4-30-2012

Altrua Healthshare, Inc. v. Deal Appellant's Brief Dckt. 39388

SUPREME COURT OF THE STATE OF IDAHO

ALTRUA HEALTHSHARE, INC.,	)	
A Texas Nonprofit Corporation,	)	**SUPREME COURT**
	)	**DOCKET NO. 39388-2011**
Petitioner,	)	
vs.	)	
	)	
BILL DEAL, in his capacity as Director	)	
Of the Idaho Department of Insurance, and	)	
THE IDAHO DEPARTMENT OF	)	
INSURANCE,	)	
	)	
Respondents.	)	
	)	

OPENING BRIEF OF APPELLANT

ALTRUA HEALTHSHARE, INC.

Appeal from the District Court of the
Fourth Judicial District of the State of Idaho
In and for the County of Ada

HONORABLE KATHRYN STICKLIN, District Judge.

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STATEMENT OF THE CASE

Introduction

An ever-increasing number of families in Idaho cannot afford to buy traditional private medical insurance. 59 Idaho families turned to Altrua Healthshare's ("Altrua") medical sharing plan as their only affordable alternative. As a faith-based nonprofit organization, Altrua is able to state as a historical fact that "[N]ot one eligible medical need has gone unpaid since the membership started." R. Ex. p. 405. Altrua makes no promise to pay members' claims and assumes no financial risk for its members. Instead, it resolves all of its members' claims with their own escrowed funds.

Now, the Idaho Department of Insurance has declared that members' sharing of medical expenses under Altrua's Membership Plan constitutes insurance. As a result, Altrua has been forced out of Idaho, depriving these 59 families of the means to pay for medical care by sharing their medical expenses with other believing families.

A. Course of Proceedings

On January 15, 2010, the Idaho Department of Insurance filed a Notice of Violation against Altrua, contending that it was operating as a health insurance company in Idaho without being licensed. Altrua failed to respond and a default order was entered against it on March 10, 2010. R.CR. p. 92. On April 21, 2010, the Director of the Department entered an order withdrawing and rescinding the March 10, 2010 order and appointed a hearing officer. An administrative hearing was held on September 1, 2010 before David V. Nielsen, Esq., Hearing Officer. R.CR. p. 93. After post-hearing briefing was completed by both parties, the Hearing Officer issued his initial Findings of Fact, Conclusions of Law and Preliminary Order on November 15, 2010. R.CR. p. 93. Due to a clerical error, an Amended Preliminary Order

was issued on November 22, 2010. R.CR. p. 93. The agency found that Altrua was operating as a health insurance company in Idaho and ordered it to cease and desist from operating in Idaho, or alternatively, required it to obtain a license as an insurance company.

Altrua filed a Motion for Reconsideration and a Memorandum in Support on December 2, 2010. The Department filed its response on December 6, 2010. R.CR. p. 93. On December 22, 2010, an Order Denying Request for Reconsideration was entered. R.CR. p. 93. By operation of law, the Hearing Officer's Preliminary Order became final on January 4, 2011. Altrua filed a Notice of Appeal and Petition for Judicial Review on January 24, 2011. R.CR. 110.

Altrua filed a Petition for Judicial Review in the District Court for Ada County on the grounds that the agency decision was in error on the facts and the law. Altrua argued that it was not an insurer since Altrua's membership plan does not result in the transfer of any of its members' claim risk to Altrua. The U.S. Supreme Court has held that transference of the claim risk to the insurer is an essential element of the contract of insurance.

The Petition for Judicial Review was heard in the Ada County District Court before the Honorable Kathryn L. Sticklin, District Judge. On October 13, 2011, Judge Sticklin issued a Memorandum Decision and Order affirming the decision of the Idaho Department of Insurance prohibiting Altrua Healthshare, Inc. from selling insurance in Idaho. R.CR. p. 92. The appeal was suspended until judgment was entered on December 15, 2011. R.CR. p. 114.

B. Statement of Facts

Altrua Healthshare, Inc., a Texas Nonprofit Corporation, ("Altrua") administers a membership program for sharing of medical needs as an alternative to health insurance. Altrua, formerly Zion Share has been operating in Idaho since 2001. It is a Non-Insurance faith-based

health sharing organization that serves 59 member families in Idaho. Most of these families have limited financial means and would not be able to afford health insurance coverage from traditional health insurers. All of these member families are of the LDS faith. R. CR. p. 23

Altrua is a private nonprofit Christian organization designed to help members pay for their health care expenses through its members' voluntary sharing of their monthly membership payments. Membership in the organization is based on religious principles and beliefs common to its members. Members of Altrua pay a monthly fee that is placed in an escrow account. Altrua administers the members' funds by negotiating with health care providers and making payments from the members' funds to resolve their medical expense claims pursuant to guidelines agreed upon by all of the members. R. CR. p. 23.

Members of Altrua remain self pay and sign a membership application with the knowledge that they are each fully responsible for their medical claims. Members' expectations, based on their membership agreement, is that all of the members will share the funds they have deposited in escrow with Altrua to resolve members' claims submitted according to the guidelines.

The members affirm that they believe that by following what the Bible calls us to do as Christians, together we can share in each other's burdens by sharing in medical claims with each other. R.CR. p. 23.

Since 2001, members in Idaho have submitted their claims and have had their claims discounted and adjusted through the providers which has saved both the membership and families large amounts of money. From 1/1/2006 through the present date, Altrua has resolved 6,331 medical claims for its Idaho members, and issued payments to medical providers of $1,050, 479.50. R.CR. p. 0023.

Altrua does not agree to pay any members' medical expense claims from its own funds, and does not assume any risks with respect to its members' medical expense claims. Altrua only makes the that Altrua will apply the members' escrowed funds to the resolution and payment of members' medical claims submitted in accordance with the guidelines subscribed to by all of the members. R. Ex. p. 409.

As a nonprofit entity, Altrua does not receive any monetary benefit from the approval or denial of a members' claim. Altrua receives only an administrative fee for handling of the escrow account funds and for claims resolution on behalf of the members. R. Ex. p. 472 (Tr. p. 83, line 2 - p. 84, line 11.)

The medical bills of the 59 Idaho member families are resolved not through guaranteed insurance claim payments, but instead by each member agreeing that the membership dues that he contributes may be used together with the dues paid by other members to resolve and pay claims submitted by the members.

The following facts were established at the administrative hearing in this case.

1. In order to have an insurance contract, there must be a promise to pay or indemnify by the "insurer." R. Ex. p. 457, (Tr. p. 23, lines 17 – 21, Eileen Mundorff Testimony); Idaho Code §41-102.
2. Upon review of the medical sharing program of the Christian Brotherhood in 2000, the Idaho Department of Insurance determined that the agreement by its members to share in the medical expenses of the other members, was not a contract of insurance because there was no contract to indemnify or pay a benefit to another party. R. Ex. p. 435, Petitioner's Exh. 6, 12/14/00 IDOI Letter.

3. Altrua Healthshare's Membership Application does not include any promise to pay or indemnify the members' medical expenses. There are specific disclaimers in Altrua Healthshare's Membership Agreement and Guidelines. R. Ex. p. 457 (Tr. p. 24, lines 1 – 24); R. Ex. p. 458 (Tr. p. 26, lines 16 – 22); R. Ex. p. 459 (Tr. p. 32, lines 15 – p. 33, line 2, Eileen Mundorff Testimony); R. Ex. p. 463 (Tr. p. 48, line 16 – p. 49, line 6); R. Ex. p. 464 (Tr. p. 51, line 16 – p. 52, line 6, Randall L. Sluder Testimony).
4. There is no provision in the plan documents that states that Altrua has a duty to pay a claim. R. Ex. p. 457 (Tr. p. 24, line 1 – p. 24, line 14; Tr. p. 26, lines 16 – 22); R. Ex. p. 459 (Tr. p. 32, line 15 – p. 33, line 2, Eileen Mundorff Testimony); R. Ex. p. 463 (Tr. p. 48, line 16 – p. 49, line 6); R. Ex. p. 464 (Tr. p. 51, line 16 – p. 52, line 6, Randall L. Sluder Testimony).
5. Altrua Healthshare did not agree to indemnify or pay any benefits to or for its members. It does not make any promise that a member's expenses will be shared or reimbursed. R. Ex. p. 463 (Tr. p. 48, line 16 – p. 49, line 6); R. Ex. p. 464 (Tr. p. 51, line 16 – p. 52, line 6, Randall L. Sluder Testimony;) R. Ex. p. 406, Petitioner's Exh. 5, p. 4; R. Ex. p. 408, Pet. Exh. 5, p. 6; Exh. 5, R. Ex. p. 200, Resp. Exh. A, p. DOI – 000004, R. Ex. p. 205, Resp. Exh. A., p. DOI - 000009.
6. Altrua Healthshare does not assume the responsibility for payment of any member's medical expenses. Each member remains financially liable for all of his or her unpaid medical needs, as set out in Altrua's Guidelines. R. Ex. p. 408, Pet. Exh. 5, p. 6, Resp. Exh. A., p. DOI - 000031. R. Ex. p. 463 (Tr. p. 48, line 16 – p. 49, line 6;) R. Ex. p. 464 (Tr. p. 51, line 16 – p. 52, line 6, Randall L. Sluder Testimony).

7. The Acknowledgements, Standards and Commitments section of Altrua's Application for Membership, R. Ex. p. 386, states in pertinent part:

   a) "I understand that the membership is not insurance but is a voluntary medical needs sharing program, and that there are no representations, promises, or guarantees that my medical expenses will be paid. I also understand that sharing for medical needs does not come from an insurance company, but from the membership according to the guidelines and membership Escrow Instructions."

   b) "I understand that the guidelines are not a contract and do not constitute a promise or obligation to share, but instead are for Altrua Healthshare's reference in following the Membership Escrow Instructions."

   c) "I understand that monthly contribution amounts are based on operating and medical needs and the total number of members and that monthly contributions are figured on a periodic basis as needed and are subject to change at any time. I also understand that the payment of my monthly contributions is voluntary and that I am not obligated in any way to send any money."

