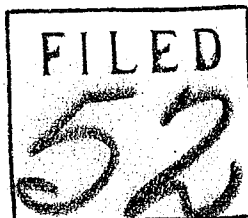


INSURANCE: Current agreement forms, Nos. 9, 12 and 111 issued by United Development Co., Inc., a Missouri corporation, and Mount Lebanon Cemetery, effect a contract of insurance and may not be negotiated unless said corporation and association are licensed to conduct an insurance business in Missouri.



August 9, 1954

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

Dear Mr. Leggett:

The following opinion is rendered in reply to your inquiry reading as follows:

"Re: Mount Lebanon Cemetery

"Dear General Dalton:

"You will find enclosed photostatic copy of a contract being issued by the captioned organization.

"I respectfully ask you to examine these documents and render an official opinion of your office as to whether or not such documents constitute a contract of insurance under the applicable laws of this State."

Documents referred to in the opinion request will be briefly referred to in this opinion as:

- (1) Form 9, "Guarantee" of Mount Lebanon Cemetery.
- (2) Form 111, "Offer" of purchaser to buy, through installment payments, a burial lot from United Development Co., Inc., such company's acceptance of the "offer"

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and the promissory note given by the purchaser to United Development Co., Inc.

- (3) Form 12, "Protection Agreement" executed by Mount Lebanon Cemetery and signed by the purchaser.
- (4) Letter dated May 5, 1954, directed to the purchaser by United Development Co., Inc., and signed by the company's secretary. W. F. Hecht.

For the purpose of this opinion it will not be necessary to quote the full text of each of the documents briefly described above. Pertinent provisions of the documents will be quoted when related to the inquiry being made.

It appears that United Development Co., Inc., a Missouri corporation, has sufficient title and interest in Mount Lebanon Cemetery to allow it to sell burial plots in such cemetery to those who will offer to buy the same for the price fixed in Form 111, and to be paid for by installment payments mentioned, such agreement to be further evidenced by an installment promissory note fully described in Form 111. This "offer" is executed by the purchaser and is accepted by United Development Co., Inc., over the signature of W. F. Hecht, Secretary of the company. The purchase price of the burial plot, plus a service charge, is to be paid in installments over a period of thirty-two months. One of the mutual covenants in Form 111 provides:

"It is intended that this offer shall upon acceptance by the Company become the agreement between the parties and shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto."

Under the terms of the installment note made a part of Form 111, "upon non-payment of any installment at its maturity, at the option of the holder, without notice, all remaining installments shall become immediately due and payable, * * *." Another of the mutual covenants in Form 111 which is of prime importance in this inquiry reads as follows:

"The purchaser hereby acknowledges that he or she has carefully read and fully understands the terms of this offer and that there are no conditions or representations other than those contained herein."

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Form 111 discloses that it, the "Offer," was made by the purchaser on May 4, 1954, with acceptance by United Development Co., Inc., on the same date. The installment note of the purchaser is also dated May 4, 1954.

Attention is now turned to Form 12, the "Protection Agreement", dated April 21, 1954 and signed by Mount Lebanon Cemetery over the signature of W. F. Hecht, Secretary. This Form 12 also carries the signature of the purchaser named in Form 111, and discloses what promises are made by Mount Lebanon Cemetery to the purchaser named in Form 111 heretofore described. Although Form 12 is dated April 21, 1954, it is described as being:

"Supplemental to an Agreement of even date, by and between MOUNT LEBANON CEMETERY, therein designated the 'Company,' and Richard G. Kerlin of St. Louis County, therein designated the 'Purchaser.'"

It is considered that the reference just made, is to Form 111, although the latter discloses a date of May 4, 1954.

Form 12, the "Protection Agreement," is of prime importance and its full text is quoted as follows:

"PROTECTION AGREEMENT

"This Agreement made this 21 day of April, 1954, Supplemental to an Agreement of even date, by and between MOUNT LEBANON CEMETERY, therein designated the 'Company,' and Richard G. Kerlin of St. Louis County, therein designated the 'Purchaser,'

"WITNESSETH, that:

"WHEREAS, in accordance with the terms of said Agreement of even date, Purchaser has purchased from the Company on installment payments, a plot in Mount Lebanon Cemetery located in St. Louis County, Mo., containing 4 adult interment spaces to be used exclusively for interment of Caucasians, and

"WHEREAS, the parties hereto desire to provide funds for the payment of the purchase price of said plot, in the event of the death of the Purchaser and for other interment services as

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hereinafter set forth.

