OPINION
67-95

August 9, 1967 (OPINION)

Honorable K. O. Nygaard

Commissioner of Insurance

RE: Insurance - Merger of Companies - Notice

This is in response to your letter wherein you request an opinion regarding three specific questions concerning the merger of insurance companies doing business in the State of North Dakota. The questions posed are as follows:

1. Does the proposed merger come within the purview of chapter 26-20, N.D.C.C.?

2. Assuming an affirmative answer to the first question, must the Commissioner of Insurance order that notice be given by mail to each policyholder of the petitioning company pursuant to section 26-20-03, N.D.C.C., or may the commissioner waive such requirement if he is satisfied that the interests of the policyholders are properly protected?

3. Assuming a negative answer to the first question, does the commissioner have authority by virtue of any other statutory provisions to either approve or disapprove of the proposed merger?"

The Supreme Court of the State of North Dakota has never had occasion to expound upon chapter 26-20 or any of its antecedents, and the writer has been unable to find a case directly in point in any other jurisdiction. As such, a resolution of whether the proposed merger comes within the purview of chapter 26-20 of the North Dakota Century Code will of necessity involve an attempt to arrive at legislative intent.

Chapter 26-20 of the North Dakota Century Code is entitled "Consolidation and Reinsurance, Domestic Companies." Nowhere within the context of this chapter does the word "merger" or any of its inflected forms appear. As discussed below, if the word "consolidation" and its cognates are to be understood in their ordinary sense, chapter 26-20 will encompass the proposed merger; however, if the word "consolidate" and its cognates are to be understood in their technical sense, the proposed merger will fall outside of the ambit of chapter 26-20.

There is a definite cleavage among the authorities in regard to whether the words "consolidation and "merger" and their cognates are to be understood in a strict, technical sense or in a broad, general sense. In 15 FLETCHER, CYCLOPEDIA CORPORATIONS section 7041 (perm. ed. rev. vol. 1961) at pp. 6-12, the distinction is discussed in the following language:

"There is some confusion in the cases in the use of the terms

'consolidation' and 'merger', as applied to corporations. As will be seen, they are not in legal effect the same. And both should be distinguished from other combinations and transactions entered into by corporations which do not constitute either a consolidation or a merger.

"Taking up first the matter of consolidation, it should be observed that the term, when accurately used, has a definite legal meaning.

"It is a combination by agreement between two or more corporations of the same or different states, and under authority of law, by which their rights, franchises, privileges and property are united, and become the rights, franchises, privileges and property of a single corporation, composed generally, although not necessarily, of the stockholders of the original corporations. Strictly speaking, a consolidation signifies such a union as necessarily results in the creation of a new corporation, and the termination of the existence of the old ones. The corporation resulting from the consolidation is called the consolidated corporation, and the original corporations are called the consolidating or constituent corporations.

"The term 'merger" in connection with corporations has also a distinct meaning, although it is very often somewhat loosely used, and sometimes as denoting the same thing as consolidation. Like the latter, it is permissibly used to denote various arrangements by which two or more corporations become united in interest. Strictly speaking, a merger means the absorption of one corporation by another, which retains its name and corporate identity with the added capital, franchises and powers of the merged corporation. It is the uniting of two or more corporations by the transfer of property to one of them, which continues in existence, the others being merged therein.

"It is apparent from the foregoing definitions of consolidation and merger that although they are often used as synonymous in the decisions and textbooks and in agreements effecting combinations of corporations, and even in the statutes, the one is not the equivalent of the other, and that merger, rightly understood and according to its strict legal meaning, is clearly distinguishable from a consolidation such as is authorized by statutes in most of the states. . ." (Citations omitted.)

And in 19 Am. Jur.2d. CORPORATIONS sections 1491-92, the following discussion is presented:

"Transactions whereby the interests of two or more corporations become identified are susceptible of arrangement into four general groups. The first of such groups comprehends consolidations proper. The use of the word 'consolidation' by textwriters and in adjudged cases has frequently been inclusive rather than accurate. Practically speaking, every alliance of corporations and every transaction looking to the control of

one corporation by another has been termed a 'consolidation' of the two. By consolidation, however, in its proper and more restricted sense is meant a union, blending, or coalescence of two or more corporations in one corporate body whereby, in general, their property, powers, rights, and privileges inure to, and their duties and obligations devolve upon, a new organization thus called into being; and they cease to exist except constructively in certain cases, as, for example, where the jurisdiction of the courts and the power of the state to tax and regulate are concerned. As the term is correctly and strictly used, there can never be a consolidation of corporations except where all the constituent companies cease to exist as separate corporations and a new corporation, the consolidated corporation, comes into being. This does not mean, however, that the term, wherever found, must be construed according to the foregoing definition. Its meaning in a particular context may be determined as a matter of intent either of the legislative or of parties to an agreement of combination.