8. Unlike an insurance company, Altrua Healthshare escrows membership funds and distributes them according to Guidelines agreed to by the Members. R. Ex. p. 387. ("Escrow Instructions, Signatures and Application Checklist"); Pet. Exh. 5, p. 5; R. Ex. p. 461 (Tr. 37/18 – 38/8, Eileen Mundorff Testimony;) R. Ex. p. 463 (Tr. 48/16 – 49/6;) R. Ex. p. 464 (Tr. p. 51/16 – 52/6, R. Ex. p. 466, Tr. p. 57, line 15 – p. 58, line 6; R. Ex. p. 468 (Tr. p. 67, line 3 – p. 69, line 9, Randall L. Sluder Testimony).

9. Altrua's Brochure states that membership needs are shared among the membership from their contributions. Altrua acts as an Escrow and processing company for membership contributions. It states:

   a) "Altrua Healthshare is not insurance, does not collect premiums, make promises of payment, or guarantee that your medical needs will be shared by the membership. Sharing of eligible medical needs is completely voluntary among the membership. Member contributions are used to share in eligible medical needs as directed in the Membership Escrow Instructions listed on the application." R. Ex. p. 406, Pet. Exh. 5, p. 6.

b) Altrua's Guidelines brochure, R. Ex. p. 408, Pet. Exh. 5, p. 8., informs applicants of Altrua's role. "To those who may be unfamiliar with the concept of people caring for one another and voluntarily sharing their medical needs, Altrua Healthshare is a medical-cost sharing membership that acts as a neutral escrow agent for the members. Our members voluntarily submit monthly contributions into an escrow account with Altrua Healthshare acting as the escrow agent between members."

c) The following disclaimer is also set out in Altrua's Guidelines Brochure R. Ex. p. 408, Pet. Exh. 5, p. 8: "This publication or membership is not issued by an insurance company, nor is it offered through an insurance company. This publication or the membership does not guarantee or promise that your eligible medical needs will be shared by the membership. This publication or the membership should never be considered as a substitute for an insurance policy. If the publication or the membership is unable to share in all or part of your eligible medical needs, or whether or not this membership continues to operate, you will remain financially liable for any and all unpaid medical costs.

This is not a legally binding agreement to reimburse you for medical needs you incur, but is an opportunity for you to care for one another in a time of need, to present your medical needs to others as outlined in these membership guidelines. The financial assistance you may receive will come from other members' monthly contributions that are placed in an escrow account, not from Altrua Healthshare."

10. In September, 2001, the Idaho Department of Insurance reviewed the medical sharing program of Kirtland Sharing Alliance dba Zion Healtthshare, Altrua Healthshare's predecessor, and determined that its medical sharing program did not constitute insurance under Idaho law. R. Ex. p. 341, Pet. Exh. 1, IDOI Letter dated 9/18/01.

11. Altrua Healthshare acquired Zion Healthshare's business in 2005. Altrua operates the same program that Zion Healthshare operated in Idaho. It has made no substantial changes in the way that funds are escrowed, claims reviewed or moneys distributed. R. Ex. p. 462, (Tr. p. 44, line 3 – p. 46, line 1, Randall L. Sluder Testimony).

12. Altrua Healthshare has continued to provide membership services to Idaho members who were formerly members of Zion Healthshare's program. R. Ex. p. 463 (Tr. p. 47, line 17 – p. 48, line 7, Randall L. Sluder Testimony).

13. Altrua Healthshare is a nonprofit organization. It does not have the right to appropriate the members' escrowed funds for its own use or benefit. Tr. administrative fee for negotiating and resolving claims under the Guidelines and administering the escrowed funds to pay approved members' claims. It does not make a profit by declaring member's claims ineligible for sharing. It has nothing to gain or lose financially from approving or disapproving payment of a member's claim with the members' funds. R. Ex. p. 472 (Tr. p. 82, line 22 – p. 84, line 7, Randall L. Sluder Testimony).

14. Altrua Healthshare is paid an administrative fee for administering the Membership program pursuant to the Guidelines. R. Ex. p. 472 (Tr. p. 82, line 2 – p. 84, line 7, Randall L. Sluder Testimony).

ISSUES ON APPEAL

1. Whether the Court erred in finding that Altrua's Membership Plan constituted a contract of insurance, notwithstanding express statements and disclaimers repeated throughout Altrua's membership brochure, Application, and Guidelines, that negate any assumption of risk of loss or duty to pay members' claims.

2. Whether the Court erred in finding that by establishing lifestyle requirements for membership, and guidelines for claims eligible for sharing from members' escrowed funds, that Altrua was conducting the business of insurance.

3. Whether the District Court based its factual findings upon substantial and competent evidence, and whether that evidence supported the District Court's conclusions of law and judgment.

4. Whether the findings, inferences, conclusions or decisions issued by the Department of Insurance and affirmed by the District Court are in violation of the Idaho law.

5. Whether the findings, inferences, conclusions or decisions issued by the Department of Insurance and affirmed by the District Court are in excess of the statutory authority of the agency.

6. Whether the findings, inferences, conclusions or decisions issued by the Department of Insurance and affirmed by the District Court are arbitrary, capricious, or an abuse of discretion.

