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ATTORNEY GENERAL OPINION NO. 79-12

The Honorable Fletcher Bell
Commissioner of Insurance
State of Kansas
State Office Building
Topeka, Kansas 66612

Re: Insurance--Employees--Interest in Insurance Company

Synopsis: A former insurance company employee does not have an interest in an insurance company within the meaning of K.S.A. 40-110, when such employee is merely eligible to receive pension benefits from a trust fund established under the insurance company pension plan administered by an independent trustee.

* * *

Dear Commissioner Bell:

You inquire whether a former insurance company employee has an "interest" in an insurance company within the meaning of K.S.A. 40-110, when such former insurance company employee is eligible to receive pension benefits from a trust fund derived from the insurance company's pension plan and administered by an independent trustee. The specific factual situation is presented as follows:

A prospective employee of your department was previously employed by an insurance company that had a pension plan available to its employees. The plan, although sponsored by the company, was placed in trust and administered and controlled by a bank which had been appointed as the trustee of the fund. Pursuant to the plan, after the employee had worked for the company a required period of time, the employee obtained a vested right to benefits

available from a trust fund which had been established pursuant to the pension plan and out of which pension benefits were to be paid. These benefits would be payable to the employee on a monthly basis at age sixty-five. The applicant with whom you are concerned worked for the company for the required period of time and thereby obtained a vested right to the benefits from the trust fund available under the plan. Your concern is whether the applicant's vested right to the benefit would constitute an interest in an insurance company within the meaning of K.S.A. 40-110.

K.S.A. 40-110 requires that appointees of the insurance commissioner "be in no way interested, except as policyholders, in an insurance company." Therefore, in considering whether an individual's appointment is proscribed by the statute, it must be determined if (1) the appointee has an interest in an insurance company and, if so, (2) the nature of that interest.

Whether the "interest" of the beneficiary to a trust fund of this character disqualifies said beneficiary from employment with the Department of Insurance depends upon the interpretation of K.S.A. 40-110.

Having reviewed K.S.A. 40-110 and the particular plan involved it is our opinion that the applicant's vested right to certain benefits available from the trust fund derived from the pension plan would not constitute an interest in the insurance company as a matter of law. We have arrived at this conclusion after a careful examination of the company's trust agreement and what is meant by the term "interest."

"Interest" is defined in Black's Law Dictionary, Fourth Edition, as "a right to have the advantage accruing from anything; any right in the nature of property, but less than title; a partial or divided right; a title to a share." Since the prospective employee has an admitted property right to pension benefits derived from the trust fund, he has an undeniable "interest" in the fund. It is, therefore, necessary to examine the relationship between the trust fund and the company to determine if an "interest" in these pension benefits is, in fact, an interest in the company establishing the fund. For this determination, it is necessary to examine the trust agreement entered into by the trustor (insurance company) and trustee (bank).

Under the terms of the Trust Agreement, once the company has made its required contribution to the trust fund on behalf of its employee pursuant to the pension plan, the company loses legal title and control of such funds to the trustee whose duty it is to protect the corpus for the benefit of such employees. Article Five of the Trust Agreement provides, in part, regarding termination and amendment of the Trust Agreement, as follows:

> "5.1 Termination: In the event of the termination of the Plan in whole or in part as provided therein, the Trustee shall dispose of the Trust Fund or any part hereof in accordance with the written order of the Company accompanied by its certification to the Trustee that such disposition is made in accordance with the terms of the Plan and that the conditions of the following sentence are met with respect to such disposition. At no time prior to the satisfaction of all liabilities with respect to participants or beneficiaries shall any part of the corpus or income of the Trust Fund, after deducting any expenses properly chargeable thereto, be used for or diverted to purposes other than for the exclusive benefit of members of the Plan, or their beneficiaries, contingent members, or estates.
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> "5.2 Amendment: The Company reserves the right at any time and from time to time by written instrument delivered to the Trustee to alter or amend this Trust Agreement in whole or in part, provided that no such alteration or amendment which affects the rights, duties, or responsibilities of the Trustee may be made without its consent, and provided further that no such amendment shall authorize or permit any part of the corpus or income of the Trust Fund to be used for or diverted to purposes other than for the exclusive benefit of members of the Plan, or their beneficiaries, contingent members or estates, except the sum, if any, remaining after a full apportionment to such members or their beneficiaries, contingent members, or estates as provided in the Plan."

