OPINION
60-142

April 29, 1960 (OPINION)

INSURANCE

RE: Hospital Service Contracts - Jurisdiction of Insurance

Commissioner

This is in reply to your letter in which you state that on numerous occasions Blue Cross and Blue Shield filed rate increases with your department for your approval, and for that reason you had always assumed that you had jurisdiction over the rates of these associations.

In October of 1959 the Blue Cross and Blue Shield filed another rate increase of twenty-four percent and twenty-nine percent respectively with your department for your approval. After a thorough study by the Insurance Department, you as Commissioner, deeming the rates excessive, disapproved the rate increase.

The rates were submitted to your department with the following request:

> We are herewith submitting application in duplicate for approval of changes in rates and benefits effective January 1, 1960."

You state that now Blue Cross is challenging the jurisdiction of the Insurance Commissioner, claiming that he has no authority to regulate the rates for Blue Cross. You then ask for an opinion relating to the above matter.

The Blue Cross plan is a hospital service plan and as such is governed by the provisions of chapter 26-26 of the 1943 Code. Under the provisions of chapter 26-26, which was enacted in 1943 and appears in the 1943 Code, section 26-2601 provides among other things that a corporation providing for such plan shall not be subject to the laws of this state relating to insurance and insurance companies, except as hereinafter specifically provided.

In 1947 the Legislature enacted chapter 26-28. This Act in section 26-2802 entitled "Scope of the Act" provides among other things that it shall be applicable to every insurer authorized by any provisions of the laws of this state to transact any said kinds of insurance, but shall not apply to county mutual insurance companies organized under chapter 26-15 of N.D.R.C. of 1943. The preceding paragraph of this section excludes from the provisions of the Act accident and health insurance. However, the hospital service plan is not an accident and health insurance program. Therefore the exclusion pertaining to accident and health insurance would not apply to the Blue Cross program.

It is observed that chapter 26-28 does not contain the qualifying

language "unless otherwise provided for." In the absence of such qualifying language it could be construed to mean that all types of insurance programs come within the provisions of the Act, particularly where some exclusions are made as to certain types of insurance companies or programs and the hospital service plan is not included in such exclusion.

While the connection between chapter 26-28 and chapter 26-26 is not too clear, there are the specific provisions under chapter 26-26 which must be considered. Section 26-2608 provides as follows:

> CONTRACTS WITH SUBSCRIBERS SUBJECT TO APPROVAL OF COMMISSIONER. The contracts by such corporation with the subscribers for hospital service at all time shall be subject to the approval of the commissioner of insurance."

Section 26-2609 provides:

> CONTRACTS WITH HOSPITALS SUBJECT TO APPROVAL OF COMMISSIONER. The contract by such corporation with participating hospitals for hospital service at all times shall be subject to approval of the commissioner of insurance."

Section 26-2610 provides as follows:

> OPERATING COSTS SUBJECT TO APPROVAL BY COMMISSIONER. All acquisition costs in connection with the solicitation of subscribers to such hospital service plan and administration costs, including salaries paid its officers, if any, at all times shall be subject to the approval of the commissioner of insurance."

Under the foregoing sections it is noted that the contract by such corporation with the participating hospital for hospital services, and the contract by such corporation with the subscribers for hospital services, and the acquisition costs in connection with the solicitation of subscribers to such hospital service plan and administrative costs, are at all times subject to the approval of the Commissioner of Insurance.

With reference to the contract by such corporation with the subscribers for hospital service, all of the elements of the contract must be taken into consideration. The statute in question does not specify what portion of the contract is subject to the approval of the Commissioner and therefore we must conclude that all of the aspects or items of the contract are subject to the approval of the Commissioner. The cost to the subscriber is as much of the contract as is the provision when the payment is to be made, or when the contract is effective, and what service will be rendered, etc. For that matter, the cost to the subscriber might well be one of the primary features of the contract. The same holds true on the contracts with the participating hospitals for hospital service.

The matter relating to acquisition costs in connection with solicitation of subscribers, directly or indirectly, affects the contract with the subscribers and the contract with the participating hospital. Administrative costs likewise affect the same contract.

The rates charged to the subscriber are reflected in the contract with such subscriber. All of these items are considered in determining the rate and will affect the rate. For example: increased service to the subscriber everything else being equal will contemplate an increase in the rate for that contract. Also a change in the contract decreasing or limiting hospital service to the subscriber should bring about a reduced rate to the subscriber. The same correlation should hold true with reference to the acquisition costs and administrative costs. Each of these items in addition to others will have a definite effect on the rates charged to the subscriber.

It is difficult to envision any contract in which the consideration does not entail or relate specifically to money paid or money to be paid in one form or another, and in the subject matter before us it is rates, which when translated is money.

There is a question whether a hospital service plan is considered an insurance program. In the case of Michigan Hospital Service v. Sharpe et al, 63 N.W. 2d. 638, the court indirectly concluded that the hospital service program was not an insurance program under the laws of the state of Michigan. The main question before the court was one of subrogation.

Another view was expressed by the court in 45 N.E. 2d. 157 and then affirmed in 49 N.E. 2d. 929 to the effect that a hospital service plan substantially amounts to an insurance contract. The court said that the mere fact that the insurance contract does not provide for the payment of money upon the happening of a contingency is not in itself sufficient to hold that it is not an insurance contract. The court also said that the mere fact that the payment is made to the hospital and not to the subscriber does not change the character of the contract. The court had this to say:

> ". . . . Although that which is provided the subscriber upon the happening of a contingency is, so far as he is concerned, service, yet it is measured by a money consideration payable to the hospital because of the rendering of that service to the subscriber on behalf of the plaintiff association. . . ." (Cleveland Hospital Service Association)

Even though a question exists whether or not a hospital service plan is an insurance contract, the statutory provisions of chapter 26-26 are to be given great weight. The term "subject to the approval of the Commissioner of Insurance" cannot be considered to be idle language. The provision that a certain item is subject to the approval of a designated official carries with it the provisions that the same is subject to examination and study and that the approval follows only after the examination and study discloses justification or basis for the approval. The statutes quoted above do not merely provide that certain items shall be filed with the Commissioner, but provide that they shall be subject to the approval of the Commissioner.

In examining the items submitted for approval, the Commissioner must take into consideration all matters pertinent and related thereto.

It is therefore out opinion that there is sufficient justification for the Insurance Commissioner to assume that he has jurisdiction, and that where rate increases are submitted to him for his approval he is authorized and obligated to examine the various criteria which go into the rate structure to determine whether or not such rate increase is justified. If his examination discloses that the rate increase is not justified, he is within his authority to disapprove the rate increase as submitted.

LESLIE R. BURGUM

Attorney General