ARGUMENT

I

ALTRUA'S MEMBERSHIP PLAN IS UNAMBIGUOUS AND IS NOT A CONTRACT OF INSURANCE

A. Contracts must be interpreted according to the plain meaning of their words.

The fact that Altrua's Membership Application and Guidelines Brochure clearly delineate that it is not insurance, and that membership does not create any legally binding agreement for Altrua to pay a member's medical expenses was not disputed by the Department of Insurance. Nor was there any dispute that Altrua administers the resolution of members' claims as an escrow company, paying all member's claims with member's escrowed funds. R. Ex. p. 373, Petitioner's Exh. 5, p.5 ("Escrow Instructions")

Altrua's Application and Guidelines Brochure are replete with disclaimers and notices to members that inform them that they are not purchasing insurance coverage, and that Altrua does not agree to pay or indemnify them for their medical expenses. R. Ex. p. 372, Petitioner's Exh. 5, p. 4; R. Ex. p. 406, 408, 409.

The Department of Insurance found and the Court affirmed that, notwithstanding the clear and unambiguous terms of the membership application and guidelines, and specific language in the plan documents disclaiming any assumption of risk or duty to pay, that Altrua's agreement guaranteed payment of its members' claims and assumed their risk of loss because Altrua informed members of the fact that "Not one eligible medical need has gone unpaid since the membership started." R. Ex. p. 405.

The Department's expert, Eileen Mundorff, admitted that the Altrua Membership documents include these disclaimers, and that there is no specific provision that states that Altrua has a duty to pay a claim, or language stating that Altrua will pay a member's claim.

Instead, she relied entirely on "the general tenor of the plan documents." R. Ex. p. 459 (Tr. p. 32, line 15 – p. 33, line 2.)

Idaho law does not support the Department's position. In *Reynolds v. Shoemaker,* 139 Idaho 591, 83 P.3d 135, 137 (App. 2003), the Court declared:

> If the terms of a contract are clear and unambiguous, then interpretation of that contract is a question of law. *City of Idaho Falls v. Home Indem. Co.,* 126 Idaho 604, 607, 888 P.2d 383, 386 (1995). The meaning of an unambiguous contract must be determined from the plain meaning of the contract's own words. *Id.*

Idaho courts have applied this basic principle of contract interpretation to insurance contracts. Thus, the Court noted in *Andrae v. Idaho Counties Risk Management Program Underwriters,* 175 P.3d 195 (2007):

> "Insurance policies are contracts, and "the parties' rights and remedies are primarily established within the four corners of the policy." *Featherston By and Through Featherston v. Allstate Ins. Co.,* 125 Idaho 840, 843, 875 P.2d 937, 940 (1994).
> Like other contracts, insurance policies "are to be construed as a whole and the courts will look to the plain meaning and ordinary sense in which words are used in a policy." *Miller v. Farmers Ins. Co. of Idaho,* 108 Idaho 896, 899, 702 P.2d 1356, 1359 (1985). Finally, where the "policy language is clear and unambiguous, coverage must be determined in accordance with the plain meaning of the words used." *Mut. of Enumclaw Ins. Co. v. Roberts,* 128 Idaho 232, 235, 912 P.2d 119, 122 (1996)."

Article I, §10 of the United States Constitution states that "No State shall … pass any…law impairing the obligation of contracts…" Citizens have a constitutional right to enter into a contract, and a State may not retroactively alter a contract, except under very limited circumstances. The terms of a contract are entitled to be honored. Therefore, under Idaho law, the court must find an ambiguity in the words of the agreement in order to 'reform the instrument,' with the intent not to alter the contract, but to enforce it according to the actual intention of the contracting parties. A Court has no power to impose its own construction on the plain language of the contract just because the Court believes that rewriting the agreement

would make it more equitable. These principles were set out in *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485, 492 (2009), in which the Court noted:

> "[I]n *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 93 P.3d 685 (2004), we reiterated that " [c]ourts do not possess the roving power to rewrite contracts in order to make them more equitable." *Id.* at 362, 93 P.3d at 693. Although we recognize that this portion of the opinion is dicta in light of our determination that the grant of summary judgment must be vacated, we address this issue in order to provide guidance to the district court on remand.
>
> We have held that " a court is acting properly in reforming an instrument when it appears from the evidence ... that the instrument does not reflect the intentions of the parties and that such failure is the product of a mutual mistake, a mistake on the part of all parties to the instrument." *Collins v. Parkinson,* 96 Idaho 294, 296, 527 P.2d 1252, 1254 (1974). *See also Belk v. Martin,* 136 Idaho 652, 658, 39 P.3d 592, 598 (2001). However, we emphasize that when reforming an instrument, the court gives effect to the contract that the parties did make, but that by reason of mistake was not expressed in the writing executed by them. *Id.* (quoting *Uptick Corp. v. Ahlin,* 103 Idaho 364, 372, 647 P.2d 1236, 1244 (1982)). Thus, the district court is not free to reform the Agreement simply for the purpose of arriving at a result that is subjectively viewed as " fairer" to one of the parties."

