

INSURANCE DEPARTMENT: ✓

What constitutes insurance contract
and doing insurance business.
Steuben Health Clinic.

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July 8, 1933



Honorable R. Emmet O'Malley
Superintendent of Insurance
Jefferson City, Missouri

Dear Mr. O'Malley:

This Department acknowledges receipt of
letter dated June 29, 1933, from your Department, signed
by James K. Coolidge, counsel, the letter is as follows:

"Enclosed is a circular and
contract issued by the Steuben Health
Clinic, Kansas City, Missouri, which
contracts are being offered to the
public.

This Clinic is not licensed by the
Insurance Department to conduct an
insurance business and we would
appreciate your opinion as to whether
or not this contract constitutes an
insurance contract. If it does we
will, of course, make demand that it
cease its operations."

In the first paragraph of the contract it
is stated that by the agreement the applicant becomes a member
of the Steuben Health Clinic, and for the considerations there-
inafter set out such member is entitled to all rights, services
and benefits stipulated in the contract.

The second, third and fourth paragraphs of
the contract are as follows:

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"The Steuben Health Clinic agrees to furnish the holder of this contract, his wife, and all his dependent children under sixteen years of age, Medical and Surgical service for one year from date hereon upon the following terms:

The beneficiaries of this contract shall receive Surgical and Medical treatment, through the offices of the Steuben Health Clinic, for all sickness and accidents requiring hospital service; including meals, semi-private room, general nurse, medicines, surgical dressings, Surgeon's operating service, laboratory and X-Ray examination, and whatever is required, according to the best PRACTICE OF MEDICINE and SURGERY, to restore the beneficiary to the best health possible.

The beneficiaries under this contract are entitled to examinations and consultations and advisory service at any time and as often as necessary".

The sixth, seventh and eighth paragraphs of the contract are as follows:

"Hospital service will be given the member or dependents in recognized reputable hospitals in good standing.

The Surgeons, Physicians, and Specialists on the Staff of the Steuben Health Clinic are professional men of wide experience and recognized ability.

The above services are given complete for a consideration of only Ten Dollars initial membership fee and Two Dollars monthly dues, payable in advance on the

first day of each month, for a period of one year. This contract shall remain in full force after the first year upon the payment of Two Dollars per month dues, payable in advance on the first day of each month".

The contract states that for individual members without families the monthly dues will be One Dollar. Beneficiaries under the contract are not entitled to services for any cases that are not admitted to a general hospital and likewise not entitled to services in certain other specified cases. The Steuben Health Clinic claims the benefits to Workmen's Compensation paid to a member for medical and surgical service in all accident cases. The contract may be terminated by either party thereto by giving a thirty days' notice in writing to the other party, at his last known address.

The question to be determined therefore is whether or not the Steuben Health Clinic by the issuance and delivery of the aforesaid contract, and the engagements and commitments therein provided for on its part, is engaged in the insurance business within the meaning of the insurance laws of the State of Missouri. In reaching a conclusion in the premises it is of course obvious that the determination of the question whether the contract is one of insurance or whether a corporation or association is making contracts of insurance, depends, not upon the name by which the association is called but upon the nature of the business it transacts and the contract it issues.

State v. Alley, 96 Miss. 720, 51 So.467.

Cooley's Briefs on Insurance, Vol. I, page 8.

For a consideration of Ten Dollars as an initial membership fee and Two Dollars monthly dues payable in advance the Steuben Health Clinic agrees to furnish medical, surgical and hospital service to its members, and to pay the cost of same. The contract seems to proceed upon the theory that the Steuben Health Clinic does not within and of itself have a staff of physicians and surgeons, but that such physicians and surgeons as are necessary are procured from outside sources. It also appears that the hospital service furnished by the Steuben Health Clinic will be furnished not in hospitals of the Steuben Health Clinic but in other recognized reputable hospitals in good standing.

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We understand the contract to entitle a member to all examinations and consultations and advisory service as may be necessary for such member and whatever attention is needed by surgeons, physicians and specialists will be furnished and likewise such hospital services as are necessary, regardless of the length of time or the cost of such services so long as such member is in good standing, and when the member is not afflicted with any of the ailments, diseases or sickness excepted by the terms of the contract.

The case of Physicians' Defense Company v. Cooper, 199 F. 576, involved the question of whether or not the plaintiff company was transacting insurance business within the meaning of the statutes of California in the issuance of the policy involved in that case. The contract provided that if the holder thereof be sued for damages for civil malpractice the Defense Company would employ a local attorney in whose selection the holder of the contract had a voice, who together with the company's attorney would defend the case without expense to the holder of the contract up to the extent of a fixed amount of expense. The contract specifically provided that the company did not agree to pay the holder of the contract any expense and it is specifically provided that the company did not agree to pay any judgment that might be rendered against the holder. The Defense Company simply agreed to hold the holder of the contract harmless in case of suit to the extent of Five Thousand Dollars in the matter of expense. The court at page 578 of the opinion sets out many definitions of insurance, as follows:

"(1) The statutory definition of insurance does not differ greatly from that usually given by lexicographers, text-writers and judges, and yet it is practically as comprehensive as any. Webster defines it as:

"The act of insuring against loss or damage by a contingent event; a contract whereby one party undertakes to indemnify or guarantee the other against loss by certain specified risks". Webst.Dict. "Insurance".

The Standard Dictionary defines it as:

"An act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or

several parties to another party, in certain contingencies, upon specified terms".

And the Century Dictionary:

"In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes".

As to the text-writers, May defines insurance as:

"A contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss".

Such, says the author, is the definition of the term in its most general terms, and, speaking further, he says:

"It had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and, under the guidance of the spirit of modern enterprise, tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended, or protection required, it holds out its fostering hand and promises indemnity". May on Insurance Sections 1, 2.

Phillips defines it as:

"A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks". 1 Phil.Ins. Section 1.

Smith, in his work on Commercial Law, defines it as:

"A contract by which a person, in consideration of a gross sum, or a periodical payment, undertakes to pay a larger sum on the happening of a particular event". Smith, Com. Laws, 299.

This collation of definitions is taken, with some rearrangement, from People v. Rose, 174 Ill. 310, 314, 51 N. E. 246, 247, (44 L. R. A. 124).

"An insurance contract", says the court, in Shakman v. Credit-System Co., 92 Wis. 366, 66 N.W.528, 32 L. R. A. 383, 53 Am. St.Rep.920, "is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril".

Again the court, in Commonwealth v. Equitable Beneficial Ass'n. 137 Pa. 412, 419, 18 Atl. 1112, 1113, says of insurance that:

"It is a merely business adventure, in which one, for a stipulated consideration or premium per cent., engages to make up, wholly or in part, or in a certain agreed amount, any specific loss which another may sustain; and it may apply to loss of property, to personal injury, or to the loss of life. To grant indemnity or security against loss for a consideration is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance".

We will refer to but one more definition of the term, which is that given by 22 Cyc. p. 1384, as follows:

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"Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them".

The principal ingredients of such a contract are the consideration, the risk and the indemnity. The consideration is the premium for the insurer's undertaking; the risk may be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified. Insurance, under the statute, is a contract to indemnify "against loss, damage or liability". We think the addition of the word "liability" to the usual definition of the term does not operate to enlarge its significance. The kinds of insurance which have grown up and are denominated insurance under the usual definition have become very numerous. 22 Cyc. 1386."

The court at page 581 of the opinion further says:

"It is faulty logic to say that this is not a loss, damage, or liability of the contract holder, premising that he does not incur it, and concluding that it is the liability of the Defense Company. The loss, damage, or liability follows the suit for malpractice; and, were it not for the contract of the Defense Company, the holder must bear it. Whose loss, damage or liability would it then be? That of the person sued, of course. It is this very burden which the Defense Company agrees to bear in case the

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contingency of the holder being sued happens, and this is insuring the holder against the risk dependent upon the contingency. Looking on the other side, if this be a contract for personal services, why limit the amount of the services to be rendered in dollars and cents? Attorneys do not take contracts for defending parties sued in that way. How peculiar it would be for an attorney to say: "I will engage in your defense \$5,000worth". It would follow that when the fund was exhausted the attorney would quit, whether the case was brought to a close or not. The very uncertainty of the amount to be paid by the Defense Company to meet the exigency contracted against is persuasive that the contract is not one of hiring, but one rather of indemnity. And such is our conclusion. See Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N.W. 396. The reasoning of the court in this case is both cogent and persuasive".

The same contract was before the Supreme Court of Minnesota in Physicians' Defense Company v. O'Brien, 111 N. W. 396. At page 397 of the opinion the court said:

"The contract is very carefully and skillfully framed for the purpose of conveying the idea that it is an agreement for the performance of services and not for the indemnification of the physician against loss; but, unless we admit that language was invented to enable us to conceal our thoughts, this is a contract of insurance. Calling it "prophylactic and preventive" suggests its connection with the medical profession, but does not change its essential character. The books are full of definitions of insurance, and the contract has been variously described and characterized.

Underlying all the definitions, except in life insurance, is the idea of indemnity".

And further, on page 398:

"A physician is subject to the ever-present peril of an action for malpractice. The defense of such an action, regardless of its merits, requires the expenditure of time and money. If the defense is successful, there is nevertheless a financial loss; if unsuccessful, the amount of the judgment is added to this initial loss. The judgment in favor of a defendant always leaves him a loser, because but a part of the actual expenses of the litigation are taxable as costs against the plaintiff. If judgment in a malpractice case is rendered against the physician, it is so much in excess of what he has incurred in the defense of the suit. In every case the defendant suffers a financial loss. Under this contract the company does not agree to pay the judgment, but it does agree to defend the action at its own expense, and thus in substance indemnify the physician against the risk or peril of being called upon to defend such an action. The consideration is paid annually. If no action is brought during the life of the contract, the company gains the amount of this compensation, which it received for subjecting itself to the risk of being called upon to defend an action at its own expense".

The object and purpose of the contract under consideration obviously is to indemnify, protect and save harmless the member from the heavy expenses entailed in the services and operations by physicians and surgeons and the cost of treatment and attention in hospitals. We can see no difference in

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principle in the contract before us and one where a company agrees to repay to the contract holder the amount and sums of money he had expended of his own funds by reason of such services having been administered to him. By collecting a small initial fee and monthly premium from a great many persons, under the law of averages the Steuben Health Clinic might be enabled to take care of and pay the expenses of such services to its members when necessity therefor may arise and thus the individual member is indemnified against the burden of the expense of paying the whole bill for such ministrations to himself.

In the case of *John Renschler v. State ex rel Hogan*, L. R. A. 1915 D, 501, an individual engaged in the undertaking business agreed, in consideration of what was termed a note and certain interest payments to be made thereon, to furnish burial service to the holders of such notes. The court at page 502 of the opinion said:

"In February, 1914, the court of appeals of Franklin county, on the foregoing agreed facts, entered its decree of ouster against the respondent, and error was thereupon prosecuted by respondent to this court. Held, the so-called mutual note is clearly insurance. By all the tests to which the contract may be subjected, it unerringly leads one to the conclusion that the intention of the parties was on the one hand to receive and on the other to provide a fund to pay the burial expenses of the insured.

The contract being naked insurance and nothing else, it is subject to regulation by the insurance department. *State ex rel. Coleman v. Wichita Mut. Burial Asso.* 73 Kan. 181, 84 Pac. 757; *Fikes v. State*, 87 Miss. 251; 39 So. 783; *State v. Willett*, 171 Ind. 296, 23 L. R. A. (N.S.) 197, 86 N. E. 68; *Guenther, Ins. Sec.* 191; 1 *May, Ins.* 4th ed. Sec. 27; *Robbins v. Hennessey*, 86 Ohio St. 181, 99 N. E. 319".

We think it is just as true in this case that by the payments provided for in the contract that the members are establishing a fund out of which payment may be made for the services they are entitled to under this contract.

Honorable R. Emmet O'Malley

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We have not overlooked the cases of Vredenburg v. Physicians' Defense Company, 125 Ill. App. 509, and State v. Laylin, 76 N. E. 557, but we think the cases heretofore quoted from are based on sounder reasoning and logic.

We are of the opinion that by the issuance, sale and delivery in the State of Missouri of the contract attached to your letter the Steuben Health Clinic would be engaged in the insurance business in the State of Missouri, and that the contract constitutes an insurance contract.

We return you your inclosures herewith.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

Acting Attorney General.

GL:LC

Inclosures