

INSURANCE:

Described "plan" offered by Southwest Blood Banks, Incorporated, is a contract of insurance, and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections 375.300 and 375.310 RSMo 1959.

August 16, 1961



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

In answer to your request of March 2, 1961, this opinion reviews the Southwest Blood Service Plan offered to residents of Missouri by Southwest Blood Banks, Incorporated, a not-for-profit corporation under the laws of Arizona, and presently licensed to conduct its business in Missouri under Chapter 355 RSMo 1959, Missouri's General Not For Profit Corporation Law.

The Southwest Blood Service Plan, hereinafter referred to as the "plan", is being examined with a view to determining if it is, in point of law, a contract of insurance, the issuance of which is subject to the provisions of Section 375.310 RSMo 1959, providing in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred dollars for each offense, * * *."

Membership in the "plan" is acquired by completing an application for membership found in circular form SP603, and the subsequent issuance of a Certificate of Membership, the essential features of which will be referred to herein.

Missouri's statutes do not define the term "insurance". In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 257 Mo. 529, 1.c. 535, 165 S.W. 1084, the essential elements of a contract of insurance are alluded to in the following language:

Honorable C. Lawrence Leggett

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, l.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him'."

In Richards On Insurance, Fifth Edition. Vol. 1, Sec. 4, p. 11, we find the following:

"Where statutory definition is lacking, what constitutes 'insurance' is left to judicial decision and temperament."

At 44 C.J.S., Insurance, Sec. 59, p. 528, we consider the following language appropriate as an introduction to our problem:

"Whether a company is engaged in the insurance business depends, not on the name of the company, but on the character of the business that it transacts, and whether that business constitutes an insurance business subject to regulation as such is determined by the usual course of business, and whether the assumption of a risk, or some other matter to which it is related, is the principal object and purpose of the business. In determining whether a business is an insurance business, the nature of the contract or forms in which the parties state their relations must be considered, and whether a contract is one of insurance is determined by its purpose, effect, contents and import, and not merely from its terminology, although it does not, on its face purport to be one of insurance, and even though it contains declarations to the contrary."

Honorable C. Lawrence Leggett

The following admonitions are not to be overlooked when considering whether an association is unlawfully engaged in the insurance business, and are found at 44 C.J.S., Insurance, Section 70, p. 549:

"The prohibition against engaging in the business of insurance without the prescribed authority is held absolute. In determining whether or not an association is engaged in the business of insurance in violation of law, the court is concerned with the plan as a whole and not with artificially segregated single phases of the plan."

We next summarize the important provisions contained in the application form and certificate of membership which go to make up the agreement between Southwest Blood Banks, Incorporated, and persons holding its membership certificates.

The application for membership in Southwest Blood Banks, Incorporated, is made on an individual basis, or on a family membership basis, with individual membership fee being \$1.00 and family membership fee being \$3.60, and to such initial membership fees is added an enrollment fee of \$1.00. Except for blood transfusions required as a result of accidental injuries, eligible members are not entitled to any benefits under the "plan" for (90) days after the date the application is accepted. In executing the application the applicant agrees:

"* * * that services of the Plan are not available with respect to transfusions resulting from any of the following diseases or conditions existing on the date of acceptance of the application for membership: hemophilia, leukemia, aplastic anemia, ulcers, pulmonary tuberculosis, cancer, or congenital cardiovascular diseases requiring surgery, nor are such services available with respect to transfusions resulting, during the first twelve months of membership, from acquired cardiovascular diseases requiring surgery."

We next look to the Certificate of Membership issued under the "plan", and find that membership is on an annual basis, and renewal is optional with Southwest Blood Banks, Incorporated, "upon payment of the established fee, subject, however, to such general changes in the program as the Corporation may determine to be necessary, based upon experience and as may be set forth

Honorable C. Lawrence Leggett

in current edition of Southwest's Conditions of Service to Members".

Under Article III of the Certificate of Membership we find that services of the "plan" available to members are "with respect to all transfusions of whole blood required by any of such persons during the term of membership", with the exceptions heretofore outlined in the application and restated again in Article III of the Certificate of Membership.

It is to the actual services to be rendered under the "plan" to the member that we must look in order to determine just what the member obtains in return for his membership fee. Such services are furnished in one of two different manners fully described in the following language from Article III, Paragraph 2 of the Certificate of Membership:

"* * * the Corporation will provide the services of the Plan in one of the following manners:

a. If the whole blood used for transfusion purposes was issued by any Southwest Blood Bank, the actual charge for such whole blood will be wholly eliminated.

b. If the whole blood used for transfusion purposes was not issued by a Southwest Blood Bank, then the Corporation will replace the blood, unit for unit, either directly to the blood bank or transfusing person or institution supplying the blood, or through the Blood Bank Clearing House Program of the American Association of Blood Banks."