In light of the clear and unambiguous language found in the Altrua Membership Application and its Guidelines Brochure, including specific disclaimers, and no language stating that Altrua had any duty to pay a member's claim, or assume any risk for payment or indemnification of a member's claim, the Altrua Membership Agreement is not an insurance contract.

B. To constitute an insurance contract, the insurer must assume some "element of risk." The Altrua Member's Agreement is not insurance because Altrua does not assume any risk of payment of a member's expenses.

In order to have an insurance contract, there must be a promise to pay or indemnify by the "insurer." R. Ex. p. 457, (Tr. p. 23, lines 17 – 21, Eileen Mundorff Testimony). The Department of Insurance admitted that an essential element of an insurance contract is the requirement that the "insurer" take on some risk of payment of the "insured's" claims.

Idaho Code §41-102 defines insurance as a "contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies." An insurer is a person or entity "engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity." Idaho Code §41-103.

The hearing officer and the Court noted that there are elements of underwriting and spreading of risk in Altrua's guidelines for eligible claims and requirements for membership. But, as the hearing officer noted in ¶ 8 of his Conclusions of Law, "the fundamental attribute of insurance is risk sharing; this, however, is not simply the spreading of loss. "Risk sharing is the lynch pin of insurance...Risk sharing connotes not only a transfer of risk (risk shifting) to others but a distribution (sharing) of the risk among the others." *Holmes Appleman on Insurance, 2d* § 1.3 p.10 (1996). R. Ex. p. 156.

In ¶¶ 10 and 11 of the Conclusions of Law, the hearing officer acknowledged that "To be an insurance contract" Altrua must "undertake some risk of payment of the insured's claim or loss." "The agreement provided must show that Altrua has assumed or had transferred to it the subject risk." R. Ex. p. 156.

There is no doubt that under Altrua's Membership plan, its members spread their risk of loss among the entire membership. But there is also no question that Altrua does not assume any of its member's risk of loss. The transfer of risk is only from each member to all of the members. There is no transfer of risk from any member to Altrua.

The United States Supreme Court held that ***risk taking by the insurer*** is central to the concept of 'insurance,' in *Securities & Exch. Comm'n v. Variable Annuity Life Ins. Co.,* 359 U.S. 65, 71-73, 79 S.Ct. 618, 622, 3 L.Ed.2d 640, 644-45 (1959). The Court declared:

> "[W]e conclude that the concept of "insurance" involves some investment risk-taking on the part of the company....We deal with a more conventional concept of risk-bearing when we speak of "insurance." For, in common understanding, "insurance" involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts. *See Spellacy v. American Life Ins. Ass'n,* 144 Conn. 346, 354-355, 131 A.2d 834, 839; Couch, Cyclopedia of Insurance Law, Vol. 1, § 25; Richards, Law of Insurance, Vol. 1, § 27; Appleman, Insurance Law and Practice, Vol. 1, § 81. The companies that issue these annuities take the risk of failure. But they guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities -- an interest that has a ceiling, but no floor. There is no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage."

The Department and the District Court cite *Messerli v. Monarch Memory Gardens, Inc.,* 88 Idaho 88, 110, 397 P.2d 34 (1964) for the same proposition. In that case, the Idaho Supreme Court declared that "a contract of insurance must contain an element of risk in so far as the particular individual contract is concerned."

In asserting that Altrua's escrow arrangement constitutes a contract of insurance, the Department and the Court missed the one fact central to the holdings of the U.S. Supreme Court on this issue. **To constitute a contract of insurance, the insurer must assume an 'element of risk' for each of its 'insureds.' A transfer of risk from one member to a group of members without any assumption of risk by an 'insurer' for any of them does not qualify as a 'contract of insurance.'** The U.S. Supreme Court's analysis in *Group Health & Life Ins. Co. v. Royal Drug, Inc.,* 440 U.S. 205, 212, 99 S.Ct. 1067, 59 L.Ed.2d 261(1979) illustrates this conclusion.

> "The significance of underwriting or spreading of risk as an indispensable characteristic of insurance was recognized by this Court in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65. That case involved several corporations, representing themselves as "life insurance" companies, that offered variable annuity contracts for sale in interstate commerce... The Court held that the annuity contracts were not insurance, even though they were regulated as such under state law and involved actuarial prognostications of mortality. **Central to the Court's holding was the premise that "the concept of 'insurance' involves some investment risk-taking on the part of the company."** 359 U.S. at 71. Since the variable annuity contracts offered no guarantee of fixed income,

> **they placed all the investment risk on the annuitant, and none on the company.** *Ibid.* The Court concluded, therefore, that the annuities involved "no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." *Id.* at 73 (emphasis added)

No proof was presented by the Department to establish that Altrua assumed any risk of indemnity or payment of a member's claims. The express language of the membership agreement does not create a legal right to payment of any claim. Such rights are expressly disclaimed. No one has a legal right to require their claims to be paid out of the escrowed funds, and Altrua has no obligation to pay any claim, either from the escrowed funds, or from its own funds. No member has a legal claim against the assets of Altrua Healthshare, which is the essence of risk transfer. Although the Court pointed out that Altrua's guidelines include an appeals process for review of denied claims, R. Ex. p. 50-51, the Court missed the critical distinction between this process and that found in a traditional insurance policy. Altrua's guidelines state:

