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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ALTRUA HEALTHSHARE, INC., a Texas
Nonprofit Corporation,

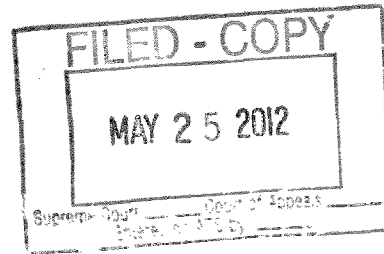
Petitioner-Appellant,

vs.

BILL DEAL, in his capacity as Director of
the Idaho Department of Insurance, and the
IDAHO DEPARTMENT OF INSURANCE,

Respondents.

Supreme Court Case No. 39388-2011



RESPONDENTS' BRIEF

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

HONORABLE KATHRYN A. STICKLEN
Presiding Judge

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I. STATEMENT OF THE CASE

A. Nature of the Case

The Idaho Department of Insurance (hereinafter “Department”) is an agency of the State of Idaho as provided by title 41, Idaho Code. William W. Deal, or Bill Deal, is the Director of the Department. Altrua HealthShare, Inc. (hereinafter “Altrua HealthShare” or “Altrua”) is a Texas corporation operating what it has characterized as a faith-based medical sharing plan. Altrua HealthShare appealed from the Memorandum Decision and Order of the District Court of the Fourth Judicial District entered October 13, 2011, (C.R., pp. 92-109¹), which Order affirmed the decision of the Department that Altrua HealthShare is in violation of Idaho Code § 41-305(1) by transacting insurance in the state of Idaho without obtaining a certificate of authority. C.R., pp. 147-173.

B. Statement of the Case

This is a statement of the case to the extent that the Department does not agree with the statement of the case as presented by Altrua HealthShare.

In Altrua HealthShare’s Opening Brief at page 4 of its “Statement of the Case” under “Introduction,” Altrua states that, as a result of the Department’s decision, “Altrua has been forced out of Idaho, depriving [] 59 families of the means to pay for medical care by sharing their medical expenses with other believing families.” Altrua HealthShare’s Opening Brief at 4.

On the contrary, the Department has not “forced” Altrua HealthShare out of Idaho. In the

¹ As used herein, C.R. shall refer to the record prepared by the Clerk of the District Court. A.R. shall refer to the agency record of the Department of Insurance, which was originally submitted to the District Court and subsequently delivered to this Court.

District Court proceedings, Altrua HealthShare filed a Motion to Stay Enforcement of Administrative Order on March 23, 2011. C.R., pp. 19-20. District Judge Kathryn A. Sticklen granted the motion to stay enforcement of the Department's Final Order pending further order of the District Court. Tr., p. 19, LL. 16-18 (Transcript of Proceedings of May 24, 2011). Since Altrua's filing of an appeal to the Idaho Supreme Court, the Department has not taken any further action to enforce its original Final Order, pending the outcome of the appeal.

With regard to Altrua's statement on the "Course of Proceedings" [Altrua HealthShare's Opening Brief at 4], Altrua HealthShare has interspersed its "argument" therein; otherwise the Department has no objection with the "Course of Proceedings" statement.

C. Statement of Facts

With regard to Altrua's "Statement of Facts" [Altrua HealthShare's Opening Brief at 5-11], the Department refers the Court to the Findings of Facts as stated in the Hearing Officer's Findings of Fact, Conclusions of Law and Preliminary Order dated November 15, 2010. For the Findings of Facts, *see*, A.R., pp. 149-155.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Whether the Idaho Supreme Court should affirm the District Court's Memorandum Decision and Order entered on October 13, 2011 finding and affirming the Department's Final Order finding that Altrua HealthShare was in violation of section 41-305(1), Idaho Code, by transacting insurance within the state of Idaho without first obtaining a certificate of authority.

III. ARGUMENT

A. Standard of Review

“In an appeal from a decision of the district court acting in its appellate capacity under the [Idaho Administrative Procedures Act], this Court reviews the agency record independently of the district court's decision.” *Chisholm v. Idaho Department of Water Resources*, 142 Idaho 159, 161, 125 P.3d 515, 517 (2005) (citation omitted).