"The second of such groups comprehends a merger, which consists of a combination whereby one of the constituent companies remains in being, absorbing all the other constituent corporations. The third type of combinations comprehends cases in which the new corporation is, either in law or in point of fact, the reincarnation or reorganization of one previously existing. To the fourth group belong those transactions whereby a corporation, although continuing to exist de jure, is in fact merged in another which, by acquiring its assets and business, has left of the other only its corporate shell.

"There are of course varying combinations of these generic methods.

"A merger of corporations consists of a combination whereby one of the constituent companies remains in being - absorbing or merging in itself all the other constituent corporations. The terms 'consolidation' and 'merger' have been used rather indiscriminately, and some of the courts and textwriters have used the terms interchangeably, and, in cases of doubt, conjunctively, to express the idea of complete corporate union, whether a new corporation normally results or whether a constituent corporation is normally preserved. Also, under some statutes, except so far as the identity of the merging or consolidating corporations is concerned there appears to be no difference between consolidation and merger. However, it is said that accurate logicians properly distinguish between the meanings of the two terms.

"Whether a particular transaction is in reality a merger or otherwise depends upon circumstances of the particular case. Calling a corporate transaction a merger does not necessarily make it so nor does giving it another name prevent it from being a merger." (Citations omitted.)

Thus it would appear the the word "consolidate" and its cognates are susceptible of being construed in either a strict, technical sense or

in a broad, general sense.

The language employed in chapter 26-20 is not particularly helpful in making this determination. Perhaps the most conspicuous phraseology is found in section 26-20-04 and reads as follows ". . .and may make such order with reference to the distribution and disposition of the surplus assets of the company thereafter remaining as shall be just and equitable to the policyholders." (Emphasis added.) As noted above, those authorities which insist upon a technical distinction between mergers and consolidations sedulously point out that in a merger one company is absorbed into another company which "remains" intact and is designated as the "survivor"; whereas in a consolidation one or more companies fuse or pool their assets and liabilities to form a third or "new" company. This reference to the "company thereafter remaining", however, should not of itself be dispositive of the sense in which the word "consolidate" is used.

Chapter 26-20 had its origin in chapter 150 of the Session Laws of 1907. The derivation of this chapter (chapter 150, Session Laws 1907) is not indicated in any of the compilations. Although under these circumstances any attempt to pinpoint the derivation would be speculative, it is interesting to note that Minnesota enacted an identical chapter (chapter 303, Laws of 1905) which subsequently became codified as section 3519, G.S. 1913, and was involved in the case of Austin v. National Casualty Co., 125 Minn. 390, 147 N.W. 281. The primary issue in Austin was the plaintiff's right to recover compensation for attempting to effect a consolidation of the Globe Fraternal Accident Association with the defendant company. In discussing this issue, the Minnesota Supreme Court demonstrated that it considered the word "consolidate" in its broad, general sense. For example, in the first paragraph of the opinion at page 281 of the Northwestern Reporter, Judge Holt states:

> "'. . .Plaintiff and Mr. Curtis, the president of defendant, conceived a plan to consolidate the Globe Company with the defendant, or in other words have the latter overtake the former, receive all its property and assets, and assume all its debts and obligations, including outstanding policies according to the terms and conditions thereof. . .'"

Considering this opinion in its entirety, it is readily apparent that no technical or restricted meaning is attributed to the word "consolidate." In unmistakably clear terms the court points out that the defendant company would take over the Globe Company. No contemplated fusion of the defendant company and Globe Company into a new company which would succeed to their assets and liabilities is discussed. Those who insist upon nice distinctions would undoubtedly be offended with the loose use of the word "consolidate" in this opinion, for the defendant company would be the "remaining" or surviving company (an attribute of a technical merger), and no third or "new" company would be formed (an attribute of a technical consolidation); yet this opinion certainly evinces that the word "consolidate" is susceptible of more than one interpretation.

