

- There is no credible evidence that the supposed benefits of the transaction touted by BCBSKS and Anthem are likely to occur. For example, none of the witnesses for BCBSKS and Anthem were able to quantify the supposed benefit of “economies of scale” and there is no commitment that Anthem will infuse any capital into BCBSKS. The experience of AETNA over the last several years is evidence enough of the lack of merit in “economies of scale.”
- As a result of an expedited process mandated by BCBSKS and Anthem, BCBSKS policyholders, the persons most directly affected by the proposed transaction, have had a reduced opportunity to participate in this process. For example, policyholders have not been informed through the same comprehensive mailing used by BCBSKS and Anthem to seek approval of the transaction, that the KID Testimonial Team has, in effect, recommended that the transaction not be approved because of likely marginal premium increases.
- The fairness of the amount paid for BCBSKS has not been tested by the KID Testimonial Team because of the very low minimum contained in the applicable statute but the interest of policyholders and the public should be vindicated by a close examination of this part of the transaction. The deal is subject to strong question when it is viewed simply as whether Anthem is paying enough for the largest Kansas health insurer responsible for over 700,000 Kansas lives.

BCBSKS and Anthem have the burden to establish by substantial evidence that this transaction complies with the applicable statutory criteria including that it is not harmful to policyholders and the public. KMS and KHA assert that BCBSKS and Anthem have not met their burden. In a process where an investment banking house that was supposedly to provide an unbiased fairness opinion is also a part of Anthem’s initial public offering, where the proponents have insisted on an expedited process which made a careful analysis by the parties extremely difficult and where the takeover of the state’s dominant insurance company by an out of state investor owned company with the goal of obtaining substantially higher underwriting returns will likely lead to a reduction in competition, there are simply too many questions about this

transaction and too much risk to conclude that it is in the best interest of policyholders or the public.

II. ANALYSIS AND DISCUSSION

A. Burden Of Proof

KMS and KHA assert that the proponents of this transaction have the burden of proof and risk of non-persuasion in this matter. As noted in the initial brief, the Kansas Judicial Review and Enforcement of Civil Agencies Act, KSA. § 77-601 *et seq.* effectively requires that a decision of a state agency be supported by substantial evidence and not be arbitrary and capricious. It is a self-evident corollary of this rule that an agency decision unsupported by substantial evidence is arbitrary and capricious. Unified School District 461 v. Dice, 228 Kan. 40, 50, 612 P.2d 1203 (1980); Farmers Co-Op Elevator and Mercantile Ass'n v. Kansas Employment Sec. Bd. Of Review, 25 Kan.App.2d 567, 573-74 (1998). It is the proponents of the transaction that are obligated to provide the “substantial evidence” to support the decision that the proponents seek. Accordingly, it is BCBSKS and Anthem that have the burden of presenting “substantial evidence” to support a favorable ruling on the application. The failure to do so, which is exactly what KMS and KHA are suggesting is the situation here, means that there is not substantial evidence to support approval of the transaction and the commissioner is, thereby, obligated to reject the application.

Anthem argues in the Rebuttal Memorandum filed on January 4, 2002, that it is incorrect to assert that BCBSKS and Anthem have the burden of proof in this matter. Rebuttal Memorandum, at 2-7. The Anthem analysis, in a manner roughly analogous to its general presentation of facts, presents an argument that is on the edge of the issue but never directly addresses the question. Anthem asserts that it does not have the burden but does not state which

party does, in fact, have the burden of proof and a concurrent risk of non-persuasion. It is not clear whether Anthem believes that it is the Commissioner's burden of proof to establish that the elements set out in the applicable statute have been satisfied or not satisfied. It is also not clear whether Anthem asserts that it is the KID Testimonial Team that has the burden of proof on the main elements that are to be applied by the Commissioner. Anthem agrees in this discussion that a finding of the Commissioner must be supported by substantial evidence but Anthem never addresses who is responsible for putting the substantial evidence in the record.

