appears broader in scope than "life insurance company," the problem remains to define the dimension of the apparent expansion.

We are required in the first instance to give effect to a statute according to the usual and ordinary import of its terms; such terms must be interpreted contextually and in furtherance of the nature and obvious purpose of the enactment. (*Moyer v. Workmen's Comp. App. Bd.* (1973) 10 Cal.3d 222, 230.) In this regard, it is noted that the Public Employees' Retirement System provides retirement benefits to state employees, and to employees of local agencies which have contracted with the system. These include, inter alia, benefits for normal retirement, which is a pension annuity based upon age and years of completed service (Gov. Code, § 21250 et seq.); benefits for disability retirement, which also consists of an annuity pension (Gov. Code, § 21290 et seq.); numerous optional settlements of employees' retirement allowances (Gov. Code, § 21330 et seq.) to provide, inter alia, greater benefits for a surviving spouse than are automatically provided by law; other survivorship benefits (Gov. Code, § 21380 et seq.); and death benefits for both active and retired members' survivors (Gov. Code, § 21360 et seq.).

The foregoing benefits are generally financed through public employer and member contributions to the retirement system (Gov. Code, § 20600 et seq., § 20740 et

seq.) which are placed in a trust fund known as the Public Employees' Retirement Fund (Gov. Code, § 20200 et seq.). The board of administration of the system is specifically authorized to invest these trust funds in stocks, bonds or real estate. (*Ibid.*) The board, in which "the management and control of this system is vested" (Gov. Code, § 20103), is also charged with keeping necessary actuarial data for the system and making actuarial investigations, clearly toward the goal that the retirement system shall be actuarially sound. (Gov. Code, §§ 20127-20130.2.)

Thus, the "provisions of the Retirement Law providing for a death benefit have certain characteristics in the nature of life insurance. (Cf. *Shaw v. Board of Administration* (1952) 109 Cal.App.2d 770, 774.) It is reasonable to infer, therefore, that the specified qualification for appointment was intended to provide a certain measure of technical competence and expertise with respect to the dynamics of life insurance. It is implicitly assumed that an official of a life insurance company, i.e., an enterprise exclusively or primarily engaged in the business of life insurance, would possess the expected level of specialized knowledge and training. In our view, therefore, the deletion of the word "company" in Government Code section 20100, subdivision (c), did not portend the impairment or reduction of technical qualification by expanding the scope of the term to include any organization which confers any manner of death benefit, or the principal function of which is other than the business of life insurance. Such a construction is neither required nor consistent with the purpose of the enactment. Rather, while the term "life insurer" may include a life insurance company, association, and reciprocal or interinsurance exchange, doing business as a person, partnership, joint stock association, company or corporation (compare, Cal. Const., art. XIII, § 28(a)), the essential element remains the word "insurer."

A Taft-Hartley employer-employee benefit trust is established and created through collective bargaining agreements for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing or unemployment benefits or life insurance, disability and sickness insurance or accident insurance, under the provisions, terms, and conditions of section 186(c)(5) of title 29, United States Code. The trust is funded solely by participating employer contributions in accordance with the terms of an agreement for the exclusive benefit of employees, their families and dependents.

According to the terms of a certain bargaining agreement presented for purposes of analysis, the Board of Trustees is composed of an equal number of members appointed by the union and by the industry. The trust includes a death benefit plan under which basic death benefits for an active eligible employee commence at \$5,000.00, with

an additional \$1,000.00 for each completed year of service following completion of the sixth year, to a maximum of \$10,000.00 following completion of ten years of service.¹ Additional benefits are provided for accidental death and dismemberment. Other primary welfare benefits include medical and dental, supplementary disability, unemployment, and vacation benefits. All benefits are paid directly from the trust funds. While the employer may be contractually obligated to maintain the level of funding, during the term of the agreement, to assure the benefits thereunder provided, there is no liability of the trust as a separate entity to provide payment over and beyond the amount of funds collected and available for such purpose.

