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OPINION	:	No. 83-1002
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THE HONORABLE JIM ELLIS, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on a question we have rephrased as follows:

May a hospital district contract with a private insurance carrier pursuant to Government Code sections 53200-53205 to invest its pension fund monies in the stock and real estate divisions of the carrier's separate account through the purchase of a variable group annuity in which the carrier assumes no risk and the district is able to transfer its funds at will?

CONCLUSION

A hospital district may not contract with a private insurance carrier to purchase a variable group annuity under Government Code sections 53200-53205.

ANALYSIS

Hospital districts in this state are formed and derive their powers under the "Local Hospital District Law" ("LHDL") (Health & Saf. Code, div. 23, chs. 1-7, § 32000 et seq.). Its primary purpose is to protect the public health and safety by furnishing hospital services in areas in which for some reason they might be inadequate. (*Talley* v. *Northern San Diego Hosp. Dist.* (1953) 41 Cal.2d 33, 40.) Under the LHDL a local hospital district may exercise those powers that are expressly granted therein or those that are necessarily implied (§ 32001), and it may do "any and all other acts and things necessary to carry out [its] provisions . . . ." (§ 32121, subd. (k).) Needless to say, such would include a "broad authority to contract." (24 Ops.Cal.Atty.Gen. 53 (1954) (power of hospital district to contract with a labor union representing its employees).)[1]

We are asked whether that power extends to a district's contracting with a private insurance carrier to invest the assets of the hospital district's pension funds in the carrier's stocks and real estate accounts, the values of which fluctuate with the market.[2] This would be done ostensibly through the direct purchase of a variable group annuity contract with the insurance company providing appropriate direction for the investment of the district's pension fund monies (e.g., 50% in the carrier's stock account and 50% in an account of the carrier which consists of 70% equity real estate investments and 30% debt type real estate investment). The contract would provide that the insurance company would not be liable for any loss or diminution of value of the investment and that the district could withdraw or transfer funds at will. We conclude that such an arrangement is beyond the authority of a hospital district to make.

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[1] Opinions of this office have addressed whether hospital districts could enter into other particular types of contracts. (See, e.g., 24 Ops.Cal.Atty.Gen. 53 (1954) (they may contract with a labor union representing their employees); 30 Ops.Cal.Atty.Gen. 351 (1957), *post*, (they may not contract with a trustee to establish an independent retirement plan for their employees but may contract with state employees retirement system to do so); 36 Ops.Cal.Atty.Gen. 111 (1960) (they may enter a collective bargaining agreement with employees providing for open shop); 33 Ops.Cal.Atty.Gen. 70 (1959) (they may enter lease back agreement with private nonprofit corporation, with certain restrictions); 33 Ops.Cal.Atty.Gen. 156 (1959) (they may contract to perform laundry services for a high school district under Joint Exercise of Powers Act); cf. *Talley* v. *Northern San Diego County Hosp. Dist.*, *supra*, 41 Cal.2d 33 (they may enter exclusive use and services agreement with radiologist).)

[2] Insurance companies providing investment vehicles, for pension retirement or profit sharing plans or programs segregate the funds received for investment in one or more separate accounts for their investment. (Cf. Ins. Code, § 10506; 10 Cal. Admin. Code, art. 11.1, § 2534 et seq.) Within the separate account there are various divisions (sometimes called "pockets") which invest in different equity portfolios such as money market funds, bonds, *real estate and stocks*. (A.M. Auerback, CLU.)

The grant of powers to a hospital district under the LDHL is seemingly broad: it permits a hospital district to exercise those powers and do those things that are expressly mentioned therein or which may necessarily be implied to carry out the Law's purpose (cf. §§ 32001, 32121(k).) That, as we have previously said, includes a broad power to contract (24 Ops.Cal.Atty.Gen. 53, *supra*). But the area of any particular contract must be within the authority of a hospital district to enter (*County of Alameda* v. *Ross* (1939) 32 Cal.App.2d 135, 146), and therein lies the rub, for the power of a hospital district to provide a pension plan is not one of its implied powers nor one that is essential to accomplish its purposes. The authority of a hospital district to establish a plan must therefore be *expressly* granted by the Legislature and the scope of its exercise would be defined by that grant. (Cf. 30 Ops.Cal.Atty.Gen. 351 (1957) (hospital district does not have inherent authority to establish retirement plan; it is not empowered to establish an independent retirement plan for its employees); *Frisbee* v. *O'Connor* (1932) 119 Cal.App. 601, 603 (general law/sixth class city may not provide an insurance plan and pension plan for its employees); *Fessier* v. *Campbell* (1935) 2 Cal.2d 638, 642, 644 (ditto, charter city).) We must therefore look to express legislation for a hospital district to establish a pension plan and invest its funds, and scrutinize it accordingly.