KMS and KHA assert that it is the proponent of the transaction that is obligated to put sufficient evidence in the record for the commissioner to enter certain findings. For example, it is BCBSKS and Anthem's burden of proof (and concurrent risk of non-persuasion) to put substantial evidence in the record so that the Commissioner can make a finding that the acquisition is not likely to be hazardous or prejudicial to the insurance buying public. *See* K.S.A. § 40-3304(d)(1). Anthem apparently refuses to undertake this burden and even suggests that by the mere filing of its Form A the Commissioner has sufficient information to approve the transaction. Rebuttal Memorandum, at 2.

Anthem is correct that the language of the statute provides that the Commissioner "shall approve" the acquisition of control unless the Commissioner finds any of the five elements set out in K.S.A. § 40-3304(d)(1). However, KMS and KHA assert that it is the burden of BCBSKS and Anthem to put sufficient evidence into the record so that the Commissioner can make a finding supported by substantial evidence that, for example, the acquisition is not likely to be hazardous or prejudicial to the insurance-buying public. If the proponents of the transaction fail to present such substantial evidence, then the Commissioner is empowered to conclude that the

acquisition is likely to be hazardous or prejudicial to the insurance-buying public and, therefore, the transaction is rejected.¹

Anthem's unwillingness to accept the burden of proof on these issues is simply a refusal to address an important question that will make a huge difference to BCBSKS policyholders, health care providers and the public generally. Anthem's refusal to accept the burden of proof in this question demonstrates that it is unwilling to establish that its takeover of BCBSKS will not harm policyholders and will not harm the public.

B. Insurance Commissioner Has Broad Discretion To Protect The Public Interest

A review of Kansas insurance law demonstrates that Kansas broadly defines the term "public interest" to generally signify anything that affects the insurance buying public. Concurrently, the legislature has given the Commissioner broad authority to determine the parameters of public interest as it relates to the insurance industry.

For example, the Kansas Insurance Company Holding Act, K.S.A. § 40-3301(b), ("Holding Act") states how the public interest is affected by an insurer acquisition. Specifically,

¹ Kansas Courts have routinely confirmed the notion that a party seeking relief from an agency has the burden of demonstrating that it is entitled to the relief sought in all respects. See generally Fischer v. State Department of Social and Rehabilitation Services, 271 Kan. 167, 21 P.3d 509, 515-16 (2001)(when applying for most government benefits, applicants bear the burden of showing eligibility in all respects); Sheila A. by Balloun v. Whiteman, 259 Kan. 549, 567, 913 P.2d 181 (1996)(as part of a claim for attorney's fees, the Court held that the "fee applicant" has the burden to justify the rates sought in that it is the burden of the fee applicant to produce satisfactory evidence "in addition to the attorney's own affidavits" that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation); Bruns v. Kansas State Board of Technical Professions, 255 Kan. 728, 736, 877 P.2d 391 (1994)(it is the applicant's burden, and not that of the government agency, to demonstrate that the circumstances meet the standard acceptable by the Kansas Board of Technical Professions in a professional licensing case); Kansas Pipeline Partnership v. State Corporation Commission of the State of Kansas, 24 Kan. App.2d 42, 52, 941 P.2d 390 (1997)(joint applicants in a case before the Kansas Corporation Commission had the burden of proving they were entitled to a rate increase).

the public interest and the interest of the policyholders of the insurer sought to be acquired are adversely affected when:

1. Control of an insurer is sought by persons who would utilize such control adversely to the interests of policyholders;
2. Acquisition of control of an insurer would substantially lessen competition or create a monopoly in the insurance business in this state;
3. An insurer which is part of a holding company system is caused to enter into transactions or relationships with affiliated companies on terms which are not fair and reasonable; or
4. An insurer pays dividends which jeopardize the financial condition of such insurer.

