

of a county board of supervisors in the same county, since the intermediate board of education is also required to file a budget for review and examination by the county tax allocation board and is subject to determination of the tax rate for such governmental unit by the county tax allocation board, in accordance with the provisions of Act 62, P.A. 1933, as amended, *supra*.

Since your question relates to governmental units located within a county whose electors have not voted to fix separate tax limitations for the county and for school districts therein, in accordance with Article IX, Sec. 6 of the Michigan Constitution of 1963, and Sections 5a-5m of Act 62, P.A. 1933, as added by Act 278, P.A. 1964, being M.C.L.A. § 211.105a-§ 211.205m; M.S.A. 1969 Cum. Supp § 7.65(5)-§ 7.65(13), we need not consider here the question of incompatibility between the office of member of a board of education of a school district and the office of member of a county board of supervisors in a county where separate tax limitations have been established by the vote of the people.

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**BLUE CROSS-BLUE SHIELD:** Blue Cross is not empowered under Act 109, P.A. 1939, being C.L. 1948, §550.501 et. seq. [M.S.A. 1957 Rev. Vol. §24.621 et. seq.], to dispense prescription drugs other than on an inpatient-outpatient basis.

Blue Shield may provide drug services where such drugs are necessarily incident to medical care as a service through participating pharmacies and may also reimburse subscribers for such drugs furnished by nonparticipating pharmacies.

No. 4666

May 16, 1969.

Commissioner Russell E. Van Hooser  
Insurance Bureau  
Lansing, Michigan

You have requested my opinion with regard to the permissibility of the Michigan Hospital Service, hereinafter referred to as Blue Cross, and the Michigan Medical Services, hereinafter referred to as Blue Shield, to offer a prescription drug benefit program.

Under the proposal, all licensed pharmacies in the State will be permitted to notify Blue Cross-Blue Shield whether they wish to participate in the program. If so, they will agree to accept payment of cost of acquisition of drugs plus a fixed fee as determined by Blue Cross-Blue Shield. Those pharmacies which do not wish to participate will charge the Blue Cross-Blue Shield member in the usual manner. The member in turn will be reimbursed for such costs in an amount not to exceed 75 percent of the usual and customary charges as determined by Blue Cross-Blue Shield, unless the prescription is filled in an area which is not serviced

by Blue Cross-Blue Shield, in which case the member will receive 100 percent of the prescription cost as determined by Blue Cross-Blue Shield. The Blue Cross-Blue Shield member will pay an amount designated in his contract as "member's liability amount" which will vary from zero to two dollars depending upon the terms of his individual contract or group certificate. Said amount will be the responsibility of the member whether he purchases the drugs at a participating or nonparticipating pharmacy.

Your questions have been restated as follows:

1. Do Blue Cross-Blue Shield have the authority to underwrite jointly a benefit for their members which provides for the payment for prescription drugs not furnished to the member of Michigan Blue Cross on an inpatient-outpatient basis?
2. Does Michigan Blue Cross have the authority to underwrite a benefit for its members which provides for payment of prescription drugs which are not furnished on an inpatient-outpatient basis by the hospitals?
3. Does Michigan Blue Shield have the authority to underwrite a benefit which provides payment for prescription drugs which are not furnished on an inpatient-outpatient basis?
4. If the answer to Question 1 is in the affirmative, do Michigan Blue Cross-Blue Shield have the authority to enter into contractual agreements with pharmacies to provide the drug benefits?
5. If the answer to Question 2 is in the affirmative, does Michigan Blue Cross have the authority to enter into contractual agreements with pharmacies to provide the drug benefits?
6. If the answer to Question 3 is in the affirmative, does Michigan Blue Shield have the authority to enter into contractual agreements with pharmacies to provide the drug benefits?

Unlike the funds and property of insurance corporations, which are not considered to be charitable and benevolent institutions, the funds and property of Blue Cross-Blue Shield are exempt from taxation by the State or any political subdivision thereof.<sup>1</sup>

Further, the provisions of the Insurance Code are specifically declared not to be applicable to either corporation unless the governing statutes specifically provide to the contrary.<sup>2</sup> Both corporations are prohibited under their respective statutes from indicating that they are engaged in the business of insurance.<sup>3</sup> These corporations may not engage in the

<sup>1</sup> Blue Shield: Section 15, Act 108, P.A. 1939, C.L. 1948 § 550.315; M.S.A. 1957 Rev. Vol. § 24.605. Blue Cross: Section 15, Act 109, P.A. 1939, C.L. 1948 § 550.515; M.S.A. 1957 Rev. Vol. § 24.635.

<sup>2</sup> Blue Shield: Section 2, Act 108, P.A. 1939, C.L. 1948 § 550.302, as last amended by Act 346 P.A. 1965, M.S.A. 1969 Cum. Supp. § 24.592, P.A. 1939, C.L. 1948 § 550.501; M.S.A. 1957 Rev. Vol. § 24.621.