The Legislature has provided two mechanisms by which local hospital districts may establish pension plans for their employees. One is found in those provisions of *article 1* of chapter 2 of division 2 of title 5 of the Government Code (§§ 53200-53205 (Group Insurance)) which authorize "the legislative body" of a "local agency" to provide "health and welfare benefits" for its officers and employees by contracting with one or more admitted insurers (i.e., persons or companies entitled to transact insurance business in California (Ins. Code, § 24)) for such plan or plans of health and welfare benefits (i.e., group life insurance, group annuities or group annuity contracts (§ 53200, subds. (b), (d)) as the agency might determine to be in its and their best interests. (§§ 53201, 53202.)[3]

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[3] For the purpose of article 1, the term "legislative body" is defined, inter alia, as the "governing board, by whatever name called, of a . . . district . . . or other public agency of the state." (§ 53200, subd. (b).) The term "local agency" is defined as a "district or other political agency of the state." (*Id.*, subd. (a).) There can be no question that a "hospital district" would be included within its rubric: Hospital districts have been said to be public agencies performing essentially what are governmental functions. (*Talley* v. *Northern San Diego Hosp. Dist.*, *supra*, 41 Cal.2d at 39, overruled on question of governmental immunity from tort liability in *Muskopf* v. *Corning Hospital Dist.* (1961) 55 Cal.2d 211, but see *Corning Hospital District* v. *Superior Court* (1962) 57 Cal.2d 488 discussing the effect of Stats. 1961, ch. 1404, reestablishing immunity; see also *Rosner* v. *Eden Township Hosp. Dist.* (1962) 58 Cal.2d 592, 594 (a "governmental agency"), 33 Ops.Cal.Atty.Gen. 156, *supra*, (a "public agency" vis-a-vis Joint Exercise of Powers Act); 30 Ops.Cal.Atty.Gen. 35, *supra*, (a "public entity" and "governmental entity" vis-a-vis establishing an independent retirement plan); 58 Ops.Cal.Atty.Gen. 323 (1975), (a "public agency" vis-a-vis incompatible office holding); 24 Ops.Cal.Atty.Gen. 53, *supra*, ("a public agency" vis-a-vis

The other is found in the provisions of *article 1.5* of chapter 2 of division 2 of title 5 of the Government Code (§§ 53215-53224) which authorize the "legislative body" of a "local agency" to establish a *pension trust* for the benefit of its officers and employees "funded by individual life insurance contracts, individual annuities, group policies of life insurance, or *group annuities*, or any one or combination of them, or by any other *investment authorized by this article*. . . ." (§ 53216.)[4] Among those other authorized investments are certain stocks (§ 53216.1), certain securities (§ 53216.6), and certain real property and real property interests (§ 53216.6).

The two founts of authority provide separate and distinct mechanisms for investment of a local agency's pension funds, the former through *direct purchases* under sections 53201 and 53202 and the latter through the establishment of *a pension trust* under section 53216. (48 Ops.Cal.Atty.Gen. 17, 19-20 (1966).) We do not deal with the establishment of a pension trust under article 1.5 and we must therefore determine whether the contract inquired about can be made through one of the mechanisms of "direct purchase" pension funding permitted under article 1, specifically the group annuity contract.

Article 1 as we have seen, permits a local hospital to provide "health and welfare benefits" for its officers and employees (§ 53201)[5] and in doing so, to contract with insurance companies entitled to do business in this state for such health and welfare benefit

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contracting with a labor union); and see specifically, I.L. 73-70 (April 24, 1973) at 2 (a "public agency" subject to constitutional restrictions on stock ownership)) and in the context of other statutory schemes their status as a "local agency" has been assumed. (*Letsch* v. *Northern San Diego County Hosp. Dist.* (1966) 246 Cal.App.2d 673, 677-678 (general applicability of Ralph M. Brown Act to hospital district as a "local agency"); 63 Ops.Cal.Atty.Gen. 215 (1980) (ditto) 55 Ops.Cal.Atty.Gen. 375 (1972) (a "local agency" subject to applicable local building and zoning ordinances under Gov. Code, §§ 53090 & 53091).)

