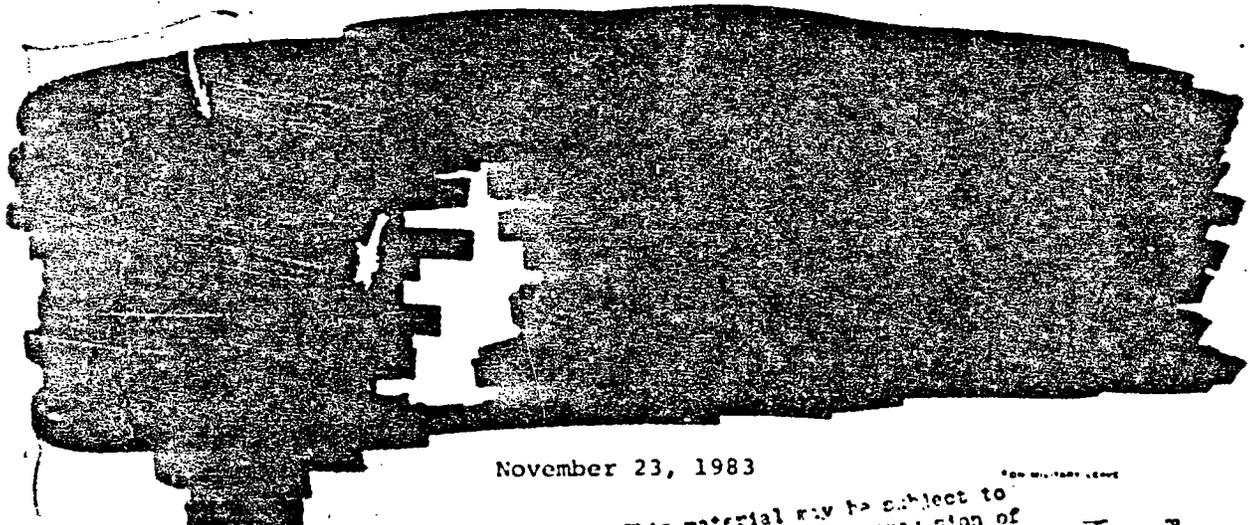


(25)



November 23, 1983

Premerger Notification Office  
Room 303  
Federal Trade Commission  
Washington, D.C. 20580

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which restricts release under the  
Freedom of Information Act

NOV 23 1983  
FEDERAL TRADE COMMISSION  
RECEIVED

Re: Request for Informal Interpretation of  
Requirements of the Hart-Scott-Rodino  
Antitrust Improvements Act of 1976

Gentlemen:

Pursuant to 16 C.F.R. §803.30, we hereby request an informal interpretation by the Commission staff and a confirmation that the transaction described herein will not be subject to the reporting and waiting requirements of Section 7A of the Clayton Act as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18A (the "Act").

Material Facts

A is a non-profit corporation engaged principally in the issuance of service contracts under the [redacted] [redacted] Persons covered by the service contracts ("subscribers") are entitled to receive health care services as specified therein at facilities such as hospitals. A is also engaged in certain related activities, such as the operation of a health maintenance organization. A has annual revenues in excess of \$100 million. A has no stockholders, but it does have "members" who serve as the Trustees. A's Board of Trustees is self-perpetuating, that is, the Trustees choose the new members (and Trustees) of the corporation. However, as with other non-profit corporations generally and all of the

non-profit corporations described herein, no earnings of A can be used for the benefit of any individual member or trustee.

B is a non-profit mutual insurance company engaged in the issuance of accident and health insurance contracts. B has annual revenues in excess of \$25 million. B was organized by A, but it has no stockholders. Its members consist of the holders of the insurance policies issued by B. B's Trustees are elected annually by its members. At all times since its organization, a majority of B's Trustees have been Trustees of A. There is no requirement in B's organizational papers that persons affiliated with A constitute a majority of B's members or of its Trustees, but A and the other [redacted] from which B's Trustees have been drawn have agreed to use their best efforts to ensure that a majority of B's Trustees will be Trustees of A.

C is a non-profit mutual insurance company engaged in the issuance of accident and health insurance contracts under the [redacted] trademark. It also has annual revenues in excess of \$100 million. C has no stockholders; its directors are chosen by vote of its member-policyholders, each policyholder having one vote regardless of the number of policies held. A majority of C's policyholders are also subscribers under service contracts issued by A. C also controls a for-profit life insurance company, D, and a corporation controlling health maintenance organizations, E, of whose shares C owns 50%. D and E together have annual revenues and assets of less than \$15 million.

A and C propose to consolidate, forming a new non-profit mutual insurance corporation, F, which would be engaged in the issuance of health and accident insurance policies. F will have no stockholders; its members will be the holders of its insurance policies. By virtue of the consolidation, those of A's subscribers who are not holders of C's policies and who therefore do not already have the right to vote for C's directors will gain the right to vote for the directors of F, and C's existing policyholders will now have the right to vote for F's directors instead of C's. Also, the new corporation F will succeed to voting control of D and E. Presumably F's directors would be eligible to be members of B, and it is likely that a majority of B's Trustees after the consolidation will be persons who are also F's directors.

For purposes of coverage under the Act, it may be assumed that the size-of-the-parties test and the size-of-the-transaction test would be met and that A and C are engaged in an activity affecting interstate commerce.

Coverage Under the Act

The principal question is whether this consolidation involves an acquisition of "voting securities or assets" such that the transaction is subject to the Act. The first issue is whether the policyholders of C hold "voting securities." Our interpretation, under the analysis below, is that C's present policyholders and those of the proposed F do not and will not hold "voting securities" of those companies. Accordingly, there could be no acquisition of voting securities.

Neither "assets" nor "securities" are defined within the Act or the Regulations. In fact, the Statement of Basis and Purpose indicates that a definition of "security" was deliberately deleted from the Regulations. 43 F.R. 33,462. One must look to the normal definition of a "security" in order to determine the usage of the term in the Act and the Regulations.

Under the federal securities laws, it is clear that an insurance contract is not a security. The normal test under those laws is whether the investor has given his or her money to the issuer with an eye to possible profits. It will be immediately seen that an insurance policy does not constitute such an "investment contract" but rather an "indemnity contract," providing a return only upon the occurrence of some chance event. In recognition of this distinction, the Congress specifically exempted insurance policies from the coverage of the Securities Act of 1933. 15 U.S.C. §77c(a)(8). The House report makes clear that this was merely confirming everyone's understanding and that the section 3(a)(8) exemption

makes clear what is already implied in the act, namely, that insurance policies are not to be regarded as securities subject to the provisions of the act.

H.R. Rep. No. 85, 73rd Cong., 1st Sess. (1933), p. 15. The Supreme Court and the Securities & Exchange Commission have also confirmed that insurance contracts are not securities. Tcherepnin v. Knight, 389 U.S. 332, 342 n. 30 (1967); Testimony of Professor Loss on Behalf of SEC, Securities Exchange Act Amendments, Hearings before Subcom. of Senate Com. on Banking & Currency on S.2408, 81st Cong.2d Sess. (1950), at 33.

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The only indication that the policyholders of a mutual insurance company might be deemed to hold voting securities is in Section 801.2(d) of the Regulations, which declares that consolidations are transactions subject to the Act and shall be treated as acquisitions of voting securities. However, that regulation is obviously directed only at characterization for purposes of accurately completing the report form, as are the other provisions of §801.2. (The section is headed "Acquiring and Acquired Persons.") There is no indication that the Commission intended to expand coverage of the Act where the parties do not have voting securities. In any event, the Commission does not have authority to expand the coverage of the Act, only to contract it through exemptions. 15 U.S.C. §18A(c)(12), (d)(2)(B).

Under the same analysis, B, another mutual insurance company, does not now and will not after the proposed consolidation have "voting securities." In any event, A does not and F would not "control" B within the definition in §801.1(b) of the Regulations, because A does not hold 50% or more of B's voting securities nor have the contractual power to designate a majority of B's Trustees.

D and E do have voting securities and F will succeed to "control" of D and E, but the acquisition of D and E would be exempted under the Minimum Dollar Value exemption in §802.20. Thus, the indirect acquisition of control of D and E does not make the consolidation reportable.

To complete the analysis under §7A(c), this proposed consolidation would not constitute the acquisition of "assets" within the meaning of the Act. The recent amendments to §801.2(d) makes that clear. 48 F.R. 34,430, et seq. Also, under the state law, this consolidation is not characterized as the purchase of assets and the assumption of liabilities, but rather as the succession of F to the rights and obligations of A and C.

#### The Question To Be Resolved

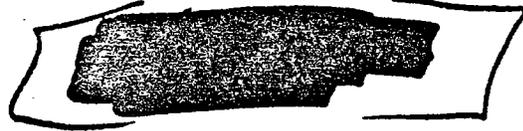
We ask that the Commission staff render an informal interpretation of the Act and the Regulations confirming that the proposed consolidation described herein is not subject to the requirements of the Act.

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Additional Information

If further information is required, we would be happy to attempt to provide it.

Sincerely yours,

A small, rectangular redacted area, likely covering a signature or name.A larger, rectangular redacted area, likely covering a signature or name.

To: John:

Subject: The letter you passed around

The office has dealt with this question many times. Basically we have always said that 801.2(d) says what it means & means what it says - consolidations are covered by the Act. We have looked for some way to exempt these guys - and have found none. As a policy matter, there can be a licensing of competition even if there is no profit motive. Farmers shop is always being non-profit hospitals.

We have several filings from Farm Co-ops (late Wayne reviews) as submitted by [redacted] Savings + Loans (which are owned by depositors and shareholders) Utility holding companies (which are owned by the sub-stations) and by numerous county-controlled hospitals. Given time I could probably think of other examples.

The time for this year to quote the version of the Jersey law was when we put 801.2(d) out for public comment - not now.

JJ (11-28-83)

FEDERAL TRADE COMMISSION  
TRANSMITTAL SLIP

TO:

PMN Staff  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For:

- Approval.
- Signature.
- Recommendation.
- Remark.
- Information.
- To check.
- Previous papers.
- File.
- Prepare reply.
- See me.
- Necessary action.
- Note and return.
- For Analysis.

FROM:

John  
\_\_\_\_\_

Date 11/28/83  
\_\_\_\_\_

REMARKS:

*I would like to have some discussion  
regarding the attached letter. Let's meet  
later today to discuss it.*

FIC Form 33 (11/78)