We have searched the language of the application as well as the Certificate of Membership in connection with the "plan" and have found no reference to any unit cost for whole blood transfusions, but we do find that in those instances where whole blood used for transfusion purposes was issued by any Southwest Blood Bank, the actual charge for such whole blood will be wholly eliminated. In those instances where the whole blood used for transfusion purposes was not issued by a Southwest Blood Bank, the Southwest Blood Banks, Incorporated, will replace the blood, unit for unit.

Southwest Blood Banks, Incorporated, has cited us to the fact that its method of operation "has resulted in a uniform \$20-per-unit charge for transfusion blood throughout the area of service", where formerly the local charge by profit-operated blood banks was as high as \$65.00 per unit. Such observation allows us to conclude that blood transfusions which become

Honorable C. Lawrence Leggett

necessary for members of Southwest Blood Banks, Incorporated, will cost the corporation a minimum of \$20.00 per unit charge for the transfusions given to its members. Here we have the thing of value purchased by the annual membership fee and enrollment fee to be paid by those who become members of Southwest Blood Banks, Incorporated.

In the light of the foregoing analysis of the "plan", we now state briefly what we consider the "plan" involves:

For and in consideration of an annual membership fee of one dollar, together with an enrollment fee of one dollar, Southwest Blood Banks, Incorporated, agrees to wholly eliminate the actual charge for all transfusions of whole blood required by an individual member, or to replace such blood, unit for unit, during the life of such membership, with some stated exceptions pertaining to particular diseases or conditions.

In this plan we find that for a very nominal consideration measured by the annual membership and enrollment fee (such consideration bearing no true relationship to the cost or value of the service to be rendered), Southwest Blood Banks, Incorporated, undertakes to hold its member free from financial obligation in relation to whole blood transfusions which the member may require during the period of membership. In the language heretofore quoted from State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 247, Mo. 529, l.c. 535, this "plan" certainly involves "an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss". When Southwest Blood Banks, Incorporated, wholly eliminates the actual charge for transfusions of whole blood, or replaces such blood, we can hardly escape the conclusion that the member has been indemnified or compensated for the obligation that becomes his on the happening of the contingency, the blood transfusion, which motivates the member to take out the membership certificate.

Proponents of the "plan" have cited to us the case of Jordan v. Group Health Association, 107 F. 2d 239, as being concerned with a situation analogous to the "plan" we are considering, and suggest that such ruling should control in relation to this "plan" being considered. A brief reference to the nature of the contract for services which was being considered in Jordan v. Group Health Association, supra, will readily point up the difference between that fact situation and the fact situation confronting us under Southwest's "plan". At 107 F. 2d 239, l.c. 243, 244, we find the United States Court

Honorable C. Lawrence Leggett

of Appeals in the Jordan case discussing the agreement in the following language:

"The effect of the agreement or arrangement is to make available to members, if they wish to receive them, the services of the physicians contracted for by Group Health; but it is specifically provided that (1) Group Health cannot and will not regulate or control the physician in his work -- he is left free, in fact required, to exercise his own judgment entirely independently as to diagnosis and treatment; (2) the only obligation which Group Health assumes toward its members is to make contracts, of the character described, with physicians and others -- there is no agreement or binding obligation to provide the service or see that it is supplied; the undertaking is to contract for the rendition of the services by independent contractors, not to supply them at all events or contingently; (3) further, the Trustees may determine or modify the extent of service so made available (presumably as to all members collectively) at any time on fifteen days written notice; (4) the Medical Director may determine the extent of the services which will be available to members in each individual case; (5) the corporation does not guarantee that any of the services will be rendered, or that any contracting physician will perform his contract to supply them; (6) the corporation assumes no liability for his failure to do so or for any act of omission or commission by him in doing so or for any breach of his contract; and (7) finally, Group Health assumes no liability, if for any reason it becomes unable to procure any or all such services when called upon to do so, or to indemnify the members for failure of the physician to keep his agreement or perform it properly, and its only obligation in such a case is 'to use its best efforts to procure the needed services from another source'. This is the basic contract relating to the primary service." (Underscoring supplied)

A reading of the foregoing quotation from Jordan v. Group Health Association, supra, in the light of provisions of the

Honorable C. Lawrence Leggett

"plan" proffered by Southwest Blood Banks, Incorporated, and heretofore discussed in detail in this opinion, discloses two entirely different factual situations. In the Jordan case it appears clearly that the contract in issue did not embrace characteristics necessary to cause it to be denominated a contract of insurance. In the "plan" being here reviewed it is apparent that it has embraced therein those essential qualities so lacking in the contract construed in the Jordan case. The Court's decision in the Jordan case, supra, contains a valuable expression in relation to "insurance" and "indemnity" which we desire to adopt as basic reasoning in support of the final conclusion to be reached in this opinion. The Court spoke as follows at 107 F. 2d 239, l.c. 244, 245:

"It is unnecessary for us to attempt formulation of an all-inclusive or exclusive definition of insurance or of indemnity, or to distinguish them sharply. While the basic concepts are not identical and each has varied legal usages, they have common and primary elements which are controlling here. Fundamentally each involves contractual security against anticipated loss. Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance and indemnity require these elements. Hazard is essential and equally so a shifting of its incidence. If there is no risk, or there being one it is not shifted to another or others, there can be neither insurance nor indemnity. Insurance also, by the better view, involves distribution of the risk, but distribution without assumption hardly can be held to be insurance. These are elemental conceptions and controlling ones."

The case of California Physicians' Service v. Garrison (1946) 28 C. 2d 790, 172 P. 2d 4, is not dissimilar to the holding in Jordan v. Group Health Association, supra, and the California Supreme Court held, at 28 C. 2d 790, l.c. 807, that there was a "total lack of a promise by the corporation to the beneficiary members to render medical care." It should be noted that California statutes authorized the organization of corporations such as California Physicians' Service, and to that limited extent California's social policy in regard to the corporate practice

Honorable C. Lawrence Leggett

of medicine had been determined and that the courts were bound thereby. In the California case two of the six Justices of the Supreme Court concurred only in the judgment. One of these, Chief Justice Gibson, wrote a concurring opinion in which he stated, in part, at 28 C. 2d 790, 1.c. 811, 812:

"I cannot, however, concur in that portion of the opinion declaring that the plaintiff is exempted from regulation by the Insurance Commissioner because it is not engaged in the business of transacting insurance, but is merely agreeing to render service. The true test is not the character of the consideration agreed to be furnished, but whether or not the contract is aleatory in nature. A contract still partakes of the nature of insurance, whether the consideration agreed to be furnished is money, property or services, if the agreement is aleatory and the duty to furnish such consideration is dependent upon chance or the happening of some fortuitous event. (See Rest., Contracts, §291.) In the present case, the agreement is to make payments to member doctors for medical services to the beneficial members, and the duty to make such payments is obviously dependent upon chance or the happening of a fortuitous event, since the necessity for the services, and also for the agreed payment, is dependent upon the member's sickness or accidental injury."

In the case of Cleveland Hospital Service Association v. Ebright (1943) 142 O.S. 51, we find that Ohio had a statute specifically authorizing the incorporation of not-for-profit corporations for the purpose of establishing, maintaining and operating a non-profit hospital service plan. The principal issue was whether the service corporation was subject to the franchise tax levied on other domestic insurance companies. It was there held that since the service corporation had paid taxes levied under its law of incorporation it would not be liable for the franchise tax levied upon other domestic insurance companies, (142 O.S., 1.c. 56). However, in relation to the service contracts written by Cleveland Hospital Association the Supreme Court of Ohio, at 142 O.S. 1.c. 55, had the following to say concerning the ruling of the Court of Appeals in such case:

Honorable C. Lawrence Leggett

"The Court of Appeals found that the contracts written by the plaintiff amounted substantially to contracts of insurance, relying on State, ex rel. Duffy, Atty. Genl., v. Western Auto Supply Co., 134 Ohio St., 163, 16 N.E. (2d), 256, 119 A.L.R., 1236; State, ex rel. Herbert, Atty. Genl., v. Standard Oil Co., 138 Ohio St., 376, 35 N.E. (2d) 437. With that conclusion we are in complete accord."

CONCLUSION

It is the opinion of this office that the within described Southwest Blood Service Plan offered by Southwest Blood Banks, Incorporated, effects a contract of insurance within the meaning of Section 375.310 RSMo 1959, and offering of the same to the public without meeting the requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons and corporations selling certificates of membership in such plan to be subject to penalties prescribed by Sections 375.300 and 375.310 RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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