We are aware of a November 30, 1972, Attorney General opinion letter interpreting K.S.A. 40-110 in which a trust arrangement was considered to be an interest in an insurance company. The 1972 opinion considered the question of whether an applicant who had been an insurance agent and had renewals forthcoming from prior sales, could place the renewal premiums in a trust while he was working at the Department of Insurance. The Attorney General noted that since the trust was one that would ultimately revert back to the applicant in the nature of a revocable trust, it should be considered an interest under K.S.A. 40-110 because the applicant still had the right to renewals and was only deferring enjoyment of them.

That situation may be distinguished from the one presented herein. The applicant discussed in the 1972 opinion still had a vital interest in the insurance company's solvency, i.e., if financial difficulties or settlement problems arose, the applicant's policies might not be renewed; therefore, he might be inclined to treat the former employer in a preferential manner. In the present situation, the financial stability of the company is apparently of no consequence to the applicant, as the trust fund in which he has an interest is self-sustaining and not dependent upon the insurance company. In the case of Scharn v. Ecker, 218 N.W. 2d, 478 (1974), the Supreme Court held that a statutory provision declaring any person ineligible to hold the office of a public utility commissioner who was "in any matter pecuniarily interested in any company, of which the public utilities commission has supervision," did not disqualify a person who received and would receive a pension from Western Union, a company regulated by the public utilities commission. The plaintiff in that case failed to show how the pension to be received depended on the existence or non-existence of the company or even its financial status. The court in recognizing that the relationship of the pension fund to the employer company was a crucial consideration, found that it did not appear that Western Union had any control whatsoever over the pension funds.

It should be noted, however, the Trust Agreement, herein, does authorize the trustee to invest a portion of the trust funds in the stock of the employer insurance company and the trustee could conceivably invest such funds in other insurance companies also regulated by the insurance commissioner. The pertinent provision of the Trust Agreement states:

> "2.2 Investment in Employer Securities: The Trustee may invest a portion of the Trust Fund in qualifying securities or real property of the Company or any affiliated company, but

> not in excess of any limitation on such investment which may now or hereafter be imposed by the Internal Revenue Code or regulations issued thereunder and not unless it receives an advance ruling from the Internal Revenue Service that such investment will not adversely affect the continued qualification of the Trust."

Whether the possibility that the trustee might invest trust funds in a regulated insurance company constitutes a connection between the trust and an insurance company sufficient to declare, as a matter of law, that the interest of any beneficiary in the trust is an "interest" in the company, requires resort to the intent of the statute.

In construing constitutional provisions and statutes imposing qualifications on public officials, "ambiguities should be resolved in favor of eligibility to office and constitutional and statutory provisions which restrict the right to hold public office should be strictly construed against ineligibility." 67 C.J.S. Officers, §17 (1978).

The New Hampshire Supreme Court declared in interpreting a similar "pecuniary interest" limitations statute, that a railroad commissioner was not disqualified because he was a treasurer and stockholder of a bank that owned stock in a railroad corporation doing business in the state. In re Opinion of the Justices, 72 A. 754, 75 N.H. 63 (1909). The court said,

> "If his actual pecuniary interest is so indirect, contingent, or problematical that men of ordinary capacity and intelligence would not be influenced by it, it is not probable that the legislature intended to disqualify him for appointment to the office of railroad commissioner, under this indefinite statutory expression."

In both cases cited herein, the courts assumed that the purpose of the qualification statute was to prohibit those persons financially interested in certain regulated industries from holding offices with the authority to supervise those industries. It is well-recognized in the law that persons who stand to gain financially from decisions made in public office are less likely to be unbiased

and, therefore, are not the proper decision-makers to protect the public interest. No doubt this same rationale underlies K.S.A. 40-110 and other conflict of interest laws in our state.

In view of the persuasive reasoning of the cases cited above and absent a showing that the pension trust fund, described herein, is the controllable appendage of the insurance company with reference to the future benefits of your prospective employee, we see no reason to expand the meaning of K.S.A. 40-110 beyond its intended purpose. Because the legal title and control of the trust fund is vested in the hands of the trustee for the exclusive and irrevocable benefit of the former employees of the insurance company, the interests of the former employees are traceable only to the trust fund itself, not to the insurance company. Therefore, we believe that the "interest" in the trust fund, herein described, is not, as a matter of law, an "interest" in an insurance company within the meaning of K.S.A. 40-110.

Very truly yours,

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RTS:BJS:gk