> "Regardless of the potential outcome of an appeal, the existence of this appeal procedure should not be interpreted as creating any expectation of sharing or a legally enforceable right or entitl4ement since there are no contractual promises of sharing under the membership guidelines." R. Ex. p. 50.
>
> Altrua's Application includes the following Member Commitments:
>
> "...I hereby promise that in the event of a disagreement over the payment of my or anyone else's medical needs, my dependents and I will bring no legal claim, demand or suit of any kind for unpaid medical needs, but will follow the appeal and mandatory mediation procedure described in the guidelines. I and my dependents also accept and appoint Altrua Healthshare as the final authority on the interpretation of the guidelines and membership Eligibility Manual and, agree to indemnify and hold harmless Altrua Healthshare and its trustees, officers, employees, representatives and service providers from any damages or expenses, including legal fees, arising from any breach of these promises..." R. Ex. p. 19.

Because Altrua does not assume any risk of loss for its members and does not promise to pay members' claims with Altrua's funds, it is not an insurer and its Membership Agreement is not a contract of insurance.

The Court cited the decision of the Kentucky Supreme Court in *Commonwealth v. Reinhold*, 325 S.W.3d 272 (2010) as support for its conclusion that Altrua is an insurer. But the Kentucky Court did not address the fundamental requirement of insurance, that the risk be transferred from subscribers to the insurer. In his dissent, Justice Scott illustrated that point when he states:

> "Because the relationship between Medi–Share and its subscribers does not amount to a distribution of risk between the policy holder (the subscribers) and Medi–Share (the conduit to the pool of subscribers), I do not believe Medi–Share to be in the business of insurance as described by the United States Supreme Court. Rather, I believe that the system set up by Medi–Share shifts the risk from one subscriber (the insured) to the pool of subscribers (the insurers) that is controlled and managed by Medi–Share. Thus, while Medi–Share is in the business of promoting and managing a cost-sharing organization, it is not in the business of insurance itself." Id. at 280.

C. Administering members' funds to obtain cost savings does not create a contract of insurance.

Even though Altrua assumed no risk of payment or indemnity for its members expenses, the Department and the Court suggested that Altrua's contracts with preferred medical providers to obtain cost savings for its members is the 'business of insurance.' That finding is contradicted by the Supreme Court's holding in the *Group Health* case, *supra.* In that case, an insurer entered into separate Pharmacy Agreements with pharmacies to obtain cost savings for its insureds. The Supreme Court held that these contracts alone did not constitute the 'business of insurance', even though in that case an insurance company was a party to them. The Court noted:

> "The Pharmacy Agreements thus do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue

Shield....Such cost-savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the "business of insurance."... *Group Health,* Id at 214.

In his dissent in the Kentucky Supreme Court decision in *Reinhold, supra,* Justice Scott, joined by Justice Cunningham wrote:

"The crux of my position is based on the fact that Medi–Share bears no risk when it admits a member to the pool. That risk is carried by the members of the pool—not Medi–Share. This conclusion derives from a plain meaning of the commitment contract submitted by Medi–Share to new members. That contract states that Medi–Share takes no responsibility for the payment of the members' medical bills. And as recognized by the majority, that provision likely shields Medi–Share from any liability for its members' medical bills. This begs the question: what risk does Medi–Share, as an entity, bear? The answer is clearly none. However, the majority reasons that the contract language alone does not overcome "the fact that *through* the Medi–Share program the individual members pool resources together to distribute the risk of major medical bills *amongst each other.*" (emphasis added). I whole-heartedly agree with this statement, but believe that this does not support a legal finding that Medi–Share is in the business of insurance, but rather that Medi–Share is in the business of administrating and managing a cost-sharing organization on behalf of others—in this instance, people of faith. In contrast, a true insurance company takes on risks and the company itself bears those risks, not the individually insured policy holders." *Id. at 280-281.*

D. Altrua's use and administration of an escrow account does not transmute its plan into an insurance contract.

Altrua's plan uses an escrow account to administer member's funds to pay member's medical expenses. The Altrua guidelines state:

"To those who may be unfamiliar with the concept of people caring for one another and voluntarily sharing their medical needs, Altrua Healthshare is a medical-cost sharing membership that acts as a neutral escrow agent for the members. Our members voluntarily submit monthly contributions into an escrow account with Altrua Healthshare acting as the escrow agent between members."

"This publication or membership is not issued by an insurance company, nor is it offered through an insurance company. This publication or the membership does not guarantee or promise that your eligible medical needs will be shared by the membership. This publication or the membership should never be considered as a substitute for an insurance policy. If the publication or the membership is unable to share in all or part of your eligible medical needs, or whether or not this membership

continues to operate, you will remain financially liable for any and all unpaid medical costs.

"This is not a legally binding agreement to reimburse you for medical needs you incur, but is an opportunity for you to care for one another in a time of need, to present your medical needs to others as outlined in these membership guidelines. The financial assistance you may receive will come from other members' monthly contributions that are placed in an escrow account, not from Altrua Healthshare." R. Ex. p. 41.

The Department found that Altrua's use of an escrow account made it an insurer. That finding conflicts with the U.S. Supreme Court's decisions that require 'risk transfer' to the insurer in order to create an insurance contract.

The Altrua Plan escrow does not make Altrua an insurer. First, if there is any risk transfer, it is from one member to all members' funds on deposit in the escrow account. There is no risk transfer to Altrua because it does not assume any risk of loss in its agreement. Altrua's escrow account consists entirely of the members' monies. Altrua does not own and has no financial interest in those funds. R. Ex. p. 472 (Tr. p. 82, line 22 – p. 84, line 7.)

Second, there is no risk transfer because each member remains contractually obligated for his or her medical expense, and there is no promise or guarantee of payment under the terms of the Altrua Plan. R. Ex. p. 41.

Third, there is no transfer of risk to the escrow account because those funds are not legally obligated for payment of any specific medical expense. The escrow account merely provides a source of payment for claims that are approved for payment from it. The escrow account has no contractual liability to any member for payment of his medical expenses. R. Ex. p. 19, 41.

Altrua's Membership Application and Guidelines create a contract with and between the members. Under the terms of that agreement, Altrua serves as a consumer cooperative with regard to its member's medical expenses, that provides an escrow service to (1) determine

whether a member's medical expenses qualify for assistance from the other members, and (2) pay those expenses from the member's funds on deposit in escrow. Altrua's duties to its members are those of an escrow company and administrator of the member's funds in accordance with the Guidelines. R. Ex. p. 463, (Tr. p. 48, line 16 – p. 49, line 6; p. 57, line 15 – p. 58, line 6; p. 67, line 3 – p. 69, line 9, Randall L. Sluder Testimony.

The Department conceded that the "Christian Brotherhood" medical expense sharing model is not insurance because the corporation merely assists members in sharing their medical expenses with the other members.[1] The Department distinguished Altrua's medical expense sharing model based solely on the fact that it used an escrow to hold and distribute member's funds, instead of the Brotherhood's program for direct payment from one member to the other. But that is a distinction without a difference. Whether the plan calls for a member's funds to be transferred from all of the members to one member who pays his medical bill directly with those funds, or calls for all of the members to pay into an escrow, whose agent pays each member's medical bill from those funds, the company administering the plan is not an insurer because neither has assumed any risk of loss that is the pre-requisite of an insurance contract.

Nor does Altrua's control over disbursement of these funds create an insurance contract. Altrua has no ownership interest in the monies. Altrua has established guidelines that

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[1] R.Ex. p. 435, Pet. Exh. 6, 12/14/00 Letter from Gina McBride, Compliance Officer, Idaho Dept. of Insurance. The Department concluded that the Christian Brotherhood program was not insurance. She stated:

"Under Idaho Code §41-102, the definition of insurance is:

"A contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies."

It is the Department's position that there is no contract to indemnify or pay any benefit to another party. Therefore the Christian Brotherhood Newsletter does not meet the definition of insurance, and is not subject to regulation by the Department of Insurance.

For your information, I have attached the Iowa Supreme Court decision of Barberton Rescue Mission dba Christian Brotherhood Newsletter v. Insurance Division of Iowa, 586 N.W.2d 352 (1998).

Also, we obtained a copy of the membership packet from the Christian Brotherhood Newsletter, and I have attached a copy for your review. This includes several disclaimers to the effect "The Christian Brotherhood Newsletter is not insurance."

determine what claims are approved and paid. The escrowed monies remain the property of the members, and Altrua does not benefit financially by denying claims. It receives fees to administer the members' funds and nothing more. Neither Altrua nor Christian Brotherhood are insurers because neither plan assumes any risk of loss, or has any opportunity for gain by reason of the handling of members' claims.

Finally, the Department contended that because Altrua has discretion in interpreting and applying the claim Guidelines, that it is not a true 'escrow' agent or administrator. That conclusion is not supported in the law. The cases cited by the Department do not say that an escrow agent must not have discretion, but only that he must be a neutral party. The definition cited by the Department from I.C. §30-902(4) states that a realty escrow is:

> "any transaction in which any person...delivers...money...to a third person to be held by that third person until the happening of a specified event...when the...money...is then to be delivered by the third person to a [third party]...pursuant to written instructions."

The authority of an escrow agent, just as that of a trustee, is determined by its written instructions, which may include discretionary authority. Nothing in the case law or Idaho Code prohibits the written instructions from delegating discretionary authority to the escrow agent. *See, e.g. Driver v. S.I. Corporation,* 139 Idaho 423, 80 P.3d 1024 (2003) (escrow agent authorized to pay claims from funds on deposit); Idaho Code §68-106 (a),(c)(1), (23) (trustee's discretionary authority to collect and retain trust assets and make distributions); *Dolan v. Johnson*, 95 Idaho 385, 509 P.2d 1306 (1975) (foundation managers given discretionary authority over distribution of foundation monies)

E. The Altrua Plan is not an illusory contract.

The Department reasoned that the Altrua membership agreement must be read either to allow a member to assert an enforceable contractual claim against Altrua to pay his or her

medical claims, or it would be an illusory contract because it did not afford insurance coverage to its members. That reasoning is based upon a faulty premise. It assumes that Altrua's membership agreement must be a contract of insurance in order to be a valid contract, and then concludes that because it is an insurance contract, the Altrua contract violates public policy.