The Idaho Supreme Court reviews “an appeal from an agency decision based on the record created before the agency.” *Chisholm*, 142 Idaho at 162, 125 P.3d at 518. This Court “does not substitute its judgment as to the weight of the evidence presented, Idaho Code § 67-5279(1), but instead defers to the agency’s findings of fact unless they are clearly erroneous. [Citation omitted.] When conflicting evidence is presented, the agency’s findings must be sustained on appeal, as long as they are supported by substantial and competent evidence, regardless of whether [the court] might reach a different conclusion” *Chisholm*, 142 Idaho at 162, 125 P.3d at 518. “Substantial and competent evidence is ‘relevant evidence which a reasonable mind might accept to support a conclusion.’” *Wohrle v. Kootenai County*, 147 Idaho 267, 273, 207 P.3d 998, 1005 (2009) (quoting *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 590, 166 P.3d 374, 380 (2007)).

“A strong presumption of validity favors an agency’s actions.” *Chisholm*, 142 Idaho at 162, 125 P.3d at 518 (citing *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (2001)). “The agency’s action may be set aside, however, if the agency’s findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the

agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. In addition, this Court will affirm an agency action unless a substantial right of the appellant has been prejudiced." *Chisholm*, 142 Idaho at 162, 125 P.3d at 518 (quoting *Cooper v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000) (and citing Idaho Code § 67-5279(3)).

"The party challenging the agency action must first show that the agency erred in a manner specified in I.C. § 67-5279(3) and then establish that a substantial right has been violated." *Id.*

The Department's Findings of Fact are found in the Agency's Record at pages 149 to 155. A.R., pp. 149-155. The Department's Conclusions of Law are found in the Agency's Record at pages 155 to 170. A.R., pp. 155-170.

B. Review of Altrua HealthShare Contract for Membership

The focus of the Department's decision was the Altrua HealthShare "Contract for Membership," which includes an Application for Membership. A.R., pp. 16-20. The Application for Membership includes a general information questionnaire (A.R., p. 16); a medical history questionnaire (A.R., pp. 17-18); a statement of acknowledgements, standards and commitments (A.R., p. 19); and a statement of escrow instructions, signatures, and application checklist (A.R., p. 20).

The Membership Eligibility Manual is also a part of the Altrua contract for membership as it is used as the "standard against which an applicant's medical history is measured to

determine if the applicant qualifies for the membership, and if so, what membership limitations should apply.” (Quote from A.R., p. 25) *See*, A.R., pp. 25-36. The Membership Eligibility Manual includes a list of “general rules” for eligibility (A.R., pp. 25-27); a list of “automatic denials” (A.R., p. 28); “Height and Weight Guidelines” (A.R., pp. 29-30); a list of membership comparison types (A.R., p. 31); a Medical Review Questionnaire (A.R., pp. 32-34); and a list of monthly contribution requests (A.R., pp. 35-36).

The next part of the contract for membership includes the Guidelines. A.R., pp. 41-53. The Guidelines are incorporated into the Application for Membership described hereinabove. *See*, A.R., p. 19 (“I also understand that the guidelines are part of and incorporated into this Altrua HealthShare application as if appended to it.”).

The Membership Eligibility Manual (A.R., pp. 25-36), the membership comparison chart (A.R., p. 21), the Medical Review Questionnaire (A.R., pp. 32-34), and the Membership Guidelines (A.R., pp. 41-53) combine to “fully describe membership and membership type eligibility.” A.R., p. 11 (correspondence dated July 14, 2009 from John Patton, Esq., attorney for Altrua HealthShare, to the Department (A.R., pp. 11-14)).

In this brief, Altrua HealthShare’s contract for membership will be referred to as “Altrua’s contract” or “contract for membership.”

C. Does the Department’s decision that Altrua HealthShare is engaged in the business of insurance violate any constitutional or statutory provisions?

Altrua HealthShare cites Article I, Section 10 of the U.S. Constitution, arguing that citizens have the right to enter into a contract and that a “State may not retroactively alter a

contract, except under very limited circumstances. 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.” Altrua HealthShare’s Opening Brief at p. 14 (underscore here).

