LETTER OPINION
95-L-258

November 9, 1995

Ms. Sheila Peterson
Director, Fiscal Management
Office of Management and Budget
State Capitol
Bismarck, ND 58505-0400

Dear Ms. Peterson:

Thank you for your October 4, 1995, letter concerning the State Risk Management Fund (Fund). It is my opinion that as a program of self-insurance for a single entity, the Fund is not insurance or a self-insurance pool and the administrator of the Fund is not an insurance company, an insurer, or engaged in the business of insurance as those terms are generally used in N.D.C.C. title 26.1.

You first ask whether the restrictions on government self-insurance pools in N.D.C.C. ch. 26.1-23.1 apply to the Fund. The restrictions in that chapter apply to "any state agency that unites with another state agency, political subdivision, or both, to self-insure against their legal liabilities . . . ." N.D.C.C. § 26.1-23.1-01(1). Comparing this section to the characteristics of the Fund under N.D.C.C. § 32-12.2-07, it is my opinion that the Fund is not subject to regulation as a government self-insurance pool under N.D.C.C. ch. 26.1-23.1.

First, to be a regulated self-insurance pool under that chapter, N.D.C.C. § 26.1-23.1-01(1) requires at least two entities: one state agency or political subdivision and "another." Also, the plain meaning of "insurance pool" is the "[c]ombining together of several insurers to share premiums and losses so as to spread risks." Black's Law Dictionary 808 (6th ed. 1990) (emphasis added). Thus, a single entity cannot be a government self-insurance pool under N.D.C.C. ch. 26.1-23.1. One could argue that the Fund is a "pool" of the state agencies participating in the risk management program. N.D.C.C. § 32-12.2-07. However, unlike the government self-insurance pool described in N.D.C.C. ch. 26.1-23.1, the Fund protects state government as a single entity rather than fragments of state

government. For example, the liability limits in N.D.C.C. 32-12.2-02(2) apply to the "state" instead of each state agency named in a claim for relief.

Second, N.D.C.C. ch. 26.1-23.1 applies when one entity "unites" with another. N.D.C.C. § 26.1-23.1-01. Nothing in N.D.C.C. ch. 26.1-23.1 indicates an intent to require state agencies or political subdivisions to join a government self-insurance pool. Further, the plain meaning of the term "unites" implies a voluntary decision by each entity. The American Heritage Dictionary 1322 (2d coll. ed. 1991). However, each state agency is required to participate in the Fund. N.D.C.C. § 32-12.2-07(1). Third, a government self-insurance pool may only invest its resources as an insurance company, N.D.C.C. 26.1-23.1-05, but the state investment board invests the Fund. N.D.C.C. 32-12.2-02.

Finally, the legislation establishing the Fund distinguishes the Fund from a government self-insurance pool and from insurance policies. All state entities "shall" participate in the risk management fund. However, state entities "may" participate in a government self-insurance pool or "may" purchase liability insurance to cover exposures determined to cause an excessive risk to the Fund, with approval of the director. N.D.C.C. § 32-12.2-06. Further, the Fund is administered by the director of the Office of Management and Budget, N.D.C.C. § 32-12.1-07(1), while government self-insurance pools are authorized by the insurance commissioner and must have a governing authority with its own board of directors, N.D.C.C. § 26.1-23.1-03.

The provisions concerning government self-insurance pools and the State Risk Management Fund are distinct and inconsistent if both are applied to the Fund. However, both chapters can be given meaning by interpreting them to be independent from each other. See Haugland v. Spaeth, 476 N.W.2d 692, 694-695 (N.D. 1991). Based on these differences between the Fund and a government self-insurance pool under N.D.C.C. ch. 26.1-23.1, it is my opinion that the restrictions in that chapter do not apply to the Fund.

You also ask whether the activities of the Fund constitute the practice or business of insurance under N.D.C.C. title 26.1, particularly N.D.C.C. §§ 26.1-02.1-02 and 26.1-04-03.

Most of the provisions in N.D.C.C. title 26.1 apply to insurance companies, insurance policies, or those "engaged in the business of insurance." The word "insurance" is not defined in this title and must therefore be given its plain and ordinary meaning. N.D.C.C.

§ 1-02-02. Thus, the question is whether the definition of "insurance" includes the protection from liability provided by the Fund.

Although not a "pool" under N.D.C.C. ch. 26.1-23.1, the Fund can accurately be described as "self-insurance for the state." N.D.C.C. 32-12.2-07(1).

> Self-insurance is the popular name of what is more accurately known as "risk retention." Self-insurance occurs when an entity, rather than purchasing insurance to cover potential losses, elects to pay off its losses as they arise, or to set aside fixed sums into a reserve account to pay off intermittent losses. The nature of "self-insurance", and the fact that it is not a form of insurance, is well established. . . . . The essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer. Because "self-insurance" does not involve a transfer of the risk of loss, but a retention of that risk, it is not insurance.