Title 26 of the North Dakota Century Code embodies substantially the entire corpus of laws relating to insurance. The word "merger" and its cognates are used sparingly throughout the title. Five such

references do exist, however, the first of which is contained in chapter 26-21 of the North Dakota Century Code, entitled "Dissolution of Domestic Insurance Companies." Section 26-21-02 of this chapter provides in part as follows:

> ". . .The commissioner of insurance, or the attorney general representing him, may apply to the district court in and for Burleigh County for an order to show cause why the commissioner should not take possession of any insurance company described in such order and conduct its business, or for such other relief as the nature of the case and the interests of the public and of the policyholders, creditors, or stockholders of the company may require, whenever it:
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> 4. By contract of reinsurance or otherwise, has transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of another corporation, association, society, or order without first having obtained the written approval of the commissioner; (Emphasis added.)
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The Legislature herein demonstrates its intent that a device of an insurance company aimed at transferring or attempting to transfer "substantially its entire property or business" must first have the written approval of the Commissioner of Insurance. This being the case, it is difficult to perceive how the Legislature could have intended that a complete transfer or merger should require no prior approval whatsoever. Although it cannot be gainsaid that the provision quoted above is not directly in point, nevertheless, it certainly supports the conclusion that the Legislature considers the prior approval of the Commissioner of Insurance indispensable where mergers and substantial transfers are concerned.

The second reference to "merger" and its cognates is contained in chapter 26-12 of the North Dakota Century Code, entitled "Fraternal Benefit Societies." Section 26-12-47 of chapter 26-12 provides as follows:

> "MERGERS AND TRANSFERS BY DOMESTIC FRATERNAL BENEFIT SOCIETIES. No domestic fraternal benefit society shall merge with, or accept the transfer of the membership or funds of, any other society unless such merger or transfer is evidenced by a written contract setting out in full the terms and conditions of the merger or transfer and such contract is filed with the Commissioner of Insurance of this state, together with a sworn statement of the financial condition of each of the contracting societies made by their respective presidents and secretaries, or corresponding officers, nor unless a verified certificate by the officers of each contracting society that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of the

society has been filed with the commissioner. Upon the submission of said contract, financial statements, and certificates, the commissioner shall examine the same, and if he shall find that such financial statements are correct, that the contract is in conformity with the provisions of this section, and that the merger or transfer is just and equitable to the members of each of said societies, he shall approve the merger or transfer and issue his certificate to that effect, and thereupon, the said contract of merger or transfer shall be in full force and effect. In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the commissioner."

Once again there is direct evidence of legislative intent to subject mergers to the control and approval of the Commissioner of Insurance.

The three remaining references are found in chapters 26-26, Hospital Service Contracts; 26-27, Nonprofit Medical Service Corporations; and 26-27.1, Nonprofit Dental Service Corporations. The applicable sections, 26-26-11, 26-27-09 and 26-27.1-10, of these chapters provide, in numerical order, as follows:

"26-26-11. DISSOLUTION - MERGER - LIQUIDATION. Any dissolution, merger, or liquidation of a corporation organized under the provision of this chapter shall be under the supervision of the Commissioner of Insurance, who shall have all powers with respect thereto granted to him under the insurance laws of this state."

"26-27-09. DISSOLUTION OR MERGER. The dissolution, liquidation or merger of any medical care corporation organized and doing business under the provisions of this chapter shall be conducted under the supervision of the Commissioner of Insurance, who shall have all the authority and power with respect thereto which is granted to him under the insurance laws of this state."

"26-27.1-10. DISSOLUTION OR MERGER. The dissolution, liquidation or merger of any dental service corporation organized and doing business under the provisions of this chapter shall be conducted under the supervision of the Commissioner of Insurance, who shall have all the authority and power with respect thereto which is granted to him under the insurance laws of this state."

(Volume 4, 1967 Pocket Supplement, N.D.C.C.)

In summary, a consideration of the references to "merger" and its cognates found in title 26 makes it apparent that the Legislature intended that such transactions by subject to the supervision and control of the Commissioner of Insurance.