[4] Section 53215 defines the term "local agency" for the purposes of article *1.5* the same way section 53200, subdivision (a) does for the purposes of article *1*, to wit, "a district or other public agency of the state." A "hospital district" would therefore be included within its definition as well. (See fn. 3, *ante*; cf. I.L. 73-70, *supra*, at 2 (hospital district is an entity covered by Cal. Const., art. XIII, § 25 (now art. XVI, § 6).

[5] Section 53201, subdivision (a), provides:

> "(a) The legislative body of a local agency, subject to such conditions as may be established by it, may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees, and retired members of the legislative body who elect to accept the benefits and who authorize the local agency to deduct the premiums, dues, or other charges from their compensation, to the extent that such charges are not covered by payments from funds under the jurisdiction of the local agency as permitted by Government Code Section 53205."

plans as the district determines to be in their and its best interests. (§ 53202; cf. Ins. Code, § 24.)[6] Section 53200, subdivision (d), provides that as used in article 1, "'health and welfare benefit' means any one or more of the following: hospital, medical, surgical, disability, legal expense or related benefits including, but not limited to, medical, dental, life, legal expense, and income protection insurance or benefits, whether provided on an insurance or a service basis, and includes *group life insurance as defined in subdivision (b) of this section*." (Emphasis added.) Subdivision (b) of section 53200 provides that "'Group life insurance' and 'group policies of life insurance' includes '*ground annuities*', and '*group annuity contracts*.'" (Emphasis added.) For the purpose of article 1 then, the term "health and welfare benefits" is defined to include "group life insurance" (§ 53200, subd. (d)) and that term in turn is defined to include "group annuities" and "group annuity contracts." (§ 53200, subd. (b).) It is under that rubric that the proposed purchase of a variable group annuity contract would be brought.

Needless to say the question presented resolves to whether the contract inquired about is truly the purchase of an "annuity" within the meaning of article 1 for just because it may be partially denominated as such would not make it so for the purposes of the article. (Cf. 57 Ops.Cal.Atty.Gen. 534, 538 (1974).) Exploring the nature of that investment vehicle we will conclude that the proposed contract is *not* of its genre. We will do so on the basis that there are fundamental differences between *variable* annuities and *fixed annuities* and that the Legislature only had the latter in mind in 1951 when it brought "group annuities" and "group annuity contracts" within the types of "group life insurance" a local agency might provide its employees pursuant to article 1.[7]

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[6] Section 53202 provides:

> "In providing health and welfare benefits the local agency may approve plans of their officers and employees or may contract with one or more admitted insurers, health service organizations, or legal service organizations for such plan or plans of health and welfare benefits as the local agency shall determine to be in the best interests of the local agency and the officers and employees electing to accept the benefits. Approval of or application for such benefits may be made by the local agency upon its own motion or with the consent of the legislative body after considering the preference of the employees of the agency, and two or more alternative plans of health and welfare benefits may be offered to the employees if the local agency determines that such action is desirable."

Section 24 in conjunction with section 19 of the Insurance Code defines the term "admitted" to mean "any person, association, organization, partnership, business trust, or corporation" (§ 19, "person"), "entitled to transact insurance business in this state, having complied with the laws imposing conditions precedent to transaction of such business." (§ 24, "admitted.")

[7] Statutes 1951, chapter 451, section 1, pages 1485, 1486, added subdivision (b) to section 53200 to define "group life insurance" as including those annuity contracts. At the time, section 53201 authorized a local agency to "execute a system of group life . . . insurance for its officers

Basically speaking, an annuity is a specialized investment vehicle through which a person(s) (the annuitant(s)), for consideration (payment of a premium), will receive a stipulated lump sum or monthly payments (the annuity) for his life or his life and that of another (joint survivor annuity). "As we understand the annuity contract, the employer periodically turns an amount of money over to a private company (the insurer) with the company to purchase an annuity and the private company ultimately invests the money. Title to the money passes . . . to the company at the time of purchase. Insurance Code section 10506, subdivision (a). 48 Ops.Cal.Atty.Gen. 17, 19." (I.L. 74-76 (Apr. 25, 1974) at 3.)

