

**LETTER OPINION
2006-L-30**

September 14, 2006

The Honorable Jim Poolman
Commissioner
North Dakota Insurance Department
State Capitol
Bismarck, ND 58505

Dear Commissioner Poolman:

Thank you for asking whether a nonprofit mutual insurance company may make a premium refund to its policyholders. It is my opinion that a nonprofit mutual insurance company may make a premium refund to its policyholders.

ANALYSIS

Section 26.1-17-33.1(3), N.D.C.C. provides:

The nonprofit corporation laws apply to the operation and control of a nonprofit mutual insurance company converted from a nonprofit health service corporation under this section and supersede any conflicting provisions in title 26.1 unless title 26.1 is more restrictive. Except as authorized in subsections 4 and 5, a nonprofit mutual insurance company may not sell, lease, transfer, or dispose of all or substantially all property or assets, and may not merge or consolidate with, or acquire, a stock insurance company or agency, for-profit subsidiary, or any other corporation. Except as provided in subsection 5, a nonprofit mutual insurance company may not pay dividends or issue stock.¹

You ask whether a premium refund would be considered a dividend which nonprofit mutual insurance companies are prohibited from paying.

The meaning of "dividend" is ambiguous. "A dividend [in the insurance industry] is commonly considered a reduction of premium."² A dividend from a stock corporation is

¹ (Emphasis added).

² 5 Steven Plitt, Daniel Maldonado & Joshua D. Rogers, Couch on Insurance § 80:50 at 80-54 (3d ed. 2005).

considered a payment to the stockholders as a return on their investments.³ As one court noted with approval “while a dividend from a stock corporation represents profit, a dividend from a mutual insurer represents not a profit but a reduction in the amount of the premium to reflect the difference between the estimated cost and the actual cost of providing insurance.”⁴ While the initial premium paid by a policyholder usually represents a somewhat inflated estimate of the cost of the policy, it is contemplated that when the cost is actually ascertained, the mutual insurance company will refund to the policyholders the excess premium, that is, the amount in excess of the company’s actual cost.⁵ “[W]e agree that the distribution of divisible surplus by a mutual insurer differs from the payment of a dividend by a stock company. . . .”⁶

When a statute is ambiguous, the statutory rules of construction permit the use of extraneous sources, including the legislative history, to determine legislative intent.⁷ In addition, a court may consider the object sought to be attained, the circumstances under which it was enacted, and the consequences of a particular construction.⁸

The law prohibiting nonprofit mutual insurance companies from paying dividends and issuing stock was enacted in 1997. At the time, Blue Cross Blue Shield of North Dakota was planning to convert from a nonprofit health service corporation to a nonprofit mutual insurance company.⁹ There was a concern that Blue Cross Blue Shield could then convert to for-profit status.¹⁰ The North Dakota Medical Association’s legal director testified that the 1997 changes proposed in S.B. 2270 would prohibit Blue Cross Blue Shield from accomplishing any form of conversion that would result in Blue Cross Blue Shield using its assets in a manner inconsistent with its nonprofit status.¹¹ The legal director later stated that the bill would clarify that the nonprofit corporation laws would

³ 18B Am. Jur. 2d Corporations § 998 (2d ed. 2004).

⁴ Spence v. Medical Mut. Liability Ins. Soc. of Maryland, 500 A.2d 1066, 1069 (Md. App. 1985).

⁵ Id.; Penn Mutual Life Insurance Co. v. Lederer, 252 U.S. 523, 525-26 (1920) (“It is of the essence of mutual insurance that the excess in the premium over the actual cost as later ascertained shall be returned to the policyholder.”).

⁶ Spence v. Medical Mut. Liability Ins. Soc. of Maryland, 500 A.2d 1066, 1069 (Md. App. 1985).

⁷ N.D.C.C. § 1-02-39; N.D.A.G. 2006-L-03.

⁸ N.D.C.C. § 1-02-39(1),(2), and (5).

⁹ Hearing on S.B. 2270 Before the Senate Industry, Business, and Labor Committee, 1997 N.D. Leg. (Jan. 28) (testimony of Bruce Levi, legal director for the North Dakota Medical Association).

¹⁰ Id.

¹¹ Id.

apply to a nonprofit mutual insurance company.¹² He stated “[t]he present nonprofit corporation laws prohibit dividends and the issuance of stock.”¹³ The president of Blue Cross Blue Shield also testified that the board of Blue Cross Blue Shield believed that “net income should remain in the company for the benefit of our policyholders, not dispersed [sic] as stockholder dividends as it would under a for-profit stock structure.”¹⁴

The intent of the Legislature in prohibiting a nonprofit mutual insurance company from paying dividends was to prohibit such a company from being able to pay dividends to stockholders that constituted a return on their investments. It was not intended to prohibit a nonprofit mutual insurance company from paying the kind of “dividends” that constitute a reduction in premiums as a result of distributing the surplus of the mutual insurance company. It is therefore my opinion that a nonprofit mutual insurance company may make a premium refund to its policyholders.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁵

¹² Hearing on S.B. 2270 Before the House Industry, Business, and Labor Committee, 1997 N.D. Leg. (Mar. 11) (testimony of Bruce Levi, legal director for the North Dakota Medical Association).

¹³ Id. The purpose of this prohibition is to assure that the corporation retains its non-profit status. N.D.A.G. Memorandum to Jenkins (Apr. 8, 1991).

¹⁴ Hearing on S.B. 2270 Before the Senate Industry, Business, and Labor Committee, 1997 N.D. Leg. (Feb. 5) (testimony of Michael Unhjem, President and CEO of Blue Cross Blue Shield).

¹⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).