In this connection, one further matter merits consideration. Section 26-08-01 of the North Dakota Century Code provides as follows:

"26-08-01. GENERAL POWERS AND DUTIES OF DOMESTIC INSURANCE COMPANY. All insurance companies incorporated by authority of

> any law of this state, except when otherwise expressly provided, may exercise the powers and shall be subject to the duties and liabilities provided by this title. The general law governing profit corporations shall apply to all incorporated domestic insurance companies so far as such provisions are pertinent and not in conflict with provisions contained in this title relating to such companies."

Section 10-23-15 of the North Dakota Business Corporation Act supplements section 26-08-01 as follows:

> "10-23-15. APPLICATION OF CHAPTERS. All foreign and domestic corporations for profit are governed by chapters 10-19 through 10-23, except profit corporations governed by special statutes, such as public utility, insurance, banking, co-operative, building and loan, annuity, safe deposit, surety, and trust companies, which are subject to the provisions of those special statutes except in so far as reference is made to the general law governing corporations or to provisions of the title Corporations. Where such reference exists, chapters 10-19 through 10-23 shall govern in that respect."

Chapter 10-20 of the North Dakota Business Corporation Act provides for mergers and consolidations, which are treated as separate and distinct corporate procedures therein. It may be argued that this fact conclusively demonstrates that the Legislature recognized and intended that the two be considered as strict, technical devices and that this intent should be transferred and applied to "consolidation" and its cognates in chapter 26-20. Were it not for the fact that chapter 26-20 antedates chapter 10-20 by fifty years, this argument might be tenable; however, the disparity in time renders this argument weak indeed.

As indicated above, no procedure exists within the insurance laws for the supervision of "mergers" of insurance companies, unless the word "consolidation" and its cognates in chapter 26-20 be construed in a broad, general sense. References to the word "merger" and its cognates within title 26 evince a definite legislative intent that "mergers" be under the direct supervision and control of the Commissioner of Insurance. It has also been established that the word "consolidation" is susceptible of a broad, general interpretation which would include "mergers." In view of this, it would be reasonable to assume that the Legislature used the word "consolidation" and its cognates in an inclusive sense. Furthermore, if a strict interpretation of "consolidation" were adopted, an anomalous situation would result; for although a technical "merger" and a technical "consolidation" are akin insofar as effect is concerned, different and inconsistent procedures would apply to them. Yet, the safety and protection of policyholders is the purpose underlying legislation of this nature, and this purpose would be subverted were not the same safeguards present in one as well as in the other. For these reasons, the writer concludes that the proposed "merger" comes within the purview of chapter 26-20 of the North Dakota Century Code.

In view of an affirmative answer to the first question posed, it is unnecessary to consider the third question. The second question,

however, must be resolved.

Whether the commissioner must order notice be given by mail to each policyholder of the petitioning company depends upon the meaning to be ascribed to the auxiliary verb "shall" in the context of section 26-20-03. The latter section provides as follows:

> "26-20-03. NOTICE OF PETITION FOR CONSOLIDATION OR REINSURANCE. When a petition asking for authority to consolidate or to reinsure is filed with him, the Commissioner of Insurance shall issue an order requiring notice to be given by mail to each policyholder of the petitioning company, of the pendency of such petition and of the time when and place where a hearing thereon will be held. He also shall publish the order of notice and the petition in five newspapers, one of which shall be a daily newspaper published at the capital of this state, for at least two weeks before the time appointed for the hearing upon said petition." (Emphasis added.)

The authorities appear in accord as to what the word "shall" ordinarily denotes and the circumstances under which a different meaning may be ascribed to it. Black, e.g., states as follows:

> "As used in statutes, contracts, or the like, this word is generally imperative or mandatory. McDunn v. Roundy, 191 Iowa, 976, 181 N.W. 453, 454; Bay State St. Ry. Co. v. City of Woburn, 232 Mass. 201, 122 N.E. 268; U.S. v. Two Hundred and Sixty-Seven Twenty-Dollar Gold Pieces, D.C. Wash., 255 F. 217, 218; Baer v. Gore, 79 W. Va. 50, 90 S.E. 530, 531, L.R.A. 1917B, 723.
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> "In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operation to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. People v. O'Rourke, 124 Cal. App. 752, 13 P.2d. 989, 992.
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> "But it may be construed as merely permissive or directory, (as equivalent to 'may') to carry out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense. Spaulding & Kimball v. AEtna Chemical Co., 98 Vt. 169, 126 A. 588, 589; Wisdom v. Board of Sup/rs of Polk County, 236 Iowa 669, 19 N.W. 2d. 602, 607, 608. Also, as against the government, it is to be construed as 'may', unless a contrary intention is manifest. Cairo & Fulton R. Co. v. Hecht, 95 U.S. 170, 24 L.Ed. 423." (BLACK'S LAW DICTIONARY, 4th Ed. 1951.)