While "it is . . . clear that the sale of annuity contracts in California is part of the business done by insurance companies [and i]n fact, only insurance companies may engage in the sale of annuities in this state" (*Equitable Life etc. Soc.* v. *Johnson* (1942) 53 Cal.App.2d 49, 57; Ins. Code, § 101 ("Life insurance includes . . . the granting, purchasing, or disposing of annuities); cf. *id.*, 10506; Corp. Code, §§ 25100(e), 25019(3), exempting annuity contracts from the ambit of regulation under the Corporate Securities Law (Corp. Code, tit. 4, div. 1, § 25000 et seq.)), an annuity is *not* insurance since the risks assumed in each contract differ: the risk assumed in a life insurance policy is to pay on the assured's death; that in a pure annuity contract is to pay as long as the assured may live. (*Equitable Life etc. Soc.* v. *Johnson*, *supra*; accord *Estate of Barr* (1951) 104 Cal.App.2d 506, 508; cf. *California Physicians' Service* v. *Garrison* (1946) 28 Cal.2d 790, 803-804.)

Traditionally and customarily, "annuities" have been "*fixed annuities*" "offering the annuitant specified and definite amounts beginning with a certain year of his or her life." The standards for investment of funds under them have been conservative. (*S.E.C.* v. *Variable Annuity Co.* (1959) 359 U.S. 65, 69.)

In about 1952, however, with New York creating a College Retirement Equities Fund to provide annuities for teachers, a new investment vehicle was introduced, the *variable annuity*. It had two new features: (1) a greater degree of investing premiums in common stocks and other equities, and (2) a varying of benefit payments with the success of the investment policy. (*Ibid.*) The variable annuity "came into existence as a result of a search for a device that would avoid paying annuitants in depreciated dollars. The theory

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and employees." (Stats. 1949, ch. 81, p. 285, § 1.) In 1957, an amendment to *that* section substituted the current phraseology "may provide for any health and welfare benefits" (Stats. 1957, ch. 944, p. 2168, § 2); the same legislation added subdivision (d) to section 53200 to define that as including "group life insurance" (Stats. 1957, ch. 944, p. 2168, § 1), so closing the circle once again.

was that returns from investments in common stocks would over the long run tend to compensate for the mounting inflation." (*Id.*, at 70; fn. omitted.)[8]

Briefly, a "variable annuity" is a contract issued by an insurance company covering a named employee. Cash contributions paid by the local agency to the pension trust for the named employee's pension benefits are used to pay the premium on the variable annuity contract. (Cf. 67 Ops.Cal.Atty.Gen. 151, 158 (1984).) (Depending on the specific plan adopted, the employee may also make contributions.) The premiums received by the insurance company (after the deduction of certain amounts by the insurance company in accordance with the contract) are invested in securities which are segregated from the other assets of the insurance company in a separate account ("variable contract account"). (See Ins. Code, § 10506, fn. 2, *ante*.) Net proceeds from premiums received by the insurance company from all variable annuity contracts issued are invested in securities (and other equity portfolios) which are placed in the same variable contract account. The value of an individual variable annuity contract depends upon the investment performance of the variable contract account as a whole. The initial monthly retirement payment to an employee depends upon the value of his variable annuity contract when he retires calculated in terms of a fixed number of annuity units. Subsequent monthly payments will vary in dollar amount with the investment performance of the variable contract account, i.e., each month the annuitant will receive a payment equal to the current unit value times that fixed number of units owned. (Cf. Huebner & K. Black, Jr., *Life Insurance*, *supra*, at 126.)

