**OPINION**
**62-26**

September 27, 1962 (OPINION)

BOARD OF ADMINISTRATION

RE: Responsibility for Obtaining Insurance for Various Departments

and Institutions

This is in response to your letter in which you ask for an opinion whether or not under the provisions of chapter 54-44, the duty and responsibility of securing insurance contracts for the various institutions under your control was transferred to the Department of Accounts and Purchases, or if it still remains your responsibility and duty.

The only provision which might be construed as authorization for the Department of Accounts and Purchases to secure insurance contracts, etc., is section 54-44-04(21), which provides as follows:

> * * *Shall be vested with the duties, powers, and responsibilities involved in the operation of a centralized purchasing service. This purchasing service shall include the purchase of all equipment, furniture, fixtures, printing, materials, supplies and other commodities for all state departments, institutions, offices, and agencies, excluding land, buildings, or space, or the rental thereof and excepting emergency purchases that are impossible of execution by the department of accounts and purchases within the required time, highly specialized equipment which can be better purchases by the department, institution or office which is to utilize such equipment, and such specific items and minor purchases as the director may exempt;* * *" (Emphasis supplied).

It appears that the term "commodity" is the only term in the above section under which insurance could be included. "Commodity" is defined by Webster's New Collegiate Dictionary (Second Edition) as "1. Quality or state of being commodious; also, that which is commodious; convenience; - now only in law. 2. That which affords convenience or profit, esp. in commerce; including everything movable that is bought and sold (goods, wares, merchandise, produce of land, etc.), 3. An element of wealth; an economic good."

Our research discloses five cases in which the court had occasion to judicially determine whether or not the term "commodity" includes insurance. They are as follows:

> STATE EX REL TAYLOR v. ROSS (16 Ohio, Dec. 704; 4 Ohio N.P. N.S. 377.). In this case, the court held that under the Valentine Antitrust Law, R.S. Section 4427-1 making it unlawful to restrict trade or commerce or to fix price of any commodity, the term "commodity" included insurance. This case was decided in 1906. This holding was in essence reversed in STATE v.

BOVEE, Infra. In 1907, the court in STATE v. BOVEE (17 Ohio, Dec. 663, 6 Ohio N.P., N.S. 337), in construing the Valentine Antitrust Law, Section 4427-1 (the same section as above) held that fire insurance contracts are not "commodities" within such act and said that a commodity as commonly used and understood means something movable and tangible and was not used in the statute in its broadest sense of being a convenience, accommodation, profit, benefit, advantage, interest or commodiousness. It is to be noted that the court arrived at this decision about a year after the case of TAYLOR v. ROSS, Supra, holding to the contrary. It is also to be observed that the court took into consideration the case of BEECHLEY v. MULVILLE, Infra, which also held to the contrary.

In PALANTINE INSURANCE COMPANY v. GRIFFIN, (Tex. 202, S.W. 1014 and 1022 (1918)), in construing a statute which made an agreement to refuse to buy from or to sell to any other person, etc., "any article of merchandise, produce or commodity", a conspiracy, said that insurance was not a trade, traffic, commerce or commodity, and cited the case of QUEENS INSURANCE COMPANY v. STATE, (24 S.W. 397), Infra. In QUEENS INSURANCE COMPANY v. STATE (24 S.W. 397 (Tex 1983)), the statute defined a trust as a combination to create restriction trade; to prevent competition in making, selling, or buying merchandise or commodities; to fix, at any standard controlling its price to the public, any article or commodity of merchandise or commerce intended for sale, use, or consumption in the state; to make or perform any agreement not to sell or dispose of any article or commodity of trade, use, merchandise, commerce, or consumption below a common standard so as to prevent free competition, etc. On page 401 of the Southwest Report, the court stated:

> Is the contract of insurance an 'article of commerce' or 'commodity,' within the meaning* * *of the statute? * * *The word 'commodity' has two significations. In its most comprehensive sense it means 'convenience, accommodation, profit, benefit, advantage, interest, commodiousness;' but, according to Webster's International Dictionary, the use of the word in this sense is obsolete. Page 286. The word is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale; and we think that this was the meaning intended to be given to it by the legislature in the statute in question. This clearly appears by the context. The language descriptive of the second category of offense - 'to limit or reduce the production or increase or reduce the price of merchandise or commodities' - implies that a commodity is something that may be produced; so, by that description, of the third class, a commodity is something that may be manufactured, made, transported, and sold; in the fourth, it implies something that may be sold, used, or consumed; and so, also the fifth and last class, it relates to a commodity that is the subject of sale and transportation. Insurance is neither 'produced,' 'consumed,' 'manufactured,' 'transported,' nor 'sold,' in the ordinary signification of any of these words, and therefore it is not within 'the plain import' of the language employed in the act."

