

No. 02-89075-AS

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IN THE SUPREME COURT OF THE STATE OF KANSAS

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BLUE CROSS AND BLUE SHIELD  
OF KANSAS, INC.,

Appellee/Cross-Appellant,

v.

KATHLEEN SEBELIUS, in her official Capacity  
as Commissioner of Insurance for the State of Kansas,

Appellant/Cross-Appellee.

ANTHEM INSURANCE COMPANIES, INC.,

Appellee/Cross-Appellant,

v.

KATHLEEN SEBELIUS, in her official Capacity  
as Commissioner of Insurance for the State of Kansas,

Appellant/Cross-Appellee.

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BRIEF OF *AMICUS CURIAE*  
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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Appeal from the District Court of Shawnee County  
Honorable Terry L. Bullock  
District Court Case Nos. 02-C-340 and 02-C-341

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## STATEMENT OF THE NATURE OF THE CASE

*Amicus curiae* National Association of Insurance Commissioners adopts the Statement of the Nature of the Case set out by Appellant/Cross-Appellee Kathleen Sebelius in her brief.

## STATEMENT OF THE ISSUES

Whether the District Court erred in ruling that the Commissioner of Insurance cannot consider the likely post-acquisition conduct and status of a holding company and the domestic insurance company it desires to acquire in order to determine whether “the plans or proposals which the acquiring party has” are “unfair and unreasonable to policyholders of the insurer and not in the public interest” or “hazardous or prejudicial to the insurance-buying public.”

## STATEMENT OF FACTS

*Amicus curiae* National Association of Insurance Commissioners adopts the Statement of Facts set out by Appellant/Cross-Appellee Kathleen Sebelius in her brief.

## ARGUMENTS AND AUTHORITIES

### Standard of Review

*Amicus curiae* National Association of Insurance Commissioners adopts and incorporates into this brief the citations to the appropriate standard of review set out by Appellant/Cross-Appellee Kathleen Sebelius in her brief.

### Argument

The National Association of Insurance Commissioners (NAIC) is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Started in 1871, it is the nation's oldest association of state government officials. The members of the NAIC completely control the same.

In filing this *amicus curiae* brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, as set out in its Annual Report, to:

... assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:

1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
2. Promote the reliability, solvency, and financial solidity of insurance institutions; and
3. Support and improve state regulation of insurance.

This cause concerns the interpretation of and analysis of the scope of the Commissioner's discretion under K.S.A. 40-3304. This statute is based on the model NAIC Insurance Holding Company System Regulatory Act. Insurance Holding Company System Regulatory Act, NAIC, *Model Laws, Regulations and Guidelines*, p. 440 (1992).

The first version of the act was drafted by a committee of the NAIC and adopted by its members in 1969. 1969 *Proceedings of the NAIC* Vol. II, p. 738. Every state in the country has adopted this act (with the exception of New York and Wisconsin, which have enacted comparable laws). State Adoption Chart, Insurance Holding Company System Regulatory Act, NAIC, *Model Laws, Regulations and Guidelines*, p. 440-29 (2002) (attached as the Appendix). The members of the NAIC are thus vitally interested in this Court's interpretation of the same since the very same language that will be construed by this Court in order to decide this case is relied upon by the commissioners, directors and superintendents of insurance throughout the country in making decisions that greatly affect the public interest.

The members of the NAIC believe that the intent of the membership when it drafted the language of and adopted the model act and the intent of the Kansas legislature when it enacted the model act was to authorize the Commissioner to do exactly what the plain language of the model act and K.S.A. 40-3304 authorizes - approve or disapprove any acquisition or control of a domestic insurer after considering its "plans and proposals" for the future and after considering how "likely" the acquisition, if allowed to go forward, would be hazardous or prejudicial to Kansas citizens. Indeed, all of K.S.A. 40-3304(d) reflects the legislature's instruction that the Commissioner of Insurance must examine the likely post-acquisition effect of the subject transaction. Terms such as "might jeopardize," "plans or proposals," and "likely" clearly communicate the legislature's command to the Commissioner to pass on the proposed acquisition now, rather than attempt to repair or prevent injury to the public at a much later date, when it may be too late to fully protect "the public interest and the interests of policyholders."