To recapitulate then, with a *fixed annuity* the insurance company involved guarantees a specific rate of growth during accumulation and at maturity a specific lump sum or monthly payment for the life of the annuitant. With a *variable annuity*, the annuitant's investment does not grow at a fixed or guaranteed rate of return; instead growth is tied to the performance of the investment vehicle. In other words:

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[8] See also S.S. Huebner & K. Black, Jr., *Life Insurance* (8th ed. 1972) at page 125:

"In times of *deflation* the value of a fixed and guaranteed annuity income increases because of a falling price structure, that it, the purchasing power of a fixed dollar income tends to go up in periods of falling prices. On the other hand, when inflation produces a rising price level the purchasing power of the same fixed dollar income tends to fall off. Consequently, in times of deflation the fixed dollar annuity finds much popularity, whereas in periods of inflation annuity incomes providing a decreasing amount of purchasing power tend to cause wide criticism. The impact of inflation since 1941 has led to a search for a way of providing a guaranteed life annuity with a reasonably stable purchasing power. The variable life annuity based on the equity type of investments has been advanced as a possible answer to this problem."

> "Instead of providing for the payment each month of a *fixed number of dollars*, the variable annuity provides for the payment each month or year of the current value of a *fixed number of annuity units*. Thus, the dollar amount of each payment would depend on the dollar value of an annuity unit when the payment is made. The valuation assigned to a unit would depend upon the investment results of the particular special account[s]." (Huebner & Black, *Life Insurance*, *supra*, at 126.)

The salient similarities and differences between the fixed and the variable annuity are now apparent:

> "Under a conventional annuity the insurance company assumes the mortality, expense, and investment risks. The company invests the assets behind conventional annuities mostly in stable fixed-dollar investments. This is necessary to implement their *guarantee* of fixed-dollar incomes. Under a variable annuity, the insurance company assumes only the risk of fluctuations due to mortality and expenses. The assets behind variable annuities are invested in equity type investments, and dollar income is permitted to fluctuate accordingly on the theory that the dollar income, while varying, will provide a more stable amount of purchasing power. The annuitant, then, [assumes] the investment risk." (*Id.*, at 126-127.)

In *S.E.C.* v. *Variable Annuity Co.*, *supra*, 359 U.S. 65, the High Court stressed the last factor, i.e., the absence of an assumption of investment risk by an insurer in a variable annuity, to expose as illusory the similarities between them and the fixed annuity.

> "The holder of a variable annuity cannot look forward to a fixed monthly or yearly amount in his advancing years. It may be greater or less, depending on the wisdom of the investment policy. In some respects the variable annuity has the characteristics of the fixed and conventional annuity: payments are made periodically; they continue until the annuitant's death or in case other options are chosen until the end of a fixed term or until the death of the last of two persons; payments are made both from principal and income; and the amounts vary according to the age and sex of the annuitant. Moreover, actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles. Each issuer assumes the risk of mortality from the moment the contract is issued. That risk is an actuarial prognostication that a certain number of annuitants will survive to specified ages. Even if a substantial number live beyond their predicted demise, the company issuing the annuity—whether it be fixed or variable—is obligated

to make the annuity payments on the basis of the mortality prediction reflected in the contract. This is the mortality risk assumed both by respondents and by those who issue fixed annuities. It is this feature, common to both, that respondents stress when they urge that this is basically an insurance device."

"*The difficulty is that*, *absent some guarantee of fixed income*, *the variable annuity places all the investment risks on the annuitant*, *none on the company*. The holder gets only a *pro rata* share of what the portfolio of equity interests reflects—which may be a lot, a little, or nothing. 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 the insurance sense*. It is no answer to say that the risk of declining returns in times of depression is the reciprocal of the fixed-dollar annuitant's risk of loss of purchasing power when prices are high and gain of purchasing power when they are low. We deal with a more conventional concept of risk-bearing when we speak of 'insurance.' For in common understanding 'insurance' involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts. [Citations.] The companies that issue these annuities take the risk of failure. *But they guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities—an interest that has a ceiling but not floor*. There is no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." (359 U.S. at 70-73; emphases added; fns. omitted.) (See also 67 Ops.Cal.Atty.Gen. 151, 157-159 (1984); 65 Ops.Cal.Atty.Gen. 190, 192-194 (1982).)

The Court held accordingly that absent an assumption of risk of investment by an insurance company, variable annuity contracts were in essence "securities" which had to be registered with the Securities and Exchange Commission, and that the companies issuing them were *not* exempt as purveyors of insurance from registering with the S.E.C. as offerors of securities under certain federal "securities" Acts. (*Id.*, at 66-76.)

Given the differences between a *fixed* annuity and a *variable* annuity we do not believe the latter can be neatly subsumed as an "annuity" within the authorization found in section 53200, subdivision (b) for a local agency to use that type of investment vehicle as part of its providing "group life insurance" as a "health and welfare benefit" for its officers and employees. (Cf. §§ 53200(a), 53201, 53202.)

It is true that on previous occasions we have not distinguished between the two investment vehicles. In an unpublished opinion in 1974 we did not find the differences between the variable and the fixed annuity to be sufficiently significant to preclude the investment of state deferred compensation funds in *variable annuities* pursuant to a statute (§ 16431) which authorized the investment of those funds in "loan accounts, credit union accounts, *annuities*, mortgages deeds of trust, or other security interests in real or personal property." (Unpub. Ops.Cal.Atty.Gen. I.L. 74-76 (April 25, 1974) at 3-4.)[9]

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[9] The actual thrust of that unpublished opinion was that the purchase of an annuity with state funds did not come within (and was not subject to) the constitutional limitations on the state (and its political subdivisions) loaning its (and their) credit to, or subscribing or being interested in the stock of any corporation. (Cal. Const., art. XIII, § 25, now art. XVI, § 6; *id.*, art. XIII, § 42, now art. XVI, § 17.)

The genesis of the prohibition was the near wreckage of some of the finances of midwestern states during the last century due to their improvident investments in railroad stocks. (*Report of the Joint Legislative Retirement Committee*, 1967, vol. 1, No. 2, 1966. Vol. 1 of Appendix to Journal of the Assembly, Reg. Sess. 1967.) The California Constitution of 1849 (art. XI, 10) prohibited such investments by the state. Section 31 of article IV of the 1879 Constitution prohibited "the state, or any political subdivision thereof, to subscribe for stock or to become a stockholder of any corporation whatever" and the language of that prohibition remains unchanged today. (See art. XVI, § 6.) The limitation operated to prohibit public retirement funds from investing in common stock . . . ." (58 Ops.Cal.Atty.Gen. 398, 399 (1975).) In 26 Ops.Cal.Atty.Gen. 241 (1955) we said that the prohibition embraced "all public bodies and agencies in the state whose powers and functions are derived from the Legislature" (*id.*, at 242) and in an unpublished opinion, I.L. 73-70, *supra*, we specifically concluded that its basic applied to investments by hospital districts. (Accord 58 Ops.Cal.Atty.Gen. 398 (1970) (applies to pension plans of the *Southern California Rapid Transit District*); 57 Ops.Cal.Atty.Gen. 534, *supra*, and 56 Ops.Cal.Atty.Gen. 529 (1973) (applies to deferred compensation plan funds); 26 Ops.Cal.Atty.Gen. 241, *supra*, (applies to stock acquisition by county water districts); 18 Ops.Cal.Atty.Gen. 159 (1951) (applies to funds of county retirement system being invested in stock of corporation or investment trust); 35 Ops.Cal.Atty.Gen. 131 (1960) (applies to pension funds of county retirement systems investing in mutual funds and other equity interests); *Miller* v. *Johnson* (1935) 4 Cal.2d 265 (applies to school districts); but see *Smith* v. *City of Glendale* (1934) 1 Cal.App.2d 463 and *Los Angeles G. & E. Corp.* v. *Los Angeles* (1922) 188 Cal. 307 (does *not* apply to *chartered* cities; contra, I.L. 74-76 (April 25, 1974) discussed, *post*, (does *not* apply to the purchase of variable annuities with state funds as part of a deferred compensation plan).)

Later that same year in 57 Ops.Cal.Atty.Gen. 534 (1974), we merely cited that unpublished opinion letter to say that local agency deferred compensation funds might be invested in "annuities" under a statute (§ 53609) which provided for their like investment in "corporate stocks, bonds, and securities, mutual funds, saving and loan accounts, credit union accounts, *annuities*, mortgages, deeds of trust, or other security interests in real or personal property." (57 Ops.Cal.Atty.Gen. 534, 535, 539, & 535, fn. 2.) That opinion however, did not distinguish between investment of those funds in variable and in fixed annuities. And both opinions were rendered at a time and interpreted statutes which existed two decades after variable annuities were on the investment funding scene. (See also fn. 10, *post*.)

Ordinarily we would be loathe to ascribe to the Legislature an intention to use the same word, "annuity," in two different senses in statutes covering like subjects, i.e., provision of a funding vehicle for "health and welfare benefits" by a local agency through "group annuities" in section 53200(b) of article 1 on the one hand, and investment of state and local agency deferred compensation funds in "annuities" under sections 16431 and 53609, respectively, on the other. (Cf. *Hunstock* v. *Estate Development Corp.* (1943) 22

In 1966 however, the *absolute* constitutional prohibition was removed when the electorate voted (Proposition 1, Nov. 8, 1966) to amend section 13 of article XII of the Constitution to permit the Legislature to authorize the investment a public retirement fund monies in stock or shares of certain corporations and in mutual funds, subject to specified limitations on types of investments and amounts therein. (58 Ops.Cal.Atty.Gen. 398, *supra*, at 399.) With the new constitutional authority, the Legislature promptly enacted appropriate legislation enabling various public agencies to invest in stock and mutual funds within the limits allowed by the 1966 constitutional amendment. (See, e.g., §§ 31595.2, 31595.5 (County Employees Retirement System, § 16430 et seq. (investment of state funds); §§ 20205.2, 20205.3 (Public Employee's Retirement System); Ed. Code, § 14675.5 (School District Retirement Salary Plan); cf. Fin. Code, § 1372.) Among the enactments was the adoption of the aforementioned sections 53216.1 (Stats. 1968, ch. 1069, at 2074, § 1) and 53216.2 (Stats. 1968, ch. 1069, at 2075, § 2) to authorize a "local agency" such as hospital districts (see fns. 4 & 3, *ante*) *to establish a pension trust* and invest the assets of it in corporate stock and mutual funds within the constitutional limitations. As mentioned however, we do not deal with *that* type of investment vehicle established pursuant to section 53216 of article 1.5 through which investments in corporate stock and mutual funds had been authorized, but rather with a variable group annuity supposedly permitted by sections 53200-53202 of article 1. With respect to the latter article we will conclude the variable annuity is not a permissible funding vehicle for local agency group insurance.

Lastly we note that we are not unaware that in June 1984 the constitutional description of excepted investments, which, as noted, had been stated in terms of types of investment and permitted amounts therein, was amended and it now focuses instead on specified standards of fiduciary responsibility and prudent investment. As we understand, the Legislature has not yet implemented the new standard through authorizing legislation. In view of the direction our conclusion takes however, we need not become enmeshed in the legal contretemps created by that turn of events.

Cal.2d 205, 210-211; *Estate of Hoertkorn* (1979) 88 Cal.App.3d 461, 465-466; 64 Ops.Cal. Atty.Gen. 240, 242, fn. 5 (1981).) But there is no rule of law which provides that the same word used in different sections of the same code *must* be given the same meaning (*Lambert* v. *Conrad* (1960) 185 Cal.App.2d 85, 95) and the presumption that such was intended only arises in the absence of contrary indications of legislative intent. (*Hunstock* v. *Estate Development Corp.*, *supra*.) We believe those contrary indications are present here.

When the Legislature authorized local agencies to invest in "group annuities" and "group annuity contracts" in 1951 as a means of providing group life insurance for their officers and employees (§ 53200(b) added by Stats. 1951, ch. 451, § 1, p. 1485; see fn. 7, *ante*), the variable annuity contract was yet unborn and its risks to the annuitant were perforce unknown. (Cf. *S.E.C.* v. *Variable Annuity Co.*, *supra*, 359 U.S. at 69.) Thus, whatever the case might have been with our 1974 pronouncement in I.L. 74-76, *supra*, that state deferred compensation funds could be invested in variable annuities under section 16431 (Stats. 1971, ch. 1629, § 1, p. 3511) or with our implication later that year in 57 Ops.Cal.Atty.Gen. 534, *supra*, that local agency deferred compensation funds might be similarly invested under section *53609* (Stats. 1971, ch. 1629, § 2, p. 3511), there can be no doubt that when the Legislature adopted *section 53200*, *subdivision (b)* in 1951, with the definition of "group life insurance" as including "group annuity (contracts)" *it could not have had the variable annuity and its attendant risks in mind*. Indeed it seems that legislative recognition of that funding vehicle only came in 1965 when section 10506 of the Insurance Code was amended to provide that pension fund benefits might be paid in "fixed or variable amounts." (Stats. 1965, ch. 1620, § 1, p. 3707.) Before then they were restricted to "prescribed fixed specific dollar amounts." (Stats. 1963, ch. 743, § 1, p. 1757.)