"NOW THEREFORE, in consideration of the premises and the covenants herein contained, the Company AGREES TO GIVE, AT ITS OWN EXPENSE, a non-cancellable five years Protection Plan on the life of the Purchaser with said Company designated as the primary beneficiary under the policy.

"THE COMPANY WILL PAY ALL COSTS upon said Plan and keep same in full force and effect for a period not to exceed five years from date hereof without cost to the Purchaser, provided said Purchaser promptly makes all of the payments in accordance with the terms of his plot purchase agreement of even date and heretofore mentioned. However, said Protection Plan will, at the option of the Company, be allowed to lapse forthwith and all of the right to the hereinafter mentioned protective benefits shall terminate, in case of default for more than thirty (30) days in any of the installment payments in said plot purchase agreement provided.

"IN THE EVENT OF DEATH OF THE PURCHASER, except by his own hands, while this Agreement is in full force and effect, the Company agrees to do the following things:

"Deed to Lot

"To convey to Purchaser's wife, Muriel, herein designated secondary beneficiary, if living, and, if not living, then to the heirs at law or the legal representatives of the Purchaser, a Deed, if not yet issued, to said plot described in purchase agreement WITHOUT FURTHER PAYMENT.

"\$115.00 Grave Marker Installed

"To promptly install upon the plot where Purchaser has been interred in Mount Lebanon Cemetery, an individual Bronze Grave Marker, then regularly sold at retail for not less than \$115.00. Said Marker shall be inscribed

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with Purchaser's name, date of birth and date of death.

"\$60.00 Interment Services

"To pay to the Funeral Director designated, or to the cemetery, as the case may be, the sum of \$60.00 for, or to apply upon, Purchaser's interment service. Such service to include opening and closing of the grave, erection and use of the Chapel Tent, use of the greens and equipment.

"Cancellation of Balance Due

"To cancel the balance due without any further payment in the event of death of the Purchaser except by his own hands.

"THIS SUPPLEMENTAL AGREEMENT shall become effective when duly signed by an authorized official of the Company.

"IN WITNESS whereof the parties hereto have executed this Supplemental Agreement the day and year first above written.

MOUNT LEBANON CEMETERY,

BY: W. F. Hecht, Secy.

X Richard G. Kerlin
Purchaser "

"Form 12

It will be noted that Form 12, quoted above, alludes to the fact that the Purchaser named in Form 12 has purchased a burial plot in Mount Lebanon Cemetery from United Development Co., Inc.; that the parties to the "Protection Agreement" (Form 12):

" * * * desire to provide funds for the payment of the purchase price of said plot, in the event of the death of the Purchaser and for other interment services. * * *"

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In order to accomplish the objective as outlined above, Mount Lebanon Cemetery agrees to give, at its own expense, a non-cancellable five years Protection Plan on the life of the Purchaser, with Mount Lebanon Cemetery being designated as the primary beneficiary under the policy. Under the "Protection Agreement", Form 12, quoted above, Mount Lebanon Cemetery agrees that if the Purchaser named in Form 111 promptly makes all of his installment payments becoming due on the burial plot purchase agreement (Form 111), Mount Lebanon Cemetery will pay all costs upon the Protection Plan (Form 12) for a period of five years, such Protection Plan calling for (1) a deed to the burial plot contracted by the purchaser to be bought from United Development Co., Inc., (2) installation of a grave marker, and (3) interment services of the value of \$60.00. A cancellation clause in the Protection Agreement provides that Mount Lebanon Cemetery agrees:

"To cancel the balance due without any further payment in the event of death of the Purchaser except by his own hands."

Form No. 9, a "Guarantee" issued by Mount Lebanon Cemetery provides as follows:

"GUARANTEE

"Mount Lebanon Cemetery does hereby certify that the following statements are true and correct relative to the attached agreement for the purchase of a burial lot:

"1. That the said lot is free and clear of all encumbrances and tax obligations.

"2. That Mount Lebanon Cemetery has been dedicated exclusively for the interment of members of the Caucasian race.

"3. That the purchaser shall have the right to transfer ownership in his or her lot to another member of the Caucasian race.

