STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

FOR PUBLICATION
December 7, 2010

No. 290167
Ingham Circuit Court
LC No. 08-000917-CZ

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellee,

and

OFFICE OF FINANCIAL AND INSURANCE REGULATION,

Respondent-Appellee,

and

COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE REGULATION,

Respondent.

No. 295750
Ingham Circuit Court
LC No. 09-000952-CZ

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

BANDSTRA, J. (*concurring in part and dissenting in part*).

I concur with most of the majority opinion but disagree with its conclusion that the trial court should decide on remand a question that was raised on appeal, whether BCBSM's $125 million capital contribution to the Accident Fund violated MCL 550.1207(1)(x). The majority directed a remand on this issue to allow the parties an opportunity to present evidence and fully brief it. However, the issue has been fully briefed, and no set of facts would justify the capital contribution under the clear language of the statute.

MCL 550.1207(1)(x) provides in relevant part:

> (1) A health care corporation, subject to any limitation provided in this act, in any other statute of this state, or in its articles of incorporation, may do any or all of the following:
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> * * *
>
> (x) . . . establish, own, and operate a domestic stock insurance company only for the purpose of acquiring, owning, and operating the state accident fund pursuant to chapter 51 of the insurance code of 1956 . . . so long as all of the following are met:
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> * * *
>
> (*vi*) Health care corporation and subscriber funds are *not used to operate or subsidize in any way* the insurer *including the use of such funds to subsidize contracts for goods and services*. This subparagraph does not prohibit joint undertakings between the health care corporation and the insurer to take advantage of economies of scale or arm's-length loans or other financial transactions between the health care corporation and the insurer. [Emphasis added.]

As the majority has noted, this Court's goal when interpreting a statute is to discern and give effect to the Legislature's intent. *Neal*, 470 Mich at 665. The intent of the Legislature is most reliably evidenced through the words used in the statute. *Id.* If the language in the statute is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and the statute must be enforced as written. *Turner*, 448 Mich at 27. Effect should be given to every phrase, clause, and word in the statute, and this Court will avoid a construction that would render any part of a statute surplusage or nugatory. *Herman*, 481 Mich at 366. "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods*, 460 Mich at 237. And, this Court "must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *Williams*, 268 Mich App at 425-426. This Court may "consult dictionary definitions of terms that are not defined in a statute." *Woodard*, 476 Mich at 561, quoting *Perkins*, 473 Mich at 639. However, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a; *Woodard*, 476 Mich at 561.

By its plain language, MCL 550.1207(1)(x)(*vi*) prohibits BCBSM funds from being used to "operate or subsidize in any way" the Accident Fund, "including the use of such funds to

subsidize contracts for goods and services." Random House Webster's College Dictionary (1992), defines "any" as "one, a, an or some," or as "every, [or] all"; it defines "way" as "manner, mode, or fashion"; it defines "operate" as "to work, perform or function" or "to manage or use"; it defines "subsidize" as "to furnish or aid with a subsidy" and it defines "subsidy" as "any grant or contribution of money." Applying these definitions to Section 207(1)(x)(*vi*) then, BCBSM is prohibited from using its funds to aid the Accident Fund with a grant or contribution of money, in any manner or fashion. Certainly, the $125 million non-repayable contribution of BCBSM fund to the Accident Fund meets this definition.

BCBSM argues, and the Commissioner agreed, that the term "subsidize" as used in the statute refers only to "subsidization," an insurance industry term with a particular, technical meaning limited to *rate* subsidization and that it is only this particular activity that the Legislature intended to prohibit. See MCL 8.3(a). However, even assuming "subsidization" might be interpreted that way, the statute does not merely prohibit "subsidization" and the restrictive connotation that BCBSM would have us impose is belied by the Legislature's use of the much broader "operate or subsidize in any way" phrase, as just explained.

Further, Section 207(1)(x)(*vi*) states that BCBSM may not subsidize the Accident Fund by using BCBSM funds "to subsidize contracts for goods and services." Again, this is a broad phrase and there is no limiting language suggesting that the contracts BCBSM cannot subsidize are only contracts that would impact the Accident Fund's rates. Again, therefore, this broad statutory language is inconsistent with the reading of the statute that BCBSM urges upon us; to accept BCBSM's argument would improperly render the broad statutory provision regarding "contracts for goods and services" surplusage or nugatory. *Herman*, 481 Mich at 366.

In sum, reading the prohibition against the use of BCBSM funds to subsidize in any way the Accident Fund, "in its grammatical context," *Sun Valley Foods*, 460 Mich at 237, and considering "both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme," *Williams*, 268 Mich App at 425-426, as this Court is required to do, the only conclusion that can be drawn from the plain language of MCL 550.1207(1)(x)(vi) is that BCBSM is prevented from contributing its funds to the Accident Fund for any purpose, not merely for the purpose of subsidizing the Accident Fund's insurance rates.[1]

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[1] BCBSM asserts, and the Commissioner noted, that capital contributions between parent and subsidiary corporations are commonplace in the insurance agency. However, this has no bearing on the interpretation of the instant statutory provision, which regulates particularly *this* parent and *this* subsidiary in a very specific manner, considering the unique nature of BCBSM and its corresponding unique posture in the insurance market. Nor does the application of MCL 550.1207(1)(x)(*vi*) depend in any way on the motivation or purpose of BCBSM's contribution to the Accident Fund. Rather, the statute prohibits BCBSM from aiding the Accident Fund financially in any manner or fashion.

BCBSM relies on the legislative history behind changes that were made to the Health Care Act at the same time that the statute at issue was enacted. BCBSM cites old case law

BCBSM further argues that the capital contribution constitutes a permissible "other financial transaction" within the meaning of Section 207(1)(x)(*vi*). This argument also lacks merit. "Under the statutory construction doctrine known as *ejusdem generis*, where a general term follows a series of specific terms, the general term is interpreted 'to include only things of the same kind, class, character, or nature as those specifically enumerated.'" *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004), quoting *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001). Therefore, the language "other financial transactions" must be interpreted to include only those transactions "of the same kind, class, character or nature" as "joint undertakings" to allow BCBSM and the Accident Fund to take advantage of economies of scale, or "arm's-length loans." MCL 550.1207(1)(x)(*vi*). Thus, the "other financial transactions" permitted by the statute are of the type that have direct, immediate and concrete mutual economic/financial benefit. A transfer of $125 million from BCBSM to the Accident Fund, without any repayment obligation or direct benefit to BCBSM, regardless of the purpose, does not meet this criteria.

For these reasons, I would conclude, without remanding the issue, that BCBSM's $125 million contribution to the Accident Fund was impermissible under the plain language of MCL 550.1207(1)(x).

/s/ Richard A. Bandstra

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suggesting that legislative intent can appropriately be considered, *Girard v Wagenmaker*, 437 Mich 231, 238-239; 470 NW2d 372 (1991), but that case law has been seriously undermined by more recent authority stating that "in Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction." *Lynch & Co v Flex Tech, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001). In any event, as I have explained, the statute here is unambiguous and judicial construction of any sort, including through an analysis of legislative history, is neither required nor permitted. *Nastal*, 471 Mich at 720. That same rule applies to consideration of statutes or legislation that are *in pari materia*, a doctrine only to be utilized when "the statute under examination is itself ambiguous." *Tyler v Livonia Pub Schools*, 459 Mich 382, 392; 590 NW2d 560 (1999). For all these reasons, BCBSM's attempts to avoid the clear language of the statute, while creative, must fail.