<sup>3</sup> Section 3, Act 108, P.A. 1939, C.L. 1948 § 550.303; M.S.A. 1957 Rev. Vol. § 24.593; Section 4, Act 109, P.A. 1939, C.L. 1948 § 550.504; M.S.A. 1957 Rev. Vol. § 24.624.

business of insurance. Such activity might jeopardize their tax exempt status.<sup>4</sup> The Michigan Supreme Court held in *Michigan Hospital Service v. Sharpe* (1954), 339 Mich. 357, that Michigan Blue Cross was not an insurance company but instead was a provider of prepaid hospital benefits through its association members. A majority of the court determined on page 370 in pertinent part as follows:

"The requisite for insurance is wholly lacking and its closest relationship thereto is that the enabling statute \* \* \* under which the plaintiff corporation is organized, provides for supervision by the State commissioner of insurance.

"'If there is no hazard or peril, as contemplated by a statute defining insurance, but a mere contract entitling certificate holders to medical services or supplies at free or reduced rates, the contract is not one of insurance.' 20 Am Jur, Insurance, § 12, p. 54, \* \* \*.

"In 29 Am Jur, Insurance (1953 supp), at pages 4 and 5, § 12.5, it is said:

"'A majority of cases dealing with the subject hold that a corporation, whether or not organized for profit, the object of which is to provide the members of a group with medical services and hospitalization, is not engaged in the insurance business and hence not subject to the insurance laws.' \* \* \*

"It is evident from the foregoing that insurance law affords us no cure-all in resolving this problem. It is conceded by plaintiff that since it is not an insurance company it cannot claim the benefit of C.L. 1948, § 612.2 (Stat. Ann. § 27.654), that permits insurers to join in actions against tort-feasors at law."

The prepaid services which Blue Cross is authorized to render are all hospital oriented and affect subscribers only in their capacity as inpatients and outpatients of the particular hospital. An examination of Act 109, P.A. 1939, supra, does not indicate that it was the intention of the Legislature to authorize such organization to pay for drugs dispensed outside the hospital.

On the other hand, an examination of Act 108, P.A. 1939, supra, indicates that it is within the incidental powers of Blue Shield to offer a prescription drug benefit program.

Section 9 of Act 108, P.A. 1939, supra, provides in pertinent part as follows:

"A medical care corporation may, in its discretion by its articles of association or its by-laws limit the benefits that it will furnish into classes or kinds. In the absence of any such limitation or division of service, a non-profit medical care corporation shall be authorized to provide both general and special medical and surgical care benefits, including such service as may be necessarily incident to such medical care. \* \* \*"

<sup>4</sup> See: *Associated Hospital Service of Maine v. George F. Mahoney, The Health Insurance Association of America, et. al., Intervenor* (1965), 213 A. 2d 712; 161 Me. 391.

The important language in Section 9 is that which occurs at the end of the quotation. This language recognizes that the benefits which may be offered are to be as broad as possible to keep within the intent of the legislation set forth in Section 1 of the Act to the effect that medical care is to be promoted to afford its widest distribution and to promote the progress of the science and art of medicine in the State of Michigan.

Drugs are necessarily incident to modern medical care. Thus, the statutory definition of the term "practice of medicine" contains the following pertinent language:

"\* \* \* the term 'practice of medicine' shall mean the actual diagnosing, curing or relieving \* \* \* or professing or attempting to diagnose, treat, cure or relieve any human disease, ailment, defect, or complaint \* \* \* by prescribing or furnishing any drug, \* \* \*."  
(Emphasis supplied.)<sup>5</sup>

Further, Section 2 of Act 108, P.A. 1939, supra, contains the following pertinent language:

"Any number of persons not less than 7, all of whom shall be residents of the state of Michigan, may form a corporation, under and in conformity with the provision of this act, for the purpose of establishing, maintaining and operating a voluntary non-profit medical care plan, whereby medical care is provided at the expense of such corporation to such persons or groups of persons as shall become subscribers to such plan, under contracts which will entitle each such subscriber to definite medical and surgical care, appliances and supplies, by licensed and registered doctors of medicine, doctors of surgical chiropody or podiatry in their offices, in hospitals, and in the home. *Such other benefits may be added from time to time as the corporation may determine, with the approval of the commissioner of insurance.* \* \* \*" (Emphasis supplied.)

From a reading of Sections 9 and 2 it is my opinion that Blue Shield is empowered to include within its services a drug benefit. This additional benefit will require the approval of the Commissioner of Insurance.

The language of Section 12 of Act 108, P.A. 1939, supra, reads in its entirety as follows:

"All medical care rendered on behalf of a non-profit medical care corporation shall be in accordance with the accepted medical practice in the community at all times.

*"A non-profit medical care corporation shall not furnish medical care otherwise than through doctors of medicine, or surgical chiropody or podiatry, licensed and registered under Act No. 237 of the Public Acts of 1899, as amended, or Act No. 115 of the Public Acts of 1915, as amended."* (Emphasis supplied.)