Altrua HealthShare claims its contract is clear and unambiguous and therefore must be given effect according to the plain meaning of the words used in the contract and that the “interpretation of that contract is a question of law.” *See*, Altrua HealthShare’s Opening Brief, at 14 (quoting *Reynolds v. Shoemaker*, 139 Idaho 591, 83 P.3d 135 (1995) and *Andrae v. Idaho Counties Risk Mgmt Program Underwriters*, 175 P.3d 195 (2007)).

The Department is not asking this Court to rewrite or reform Altrua’s contract for membership. The terms of the contract for membership are clear and unambiguous, therefore the “interpretation of that contract is a question of law.” *Reynolds v. Shoemaker*, 139 Idaho 591, 591, 83 P.3d 135, 137 (Ct.App. 2003). In other words, “[i]f the contract is clear and unambiguous, the determination of the contract’s meaning and legal effect are questions of law” *City of Idaho Falls v. Home Indemnity Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995).

The Hearing Officer found that, as a matter of law, Altrua HealthShare’s contract for membership is a contract of insurance. A.R., p. 165 (para. 32). The Hearing Officer affirmed that conclusion in a second order after Altrua HealthShare filed a Motion to Reconsider. A.R., p. 191. The Hearing Officer’s Preliminary Order was not reviewed as provided under section 67-5245, Idaho Code; therefore, it became a Final Order of the Director of the Idaho Department of Insurance as a matter of law. *See*, Idaho Code § 67-5246(3).

Based on these conclusions of law, the Altrua HealthShare contract for membership is a contract of insurance and, as such, Altrua HealthShare must obtain a certificate of authority under section 41-305, Idaho Code, or cease any further insurance business within the state of Idaho.

Altrua HealthShare appears to argue that, based on the clear and unambiguous terms of the contract for membership, the plain meaning of the terms of the contract steer Altrua HealthShare clear of any state oversight or regulation.

In view of legitimate state of Idaho interests and public policy, it would be unsound to conclude—as Altrua in effect urges—that, as a general rule, when two parties enter into a contract where such contract is clear and unambiguous, it creates a shield against state regulation. On the contrary, as with Altrua HealthShare’s contract for membership, “[u]nambiguous contracts that violate public policy are illegal and unenforceable.” *National Union Fire Ins. Corp of Pittsburgh PA v. Dixon*, 141 Idaho 537, 541, 112 P.3d 825, 829 (2005). The public policy of the state of Idaho is found in its Constitution, in its statutes, and in its judicial decisions. *Stearns v. Williams*, 72 Idaho 276, 287, 240 P.2d 833, 840 (1952). With regard to the matter of insurance, Idaho’s public policy is stated in title 41, Idaho Code, and in Idaho’s body of case law. The issue is whether Altrua HealthShare’s unambiguous contract for membership is one of insurance. Therefore, “its meaning and legal effect are questions of law . . .” *City of Idaho Falls*, 126 Idaho at 608, 888 P.2d at 383.

Altrua argues that the Department’s actions are in violation of the Contract Clause of the U.S. Constitution where it states that “No State shall . . . pass any . . . Law impairing the

Obligation of Contracts . . .” U.S. Const. art I, § 10, cl. 1. (*See*, Altrua HealthShare’s Opening Brief at 14-15). The Department’s interpretation of the contract for membership as one of insurance does not violate the U.S. Constitution.

As noted by the U.S. Supreme Court, the Contract Clause must accommodate “the inherent police power of the State ‘to safeguard the vital interests of its people’ [citation omitted].” *Energy Reserves Group, Inc. v. Kansas City Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 704 (1983).

For Altrua HealthShare to effectively challenge the Department’s interpretation of Idaho’s insurance law as applied to Altrua HealthShare under the Contract Clause, Altrua HealthShare must show: (1) that Idaho’s law substantially impairs a contractual relationship; (2) that the applicable Idaho insurance code has a narrow purpose without “a significant and legitimate purpose behind the regulation, such as the remedying of a broad and general social or economic problem[;]” and (3) that the law is unreasonable and inappropriate for its intended purpose. *Energy Reserves Group*, 459 U.S. at 412-414, 103 S.Ct. at 704-706.

Insurance is a heavily regulated industry under title 41, Idaho Code. The public policy of the state of Idaho states clearly that the business of insurance is affected “by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.” Idaho Code § 41-113. To the extent that Idaho’s insurance code impairs Altrua HealthShare’s contract for membership, Idaho’s law is “prompted by [] significant and legitimate state interests.” *Energy Reserves Group*, 459 U.S. at 416, 103 S.Ct. at 707.