"4. No space for interment in the Garden where a selection may be made, will be sold for less than One Hundred Sixty-Five (\$165.00) Dollars per space, including care and maintenance fees, after said Garden is fully completed."

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The document which discloses that the entire plan is in operation is manifested by the following letter dated May 5, 1954:

"Perpetual Care

Perpetual Charter

MOUNT LEBANON
The Cemetery Exclusive
Where Equality Endures

Situated on St. Charles Road and Lindbergh Boulevard

United Development Co.
Fiscal Agent
Route No. 7, Overland, Mo. 14
Terryhill 5-2900

Overland, Mo.
May 5, 1954

"Richard G. Kerlin
8349 Archer
St. Louis 14, Mo.

Dear Mr. and Mrs. Kerlin:

We are happy to inform you that your application for a 4 space Family Memorial Shrine, including the five-year protection plan, has been processed and approved.

The protection plan is now in effect, and you may come out to Mount Lebanon any Sunday between the hours of 1:00 and 4:00 p.m. and select your memorial estate in one of our approved gardens of memory.

May we take this opportunity to congratulate you upon your wise decision and action that you have taken for your family's protection and inevitable needs.

You will receive a payment booklet from the St. Johns Community Bank in the near future, first payment beginning on June 15, 1954 of \$10.70 and \$10.70 each month thereafter until the balance has been paid.

Very truly yours,

UNITED DEVELOPMENT CO.

W.* F. Hecht, Secretary."

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The foregoing instruments are abundant proof that United Development Co., Inc., through its Secretary, W. F. Hecht, and Mount Lebanon Cemetery, through its Secretary, W. F. Hecht, have become parties to agreements with the "Purchaser" named in said agreements in such manner as to cause the two agreements to be inseparable and to cause one agreement to be dependent upon and consideration for the other. This being so, we view the affect of the agreements as follows:

United Development Co., Inc., and Mount Lebanon Cemetery have contracted with a Purchaser for the sale of a burial plot in Mount Lebanon Cemetery at a fixed price to be paid for in instalment payments over a period of thirty-two months, and as an inducement to the Purchaser and as part of the consideration moving to the Purchaser, United Development Co., Inc., and Mount Lebanon Cemetery have effected upon the life of the Purchaser a five year Protection Plan which guarantees to the Purchaser a deed to the burial plot, a grave marker of the value of \$115.00 and interment services of the value of \$60.00. If the Purchaser should die, except by his own hand, prior to the completion of payment of the thirty-two monthly installments payable on the purchase price of the burial plot, and without default causing cancellation of said agreement, the burial plot, grave marker and interment services are furnished, and any balance due on the purchase price of the burial plot is cancelled.

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

"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.* * *"

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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.'"

The insurance character of burial associations is evident from the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, resident of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

In 44 C.J.S., Insurance, Sec. 48, p. 494, we find burial insurance referred to in the following language:

"Burial insurance is a contract based on a legal consideration whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum."

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The foregoing citation disclosing a definition of burial insurance bears remarkable likeness to the following definition found in 1 Joyce on Insurance (2 Ed) p. 87:

"Burial insurance is a contract based upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum. It is a valid contract, and constitutes life insurance."

In 1 Couch on Insurance, Section 32, burial insurance is referred to in the following language:

"Burial or funeral benefit insurance is valid, and being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance."

It will not be questioned that "risk" is one of the essential elements of an insurance contract. The "risk" to be assumed under the agreements here considered is well illustrated by the provision found in Form 12, which makes a covenant "to cancel the balance due without any further payment in the event of death of the Purchaser except by his own hands." In other words, if the Purchaser should die, except by his own hand, after making one or two installment payments on his agreement to purchase the burial plot, the return to him in the form of interment services, grave marker and deed to the burial plot would bear no true or correct relationship to the actual amount he had paid on his contract. The result under such circumstances discloses a pure insurance risk.

Section 375.310 RSMo 1949 provides, 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 and fifty dollars for each offense, * * *."

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CONCLUSION

It is the opinion of this office that United Development Co., Inc., a Missouri corporation, and Mount Lebanon Cemetery, by negotiating Forms 9, 12 and 111, described in the foregoing opinion have effected a contract of insurance and are subject to the penalties prescribed by Section 375.310 RSMo 1949, unless licensed to conduct such insurance business by the Superintendent of the Division of Insurance.

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

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw