Opinion No. 57-29

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BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Mr. Ralph Apodaca, Superintendent of Insurance, State Corporation Commission, Santa Fe, New Mexico

QUESTIONS

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Does an agreement entered into by a physician and certain prospective patients, wherein those patients pay a stipulated amount per month for the personal service of such physician, constitute insurance or merely pre-payment of medical fees?

(Note: A full statement of the facts given below.)

CONCLUSION

So long as the physician does the treating of the patient, it is merely pre-payment of medical fees.

OPINION

ANALYSIS

The instant situation, briefly, arises out of an agreement which has been entered into by several doctors, individually, and officers of a labor union, in behalf union members who voluntarily have become subscribers to the plan. In accordance with the terms of the herein considered agreement, each union member subscriber pays $ 3.25 per month, said sum being deducted by the employer-company, or collected by the union and in turn forwarded to the individual physicians designated by the paying subscriber. The union, for its part, merely provides the several doctors with a monthly list of eligible subscribers and their dependents. In the situation were company deductions are carried out, no money passes through the Union, payment to the doctors being direct; but where individual members tender their payments to the union, which collectively is forwarded to the designated physicians, a ten cent administrative charge is imposed, additionally, by the union, on the subscriber.

In consideration for the payments afore described, the agreement provides that each doctor will perform all outpatient services and administer medicines and drugs, with stated exceptions, as may be needed by each subscriber and any of his dependents.

The agreement does not provide for surgery or other professional services which require hospitalization.

The agreement is further open to any physician who contracts for himself or his staff individually. Each subscriber elects his own family physician, and is free to change at the end of any six-month period. The doctor-patient relationship is in no way controlled by the union, and, further, the union assumes no liability for performance. Acceptance of the provided fee by a physician obligates him to perform in accordance with the terms provided.

Generally speaking, the term insurance may be defined:

". . . as an agreement by which one person for a consideration promises to pay money or its equivalent, or to perform some act of value, to another on the destruction, death, loss or injury of someone or something by specified perils." 29 Am. Jur. 47. ". . . the essential feature of policies of insurance at the present time is substantially that of indemnity to the unusual."

In California Physicians' Service v. Garrison, 28 Cal. 2d Adv. 771, 172 P. 2d 4 (1946), the Court, is giving consideration to the operation of a physicians' service plan contended by the State Commissioner of Insurance to be in fact an insurance operation, stated as follows:

"Whether the contract is one of insurance or of indemnity, said one court, 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."

Looking specifically to the New Mexico statutory provisions, we find no definition of the term "insurance" other than the inclusions stated in §§ 58-1-1 and 58-7-1, N.M.S.A., 1953. An Attorney General Opinion No. 4884, dated March 25, 1946, dealing with the subject of a physicians' service plan, points out:

". . . that there are three necessary elements of a contract of insurance, namely, consideration, contingency and indemnity, or its equivalent."

And continuing:

". . . it appears that the indemnity feature of insurance is not necessarily present. Indemnity means compensation for loss. Under the plan there does not appear to be any agreement to compensate for loss, as neither the professional nor the administrative members assume the risk of losses by the beneficiary members. The

beneficiary members do not receive any compensation for a loss. Rather, it appears to be a plan by which the beneficiary members are provided with medical service, and the professional members receive compensation for their services."

And also:

"Further, there is a very close question as to whether the element of contingency or peril is present.

"Strong arguments can be made that the contract is in the nature of a retainer arrangement, which has long been looked upon as outside the field of insurance. Under a retainer contract, a client pays his attorney a fee for services rendered over a period of time when the amount and character of the services are unknown. While the services may be great or small during the specified period of time, both the client and attorney know that some services will probably be needed, and that on the average for such period they are worth approximately this specified amount.

"The same may be true of medical services of the average individual. At the start of a year, while not knowing the exact amount or character of medical services he will need, he knows, from his past experience, that he will need medical services, and the average amount of such services."

The Opinion concluded that a physicians' service plan was not insurance as provided by the statutes.

Referring again to the Garrison case, supra, the Court states:

"One of the reasons behind the declaration of the earlier cases that it was against public policy for a corporation to engage in the practice of medicine was because the control of its activities was placed in the hands of laymen. (Citing authority) To allow the Insurance Commissioner to impose the extensive regulations provided for in the Insurance Code upon the activities of the service would result in the same evil. (See Yale Law Journal 171)"

And, further in the same case:

"The extensive insurance regulations primarily are designed to protect the insured, or the public, from the insurer. (52 Harv L Rev 815). Such regulations become important only if the insurer has assumed definite obligations. Conversely, it is evident that they are not intended to apply where no risk is assumed and no default can exist. Further more, by the very nature of its operations, the service could not accumulate vast reserves. The flow of funds from patient to physician primarily on a monthly basis of pay-as-you-go and to require reserves would be a useless and uneconomic waste. (Citing 71 App DC 38, 107 F 2d at page 251; see 53 Yale LJ 171.)"

In the instant situation, the doctor-patient relationship is in no way changed by the terms of the considered agreement. There is no intermediate entity or corporation as provided for in § 58-16-5, N.M.S.A., 1953. Subscription or retainer fees are collected and forwarded to the respective doctors merely as a convenience and to avoid the time and expense of individual billing by mail. The fact that in one case the patient's employer acts as the collecting agent, and in the other, the labor union, does in no way void the individual liability of the doctor's performance in regard to each subscriber.

The provisions of the Physicians' Service Plan (§§ 58-16-1 to 58-16-16, N.M.S.A., 1953) contemplate, first, the existence of an administrative, nonprofit corporation whose duties it will be to contract for the professional services required, solicit subscribers to the plan, fix rates based upon a mutual benefit criteria, and finally, to pass upon and pay claims as they are submitted. At no time does there exist a direct obligation of performance between an individual doctor and a patient. Only a beneficial responsibility is fixed by the law; the physicians agreeing to render services to the corporation through its beneficiaries.

While certainly a plan as hereinabove described could easily slide into the framework of insurance provisions with the introduction of the elements contingency, indemnity and distribution of risk, still the absence of these is prime in determining that a plan of prepaid medical charges is not insurance. Likewise, should the part played by the union become that of a contracting, soliciting and controlling factor with regard to the doctor-patient relationship, and further, and probably of greater importance, become selective in the choice of doctors and retain a part of the subscriber's payments as costs of administration, then such a plan could readily be identified with the physicians' service plan as contemplated in Chapter 58, § 16. It is finally suggested that the instant plan, in that situation where the union is charging a nominal administrative fee to each subscriber, amounts to an intermediary and would indicate creation and existence of a nonprofit administrative corporation.