The Department's conclusion that Altrua HealthShare's contract for membership is one of insurance does not violate any statutory or constitutional provisions.

D. Has the Department exceeded its statutory authority by concluding that Altrua HealthShare's contract for membership is a contract of insurance under Idaho law?

The Director of the Department Insurance is charged with the enforcement and execution of the provisions of title 41, Idaho Code, and the Director may delegate to his or her deputies such powers or duties as imposed by the insurance code. *See, generally*, title 41, chapter 2, Idaho Code. These duties and powers include the Director's duty to authorize insurers to operate under Idaho law. *See, generally*, title 41, chapter 3, Idaho Code. This includes the issuance of a certificate of authority to authorized insurers, as the law states that no entity or person "shall act as an insurer and no insurers or its agents . . . shall directly or indirectly transact insurance in this state except as authorized by a subsisting certificate of authority issued to the insurer by the director . . ." Idaho Code § 41-305(1).

Transacting insurance includes the solicitation, inducement, negotiation, and effectuation of a contract of insurance. Idaho Code § 41-112. The insurance code provides a penalty in the amount of \$15,000 against any person who transacts insurance without a proper license. Idaho Code § 41-117A. Among the Director's enforcement powers, after hearing, is the power to impose a cease and desist order or, among other things, to impose an administrative penalty in accordance with title 41, Idaho Code. *See*, Idaho Code § 41-213.

The Department's Final Order (A.R., pp. 147-173 (*See, also*, Amended Order, A.R., pp. 174-177)) did not exceed the Director's authority to enforce Idaho's insurance code.

E. Was the Department's decision made upon unlawful procedure?

The Department understands from discussion and briefing herein that Altrua HealthShare has not made a claim that the Department's decision that Altrua HealthShare's contract for membership is one of insurance was made under any unlawful process.

F. Was the Department's decision that Altrua HealthShare's contract is a form of insurance under Idaho law not supported by substantial evidence on the record as a whole, or was it arbitrary, capricious, or an abuse of discretion?

Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Jensen v. City of Pocatello*, 135 Idaho 406, 409, 18 P.3d 211, 214 (2000). After careful and detailed review of the evidence and record before him, the Hearing Officer who issued the Final Order on November 15, 2010, found that "Altrua is in violation of Idaho Code Section 41-305(1) by transacting insurance in the State of Idaho without having obtained a certificate of authority." A.R., p. 170.

The Hearing Officer reviewed whether the contract for membership was one of indemnification and whether it effectively shifted the subject risk from the members to Altrua HealthShare. He rejected Altrua HealthShare's claim that it was merely in the business of administering and/or managing a simple cost sharing, finding instead that the Altrua HealthShare contract constitutes insurance because it is "the form of the relationship and transaction which determine the ultimate relationship here, not the designation given by Altrua." A.R., p. 160 (*See, also*, A.R., p. 191).

The next question relating to this issue turns on whether the Department's decision was arbitrary, capricious, or an abuse of discretion. The Department's actions "are considered arbitrary and capricious if made without a rational basis, or in disregard of the facts and circumstances, or without adequate determining principles." *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 91, 173 P.3d 776, 780 (2007).

While the parties to this action may disagree, upon careful review of the Final Order in this proceeding, it cannot be seriously argued that there is no rational basis for the Hearing Officer's decision or that certain facts and circumstances were simply ignored. The Hearing Officer clearly applied the legal principles of law regarding insurance, indemnification, and underwriting to the Altrua HealthShare contract for membership and determined it is a contract of insurance.

G. Altrua HealthShare's contract for membership is a contract of insurance.

Under Idaho law, the term "insurance" is defined as a "contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies." Idaho Code § 41-102.

To "indemnify" another person means to "restore the victim of a loss, in whole or in part, by payment, repair, or replacement." *Black's Law Dictionary*, 5th Edition, p. 692. In an earlier case, this Court noted that an indemnity is a concept under the common law, where "a person who without fault on his part is compelled to pay damages occasioned by the negligence of another is entitled to indemnity." *Industrial Indemnity Company v. Columbia Basin Steel & Iron Inc.*, 93 Idaho 719, 723, 471 P.2d 574, 578 (1970).