K.S.A. 40-3301(b). To the extent that the District Court ruled otherwise, the members of the NAIC respectfully disagree.

The reasoning behind authorizing the Commissioner to rule on the transaction now rather than take subsequent remedial action goes to the heart of insurance regulation.

... there should be effective state supervision of insurers in their relationship with holding companies. Such supervision is a proper and natural extension of the responsibility of regulatory authority to assure, in the public interest, the solvency of the insurer and the protection and fair treatment of policyholders. Insurance is a business that is dependent completely on public confidence. Its contracts underwrite contingencies that may be long deferred or promise payments to be made many years in the future. Patronage of insurers is dependent upon the confidence of the buyer that the insurer can and will discharge its obligations in the manner provided in its contract. Because of the intangible nature of the insurance promise and its enormous significance to the social and economic structure as well as to the parties of the contract, the insurance business over many decades has developed and maintained a philosophy and ethics and practices on a level far above those that are generally accepted in the marketplace. Sound regulation of the insurance business by the states has reinforced this unique status of insurers and such regulation has been a principal bulwark of the public confidence that the business enjoys.

1969 *Proceedings of the NAIC* Vol. I, p. 178.

The members of the NAIC submit that the District Court has in effect taken away the legislature's charge to the Commissioner to regulate insurance holding company acquisitions. Furthermore, the District Court ignores the logical result of the method of regulation its order commands. If there is approval of the acquisition and then a future denial by the Commissioner of applications for rate increases and the very significant reduction in surplus, Anthem would be left with an acquisition that will not perform as it had planned. This scenario could well result in Anthem not devoting the resources to Blue Cross and Blue Shield of Kansas that it originally intended to devote and end in Anthem spinning off or selling Blue Cross and Blue Shield of Kansas, subjecting the

company, its policyholders, health care providers and the people of Kansas to the resulting turmoil. The Kansas legislature never intended that holding company transactions be regulated in such a harmful way. “We believe that state authority in the area of insurance regulation should enjoy a presumption of validity. We refuse to adopt the position of requiring the least intrusive means of protecting insurance company – policyholder relations ....” *Professional Investors Life Insurance Company, Inc. v. Roussel*, 528 F. Supp. 391, 402 (D. Kan. 1981).

Holding company acts in every area of business, banks, utilities, savings and loans, railroads, all provide for the governmental regulator to determine what will most likely happen in the future if an acquisition is allowed to proceed (*e.g.*, *Public Service Company of New Mexico v. New Mexico Public Service Corporation*, 747 P.2d 917, 920 (N.M. 1987)) and to approve or disapprove the proposed acquisition based on the public interest. *E.g.*, *New York Central Securities Corporation v. United States*, 287 U.S. 12, 24-25, 53 S. Ct. 45, 49 (1932). To argue that the Commissioner of Insurance, or any governmental regulator, has no discretion to take action to protect the public interest absent illegal acts or a statutory violation is to invite disaster. Clearly, there can be no rational argument that the public interest can only be harmed by illegal acts. If that is the case, then there is no need for administrative agencies, only prosecutors.

With regard to this issue, the Kansas legislature has spoken. It has stated that the Commissioner of Insurance can deny a proposed acquisition if it is not in the public interest. It has not stated that the public interest is adversely affected only when there is or will be an illegal act or statutory violation. Indeed, in this matter the Kansas legislature has set out examples of when the public interest may be adversely affected so that there

can be no doubt that it did not in any way intend that the Commissioner's discretion in this matter be limited to only consideration of possible illegal acts. K.S.A. 40-3301(b) states "... the public interest and the interests of policyholders are or may be adversely affected when: (1) control of an insurer is sought by persons who would utilize such control adversely to the interests of policyholders; ... (3) an insurer which is part of a holding company is caused to enter into transactions or relationships with affiliated companies on terms which are not fair or reasonable ...." This language simply does not allow for an interpretation which holds that only violations of statutory provisions would "adversely affect" the "public interest."