Conversely, K.S.A. § 40-3001(a) states that it is consistent with the public interest to allow insurers to:

1. Engage in activities which would enable them to make better use of management skills and facilities;
2. Diversify into new lines of business through acquisition or organization of subsidiaries;
3. Have free access to capital markets which could provide funds for insurers to use in diversification programs;
4. Implement sound tax planning conclusions; and
5. Serve the changing needs of the public and adapt to changing conditions of the social, economic and political environment, so that insurers are able to compete

effectively and to meet the growing public demand for institutions capable of providing a comprehensive range of financial services.

The Kansas Insurance Code contains other statutory references to matters that affect the public interest. For instance, K.S.A. § 40-281 states that the Commissioner may hold a hearing on any matter relating to the business of insurance “whenever she shall have reason to believe that such a proceeding by her would be in the public interest.” K.S.A. § 40-2406 authorizes the Commissioner to hold a hearing if the Commissioner has reason to believe that any person has been engaged in any unfair method of competition or deceptive act or practice and if such hearing is in the interest of the public. This statute was cited in the Spencer v. Aetna Life and Casualty Insurance Company, 227 Kan. 914 (1980), where the Kansas Supreme Court refused to recognize a cause of action for insurer bad faith. As the court noted “The legislature has recognized the public interest nature of the insurance industry and has also recognized policy holders require protection because of the inequitable bargaining position. The penalties, including fines and imprisonment, and imposition of attorneys’ fees are adequate to protect the public from actions of a recalcitrant insurer in first party cases.” Spencer, 227 at 926.

K.S.A. § 40-4309 allows the Commissioner to suspend a certificate of authority of a captive insurer if the insurer engages in prohibited conduct and the Commissioner deems suspension is in the best interest of the public and the policyholders of the insurer. Examples of prohibited conduct include insolvency, failure to submit annual reports, refusal to pay for financial examinations, and failure to comply with its articles or bylaws. Finally, it should be noted that the conversion statutes give the Commissioner broad power to do what she feels is necessary to protect the interests of the public and the policyholders. Specifically, K.S.A. § 40-4001 states that:

Because it is not possible to anticipate all of the circumstances and considerations which may arise incident to a conversion from a mutual insurer to a stock insurer, the commissioner has broad authority in reviewing such conversion, and the procedures and criteria to be applied by the commissioner are flexible within the parameters of this act.

Although the term “public interest” is referenced in many sections of Kansas law, the term is rarely defined either by statute, regulation or case law. For instance, the Kansas Banking Code contains procedures and standards for the acquisition of domestic banks by out of state banks. The Bank Commissioner may approve such acquisition if several standards are met, and “the proposed acquisition is in the interest of the depositors and creditors of the Kansas bank or Kansas bank holding company ... and in the public interest.” K.S.A. § 9-535. The phrase “in the public interest” has not been interpreted by case law. Similar to the above statute, K.S.A. § 9-1723, which concerns the change of control of a bank, states that the Bank Commissioner may disapprove such transaction for several reasons, including:

The competence, experience or integrity of any acquiring person or of any of the proposed management personnel indicates that it would not be in the interest of the depositors of the bank or in the interest of the public to permit such person to control the bank.

There are examples under Kansas law where the term “public interest” has been defined, either through statute or case law. For instance, the Kansas Open Records Act (“KORA”) states that “It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.” The Kansas Supreme Court has explained the phrase in Harris Enterprises, Inc. v. Dennis Moore, 241 Kan. 59 (1987). The issue at bar in Harris was whether the Johnson County District Attorney could withhold criminal investigations records from the press. As the Court noted in its opinion:

The KORA does not contain a definition of ‘public interest,’ nor has that concept been expressly defined by this court. The trial court noted that, in general, the term means more than ‘public curiosity.’ The court further held that, to be a matter involving public interest, it must be a matter that affects a right or expectancy of the community at large and must derive meaning within the legislative purpose embodied in the statute. We hold that the trial court accurately defined public interest.

Harris at 66.