The Altrua HealthShare contract for membership at issue here is a form of disability insurance under Idaho law, which includes “[i]nsurance of human beings against bodily injury, disablement, or death by accident or accidental means, or the expense thereof, or against disablement or expense resulting from sickness, and every insurance appertaining thereto. . .” Idaho Code § 41-503(1). *See, also*, Tr., p. 19, LL. 11-13 (Transcript of Proceedings of September 1, 2010 (A.R., p. 439, *et seq.*)).

If a loss occurs, the insurer indemnifies another person or allows a “specified or ascertainable amount or benefit upon determinable risk contingencies.” Idaho Code § 41-102. In insurance law, the term “risk” is “the danger or hazard of a loss of the property insured; the casualty contemplated in a contract of insurance; the degree of hazard; a specified contingency or peril; . . . [i]n general, the element of uncertainty in an undertaking.” *Black’s Law Dictionary*, 5th Edition, p. 1193.

In the influential 1964 case of *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho 88, 397 P.2d 34 (1964), in deciding that the contract in controversy was not a contract of insurance, this Court ruled that a “contract of [] insurance must contain an element of risk in so far as the particular individual contract is concerned.” *Messerli*, 88 Idaho at 110, 397 P.2d at 49 (quoting *Georgia Funeral Homes v. Harrison*, 183 Georgia 379, 188 S.E. 529 (1936)).

In another Idaho case, this Court noted that “[i]nsurance has been defined as * * * a contract by which one party, for a consideration * * * promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.” *Rungee v. Allied Van Lines, Inc.*, 92 Idaho 718, 721, 449 P.2d 378, 381 (1968) (citing Couch on

Insurance 2d § 1:2 (Anderson ed.1959)).

Another term used in Idaho's statutory definition of insurance at section 41-102, Idaho Code, is "determinable." That term has been defined as "[l]iable to come to an end upon the happening of a certain contingency. Susceptible of being determined, found out, definitely decided upon, or settled." *Black's Law Dictionary*, 5th Edition, p. 405. The word "contingency" is defined as the "[q]uality of being contingent or casual; the possibility of coming to pass; an event which may occur; a possibility, a casualty." *Black's Law Dictionary*, 5th Edition, p. 290.

At hearing, Eileen Mundorff, an expert witness and consumer affairs officer for the Idaho Department of Insurance, noted that the term "determinable risk contingencies" from section 41-102, Idaho Code, as applied to Altrua HealthShare's contract means:

[that the] insurer would have specific eligibility Guidelines, specific underwriting Guidelines, where they would accept eligibility for a person based on those Guidelines. So [Altrua HealthShare is] determining the type of risks [it is] willing to take on in order to provide the coverage under this contract of insurance. There are specific plan benefit levels that are being included and offered through this. There are option benefits that a person could elect to take. There are specific dollar amounts that are payable under those plans. There are negotiations with a preferred provider network where they are willing to take certain dollar amounts in payments for certain treatment. Those would be the type of risks that are determined in advance for any contingency of loss, injury, sickness that would combine to make this a contract of insurance.

Tr., p. 21, LL. 17-25; p. 22, LL. 1-22 (Transcript of Proceedings September 1, 2010 (A.R., p. 439, *et seq.*)). When a person joins Altrua HealthShare, he or she, known as “the membership participant,” (hereinafter “participant”) signs a form entitled “Membership Escrow Instructions.” A.R., p. 20. The instructions direct Altrua HealthShare to hold any monthly contributions paid by the participant in escrow and to pay out in order as directed. A.R., p. 20. The order of payment requires Altrua HealthShare to first “pay the expenses of operating the membership,” then “to pay eligible needs pursuant to the guidelines as modified from time to time by Altrua HealthShare and as interpretes [*sic*] and applied by Altrua HealthShare,” and, in the event of any surplus, such “remaining funds shall be disbursed to qualified charities, as determined by Altrua HealthShare.” A.R., p. 20.