In passing on a petition for approval of acquisition of stock control of ten percent or more of a domestic insurer the New York Supreme Court, Appellate Division, held "the Department is more than an 'umpire blandly calling balls and strikes' in fulfilling its statutory responsibility ... [a]nd since the very depth and breadth of the record and the comprehensiveness of the opinion-decision dispel the claim of departure from the Superintendent's responsibility, we unanimously confirm." *American Reinsurance Company v. Schenck*, 47 A.D.2d 517, 518, 363 N.Y.S.2d 593, 595 (N.Y. App. Div. 1975). Regulatory agencies in many areas have been given wide discretion when charged with protecting the "public interest." "[I]n determining what constitutes the 'public interest' ... the Commission is entrusted with the function not merely of determining the existence or non-existence of certain facts, but also of exercising an expert judgment ...." *Pittsburgh and Lake Erie Railroad Company v. United States*, 294 F. Supp. 86, 97 (W.D. Pa. 1968). "In general, where the Commission is required to consider the 'public interest,' it must look to 'the interest of the public, their needs and necessities and

location and, in fact, all the surrounding facts and circumstances to the end that the people be adequately served.” *Browning Freight Lines, Inc. v. Wood*, 570 P.2d 120, 126 (Idaho 1978). “[P]ublic interest may be taken to encompass a wide range of considerations, from environmental, health, and safety concerns to the financial concerns of employers, employees, and ratepayers.” *General Motors Corporation v. Indianapolis Power & Light Company*, 654 N.E.2d 752, 762 (Ind. App. 1995).

It is also difficult to accept the argument by Appellees that the Commissioner relied on speculation, conjecture and supposition in making her ruling when the very same Appellees, under oath, filed a Form A with the Commissioner in accordance with K.A.R. 40-1-28 setting out in detail their future intentions with regard to post-acquisition conduct. Form A requires the following disclosure:

#### ITEM 5. FUTURE PLANS OF INSURER

Describe any plans or proposals which the applicant may have to declare an extraordinary dividend, to liquidate such insurer, to sell its assets to or merge it with any person or persons or to make any other material change in its business operations or corporate structure or management.

Form A, Insurance Holding Company System Model Regulation With Reporting Forms and Instructions, NAIC, *Model Laws, Regulations and Guidelines*, p. 450 (1986).

The members of the NAIC do not believe that making a decision based in part on the detailed, declared future plans filed with the Commissioner pursuant to Kansas law (as well as the sworn testimony of Appellees’ representatives) can properly be labeled speculation, conjecture and supposition, especially by the same parties who drafted and filed the plans and so testified, unless those parties are now asserting that those very plans and testimony were in fact speculation, conjecture and supposition.

## CONCLUSION

In construing the meaning and purpose of the Kansas Insurance Holding Company Act, the members of the National Association of Insurance Commissioners, the nation's oldest association of state government officials, firmly believe that it was and is the intent of the Kansas legislature to give the Commissioner of Insurance broad authority to consider the potential post-acquisition consequences of a proposed acquisition in order to fully protect policyholders and the general public and that this statutory purpose should guide this Honorable Court. The members of the National Association of Insurance Commissioners believe the protection of insurance consumers is the ultimate goal of any insurance regulatory system. Thus, statutes enacting an insurance regulatory system should be broadly interpreted with that legislative purpose in mind.