Perhaps the area of Kansas law which is the most analogous to the regulation of insurers is the public regulation of utilities by the Kansas Corporation Commission (“KCC”). For instance, K.S.A. § 66-128g, which discusses how electric generating facilities should be valued, lists several factors that the KCC should consider in determining such valuation. One of such factors is “whether the utility acted in the general public interest in management decisions in the acquisition, construction or operation of the facility.” Case law has also discussed the public interest in the utility context. In Central Kansas Power Company v. State Corporation Commission, 181 Kan. 817 (1957), the Kansas Supreme Court, while discussing the reasonableness of rates between a public utility and its customer, noted the high threshold to interfere with such contracts unless necessitated by the public interest.

The necessity for an express finding of the unreasonableness of existing contract rates as a prerequisite to their abrogation is in recognition of the general rule that the state’s police power to modify or abrogate private rate contracts is incident to its power to regulate public utilities, the exercise of which is conditioned on the public interest. Absent this public interest, abrogation of contracts may not be affected merely to relieve one or the other of the parties from unprofitable or injudicious undertakings.

Central Kansas, at 285. Therefore, similar to the discussion regarding the Insurance Code, the Legislature has intended the term “public interest,” to be broadly applied by the KCC, and such entity has the ability to define and enforce such terms consistent with such broad definitions.

Thus, the constant theme running through the above statutes and judicial decisions is the fact that the “public interest,” when used in a regulatory framework, has a very expansive meaning that can be applied by regulators with great latitude.

C. Anthem and BCBSKS have Submitted Very Little Evidence to Demonstrate How Anthem Will Operate After the Transaction If Approved

Anthem has made a concerted effort to make no specific commitments about its methods of operation and its general administrative process. For example, John Knack, President and CEO of Blue Cross and Blue Shield of Kansas, testified that there was no commitment from Anthem to provide any capital to the newly created entity in Kansas. (I, 64-65). Nor is there any commitment by Anthem or to quantify the possible benefits of the supposed “economies of scale.” (I, 68-65). Thus, in two of the four fundamental alleged benefits from this transaction, there is no commitment, or even an attempt to quantify the exact nature of those benefits. Larry Glasscock, President and Chief Executive Officer of Anthem Insurance Companies, Inc., similarly testified that the methods of operation that Anthem will employ in Kansas is still under study and that it was not possible for Anthem to describe how it will operate in Kansas at the present time. (II, 580-85).

Another example is the testimony of Dr. Samuel R. Nussbaum, Executive Vice-President and Chief Medical Officer for Anthem. In response to questions concerning “utilization management practices,” Dr. Nussbaum was unable to specifically state whether those currently used by BCBSKS would remain in force after the transition. (II, 721-25). Dr. Nussbaum was similarly unwilling to make any type of commitments with regard to healthcare management guidelines. (II, 737).

These statements by BCBSKS and Anthem witnesses represent a pattern of an inability, or unwillingness, to set forth specifics about how Anthem will operate if this transaction is

approved. While some flexibility is certainly appropriate, the inability to give significant details about how Anthem will operate in comparison with the present company makes it extremely difficult for the intervenors to address issues and even more difficult for the Commissioner to determine whether the applicants have met their burden of proof.

One possible way to resolve this problem was for BCBSKS to thoroughly examine Anthem's performance in other states and provide documentation about that review. However, although BCBSKS asserted that it had conducted such a review, no documentation was provided and a Blue Cross Blue Shield official testified that he had destroyed any documentation prepared during that examination. (I, 166-67). The supposed "reverse due diligence" performed by BCBSKS loses credibility when there were documents created as part of this process but then destroyed prior to proceedings before the Commissioner. Further, there were no documents produced by Anthem or BCBSKS that reflected any review of Anthem procedures by Blue Cross.

