

PUBLIC SCHOOL RETIREMENT SYSTEM: Since House Bill 214 amending Section  
INVESTMENT FUNDS: 169.040, RSMo 1959, became effective  
LIFE INSURANCE COMPANIES: on October 13, 1961, the Board of  
CASUALTY INSURANCE COMPANIES: Trustees of the Public School Retirement  
STOCKS: System of Missouri are authorized  
to invest funds of the system which  
are in excess of a safe operating balance in common stocks and  
preferred stocks of corporations organized under the laws of the  
United States or any state therein subject to the prudent man rule  
regarding investments by trustees as expressed in Missouri court  
decisions.

November 13, 1961

Mr. G. L. Donahoe  
Executive Secretary  
Public School Retirement System of Missouri  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Donahoe:

This is in answer to your request for an opinion dated  
September 18, 1961, and which reads as follows:

"House Bill No. 214 as enacted by the  
last session of the General Assembly  
and approved by the Governor repeals  
Section 169.040, Revised Statutes of  
Missouri, 1959, and enacts in lieu  
thereof one new section, No. 169.040.  
This section deals with the collection,  
deposit, disbursement and investment  
of funds of the retirement system by the  
Board of Trustees. Subsection 2 of this  
section designates the classes of securi-  
ties in which funds of the system may  
be invested.

"The only change which will be made in  
Section 169.040 when House Bill 214 be-  
comes effective will be in subsection  
2 (h), in which the words 'or casualty  
insurance companies' will be included.  
Section 169.040, 2 (h) will then read  
as follows:

"Any securities as permitted by  
laws of Missouri relating to the in-  
vestment of the capital, reserve and  
surplus funds of life insurance com-  
panies or casualty insurance companies  
organized under the laws of Missouri."

"For our guidance in administration, we wish to request an official opinion which will answer the following: After House Bill 214 becomes effective, will the Board of Trustees be empowered to invest funds of the system in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein?"

Prior to October 13, 1961, funds of the Public School Retirement System of Missouri could have been invested in securities in the same manner as permitted by the laws of Missouri relating to life insurance companies organized under the laws of Missouri. When House Bill No. 214 became effective on October 13, 1961, Section 169.040, 2 (h), RSMo 1959, was amended to permit investment of the funds in securities as permitted by the laws of Missouri relating to casualty insurance companies as well as life insurance companies organized under the laws of Missouri.

Life insurance companies are defined in Sections 376.010 and 376.020, RSMo 1959, and the investment of the capital, reserve, and surplus funds of life insurance companies organized under the laws of the State of Missouri is governed by Section 376.300, RSMo 1959, and certain other statutory provisions which are not applicable to your inquiry. The investment in common stocks by life insurance companies is limited by Section 376.305, RSMo 1959.

Insurance companies other than life, or "casualty insurance companies" are described and defined by Section 379.010, RSMo 1959. The investment of capital and other funds of casualty insurance companies is governed by Section 379.080, RSMo 1959. This section provides in part as follows:

"\* \* \* and the remainder of the capital of said companies and their other assets may be invested either in the property or securities in this section above mentioned, \* \* \* or in stocks, bonds or evidences of indebtedness issued by corporations organized under the laws of this state, or of the United States, or of any other state, \* \* \* provided, that no such insurance company may buy stock in any company to an amount which will give the company so buying the

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virtual control of any other corporation, \* \* \* and no such company shall invest more than thirty-five per cent of the surplus to policyholders of such acquiring company, or fifty per cent of its surplus over and above its liabilities and capital, whichever is greater, in the stocks or bonds of any other such corporation."

This section expressly authorizes the investment of capital and other assets of casualty insurance companies in stocks of corporations organized under the laws of Missouri, the United States, or any other State. This includes both common and preferred stocks. Therefore, beginning October 14, 1961, the Board of Trustees of the Public School Retirement System of Missouri is empowered to invest funds of the system in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein.