The case of BEECHLEY v. MULVILLE (102 Iowa 602; 70 N.W. 107, (1897)) involved an action for damages because of a conspiracy to destroy plaintiff's business as an insurance agent. Statute provides, in effect, that anyone who conspired to regulate or fix the price of "oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever; or shall create, enter into, become a member of or a party to any pool, agreement, combination or confederation to fix or limit the amount or quantity of any commodity or article to be manufactured, mined, produced, or sold in this state, shall be deemed guilty of a conspiracy to defraud,* * *." Defendant contended statute had no application to insurance companies. Court held insurance was a commodity. On page 109 of the Northwest Report:

> Insurance is a commodity. 'Commodity' is defined to be that which affords advantage or profit. Mr. Anderson, in his Law Dictionary, defines the word as 'convenience, privilege, profit, gain; popularly, goods, wares, merchandise.' We see no reason why, in the act, the words should be restricted to its popular use. It is common to speak of 'selling insurance.' It is a term used in insurance business, and law writers have, to quite an extent, adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law."

The case of STATE v. ROSS was, in essence, reversed, and BEECHLEY V. MULVILLE (Iowa) cited above, definitely appears to be in the minority. In addition to this, the Iowa case can readily be distinguished because of the manner in which the term "commodity" was used in the statute.

We also note that section 1-02-02 of the North Dakota Century Code provides that words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in the Code are to be understood as thus explained. We are unable to find where the term "commodity" has been explained in chapter 54-44 and we, therefore, must accept the term in its ordinary sense. The term "commodity" is defined in the Fair Trade Law, chapter 51-11, as meaning any subject of commerce. However, we have no basis to refer to some unrelated chapter to determine the meaning of such a term in chapter 54-44.

We have taken into consideration that section 54-44-04(21) specifically excluded land, buildings, or space, or the rental thereof. As a result of this, it might be argued that since the Legislature excluded certain items, only those should be excluded, and also that the term "land, buildings, space or rental thereof," might apply to objects that cannot be moved, that is intangibles, as well as tangibles. Such, however, we believe is contrary to the recognized principles of statutory construction. We believe the more realistic view is that certain items were accepted but by such exception, it did not include all others - that the inclusion is still limited to those items stated. The context in which a word is used usually determines its true meaning.

It is to be noted that in subsection 21 of section 54-44-04, we find the language: "This purchasing service shall include the purchase of all equipment, furniture, fixtures, printing, materials, supplies and

other commodities for all state departments* * *." The term "other commodities" is, in reality, an extension or continuation or type of supplies previously mentioned. The term "other" as used in this instance, it is actually to be construed as meaning "other such like" and is construed to include only others of like kind and character. It does not embrace new material. In this instance, the doctrine of Ejusden Generis applies.

Also, in examining subsection 22 of the same section, it becomes more obvious that the term "other" as used in subsection 21 has a restricted meaning. Subsection 22 provides that the Department of Accounts and Purchases "shall maintain and operate such supply rooms as may be found desirable to supply the several departments with office supplies and other commonly used commodities* * *." Note the reference of maintaining and operating supply rooms. This obviously refers to supplies, equipment, furniture, etc., which may be placed in a supply room. It refers to tangible objects. It is extremely difficult to conceive of a situation where insurance may be placed in a supply room.

For the foregoing reasons, it is our opinion that the Department of Accounts and Purchases is not charged with the duty of securing insurance for the various state departments and institutions. In reviewing the provisions of chapter 372 of the 1959 Session Laws, which includes chapter 54-44, we are unable to find where the Legislature provided either expressly or impliedly that the responsibility of securing insurance contracts be placed in some central agency or office. From this, of course, we must conclude that the Legislature intended that the responsibility of securing insurance contracts remains as it existed before the enactment of chapter 372 of the 1959 Session Laws, of which chapter 54-44 is a part thereof.

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