In short, even though it must have been apparent to both BCBSKS and Anthem that an examination of this issue would be fundamental to the Commissioner's analysis, there is no documentation whatsoever to indicate that BCBSKS actively reviewed these questions and what conclusions were reached. Because the intervenors were not able to conduct their own discovery, this kind of documentation would have been vital to addressing a number of the intervenors' issues. Because there is no documentation, and no other information provided by the parties to address the methods of operation that Anthem will employ if this transaction is approved, it is impossible to suggest that the applicants have met their burden to convince the Commissioner that there will not be injury to policyholders or the public if the transaction moves forward.

Instead of directly addressing how Anthem will conduct itself if the transaction is approved, Anthem officials have repeatedly stated that they must be doing a good job since they have increased the number of covered lives in the states where they have taken over a Blue Cross/Blue Shield plan. For example, Larry Glasscock testified that Anthem had added members in Connecticut, New Hampshire, Maine and Colorado. (II, at 556-557). Use of this mantra that Anthem has added customers in all of these states is misleading and does not support the contention that Anthem has improved service or otherwise performed well. The addition of customers in these states was likely the result of national contracts held by Anthem such that the purchase of the local Blue Cross/Blue Shield merely required a transfer as a result of a national contract and not as the result of a local decision to utilize Anthem based upon its performance within that state. For example, Goodyear employees in Kansas have health insurance that is administered by Anthem. (II, at 836; 5-23.) If this transaction is approved, all of these Goodyear employees will be added to the new Anthem entity. Anthem could then refer to those numbers as an increase in customers when it is actually the exclusive result of a pre-existing contract. The point is that Anthem can not fairly rely on the increase in customers as a credible indication of performing good services. It is merely a function of already existing national contracts and not primarily the result of individual choices to select Anthem over other insurers within that state.

The testimony of Marvin Fairbank (Exhibit 73) also addresses this situation. Mr. Fairbank's testimony is crucial in demonstrating the likely reality of healthcare in Kansas if this transaction is approved. While admittedly anecdotal, it is the best demonstration we have of what the true nature of Anthem's method of operation will be if the transaction is approved.

Mr. Fairbank testified that Anthem has approximately 5% of the business compared to that serviced by BCBSKS at Storment Vail Healthcare. Despite this vast difference in volume, Mr. Fairbank's pre-filed testimony indicated that there are approximately 50% more Anthem denials than BCBSKS denials even though the number of claims submitted to BCBSKS far exceeds those submitted to Anthem. (Exhibit 73 at 4.) Mr. Fairbank testified that in the past year, calendar year 2001, there were only six denials by BCBSKS and nine denials by Anthem. The amazing point is the percentage of total cases that these denials represent. There were six denials by BCBSKS in 4,400 cases and nine denials by Anthem in 100 cases. (III, 1321:16-1322:12). The BCBSKS denials were less than one-half of one percent. The Anthem denials were nine percent. Put another way, if the Anthem cases were as numerous as the BCBSKS cases, and the same denial rate occurred, Anthem's denials would have outnumbered BCBSKS 396 to six or 66 to one.

Where there is nothing placed in the record by the proponents, the anecdotal evidence presented by Mr. Fairbank has significant credibility. If the remarkable difference in claim denial rates, as experienced by Storment Vail, proves to be an accurate prediction (and there is nothing in the record to counter that evidence), then a future where Anthem is able to take over BCBSKS will create significant problems for providers, policyholders and the health insurance market in Kansas.

D. There is Virtually No Evidence to Support the Supposed Benefits While the Intervenors Presented Substantial Evidence the Transaction Will Harm Policyholders and Reduce Competition.

The supposed benefits of this transaction as spelled out by BCBSKS and Anthem were directly addressed by the testimony of Dr. Carl Schramm. In his pre-filed testimony (Exhibit 71), the study done for the Abell Foundation (Exhibit 72) and his live testimony at the hearing

(III, 1256-62), Dr. Schramm explained the claimed benefits do not materialize when these types of transactions are analyzed.