The issue which derives from the principal inquiry is whether the trust, an independent nonprofit corporate entity administered by a board of trustees, which collects no premium from and maintains no contract of indemnity with its beneficiaries, neither guarantees nor is liable for payment of benefits beyond the amount of funds collected from the employer and available for such purpose, exists and operates by virtue of employer contributions fixed by collective bargaining and predicated upon such nonactuarial elements as the number of straight-time hours worked by all employees covered by the agreement during an antecedent period, and confers benefits according to such criteria, uncharacteristic of policies of insurance, as the number of completed years of service, is a "life insurer" as that term is commonly and ordinarily conceived. No.

While "insurance" is a term of contextual variability, and must therefore be construed in each case (cf. *County of Shasta v. County of Trinity* (1980) 106 Cal.App.3d 30, 38), in common parlance it connotes a contract whereby for a stipulated consideration one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril. (Cf. Webster's Third New Internat. Dict. (1961), p. 1173.)² In *Estate of Barr* (1951) 104 Cal.App.2d 506, 508, the court stated:

"For a contract to be one of insurance it is essential that there be hazard and a shifting of the incidence. If there is no risk, or if there be one and it is not shifted to another or others, there can be no insurance. According to the better view insurance also involves distribution of risk. (*California Physicians' Service v. Garrison*, 28 Cal.2d 790, 803-4 [172 P.2d 4, 167 A.L.R. 306].) 'Basically, insurance is a device which furnishes protection

¹ For retired employees the actual death benefit, ranging from \$1,000.00 to \$2,500.00, is determined on the basis of a formula involving an individual's basic pension benefit.

² The same is defined in section 22 of the Insurance Code as ". . . a contract whereby one undertakes to indemnify another against loss, damages, or liability arising from a contingent or unknown event."

against a risk of loss by distributing the losses of the few among the many who are subject to the same risk . . ."

These elements of risk-shifting and risk-distributing are essential to "life insurance," which is a contract to insure or indemnify the beneficiary against the death of the insured. (*Id.*, at pp. 509-510; and see Webster's, *supra*, at p. 1306; cf. Ins. Code, § 101.) As stated in *Ritter v. Mutual Life Ins. Co.* (1898) 169 U.S. 139, 151-152:

"Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age the probable duration of life. These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury, in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury. *Vicksburg & Meridian Railroad v. Putnam*, 118 U.S. 545, 554."

With respect to the nature of the trust in question, vis-a-vis the beneficiary, there are, as previously indicated, none of the essential elements of insurance: there is neither a contract of indemnity, the payment of consideration or premium, a guarantee or ultimate liability, nor a distribution of risk. Accordingly, we have previously concluded that an employer-employee benefit trust does not constitute insurance (54 Ops.Cal.Atty.Gen. 20, 21 (1971); 32 Ops.Cal.Atty.Gen. 229, 233-234 (1958); unpub. opn. No. I.L. 68-59 (1968)), and, indeed, such plans are expressly exempted from the provisions of the Insurance Code. (Ins. Code, § 10505.)³ In this regard, we stated in 54 Ops.Cal.Atty.Gen., *supra*, at page 21:

"If the labor-management trust fund conditions payment of benefits upon the existence of sufficient money in the fund to cover the payments,

³ Since 1974, employer-employee benefit plans have been regulated by the federal Employee Retirement Income Security Act of 1974, 29 United States Code section 1001 et seq., commonly known as "ERISA." (Cf. *Hewlett-Packard Co. v. Barnes* (1977) 425 F.Supp. 1294, aff'd. 571 F.2d 502.)

then the fund is not offering insurance. *See* Ins. Code, § 22; *People ex rel. Roddis v. California Mut. Assn.*, 68 Cal.2d 677, 680-683. For that reason, if payment is so conditioned, the fund is not subject to the Insurance Code. The fund, therefore, needs neither a certificate of authority nor a certificate of exemption from the Insurance Commissioner. The labor-management and other agreements and documents creating or describing the fund should not characterize the benefits as 'insurance' or as an 'insurance program.'"