Wherefore, *amicus curiae* asks that this Honorable Court, in any rulings it may hand down in this cause, support and affirm the intent of the legislature to grant the Commissioner of Insurance the authority to weigh the likely future consequences of a proposed insurance holding company acquisition in approving or disapproving of the same.

Respectfully submitted,



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## APPENDIX

Model Regulation Service—July 2002

### THE INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT

The date in parentheses is the effective date of the legislation or regulation, with latest amendments. The model includes the Merger and Acquisition Law as Section 3.1. See KEY at end of list.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama	ALA. CODE §§ 27-29-1 to 27-29-14 (1973/1994).	
Alaska	ALASKA STAT. §§ 21.22.010 to 21.22.200 (1976/1995) [1]	
Arizona	ARIZ. REV. STAT. ANN. §§ 20-481 to 20-481.30 (1978/2002) [1, 2]	
Arkansas	ARK. CODE ANN. §§ 23-63-501 to 23-63-530 (1971/1993) [1]	
California	CAL. INS. CODE §§ 1215 to 1215.16 (1969/2000) (Amendments pending in AB 1727 (carried over to 2002) would add [2]).	<i>See also</i> BULLETIN 93-6 (1993).
Colorado	COLO. REV. STAT. §§ 10-3-801 to 10-3-814 (1963/1992) (Contains part of § 3.1)	
Connecticut	CONN. GEN. STAT. §§ 38a-129 to 38a-140 (1969/1995).	
Delaware	DEL. CODE ANN. tit. 18 §§ 5001 to 5015 (1973/1995) [1]	
District of Columbia	D.C. CODE §§ 31-701 to 31-714 (1993/2002) [1, 2]	
Florida	FLA. STAT. §§ 628.801 to 628.803 (1985/1997) (§§ 8, 9, 10 of model); §§ 628.451 to 628.461 (1959/1999); FLA. ADMIN. CODE §§ 4-143.045 to 4-143.050 (1970/1991) (§§ 1, 4, 5 of model).	
Georgia	GA. CODE ANN. §§ 33-13-1 to 33-13-15 (1970/1993) [1]	
Guam	NO ACTION TO DATE	
Hawaii	HAWAII REV. STAT. §§ 431:11-101 to 431:11-117 (1988/2000) [1]	

THE INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Idaho	IDAHO CODE §§ 41-3801 to 41-3820 (1972/1999) [1]	
Illinois	215 ILL. COMP. STATS. 5/131.1 to 5/131.28 (1977/1998) [1]	
Indiana	IND. CODE §§ 27-1-23-1 to 27-1-23-13 (1971/1999) [1]	
Iowa	IOWA CODE §§ 521A.1 to 521A.13 (1970/1997).	
Kansas	KAN. STAT. ANN. §§ 40-3301 to 40-3315 (1975/1997) [1]	
Kentucky	KY. REV. STAT. §§ 304.37-010 to 34.37-150 (1972/1998); § 304.24-410 (1996) [1]	
Louisiana	LA. REV. STAT. ANN. §§ 22:1001 to 22:1015 (1991/1997).	
Maine	ME. REV. STAT. ANN. tit. 24-A § 222 (1969/1999).	
Maryland	MD. ANN. CODE INS. §§ 7-101 to 7-807 (1969/2000) [1]	
Massachusetts	MASS. GEN. LAWS ch. 175 §§ 206 to 206D (1993).	
Michigan	MICH. COMP. LAWS §§ 500.1301 to 500.1379 (1970/1995).	
Minnesota	MINN. STAT. §§ 60D.09 to 60D.29 (1971/1999) [1]	
Mississippi	MISS. CODE ANN. §§ 83-6-1 to 83-6-43 (1974/2001).	
Missouri	MO. REV. STAT. §§ 382.010 to 382.302 (1983/1993) [1]	
Montana	MONT. CODE ANN. §§ 33-2-1101 to 33-2-1125 (1971/1999).	