With regard to the possible benefit of “economies of scale” even Dr. Feldstein, expert witness for BCBSKS, admitted that there was no way to quantify such benefit and that no studies in recent times have been able to actually measure the benefit (I, 215, 218), Dr. Schramm testified that not only is Dr. Feldstein correct that there is no recent research to quantify such benefits, there is no discussion of the topic at all. Dr. Schramm did original research on the issue and concluded that such benefits do not “obtain automatically.” (III, 1257). Where the applicants are not able to produce substantial evidence of such benefit and, in fact, admit that it is impossible to quantify the supposed benefit of economies of scale does not amount to a significant benefit of the proposed transaction.

Dr. Schramm also testified that the purchase of BCBSKS by Anthem will not increase but, instead, will likely decrease competition. Dr. Schramm testified with regard to the Kansas market that the prominence of BCBSKS acted as a barrier to other companies entering the market. This barrier to competition will increase if Anthem, a well capitalized parent, takes over BCBSKS. Dr. Schramm concluded that it will be a “further dampening effect on anybody’s conceiving of coming to Kansas to compete against the Kansas Blue” if it is taken over by Anthem. (III, 1260).

Dr. Schramm also testified about the supposed benefit of increasing access to capital. He testified that BCBSKS is already sufficient capitalized. (III, 1261). Further, testimony in this case is clear that there is no commitment by Anthem to infuse more capital into BCBSKS. (See, e.g. I, 64-65). Dr. Schramm also testified that the fourth supposed benefit of such transactions – that it will permit the new company to attract and retain highly talented employees – does not

match up with the practical experience. Schramm testified that what usually happens is that the management basically stays the same after such a transaction. (III, 1262).

After addressing the supposed benefits from the transaction, Dr. Schramm, in his pre-filed testimony and live testimony, described his methodology to examine the medical claims ratios of non-profit blue plans, investor-owned plans and commercial carriers. (Exhibit 71, at p. 10; III, 1266-72). Dr. Schramm determined that medical claims cost ratios, defined as claims paid as a percentage of all revenues, were 83.7% for non-profit blue plans and 73.5% for investor-owned blues. Dr. Schramm's report reaches the following conclusion based upon this information:

It seems apparent that, in the journey from non-profit status to investor-owned status, the medical claims cost ratio falls substantially. Interestingly, it seems that the ratio of claims paid out for converted blue plans is lower than for commercial carriers. Clearly, the driving force for a reduction in percentage pay out is the pressure exerted by investors to achieve higher earnings. It appears that investor-owned blue plans may be required to demonstrate to the capital markets that their claims costs compare more favorably to commercial publicly traded companies. Added to the pressure to lower claims costs are the higher overhead costs in investor-owned companies. In the same four year period, administrative expenses as a percentage revenues was 13% in non-profit blues, 23.4% in the investor-owned blue plans and 15.3% in the commercial carriers.

Exhibit 71, at 10.

Dr. Schramm's analysis demonstrates that the supposed benefits from this transaction do not exist or are significantly less productive than BCBSKS and Anthem argue. Further, his study makes it clear that there will be significant disadvantages caused by an approval of this transaction. The combination of the supposed benefits being transparent or illusory along with the strong evidence of serious disadvantages caused by the transaction is a strong reason to conclude that the Anthem proposal should be rejected.

E. The Fair Market Value of BCBSKS has Not Been Properly Reviewed

The question of valuation and whether Anthem is making a fair payment has focused on the escrow fund payment of \$48 million. However, there is a more basic analysis that suggests the true purchase price for the largest insurer in the state of Kansas, with over 700,000 covered lives, is a mere \$35 million. Without considering the escrow fund, it simply cannot be considered fair, or in the public interest, for BCBSKS to be purchased for such a small amount.²

This point was brought out at the public hearing in Topeka on December 14. (Transcript of Public Hearing, at 59, 90-94). A BCBSKS executive vice president has been quoted as admitting the true purchase price is \$35 million. Topeka Capital Journal, December 15, 2001 at 10A. The Policyholder Information Statement on pages 28 and 29 sets out the basic facts. The “Purchase Price” is defined in that document as \$190 million.