State v. Continental Casualty Co., 879 P.2d 1111, 1116 (Idaho 1994) (citations, footnote and quotation omitted) (emphasis added). See also Alderson v. Insurance Co. of North America, 273 Cal. Rptr. 7, 13 (Cal. Ct. App. 1990); Antiporek v. Village of Hillside, 499 N.W.2d 1307 (Ill. 1986) (municipal self-insurance pool not insurance company).

Other courts have also distinguished between self-insurance and insurance.

> We start from the premise that so-called self-insurance is not insurance at all. It is the antithesis of insurance. The essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer. The essence of self-insurance, a term of colloquial currency rather than of precise legal meaning, is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract. Clearly then, one may be regarded as a self-insurer as to any risk of loss to which he is subject and which is susceptible to insurance coverage but as to which he has not obtained such coverage. As a matter of colloquial usage, he is a self-insurer of that risk. But as a matter both of common sense and the fundamentals of insurance law, a failure to purchase obtainable insurance is not itself insurance.

> That failure simply and inevitably means that there is no insurance for that risk. Thus, the undertaking to self-insure cannot, by definition, be regarded as insurance.

American Nurses Assoc. v. Passaic General Hosp., 471 A.2d 66, 69 (N.J. Super. Ct. App. Div. 1984), aff'd, 484 A.2d 670 (1984) - (citation omitted) (emphasis added), quoted in Eakin v. Indiana Intergovernmental Risk Management Auth., 557 N.E.2d 1095, 1098 (Ind. Ct. App. 1990) and Physicians Ins. Co. v. Grandview Hosp. and Medical Center, 542 N.E.2d 706 (Ohio Ct. App. 1988).

In summary, the Fund is not insurance, but instead "it actually provides a substitute for an insurance policy." McSorley v. Hertz Corp., 885 P.2d 1343, 1349 n.27 (Okla. 1994). The state's risk of liability has been retained under a program of self-insurance rather than transferred through policies or contracts. Therefore, it is my opinion that the activities of the Fund do not constitute the practice or business of insurance. For the same reason, the administrator of the Fund generally cannot be described as an insurance company or insurer and does not issue insurance policies or contracts.

Your letter specifically mentions N.D.C.C. § 26.1-04-03 concerning unfair insurance practices. The application of this section is also limited to the "business of insurance." In interpreting this statute, "[c]onsideration of similar statutes of other states and court decisions interpreting those statutes is appropriate and relevant." J.P. Furlong Enter. v. Sun Exploration and Prod. Co., 423 N.W.2d 130, 138 n.27 (N.D. 1988).

California has a similar provision in its unfair practices act. Szarkowski v. Reliance Ins. Co., 404 N.W.2d 502, 504 (N.D. 1987). Applying that similar statute, and consistent with the general distinction between insurance and self-insurance, two California courts have concluded that self-insured entities are not engaged in the "business of insurance" under its unfair insurance practices act. Dill v. Claims Admin. Services, Inc., 224 Cal.Rptr. 273, 277 (Cal. Ct. App. 1986); Richardson v. GAB Business Services, Inc., 207 Cal.Rptr. 519, 521 (Cal. Ct. App. 1984). Based on these decisions, it is my opinion that N.D.C.C. § 26.1-04-03 does not apply to the activities of the Fund.

Your letter also mentions N.D.C.C. § 26.1-02.1-02, which protects insurers from fraud relating to an "insurance policy." Although a self-insurer cannot generally be described as an "insurer" in the

sense of having transferred risk, the definition of "insurer" in chapter 26.1-02.1 specifically includes "self-insurer." N.D.C.C. § 26.1-02.1-01(3). By expressly including self-insurers in the chapter, the Legislature intended the chapter to apply even if there was no insurance policy" in place as the term is generally understood, but instead there is some statutory duty to self-insure or there is a memorandum of coverage or participation in a self-insurance pool or program.

As discussed above, there is no insurance policy or contract in effect when an entity is self-insured. The Fund is "self-insurance for the state," N.D.C.C. § 32-12.2-07(1), therefore the Fund is not an insurance policy as that term is defined. See N.D.C.C. § 26.1-30-01 ("insurance policy" is defined as a "written insurance contract"). However, a self-insurer generally must pay claims like an insurer and must meet the obligations that would be imposed upon it as if it were an insurer. See, for example, N.D.C.C. § 26.1-41-05(1), which allows auto accident reparation self-insurance if the owner pays basic no-fault benefits, accepts claims, and assures payment in a substantially equivalent manner to an insurance policy that complies with N.D.C.C. ch. 26.1-41. The Legislature thus treats self-insurers similarly to insurers by applying the protections against fraudulent claims contained in N.D.C.C. § 26.1-02.1-02 to claims made against self-insurers.

Therefore, interpreting N.D.C.C. § 26.1-02.1-02 to give meaning to "insurer" as defined in that chapter to include "self-insurer", it is my opinion that the protections provided in that section apply to the Fund.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk