

STATES of HEALTH

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Getting to No: How Kansas Advocates Derailed the Anthem Steamroller

A battle royale has taken shape in Kansas about the future of its Blue Cross and Blue Shield plan. This past February, Kansas Insurance Commissioner Kathleen Sebelius rocked the corporate health care establishment by refusing to allow Anthem Insurance Company to buy the state's independent Blue Cross and Blue Shield plan. Then, in June, a state judge overturned her decision. Now the case is headed to appeals court, where Sebelius will seek to have her decision reinstated. At the heart of the legal wrangling is the unprecedented manner in which advocates have asserted consumer interests, raising issues that will persist long after the courts hand down a final ruling. States of Health looks at how consumer advocates have responded to the proposed Blues transaction, a process that has strengthened the health consumer voice in Kansas—and offers important lessons for advocates in other states as well.

At the end of May 2001, the news broke that the Indiana-based corporate giant Anthem Insurance intended to take over Blue Cross and Blue Shield of Kansas. Local health care advocates mobilized almost immediately.

"We had to get involved," says Terri Roberts, executive director of the Kansas State Nurses Association (KSNA) which, together with the Kansas Association for the Medically Underserved (KAMU), formed the core of the emerging opposition effort. "We couldn't just stand by and let that happen, because we knew what it could mean," Roberts adds.

What the takeover could mean was a dramatic change in the state's health care system, especially given that the Blues plan covers 70 percent of Kansans.

Blue Cross and Blue Shield of Kansas (BCBSKS) is a "mutually

owned" company. That is, its policyholders own it, and the company's main objective is to serve them. Anthem is a stock corporation, owned by its shareholders. Turning a profit is vital: it has a fiduciary responsibility to maximize shareholder investment. As a part of Anthem, BCBSKS would have to shift its allegiance from its policyholders to its shareholders, and the Kansas advocates were concerned that such a change would be detrimental to the public interest. They sought to convince their state's insurance commissioner that an insurance company is more likely to provide access to good health care if the top priority of its owners is good health care.

"We wanted to make sure our government did the right thing," says Roberts. The key question was what impact the conversion would have on policyholders and, indeed, on health care coverage for all Kansans. Also,

advocates were looking "beyond the transaction's immediate impact, to what it might mean for Kansans 20 years from now," Roberts adds. "Because once a health plan is part of a big for-profit organization, that's it. There's no going back."

Community Catalyst staff had worked on and off with advocates in Kansas for years, always with an eye toward a possible transaction involving the state's Blue Cross and Blue Shield plan. That involvement intensified with the announcement of the proposed sale.

Dawn Touzin of Community Catalyst, a veteran of such battles, was enlisted to provide the Kansas advocates with technical support. But she flew to the Midwest in January 2002 for public hearings on the proposed takeover with a heavy heart. "It's like David and Goliath," she remembers thinking glumly—except that she seriously doubted David would prevail.

Touzin was just being realistic. "Anthem had already acquired independent Blues plans in eight states, including the one in its home state of Indiana," she explains. "They had this incredibly effective juggernaut; anyone going up against them had lost."

Indeed, "conversions"—in which nonprofit or mutually owned health plans become for-profit enterprises, often by allowing themselves to be gobbled up by a large insurer such as Anthem—have been a prominent feature of the national health care landscape for a decade. Advocates have

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often had little recourse but to pursue smaller victories, devoting most of their energy to securing the best possible deal—and whatever consumer protections they could extract—from the would-be new owner.

Since 1996, the Community Health Assets Project, a joint project of Community Catalyst and the West Coast Regional Office of Consumers Union, has helped local and state health advocates to intervene and shape such deals. CHAP's focus has been on developing basic standards to ensure adequate public input and regulatory oversight, preserve charitable assets, and prevent self-dealing or other improper profiteering from the transaction.

As director of Community Catalyst's CHAP team, Touzin was prepared to suffer through the usual: Anthem representatives would point to rising health care costs, suggest that only a big business like their own

could remain solvent, and collect *pro forma* approval from the state's insurance commissioner.

But she was in for a surprise. On the very first afternoon of the hearings, she found herself "emailing the folks back at Community Catalyst and saying, 'There's something really different going on here.'"

Scrutinizing the "Bigger is Better" Mantra

Touzin got her first clue that Kansas would be different the minute she set foot in the hearing room. It was packed. Both the public and the press were well represented. More than that, they were informed on the issues, ready to ask questions, and willing to devote a lot of energy to the three days of hearings planned.

Then came rounds of testimony and cross-examination. Both KSNA and KAMU, along with the Kansas Medical Society and the Kansas Hospital Association, had been granted intervenor status: that is, they could play an active role in the proceedings conducted by Insurance Commissioner Kathleen Sebelius. They would not only have access to the same information as the general public would, but they could request more. In addition, Sebelius had appointed a team of her staff and some outside counsel to review key particulars of the proposed acquisition. She herself was acting as an impartial adjudicator.

"Anthem was saying the same thing in Kansas that they had said in every other state," says Touzin. "They got out the 'bigger is better' mantra and went through their usual litany of benefits. But this time people weren't just nodding and saying OK. The intervenors and the Insurance Department and the independent experts Sebelius had brought in had all done their homework and found reasons to be concerned. They were ready to

demand more than just vague assertions that everything was going to be great if Anthem took over BCBSKS. They wanted evidence."

Corporate Embarrassment

They got almost none. Within hours, it was clear that BCBSKS could not even document how it had decided to agree to the acquisition. In a buyout, normal business protocol dictates that the company to be purchased give its board an executive summary detailing the pros and cons of the sale, a review that is done to ensure "due diligence." Generally, a corporate board requires at least that much in order to fulfill its fiduciary responsibilities.

When asked to supply such a report to the court, however, a BCBSKS vice president "admitted under oath that there was never an executive summary in written form—that arguments were just presented orally to the board," says Roberts. "He said that while various department managers had put together various pieces of paper, no one had ever compiled them. And he added that those documents had been destroyed."

Roberts believes that this moment was critical. She says, "Anyone who knows about these kinds of transactions had to be thinking, 'What?! You never prepared an executive summary?! What?! You destroyed documents?!' It made everything very suspect. Businesses simply do not make decisions of this magnitude without something in writing to show their board."

At the very least, Roberts adds, this testimony made clear that BCBSKS never seriously believed it owed the public any explanation of its decision to become part of Anthem.

Analyzing Anthem's Numbers

As the hearings moved on, investigators turned their attention to



Kansas Insurance Commissioner Kathleen Sebelius meeting with Community Catalyst's CHAP team, including Senior Legal Advisor Stephen Rosenfeld.

Anthem's specific claims about the effects of the buyout. Here again, the outcome was embarrassing to the companies.

For example, Anthem claimed that the buyout would generate additional revenue to pay shareholders by improving efficiency. But inquiry into the matter revealed that, in fact, the BCBSKS operation is much leaner than Anthem's, with an overall administrative expense ratio of 9 percent, compared with Anthem's 11.5 percent.

Anthem had also made a point of saying that it wanted only a small profit from BCBSKS—2 to 2.5 percent—but PricewaterhouseCoopers had conducted an independent analysis showing that, to achieve even this modest goal, Anthem would have to increase premiums 7 percent above increases BCBSKS would be expected to make. That meant 7 percent on top of the normal health cost increases that experts across the board are projecting over the next few years, increases that are expected to average 15 to 20 percent across the United States in 2003.

Significantly, Sebelius was not required to conduct such a financial analysis—nor did she have to show

that the proposed transaction was good for Kansans. By law, she was required to approve the deal if she found there was no harm. Yet she hired PricewaterhouseCoopers to make an outside, independent assessment which could have come back in favor of the deal. But the analysis PwC delivered was, in fact, negative and very specific about the costly impact on BCBSKS policyholders.

It was clear the brunt of Anthem's 7 percent increases would largely fall on Blue Cross and Blue Shield subscribers covered by small group and non-group policies. As the new plan operator, Anthem would need to strengthen its ties to its largest accounts, for fear of losing them to competitor health plans. That would mean minimizing, to the extent possible, major rate increases on those groups.

Small-group and non-group beneficiaries have few options besides Blue Cross, however. In Kansas, as in other states, the number of companies offering them coverage has dwindled, in part because of the high administrative costs of managing these accounts—especially relative to the revenue they generate. So small group and non-group subscribers can't go elsewhere to

buy coverage.