There are certain restrictions contained in Section 379.080 concerning the investment of the first two hundred thousand dollars of the capital of casualty insurance companies, and certain limitations on such insurance companies concerning the amount permitted to be invested in the stock of other companies. These are restrictions on the initial capital investments and limitations on the amount of investments of the casualty insurance companies. They are not restrictions or limitations on the type of securities in which investment is permitted. Subsection 2 (h) of Section 169.040, RSMo, Laws 1961, p. \_\_\_\_\_, now provides that the Public School Retirement System may invest all funds under its control which are in excess of a safe operating balance in . . .

"Any securities as permitted by laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri." (Emphasis supplied).

Casualty insurance companies organized under the laws of Missouri are permitted to invest funds in stocks, (both common and preferred) issued by corporations organized under the laws of the United States or any State therein. The Public School Retirement System is permitted to invest its funds which are in excess of a safe operating balance in any securities which are permissible investments for casualty insurance companies. Therefore, the Public

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School Retirement System is empowered to invest its funds which are in excess of a safe operating balance in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein.

We feel it appropriate at this time to call your attention to the case of *Rand et al. v. Mckittrick*, 142 S.W. 2d 29, in which Judge Westhues referred to the Restatement of the Law, on Trusts, and then stated at page 31, as follows:

"As to the duty of a trustee in making investments, see sec. 227, page 645 of the same book, where we find the rule as follows:

'In making investments of trust funds the trustee is under a duty to the beneficiary

'(a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived.'

"This latter statement is the yardstick generally used by the courts of the union in determining the duties of a trustee. Courts following the New York rule, as well as those following the Massachusetts rule, are in perfect harmony on this question. It is also the rule in this state. See *Cornet v. Cornet*, 269 Mo. 298, 190 S.W. 333, loc. cit. 339 (5).

"[1,2] An analysis of these cases will disclose that the courts of the land have required trustees of trust funds to exercise a greater degree of care and caution when investing such funds than prudent men ordinarily exercise when investing their own funds. Investments which are speculative in nature have been universally tabooed, by the courts of the union, as proper investments for trust funds. Yet prudent men may and do

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invest in speculative enterprises. Wild v. Brown, 120 N. J. Eq. 31, 183 A. 899. Hence the rule is well stated, Restatement of the Law, on Trusts, supra, that trustees may 'make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived.' The part we have italicized is important. \* \* \* An examination of the cases will demonstrate that trust funds, in those states where the courts, legislature, or the people by constitutional provision have prohibited the investment of trust funds in stocks, have fared no better than have the trust funds in the states following the Massachusetts rule. We think this demonstrates that the preservation of trust estates depends more upon the integrity, honesty and business acumen of the trustees than it does upon arbitrary legal classification of securities wherein trust funds may be invested. \* \* \*"

The Court then quoted with approval from the case of Walker v. Buhl, 211 Mich 124, 178 N.W. 651, 12 A. L. R. 569, as follows:

"When such a fund passes into the hands of a trustee, it becomes impressed with a double duty: First, to so invest it that it can be turned over at the expiration of the trust period without loss; and, second, to secure an income therefrom. He must act honestly and faithfully, and in what he believes to be the best interest of the cestui que trust. He must exercise a sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters employ in their own affairs when making a permanent investment, in which the primary object is the preservation of the fund and the secondary one that of obtaining an income therefrom. He must not permit himself to take

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the hazard of an investment with the hope of largely increasing the fund as he might, perhaps, do in the prudent management of his own estate. The entire element of speculation must be removed. He must at all times remember that he is handling a trust fund, the care of which has been intrusted to him in reliance on his integrity, fidelity and sound business judgment.'"

In the absence of specific statutory restrictions on this type of investment, the Board of Trustees of the Public School Retirement System of Missouri, in administering and investing the funds of the system, are bound by this general law respecting trusts and trustees.

We assume that the Board of Trustees are fully aware of the other provisions of Section 169.040, RSMo 1959, and the requirement that they shall see that the funds are safely preserved and provide appropriate safeguards against loss by the system in any contingency.

#### CONCLUSION

Since House Bill 214 amending Section 169.040, RSMo 1959, became effective on October 13, 1961, the Board of Trustees of the Public School Retirement System of Missouri are authorized to invest funds of the system which are in excess of a safe operating balance in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

This opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

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