As noted above, the Altrua contract is not insurance, but nonetheless a valid contract. The Altrua membership agreement is not an insurance contract because there is no agreement for Altrua to assume any of its members' risks. But it is also not illusory because it is a specific and unambiguous agreement that imposes duties upon both Altrua and upon its members, and is supported by consideration. To constitute a valid contract, Altrua's agreement must provide consideration to its members. It does that by agreeing to hold and administer their escrowed membership funds according to specific guidelines, and to use those funds to pay claims that fall within those guidelines. Members agree to contribute monies to share medical expenses with other members, and to abide by certain lifestyle requirements.

This consideration is not just theoretical or hypothetical. Altrua and its predecessor Kirtland Sharing has faithfully represented its member families in Idaho for the past eleven years. The Department did not present any complaints by Altrua members, nor did it assert that there was any history of a complaint against Altrua by its members or anyone else about the important service that Altrua provides these Idaho families. From 1/1/2006 through the present date, Altrua has resolved 6,331 medical claims for its Idaho members, and issued payments to medical providers of $1,050, 479.50. R.CR. p. 0023. That record is not illusory. It is a historical fact.

The cases cited by the hearing officer and the Court do not support the conclusion that the Altrua contract would be found to be illusory and held void as against public policy. In

National Fire Union Ins. v. Dixon, 141 Idaho 537, 112 P.3d 825 (2005), the Court stated that insurance policies that provide an 'illusion of coverage' will be held void as against public policy. But to create that 'illusion,' the policy language must unambiguously state that it provides coverage, but then eliminate any real coverage through ambiguous exclusions. In our case, there is no such 'illusion' of coverage. The Plan's language clearly and unambiguously disclaims any promise that Altrua will pay member claims with its funds. Instead, Altrua agrees to administer members' escrowed funds to pay their eligible claims. Members know from the outset that their claims will be covered only if other members contribute enough monies into the escrow account and only if the claim falls within the agreed guidelines. This absence of ambiguity in a plan's limitations was considered dispositive by the Court in upholding the contract in *American Foreign Insurance Co. v. Reichert,* 140 Idaho 394, 399-400, 94 P.3d 699 (2004). The Court said:

> The provision in dispute provides that "Any amount payable under this coverage shall be reduced by all sums paid or payable under any workers' compensation, disability benefits or similar law[.]" (This provision is hereinafter referred to as the "offset provision"). Reichert argues that the offset provision is void because American knew that all claimants would only receive minimal, if any, coverage because all claimants would also receive worker's compensation benefits. In support of his argument Reichert relies on *Martinez v. Idaho Counties Reciprocal Mgmt. Program,* 134 Idaho 247, 999 P.2d 902 (2000).
>
> In our review, we found nothing in the offset provision that is ambiguous and we assume the Director approved this policy and it comports with public policy. The *Martinez* case does not apply to these facts.
>
> In *Martinez,* this Court held that the uninsured motorist coverage issued to the city was illusory. *Martinez,* 134 Idaho at 252, 999 P.2d at 907. The city paid premiums for something they thought they were receiving, but due to the exclusion provisions the coverage did not exist. *Id.* at 251-52, 999 P.2d at 906-07. The policy was ambiguous as to uninsured motorist coverage. *Id.* at 250, 999 P.2d at 905.... The *Martinez* case is distinguishable. In the instant case, the policy is unambiguous, unlike the policy in the *Martinez* case."

While Altrua's Membership Plan is not a contract of insurance, it is a valid contract that is not illusory.

CONCLUSION

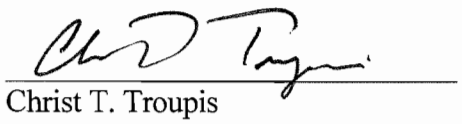
Altrua Healthshare's Membership plan does not constitute an insurance contract. The facts and the law bear this out. The Department's own expert admits that to have an insurance contract, the "insurer" must assume some risk of payment of claims. There is none in this case.

The Department has characterized Altrua as an insurance company, based on its completely hypothetical argument that in the absence of any language in Altrua's plan documents creating a promise to pay claims, or assuming the risk of payment, and in the face of clear and unambiguous disclaimers of such duty, that, if a complaint were ever filed against Altrua, a Court might rewrite its plan documents to imply such a duty.

The Department's determination that Altrua Healthshare Inc., is an insurer conducting the business of insurance in Idaho, and the District Court's Memorandum Decision and Judgment affirming the Department's decision should be reversed. This Court should find that Altrua is not in the business of selling insurance; that its medical expense sharing program does not constitute the business of insurance, and it is therefore not subject to the regulation by the Idaho Department of Insurance as an insurer.

Dated: April 28, 2012

TROUPIS LAW OFFICE, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2012, I served two (2) copies of the foregoing *Appellant's Opening Brief* by U.S. Mail, first class postage prepaid, addressed to the following persons:

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