These subscribers have no market clout and almost no shelter from sizeable rate increases, notes Joyce Volmut, executive director of Kansas Association for the Medically Underserved. "If you have fewer than 50 employees and want to buy small-group coverage for your workers... Blue Cross is the only game in town. Some employers already find they can't afford it," she says.

It became clear during the Blue Cross and Blue Shield proceedings that Anthem's proposal could spell big trouble for people who buy their health coverage on the small group or non-group market. Furthermore, that problem translated into an enormous impact statewide, because Kansas has few large employers; most Kansans work for small businesses. With BCBSKS covering 70 percent of all Kansans, it was not a pretty picture.

According to Touzin, these findings about premium increases "weighed heavily. It became obvious that the deal was not in the public interest."

On February 11, two weeks before the deadline, Sebelius announced that she was rejecting the Anthem deal. She had concluded that its proposed acquisition of the independent Blue Cross and Blue Shield plan in Kansas "would be hazardous and prejudicial to the insurance-buying public," a decision clearly indicating that as a regulator, Sebelius' had strong public interest instincts.

A Courageous Decision

"The final order from Sebelius is just fascinating to read," Touzin says. "You can see how she looked at all the supposed benefits of the Anthem deal and said, essentially, 'It doesn't fly.'"

Sebelius more or less dismisses Anthem's claim that the buyout would provide greater "access to capital" and

"financial flexibility." The order flatly states that the deal would "largely inure to the benefit of Anthem and its investors, not the policyholders and the insurance-buying public."

In response to the claim that Anthem would introduce cost-saving economies of scale, Sebelius writes that the corporation "presented little evidence of any efficiencies that could be achieved." She also notes that the evidence it did present was based on "its past performance following other acquisitions." Such evidence is faulty, she says, because "Anthem's other acquisitions involved troubled companies. BCBSKS is not a troubled company."

Finally, Sebelius addresses the matter of premium increases. She is frank about why she lends credence to the 7 percent figure: that projection, she points out, comes from "the only systematic, analytic review of the Kansas insurance market." She also points out that this review focuses, appropriately, on the small group and individual insurance markets, which would be most vulnerable were Anthem to impose major rate increases.

The final order takes all this into account. KAMU's Volmut notes that Sebelius "always said it was her responsibility to make a decision on behalf of all those Kansans who didn't have a voice in the matter, and in the

end, that's exactly what she did. It was very courageous."

An Alignment of the Universe

In retrospect, Touzin sees the Kansas experience as one where "there's a sort of alignment of the universe—the various factors all arrange themselves in such a way that you get a picture you've never seen before." What happened can be attributed partly to conditions in the state itself. Kansans turn out to be much more critical and tough-minded than Anthem had anticipated.

Sebelius' regulatory style was also a factor. When consumer interests were at stake, she was willing to ask the

Kathleen Sebelius at Community Catalyst

What brought her to Massachusetts was her Democratic candidacy for the governor's seat in Kansas. But when Kathleen Sebelius visited with Community Catalyst staff in early June, she arrived as the Kansas state Insurance Commissioner and as something of a hero.

Just a few months earlier, Sebelius had rejected the Anthem Insurance proposal to take over the state's Blue Cross and Blue Shield plan. Community Catalyst staff members Dawn Touzin and Phillip Gonzalez had been working hand-in-hand with Kansas advocates Terri Roberts of the Kansas State Nurses Association and Joyce Volmut of the Kansas Association for the Medically Underserved for months to ensure that the interests of Kansas health care consumers, especially the medically underserved in Kansas, would be well represented in the proceeding.

In the process, consumer advocates had come to respect Sebelius' regulatory style. She was absolutely thorough, devoting substantial resources and time to carefully considering the deal's probable impact on Kansans. With her decision not to approve the Anthem buy-out, the commissioner confirmed what advocates had suspected: that the regulator viewed the public interest as a critical component of her responsibilities.

Having testified before Sebelius in the Kansas proceedings, Touzin, who directs Community Catalyst's Community Health Assets Project team, welcomed the chance to exchange views with the Kansas regulator. Like Touzin, Gonzalez, and their Kansas colleagues, Sebelius said she was astonished by the sheer number of people who came to meetings wanting to know more about the Blue Cross and Blue Shield proposal.

"You have to remember," she noted, "that this was December, which is a busy time for everyone, not to mention it being a bad weather month. But still, all these people came."

Touzin says it was fascinating to look back at the Department of Insurance proceedings from the regulator's vantage point.

"It was clear the Commissioner carefully considered the arguments that consumer advocates put before her during the process," Touzin says. "What was equally gratifying to hear, this many weeks later, was how she regarded the arguments put forward by Anthem and Blue Cross and Blue Shield. Basically, she shared our view that the deal, while very beneficial to Anthem's acquisition goals, would be 'hazardous and prejudicial to the people of Kansas.' She thought their presentation was very weak, and that not being able to produce any 'due diligence' documentation really hurt their case."

Sebelius lauded Community Catalyst for the added perspective it brought to the oversight process. And, she said, the deliberations convinced her that Kansas needs to create a consumer health advocacy group.

"I've tried to represent the consumer perspective myself," she said, "but the dynamic is odd. There really needs to be a consumer group. There needs to be that balance in the dialogue. . . . Otherwise, you can end up having hearings with 25 insurance company representatives and then someone from the medical society. And you get a very skewed dialogue."

Just three days after Sebelius's Boston visit, Kansas District Court Judge Terry L. Bullock overturned her decision. Sebelius said the judge's decision disappointed her, but said she would not retreat from her commitment to protecting Kansans from a deal that she felt was "simply wrong for the health care and economic security of the people of Kansas and our business community."

Commissioner Sebelius has filed a petition to appeal Judge Bullock's decision. The move was immediately applauded by consumer advocates, who remain unswerving in their belief that Sebelius will prevail.

hard questions: What impact will this have on consumers in this state? What will it mean for insurance premiums in this state? Should this transaction be approved? And she had a strong political incentive to ask those questions in this case, because she is running for governor. She could not have failed to notice the groundswell of public sentiment against the buyout.

Another factor that worked in the advocacy community's favor was the new financial stability of many independent Blues plans, including the Kansas plan. When the first conversions were on the table in the 1990s, a number of independent Blues were fiscally shaky. To be sure, ups and downs are inherent to the insurance industry, but in the early 1990s, the industry encountered a truly exceptional "down" portion of this up-and-down cycle.

Health care costs had risen exceptionally steeply, and many independent insurers found themselves with a deficit that was considerably bigger than they were comfortable with. Also, because of market pressures, these companies couldn't respond with an immediate major increase in premiums.

Their only choice was to ride the cycle out as usual—to sit tight and raise premiums gradually over several years. In this context, joining forces with a larger insurer seemed a wise move.

Changed Blues Environment

By 2001, however, when Anthem was poised to buy out BCBSKS, premium revenues and claims expenses were, overall, much more in sync. There was no pressing need to convert. Or, as Touzin puts it, "Anthem had a history of being able to say, 'It would be beneficial to the people if we took over this plan because otherwise the sky is falling.' And in Kansas they had to reframe that. They had to say, 'Well, the sky isn't falling right now, but you

know what? It might fall someday, and if it ever does, you'd be a lot better off if a big company like us owned you.'" Clearly, that didn't have the same ring.

Meanwhile, consumer advocates were reaping the benefits of their own steadfast "capacity-building" work. Technical expertise on how to approach conversions had gained critical mass. Years ago, large insurers were the only players who went into conversion battles with a real game plan; advocates invariably had to scramble to catch up.

That started changing several years ago, when Community Catalyst began working with local and state health advocacy groups to develop a public interest and consumer protection approach to these transactions, an approach that was strengthened when it joined forces with Consumers Union to form the Community Health Assets Project (CHAP). The fact that New England consumer advocates had gone up against Anthem in its quick pursuit of several Blues plans in their region in the years before the Kansas sale was proposed intensified the learning curve.

"Capacity-Building" Was Key

While Anthem's conversion machinery was as well-oiled as ever, Community Catalyst and its partner groups had accumulated the background they needed for shrewd analysis and strategic thinking.

They knew, for example, how important it was to educate the press. They were also familiar with both the formal details of conversions and the informal maneuvers large corporations tend to rely on. They knew not only what documents each of the parties involved had to file but what the key elements were of each document. If a corporate opponent tried to set up parameters that would work in its favor—say, a particularly long or short timeline—consumer advocates could

figure out what was up right away and respond.

Furthermore, the network of relationships connecting Community Catalyst with like-minded local groups had grown. This aspect of capacity-building turned out to be pivotal: it meant that opponents of the Anthem deal could organize with dispatch, they could share know-how readily, and they could use that know-how effectively.

Forging a Solid Partnership

The relationships that became so important in Kansas did not materialize overnight. KSNA's executive director Terri Roberts recalls that her organization and KAMU had first worked with Community Catalyst about four years earlier, when BCBSKS was fighting Kansas Attorney General Carla Stovall over the issue of charitable obligations.

That issue had been one of the enduring features of an earlier attempt by BCBSKS to merge with BCBS of Kansas City. That deal had fallen apart after the Attorneys General of both Kansas and Missouri had expressed doubts about its legality, in large part because the question of charitable obligations had not been settled for either company. However, BCBSKS did not allow the charitable obligations issue to drop. A series of suits and counter-suits between Stovall and BCBSKS had followed. Basically, BCBSKS's position had been that it had no charitable obligations. Stovall's position was that it did.

What mostly caught the eye of Roberts and other advocates was the simple fact that BCBSKS had chosen to pursue the matter so doggedly. "BCBSKS seemed to be clearing the way so that it could do something, probably a conversion," Roberts says.

Charitable obligations, Roberts knew, are among the most hotly con-

tested issues in any conversion. Consumer advocates usually insist on preserving assets for the public, pointing out that a company or hospital with any history of nonprofit status does not actually own those assets. By law, the assets, built up from years of tax exemptions and other forms of community support, belong to the community and must be returned to the community when the company converts to for-profit status. Although BCBSKS was a mutually owned company at the time, it had been nonprofit until 1992, so this legal principle would certainly apply.

In most conversions, a company returns the charitable assets to the community by endowing a new health foundation. The foundation, in turn, must continue serving those same purposes for which the nonprofit institution was originally created: thus, it is charged with improving community health and supporting efforts that respond to community health needs. But if a company could enter into a conversion having already resolved that it had no charitable obligations, it would simplify the conversion review process by avoiding the key question of how much of its value is owned by the community.

When Blue Cross and Blue Shield of Kansas claimed it had no such legal obligation, it was taking a risk. If it lost this fight, its debt to the community would be acknowledged legally, and in no uncertain terms. KSNA, KAMU, and Community Catalyst labored to

make sure that was the outcome.

They succeeded. In August 2000, the Sunflower Foundation was created to receive the charitable obligations of BCBSKS. Just as significant was that the effort helped Community Catalyst and Kansas consumer groups forge a solid partnership and develop an enduring appreciation for each other's strengths.

Frank McLoughlin, staff attorney at Community Catalyst throughout this period, says that he was "always impressed with the positive, optimistic attitude of the main players in Kansas. Right from the beginning, I sensed a lot of confidence and energy." He also stresses that "the Kansans were very focused on practical solutions to problems," and that such solutions "are a lot of what Community Catalyst is all about."

Immediately in Touch

After that first battle, Phillip Gonzalez, director of Community Catalyst's Community Philanthropy Initiative, picked up where McLoughlin left off, providing the Kansas Attorney General's office and the fledgling Sunflower Foundation with ideas and information on best practices. In the late spring of 2001, when Anthem announced its plans to acquire BCBSKS, he immediately called Roberts and Volmut. "We all put our heads together and decided we wanted to do something about this," Gonzalez says.

Next on board was Kim Moore, who runs the state's United Methodist

Health Ministries Fund. While Moore did not take a position against the Anthem buyout, he wanted to ensure that its potential implications would be thoroughly investigated. The fund made a grant to KAMU to raise questions in the public interest. The money also paid for legal counsel. For that job, KAMU hired Karen Eager, an up-and-coming attorney with an interest in public health.

At this point, the Kansas Medical Society and the Kansas Hospital Association joined KSNA and KAMU in petitioning for intervenor status. As Roberts explains, this meant that "every one of the major health provider groups—hospitals, doctors, nurses, and clinics—were on the record as saying they wanted to take a serious look at the Anthem deal." The message to Kansans was unmistakable: the buyout was no trivial matter.