This section does not prohibit Blue Shield from contracting with pharmacies to provide the services, because the services to be furnished are incidental to medical care furnished by the physicians as set forth

<sup>5</sup> C.L. 1948, § 338.59; M.S.A. 1956 Rev. Vol. § 14.539.

in Section 12. The drug benefits are not to be made available unless they are in conjunction with authorized medical care.

There is, however, the problem which will arise upon the reimbursement of Blue Shield members for the cost of drugs, because the language of Section 2 quoted above prohibits the payment of any cash or other material benefit to the subscriber on account of death, illness or injury. Comparable language is also found in Section 11 of Act 109, P.A. 1939, as amended, *supra*. The legislature authorized Blue Cross by amendment of Section 11 to reimburse its subscribers for the expenses of nursing and other nonmedical care as therein set forth. The California Supreme Court held that a physicians' organization was not engaged in insurance although it agreed to reimburse the cost of necessary drugs prescribed by a professional member.<sup>6</sup> In this regard, the court held as follows:

"The fact that the rural health Service Agreement provides for limited hospitalization does not make the business of the service that of insurance. So far as the record shows, a participating hospital may look only to the pooled fund of the service for payment for facilities furnished to a beneficiary member. Also, the additional features of hospitalization and reimbursement for drugs are not distinguishable from other medical care obtainable on the group basis, *and they are merely incidental to the plan or scheme as a whole. \* \* \**" (Emphasis added.)

The Insurance Commissioner has supplied to the Attorney General copies of "Master Medical Supplemental Benefit Certificate," approved by the Commissioner in November of 1961, which provided benefits including "drugs, biologicals and solutions required by law or generally accepted pharmaceutical procedure to be dispensed only upon prescription by a physician. \* \* \*" Several supplements thereto have also been approved since 1961. It therefore appears that prescription drug benefits have been included among out-of-hospital benefits, as approved by the Insurance Commissioner, for several years in Michigan. Thus, the Commissioner has already approved benefits made available on a reimbursement basis. Administrative construction is entitled to weight in determining legislative intent.<sup>7</sup>

I am therefore persuaded that the drug program proposed by Blue Shield is merely incidental to the Blue Shield plan as a whole, and that its subject matter is within the reasonable contemplation of the statutory provisions above discussed, in so far as Blue Shield is concerned. Blue Cross, however, is not now authorized by statute to engage in the proposed drug benefit program as defined above.

With respect to the authority to contract with participating pharmacists for a price fixed by Blue Shield, at cost-of-acquisition plus a service fee fixed by Blue Shield, we caution that price fixing is a per se violation of

<sup>6</sup> *California Physicians' Services, A Non-Profit Corporation v. Maynard Garrison, As Insurance Commissioner of the State of California* (1946), 28 Cal. 2d, Adv. 771, 172 P. 2d 4.

<sup>7</sup> *Detroit Edison Co. v. Department of Revenue* (1948), 320 Mich. 506.

Section 1 of the Sherman Act, declaring every conspiracy in restraint of trade to be illegal.<sup>8</sup>

We further caution that violation of state law prohibiting monopolies is at the least a possibility under the plan offered by Blue Shield. Should widespread participation necessitate selection from among pharmacies, or should the price allowed by Blue Shield be set in such a manner as to establish or threaten a monopoly, it will be incumbent upon state authorities, including the Commissioner of Insurance and the Attorney General, to take appropriate action.

After initial approval, the Commissioner of Insurance should exercise his regulatory authority in such a manner as to safeguard the pharmaceutical market and the public from antitrust violations. I am not ruling on the legality of the operation of the plan under federal and state antitrust laws.

In conclusion, it is my opinion that the proposed drug benefit program offered by Blue Shield may be approved by you consonant with your statutory authority. It is my further opinion that Blue Cross is not authorized to engage in the proposed drug benefit program as defined above. The program may be offered by Blue Shield as a benefit to subscribers through pharmacists who have entered into contracts with Blue Shield. Blue Shield may also reimburse subscribers for the cost of drugs dispensed through nonparticipating pharmacies.

It would appear from the facts set forth in the material you have submitted that the drug program proposed by Blue Shield is merely incidental to the Blue Shield plan as a whole, and therefore, I conclude that it is permissible and within the statutory authority of Blue Shield to engage in the proposed drug benefit program with your approval as set forth in Section 2 of Act 109, P.A. 1939, *supra*.

In summary, it is my opinion that Blue Cross is not statutorily authorized to engage in the proposed drug benefit program as defined above. The drug program may be offered as a benefit to subscribers by Blue Shield through pharmacists who have entered into contracts to provide the service. Blue Shield may reimburse for the cost of drugs dispensed through nonparticipating pharmacies.

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<sup>8</sup> 15 U.S.C. § 1; *United States v. Socony-Vacuum* (1940), 310 U.S. 150; *United States v. Trenton Potteries* (1927), 273 U.S. 392; *White Motor Co. v. United States* (1963), 372 U.S. 253.