THE INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Nebraska	NEB. REV. STAT. §§ 44-2120 to 44-2153 (1991/2001).	
Nevada	NEV. REV. STAT. §§ 692C.010 to 692C.490 (1973/1995).	
New Hampshire	N.H. REV. STAT. ANN. §§ 401-B:1 to 401-B:17 (1971/2000)#	
New Jersey	N.J. REV. STAT. §§ 17:27A-1 to 17:27A-14 (1970/1996) [1]	<i>See also</i> N.J. REV. STAT. §§ 17:27B-1 to 17:27B-6 (1971).
New Mexico	N.M. STAT. ANN. §§ 59A-37-1 to 59A-37-28 (1985/1999).	
New York		N.Y. INS. LAW §§ 1501 to 1510; 1601 to 1612; 1701 to 1716 (1984/1999); 7101 to 7119 (1984/1989) (Parts of model included).
North Carolina	N.C. GEN. STAT. §§ 58-19-1 to 58-19-70 (1971/2001).	
North Dakota	N.D. CENT. CODE §§ 26.1-10-01 to 26.1-10-12 (1983/2001) [1]	
Ohio	OHIO REV. CODE ANN. §§ 3901.32 to 3901.37 (1971-1972/2002).	
Oklahoma	OKLA. STAT. tit. 36 §§ 1651 to 1663 (1970/1999).	
Oregon	OR. REV. STAT. §§ 732.517 to 732.592 (1971/2001) [2]	
Pennsylvania	PA. UNCONS. STAT. §§ 40-10-101 to 40-10-113 (1993/2001) [1]	
Puerto Rico	NO ACTION TO DATE	
Rhode Island	R.I. GEN. LAWS §§ 27-35-1 to 27-35-14 (1971/2002).	
South Carolina	S.C. CODE ANN. §§ 38-21-10 to 38-21-390 (1988/2002) [1]	

THE INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
South Dakota	S.D. CODIFIED LAWS ANN. §§ 58-5A-1 to 58-5A-77 (1972/1993).	
Tennessee	TENN. CODE ANN. §§ 56-11-201 to 56-11-215 (1986/2000) [1]	
Texas	TEX. INS. CODE ANN. art. 21.49-1 (1971/2001).	
Utah	UTAH CODE ANN. §§ 31A-16-101 to 31A-16-111 (1986/1999).	
Vermont	VT. STAT. ANN. tit. 8 §§ 3681 to 3694 (1971/1996).	
Virgin Islands	NO ACTION TO DATE	
Virginia	VA. CODE §§ 38.2-1322 to 38.2-1346 (1986/2001) [2]	<i>See also</i> VA. CODE §§ 38.2-4230 to 38.2-4235 (1989) (Regarding nonstock corporations that are members of holding co. system).
Washington	WASH. REV. CODE ANN. §§ 48.31B.005 to 48.31B.902 (1993/2000) [1]	<i>See also</i> HB 1792 (2001) (Holding company act for health care service providers and HMOs).
West Virginia	W. VA. CODE §§ 33-27-1 to 33-27-14 (1974/2001).	
Wisconsin		WIS. STAT. §§ 617.01 to 617.25 (1969/1998).
Wyoming	WYO. STAT. §§ 26-44-101 to 26-44-117 (1991/1994).	

KEY

[1] Includes Section 3.1 on mergers and acquisitions.

[2] Includes confidentiality provisions adopted by NAIC in Jan. 2000 or similar provisions.

**CERTIFICATE OF SERVICE**

I hereby certify that five true and correct copies of the foregoing were served by regular U.S. mail, first class postage prepaid, upon each of the following this 25<sup>th</sup> day of November, 2002:

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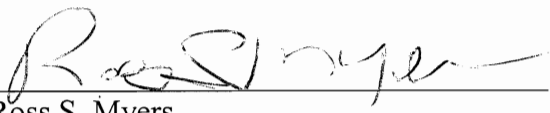
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