Going Public

With the team in place, events moved quickly. Community Catalyst collaborated with Karen Eager on legal tactics, preparing her for possible pitfalls and briefing her about conversion battles in other states.

Other team members were warned about different sorts of traps, including how Anthem might try to soften their positions on certain issues. For instance, says Roberts, "we were advised that Anthem would probably bring their medical director and their legislative person around to try to cultivate a relationship with us, and they did do that. It had worked for them in other states, so they tried it in our state."

The Front Page

Sebelius kills insurance deal

Anthem deal is first in U.S.

By Staff Reporter, Journal World Staff Writer
TUESDAY, FEBRUARY 12, 2002

TOPIC — Saying it would have cost the state too much, Insurance Commissioner Sebelius's bid to gobble up the biggest health insurer in Kansas.

Sebelius breaks ground with Anthem ruling

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By Michael Hooper
The Capital Journal

Community Catalyst deputy director Susan Sherry notes there's nothing inherently wrong with a health insurer trying to meet with consumer advocates. "If the company's sincerely interested in understanding community health needs, it may very well be a good thing," she says. "But it could just be a public relations move, which makes it all the more important to stay focused on the public's real health care needs and concerns. You've got to be on guard."

By the time Anthem came calling, Roberts notes, the Kansas advocates were prepared. "Because we already knew that this was their basic *modus operandi*, we were ready," she notes. "We stayed focused on our mission and weren't taken in by that kind of solicitation."

Focusing on the Press

Community Catalyst advocates also helped the Kansas groups develop a sound relationship with the media. Timely, well-crafted press releases kept journalists informed about newsworthy events and core concerns. Thoroughly briefed team members were made available for interviews so they could articulate plainly, with compelling quotes, just what was at stake in the Anthem buyout.

And the press responded. Every step of the way, newspapers were full of stories about Anthem and BCBSKS, and the coverage was aggressive.

Then came five public comment meetings, which Sebelius set up so people could air their concerns to Anthem and BCBSKS representatives. Kansans arrived in droves. In all, some 1,200 attended the meetings, with a minimum of 150 at each. Community Catalyst's Gonzalez remarks that "everyone involved was overwhelmed by the numbers of people who turned out, especially because in Kansas many drove long distances to get to the near-



Community Catalyst President Kate Villers listens as Sebelius reflects on her BCBSKS decision.

est urban center. One meeting was held in western Kansas, in Garden City, and for some folks it likely meant having to drive a couple of hours on country roads just to get there."

The Public Demands Answers

Moreover, he says, these people "all had burning questions to ask." And they were dogged about demanding answers. When they didn't have a public comment meeting to go to—or when, as often happened, Anthem and BCBSKS representatives did not answer a question to their satisfaction—they sought out other sources.

"We started getting all these calls at Community Catalyst," Gonzalez remembers. "I had one guy at a tractor dealership call me. There was a city councilor. And some other small business people. They called because they'd seen a piece in the local paper or a meeting notice somewhere in town. Some had found our website. Some were policyholders, and they called because they had nobody else to talk to about what was going on. They were people who really took the deal seriously."

In fact, even the journalists, who make their living from asking ques-

tions, were showing an unusual degree of interest. Gonzalez reflects that he knew they had hit a nerve when, in the middle of routine interviews, reporters started asking him about what might happen to their own families' health care in the wake of a conversion.

Momentum All Its Own

"We began to feel like the Kansas work was developing a momentum all its own," he says. "There was the sense that the public was getting on board, and events were moving fast, faster than we'd ever anticipated. I don't think any of us had envisioned the intensity of public concern that was coalescing around the deal—not in our wildest dreams."

What was going on turned out to be burgeoning skepticism that would eventually derail the BKBSKS conversion. And the after-effects of the debate in Kansas, no matter how the state's courts ultimately rule, will surely extend beyond the deal's outcome.

KSNA, KAMU, and Community Catalyst hope that advocates can use the energy generated by Kansans' interest in this issue to jump start a statewide consumer group specifically dedicated to health care issues. So far, provider groups have driven health care advocacy in Kansas, but providers and funders alike believe their efforts could be vastly strengthened if people concerned about health and representing a cross-section of communities in Kansas were drawn into the mix.

In addition, Anthem's defeat in Kansas—at the very least, in the proceedings before Sebelius and her regulatory staff—could set a precedent for other states.

To be sure, this is not the first time a large insurer has lost out on a bid to acquire an independent Blues plan. In the late 1990s, consumer health advocates working with Community Cata-

lyst and the Universal Health Care Action Network of Ohio helped defeat HCA/Columbia's attempt to buy out a BCBS plan there.

In that case, though, explains Gonzalez, the buzz had been largely about the scandalous amounts of money that executives stood to make. In Kansas, Anthem avoided that sort of controversy and did not offer any major financial incentives to BCBSKS officials.

Thus, the pivotal question of what impact the conversion might have on consumers never got lost in Kansas. It remained at the center of the debate and was the focal point in the Insurance Commission proceedings.

"That question is the one that people need to keep in mind," Gonzalez emphasizes. "Doing so elevates the standards for reviewing such deals."

Setting a Precedent

As events in Kansas have unfolded, people in other states considering conversions have been watching closely. For example, consumers in Maryland, Delaware, the District of Columbia, and parts of northern Virginia are following the Kansas transaction closely.

These consumers are concerned about the large California insurer Wellpoint, which is trying to take over CareFirst, a nonprofit Blues plan. Many seem to be concluding that a

CareFirst buyout might not be good for them or the public as a whole.

And they refuse to be distracted. Their careful, clear-headed questioning about the possible impact of the deal on access to health care has continued even as new public outrage has flared over the perks and bonuses company executives might earn if the Wellpoint purchase goes through. In particular, there seems to be a growing realization that the largest premium increases and benefit cuts could fall on CareFirst's small group and non-group subscribers.

In other ways, as well, the Kansas decision has been taking place at a particularly important time, given less

Judges Overturns Sebelius Ruling

The state officials presiding over the proposed sale of Blue Cross and Blue Shield of Kansas to Anthem Insurance have been full of surprises.

Two weeks before February's decision deadline, Insurance Commissioner Kathleen Sebelius caught many off guard when she rejected Anthem's purchase plans and called the proposal "hazardous and prejudicial to the insurance buying public." Sebelius based her decision on a detailed, independent analysis of the deal's likely impact on insurance premiums in Kansas, finding that the sale would raise premiums \$248 million over five years, significantly more than would be necessary without the acquisition.

In June, District Judge Terry L. Bullock of the Kansas District Court overturned the Sebelius decision, ruling that she had exceeded her authority. "Although the commissioner is granted power to supervise insurers and to enforce the Kansas insurance code, she is not authorized to add or change established legal requirements or take regulatory action based upon anticipated premium rates or levels of surplus that would be either required by or consistent with the law," Bullock wrote.

"Bullock was asserting a very narrow reading of Kansas state law," explains Community Catalyst CHAP team director Dawn Touzin. "Essentially his ruling says that Sebelius may have been correct in her math, and her cost analysis, but she has no authority to draw conclusions based on that assessment. His view appears to be that the Insurance Commissioner has no discretion to consider what impact those cost figures may have on people's access to health care coverage."

While Sebelius warned in her order against small- and non-group rate increases that Anthem would impose if the deal were approved, Bullock said she had no business trying to protect the public from such premium hikes. He argued that such increases were needed; otherwise, the other Blues

insurance lines would be subsidizing small- and non-group plans, which he said the law forbids.

"But this wasn't about cross-subsidies. Sebelius was talking about premium increases that would be required within the line of business, required because of Anthem's stated profit goals," says Community Catalyst deputy director Susan Sherry.

Within days, Sebelius announced she would file an appeal with the Kansas Court of Appeals and would seek to have the case transferred to the state Supreme Court. In fact, the Appeals Court has overturned many Bullock decisions, including some of his administrative rulings.

In her statement on the ruling, Sebelius declared the Bullock ruling "incorrect" and said, "I denied the out-of-state takeover of Kansas Blue Cross and Blue Shield because it would have cost Kansas families and businesses millions of dollars in increased premiums and threatened the local health care decision-making Kansans depend on from Blue Cross. Anthem of Indiana is an aggressive, for-profit holding company whose primary objective is to beat its national competitors. That may be fine for Anthem, but it's simply wrong for the health care and economic security of the people of Kansas and our business community."

Sebelius has also made clear that the fight is not yet over.

"When all is said and done" she said, "the people of Kansas will be protected and Kansas Blue Cross and Blue Shield will remain in the hands of its local policyholders."

If the case goes to the state's highest court, a ruling is not expected before December 2002.

welcome developments in the world of conversions. Also on the radar screen is New York, where Empire BCBS has announced it is converting from non-profit to for-profit status—and most of the estimated \$1 billion that would otherwise go into a conversion foundation will be used to pay for short-term increases in the hospital worker salaries. The take-home message for legislators in many financially strapped states seems to be that, number one, conversions free up enormous sums of money and, number two, those funds may be usurped to plug budget short-falls.

Empire: Non-Profit Mission Abandoned

Community Catalyst health issues director Michael Miller speaks for many advocates when he bemoans the decision of New York Governor George Pataki to use up much of the Empire asset set-aside to fund health care worker pay raises. "There is certainly a high degree of opportunism in the Empire deal," says Miller. "The governor has no idea how the salary increase for health workers will be sustained once the Empire money has been spent, but in the short run it allows him to secure union support in the upcoming election without having to address the issue of whether taxes are needed to adequately pay the workers. While we support fair wages for health care workers, this deal diverts funds from the primary purpose for which Blue Cross plans were granted tax-exempt status in the first place: to make health insurance widely available and affordable."

Advocates around the country are understandably concerned about the Empire precedent. Cash-strapped states are resorting to all kinds of one-time schemes to balance their budgets. In this environment, the charitable

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assets built up over years in Blue Cross and Blue Shield plans could be dissipated all too quickly in the rush to close budget gaps.

The Need to Remain Vigilant

Still, Gonzalez cautions that establishing a conversion foundation does not necessarily guarantee that assets will be safeguarded. The challenge for advocates is to keep their eye on health care access, and to watch carefully both "the spirit and the letter" of any move regarding a conversion foundation said to be focused on "improving community health." One telltale sign to watch for: will the resulting foundation function openly or will its operations be a closed political process?

Legislators can, and do, alter the laws governing conversion foundations whenever they feel the need. Even more sobering, officials have been known to gain control of foundations without passing new laws. For example, in Colorado, the governor "convinced the foundation board to change their bylaws. At his urging they took the final authority for appointing board members away from the foundation's community advisory committee and gave it to the

governor," Gonzalez notes.

To avert a repetition of the New York scenario, the public and consumer advocates need to be alert for these threats and prepare to fight them. In the meantime, though, what happened in Kansas is a reminder that saying no to conversions is a real option.

Community Catalyst's Touzin maintains that this alone will raise the level of debate on conversion issues.

Asking the Key Question

"Historically, we as advocates have always said the first thing that needs to be looked at in any conversion is whether it should actually take place, but we've never been able to spend much time on that question," she says. "There's always been a rush to jump to the next set of questions. Typically, the conversation would end up with people saying 'Yeah, yeah, but let's get on with business. What are we going to do with the money?'"

The way Kansas consumers, their advocates, and the state's top insurance regulator have examined Anthem's proposal ups the ante, making clear that it's no longer enough to simply focus on health plan finances and the

shape of a potential new conversion foundation.

"Kansas demonstrates that there need not be a rush to talk about the money," Touzin says. "The key question, the question that really warrants careful scrutiny, is the question we have always pushed to raise: 'What will the health impact of this transaction be?' And that question is not just a theoretical matter. Kansas demonstrates the kind of analysis that can take place, indeed, should take place, when regulators, advocates, and the public attempt to fully come to grips with the health impact of a proposed health plan transaction."

Regardless of how the Kansas court ultimately rules, the decision that Kathleen Sebelius reached, the process that she presided over, and the questions that emerged through thorough public involvement and detailed press coverage—all of that will still have transpired, providing a road map for true public engagement on one of today's most difficult health care resource issues. That victory stands and affirms the ongoing efforts of consumer advocates around the country who are fighting to preserve and expand health care access.



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