Further, in 32 Ops.Cal.Atty.Gen., *supra*, at page 234, it was noted:

"... The term 'insurance', in view of the long history of regulation by government, comprising such measures as reserve requirements, minimum capital requirements and supervision by specially designated state officials, carries a picture in the public mind different from that of one of these funds or plans. We note that the Attorney General of the State of Florida, in an opinion holding valid and proper the operation of an employees' welfare fund created and financed solely out of union dues, required provisions setting forth that the benefits provided by the plan are payable as funds are available and to that extent only, that neither the union nor the trustees will be legally liable to pay the benefits and that benefits payable would be payable as an incident of membership in a plan or fund, and not as a result of any contract issued to a member (Ops.Fla.Atty.Gen. No. 057-348, Nov. 8, 1957; Weekly Underwriter I.D.S., 1957, Fla. 70)."

Finally, in *Cal-Western States Life Ins. Co. v. State Bd. of Equal.* (1957) 151 Cal.App.2d 559, involving a retirement plan of an insurance company employer providing for pension payments on retirement of its employees in consideration of contributions through wage deduction of the employees, it was held that such plan did not constitute insurance and that the amounts withheld were not subject to the gross premiums tax. The court expounded (*id.*, at pp. 560-561):

"Respondent's employees' retirement plan, although exactly what its name implies, nevertheless contains so many features and provisions generally found in group annuity policies that the state contends it is, in fact, an insurance contract and, therefore, constitutes insurance business put into effect and continued in this state. We deem this view strained and unrealistic.

"Obviously, the plan does contain many features that can be found in group annuity contracts regularly issued by insurers. The same could be said of any comprehensive retirement plan.

"This plan provides for elective individual participation by respondent's employees and for withdrawal from participation at the option of the employee, for payment to the company by deduction from pay of a sum of money monthly and for return of such on withdrawal from participation, together with interest at the rate fixed by the plan, compounded annually. While the employee participates, the respondent credits him with monthly retirement credits or retirement units, and if he remains a participant for a stipulated length of time and acquires a stipulated age he will receive retirement pay for life. If, after retirement, his retirement benefits received do not equal before his death his accumulated contributions, plus interest, the balance is paid in cash to his beneficiary. A participating employee may also elect, by larger contributions, to purchase increased retirement benefits. The evidence showed, without conflict, that the employee contributions were markedly lower than amounts which would have to be paid under formal group annuity policies to a company issuing the same, whether paid wholly or partly by employer and employee and that, viewed in this way, employee contributions were not calculated by actuarial methods commonly used in the insurance world. Thus it was shown that where actuaries calculating the premiums on insurance contracts, whether of the life or of the annuity type, consider three elements, namely, the rate of mortality, the rate of interest and the rate of expense, the amount of contributions by respondent's employees was arrived at by nonactuarial methods. For instance, employee contributions varied according to amount of salary or wages earned and to that extent were arbitrary rather than actuarial, and the gap between the cost of the plan and the employee's contributions was thus arbitrarily assumed by respondent as its contribution. In brief, respondent proposed to any employee who desired to accept the offer that it would pay retirement benefits for a price that must eventuate in loss to respondent, while contenting itself with the imponderable benefits of better employer-employee relationship as compensation for its loss. . . . Regardless of the noted similarities in so many of the provisions contained in the plan to those found in annuity policies regularly sold by insurers, the great dissimilarity which inheres in the total absence of profit motive—never ignored by successful insurers—compels a conclusion that the establishment and maintenance of respondent's employees' retirement plan cannot be classified as insurance business done by it in this state. Such was not its purpose and such was not its nature. Had this plan been established and maintained by an employer who was not an insurer, we think no one would contend that it was an insurance contract or that its establishment and maintenance constituted the doing of insurance business. The fact that respondent is an insurer is not

competent to alter either the purpose or the nature of its employees' retirement plan."

In addition to the absence of the essential elements of insurance as previously indicated, it does not appear that a Taft-Hartley trust is based upon established actuarial criteria. It is concluded, accordingly, that a trustee of a Taft-Hartley employer-employee benefit trust is not eligible to appointment to the Board of Administration as "an official of a life insurer."