The Policyholder Information Statement describes how \$48 million will be paid into an escrow fund and \$142 million will be included in the initial distribution to eligible policyholders. The document next describes the special distribution. The document makes it clear that the \$155 million surplus will remain for use by Anthem after the conversion/acquisition. On page 28 of the Policyholder Information Statement it states that this amount will provide “Anthem with

² The Kansas statute includes language narrowing the analysis with regard to whether the consideration paid by Anthem is “fair and equitable.” In K.S.A. § 40-4004(b) the amount of consideration is deemed to be fair and equitable if the consideration is at least the amount of statutory surplus attributable to contributions of policyholders. While the proposed transaction complies with this provision, there is another overriding interest that should be considered. The question of whether the transaction will be “hazardous to existing or future policyholders or the public” should be invoked to determine whether \$35 million is an appropriate price for this company. The limiting language of § 40-4004(b) only, by its terms, applies to subsection (a)(1) of the statute and does not modify the more general principal contained in subsection (a)(4). Accordingly, the Commissioner is not precluded from considering whether this price is hazardous to policyholders or the public without being restricted to the statutory surplus language.

greater financial flexibility than would be the case if excessive capital were retained in a subsidiary insurer.” The document also says that \$155 million of surplus is “approximately 2-times the minimum levels required by the Blue Cross and Blue Shield Association.” It is apparent then that Anthem will retain \$155 million in cash reserves after the purchase of BCBSKS. It is difficult not to reach the conclusion that the actual purchase price is not the supposed \$190 million but actually the difference between that amount and the cash reserve Anthem will retain after the transaction is completed, or \$35 million.

F. Conflicts of Interest by Investment Banking Firm Taints Fairness Opinion

The applicants’ evidence in this matter was also tainted by the fact that an investment banking firm provided a fairness opinions while at the same time the firm was directly involved in the initial public offering made by Anthem. As set out in the written statement of Paul G. Adams and confirmed at the hearing, Dresdner Kleinwort Wasserstein, Inc. (“DrKW”) acted as a co-manager in connection with the initial public offering of common stock of Anthem and as a lender in connection with Anthem’s revolving credit at the same time DrKW was providing a fairness opinion to BCBSKS. (Written statement of Paul G. Adams at 5-6; I, 380:8-383:22)

The idea that an investment banking firm has filed an opinion in this case approving the fairness of the purchase price while at the same time being directly involved in the initial public offering done by Anthem creates an unavoidable appearance of impropriety. It is obvious that the separate economic interests of DrKW is furthered by the issuance of opinions that approve the fairness of the Kansas transaction. While no witness has admitted that it affected their analysis, the fact that this investment banking firm has a separate reason to assist this transaction, and not to do anything that would derail or hamper it, certainly impacts the credibility of the fairness opinions by this company.

G. There Are No Conditions that Will Solve the Issues Identified in the Process

In some of the states where Anthem has sought to take over a Blue plan, the insurance agency in that state has approved the transaction but included extensive conditions. For example, there were significant conditions placed on Anthem when a similar transaction was approved in Maine and New Hampshire. (See, KMS and KHA Motion to Intervene, at 7-8, 12-14.). KMS and KHA have determined that there are no possible conditions that could adequately address the problems outlined in their legal memoranda and testimony at the hearing. It is extremely difficult to craft a condition such that it would truly control the behavior of Anthem post-transaction in a way that would be meaningful and enforceable. Accordingly, KMS and KHA suggests to the Commissioner that the proposed transaction be rejected outright and that the Commissioner not attempt to solve the problems identified in this process by the use of conditions. These intervenors assert that it is simply impossible to construct a set of conditions that will adequately protect the public and policyholders.

III. CONCLUSION

For all the reasons set forth in this memorandum, and in the intervenors' initial brief, the Kansas Medical Society and Kansas Hospital Association assert that the application for approval of the proposed conversation/acquisition filed by BCBSKS and Anthem be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by e-mail and by U.S. Mail this 25th day of January, 2002, to:

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