In 80 C.J.S., at page 136 et seq. the following commentary on the word "shall" appears as follows:

(80 C.J.S., page 136)

"In general. It is stated in the following subdivision that the word 'shall' always has a mandatory meaning, although at times on sufficient reason it may be construed as having only a permissive or directory meaning, and whether the term, as used in constitutional, contractual, statutory, or testamentary provisions, should be construed to be mandatory or directory depends in the intention, and its construction is controlled by the object sought to be reached or by the subject matter and context.

"Compulsory, peremptory, imperative, or mandatory sense. In common, and ordinary usage, 'shall' has a compulsory, peremptory, imperative, or mandatory meaning, and it has been said that it always, or usually, has this meaning, as opposed to a permissive or directory meaning, although, as stated infra p. 138 notes 34-38, at times on sufficient reason it may be construed as having only a permissive or directory meaning.

"In its ordinary signification, 'shall' is a word of command, and is the language of command, and is the ordinary, usual, and natural word used in connection with a mandate. In this sense 'shall' is inconsistent with, and excludes, the idea of discretion, and operates to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless an intent to the contrary appears; but the context ought to be very strongly persuasive before it is softened into a mere permission.

"When the word 'shall' is employed with respect to a right or benefit to any person, and that right or benefit depends on giving the word a mandatory meaning or an imperative construction, the presumption is that the word was used with respect to such right or benefit, and it cannot be given a permissive meaning merely; and when a right to a person or property is lost or destroyed by a failure to do an act within a limited time it is given a mandatory effect; and it ought to be construed as meaning 'must,' for the purpose of sustaining or enforcing an existing right, but it need not be so construed for the purpose of creating a new right.

"Expressing obligation. Primarily, and usually, 'shall' denotes, and is expressive of, obligation, and is commonly a word of imperative obligation. 'Shall' imports the imposition of a duty, and implies a duty or necessity whose obligation is derived from the person speaking.

"As directory or permissive. The word 'shall' is frequently used without intending that it be taken literally, so that it is not always imperative or mandatory, but may be consistent

> with an exercise of discretion. Accordingly at times, on sufficient reason, or where such intent is indicated, or where the subject matter requires, the word may be construed as being merely directory, or as being merely permissive, or as meaning 'may,' especially when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power, by either of the fundamental branches of government. The word 'shall' will be construed to mean 'may,' and to be merely directory, when by giving it that construction no advantage is lost, no benefit is sacrificed, either to the public or to any individual, or no right is destroyed, or when no right or benefit to any one depends on its imperative use, or when the provision in which it is found does not confer a private right and the public interest does not demand a mandatory construction." (Citations omitted.)
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> See also 39 WORDS AND PHRASES, "shall" and "shall-in statutes" (perm. ed. 1953).

Beginning with the proposition that "shall" is mandatory rather than permissive, in its ordinary acceptation, the problem becomes one of determining whether the circumstances and the context dictate that "shall" be mollified to give it a permissive or directory import. See Novak v. Novak, 74 N.D. 572, 24 N.W.2d. 20. None of the reasons specified in the authorities cited above militate in favor of a permissive construction. On the other hand, several of these reasons favor a mandatory construction. For example, we are concerned with a right or benefit to policyholders which depends upon "shall" being taken in the imperative sense, and a duty is imposed upon a public official to protect and safeguard the interests of policyholders. In addition, the use of "shall" and "may" within the context of chapter 26-20 of the North Dakota Century Code demonstrates legislative recognition of the ordinary distinction between the two words. See United States v. Tapor-Ideal Dairy Co., D.C. Ohio, 175 F. Supp. 678, 682. The notice provision having been construed as mandatory, it follows that the commissioner is without discretion to waive such requirement even if he is satisfied that the interests of policyholders are properly protected.

HELGI JOHANNESON

Attorney General