We are not unaware of the doctrine of progressive construction which posits that legislation, if so susceptible, should be given an elastic operation or construction in order to cope with and reflect changing conditions. (See *Estate of Woodward* (1964) 230 Cal.App.2d 113, 119.) Since we are not blind to the arrival of the variable annuity as a funding vehicle for "insurance," we should, in heeding that doctrine, interpret the term "group annuity contracts" in section 53200, subdivision (b), to include that subsequent arrival. But the fact remains that very fundamental differences between the two types of annuities exist and we can not and will not say, under the guise of statutory construction *in this case*, that one may be so readily substituted for the other.

We must not forget that article 1 is basically concerned with the provision of "health and welfare benefits" by local agencies to their officers and employees (§§ 53200, 53201, 53202) and that both the statutory definition of that phrase (§ 53200(b,d)) and its provenance (cf. fn. 7, *ante*) indicate that it is a euphemism for "group life insurance." Even if we ignore the notion that a variable annuity in essence is *not* insurance because risk is not appropriately distributed thereby. (Cf. *SEC* v. *Variable Annuity Co.*, *supra*, 359 U.S.

65, 71-73; *California Physicians' Service* v. *Garrison*, *supra*, 28 Cal.2d 790, 803-804; *Equitable Life etc. Soc.* v. *Johnson*, *supra*, 104 Cal.App.2d 506, 508; 67 Ops.Cal.Atty.Gen. 151, 157-159; 65 Ops.Cal.Atty.Gen. 190, 192-194), we can not ignore the fact that the variable annuity is at least a very different funding vehicle for "insurance" from the traditional and customary fixed annuity. As we have seen, the risks it carries for the annuitant are greater because it provides no guarantee of a fixed return and because the investments from which that return is derived are more volatile and speculative than those of the fixed annuity.[10] With an ability to transfer funds to particularized equity portfolios (pockets or divisions) of the carrier's separate account, the variable annuity is tantamount to a mutual fund purchase. (Cf. *S.E.C.* v. *Variable Annuity Co.*, *supra*, 359 U.S. 65: "securities" purchased. That it is partially denominated as an "annuity" is almost fortuitous, and begs the question of whether that type of investment is permitted by article 1.

Surely the variable annuity was *not* contemplated when the saliencies of article 1 were enacted in 1951. (Cf. fn. 5, *ante.*) Thereafter, when the Legislature has thought it prudent for local agencies to be able to invest in speculative equities such as stocks, securities, and real property and real property interests, it has specifically provided the authority for them to do so (§§ 53216.1, 53216.6) *through the establishment of pension trusts under article 1.5*.

Once again though, we do not deal with that type of investment vehicle, but rather with the direct purchase of a group annuity (or a group annuity contract) under article 1. Without having to decide then what the situation might be with respect to purchases of variable annuities through the establishment of a pension trust, we conclude that at least as far as article 1 is concerned, the purchase of variable annuities cannot be brought within its authorization for local agencies, to contract with life insurers to provide their officers and employees such plan or plans of health and welfare benefits, including group annuities and group annuity contracts, as might be best. (§§ 53200(b)(d), 53201, 53202.) Most simply stated, the variable annuity (contract) is *not* a group annuity (contract) contemplated by that article.

[10] The variable annuity we considered in I.L. 74-76 had a benefit "floor," a fact we found to be significant to distinguish it from the High Court's observations in *S.E.C.* v. *Variable Annuity Co.*, *supra*, 359 U.S. 65 regarding their risk. (I.L. 74-76, *supra*, at 3, fn. 3.) The variable annuity contract proposed herein has no benefit floor. In addition, as we ultimately observed in 57 Ops.Cal.Atty.Gen. 534, "there is a distinction between monies . . . intended to be put in secure depository hands and those funds relinquished by employees pursuant to a general salary plan [such as deferred compensation] for investment." (*Id.*, at 542.)

We therefore conclude that a local hospital district may not use that vehicle under article 1 to contract with a private insurance carrier to invest its pension fund monies in the stock and real estate portfolios of the carrier's separate account.

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