The Guidelines and other program elements, as identified in Eileen Mundorff’s testimony, are set out in the record as follows: the 2007 Guidelines are at A.R., pp. 40-53; the membership eligibility manual is at A.R., pp. 25-34; the “monthly contribution requests” is at A.R., pp. 35-36; the height and weight guidelines are at A.R., pp. 29-30; the membership classifications and specific plan benefit levels (including selected “monthly contribution requests” based on membership benefit levels) are at A.R., p. 31; and the medical review questionnaire of participant is at A.R., pp. 32-34.

As the record reveals, Altrua HealthShare steadfastly denies that its contract for membership is insurance. In addition, Altrua HealthShare consistently avoids the use of the term “insurance” in its documents. *See, generally*, A.R., pp. 16-54 (Application and 2007 Guidelines) and A.R., pp. 298-319 (2010 Guidelines). Yet, “[n]o one can change the nature of insurance by

declaring in the contract that it is not insurance.” *McCarty v. King County Medical Service Corporation*, 26 Wn.2d 660, 684, 175 P.2d 653, 666 (Washington 1946).

This principle was explored by this Court in the case of *Rungee*, 92 Idaho 718, 449 P.2d 378 (1968). In *Rungee*, one issue was “whether there was an insurance contract between the parties in [that] case.” *Rungee*, 92 Idaho at 721, 449 P.2d at 381. The party subject to the inquiry denied that it was an insurance company. Even though the literature in the case “use[d] the term ‘protection’ rather than ‘insurance,’ all of the basic elements of an insurance contract [were] present.” *Rungee*, 92 Idaho at 721, 449 P.2d at 381. The Court noted that upon payment of a “premium” one party agreed to indemnify the other for “loss or damages to his household goods up to their declared value of \$5,000. Thus, there was an insurance contract between the parties [in the Rungee case].” *Rungee*, 92 Idaho at 721, 440 P.2d at 381.

When asked what about the Altrua HealthShare contract makes it an indemnification under section 41-102, Idaho Code, Eileen Mundorff answered:

Because there’s a specific application form, there are underwriting criteria and Guidelines, specific eligibility Guidelines, that would appear to me to be an application where there is a promise on behalf of Altrua HealthShare to promise to pay or indemnify someone for specific causes, for specific reasons; that once someone qualifies to be covered under this product, a person can negotiate specific plan coverages, plan levels. There are option benefits that are available that a person can elect. There are specific dollar limits included in annual limits, lifetime limits. There are exclusions. There is a requirement – a request to use

their preferred provider organization. All of these would combine to be a contract of indemnification to pay specific dollar amounts or benefits based on the covered expenses that are included under this contract.

Tr., p. 20, LL. 21-25; p. 21, LL. 1-16 (Transcript of Proceedings of September 1, 2010 (A.R., p. 439, *et seq.*)). As the foregoing notes with regard to Altrua HealthShare's eligibility requirements, underwriting standards, benefits levels, membership types, optional benefit level, dollar amounts, limitations, pre-notification, and negotiations with "preferred providers," Altrua HealthShare is underwriting and determining the risk of paying the "needs" of its members. A few of the elements of underwriting that Altrua HealthShare uses in determining risks are:

(1) The "Guidelines" is the governing document for determining eligibility of the member participant's medical needs submitted to Altrua HealthShare. *See*, A.R., p. 19 (under paragraph entitled "COMMITMENTS").

(2) The member participant promises to bring no legal claim, demand or suit of any kind for unpaid medical needs; the participant accepts and appoints Altrua as the final authority on the interpretation of the Guidelines and the membership eligibility manual; and the participant also "agree[s] 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, from any failure to follow the guidelines, or from any failure to provide accurate, complete and honest information th [sic] Altrua HealthShare." A.R., p. 19 (last paragraph).

(3) The contributions are first applied to Altrua HealthShare's operating expenses and then to pay eligible needs pursuant to the Guidelines as "modified from time to time by Altrua HealthShare and as interpretes [*sic*] and applied by Altrua HealthShare[.]" A.R., p. 20 (under paragraph entitled "MEMBERSHIP ESCROW INSTRUCTIONS").

(4) Altrua HealthShare declares it is not health insurance but represents itself as a faith-based "membership of individuals who share in each other's medical needs by bearing the burden of others." A.R., pp. 38, 286, and 405.

(5) Altrua HealthShare declares that contributions are placed in an escrow account from which members medical needs are shared according to the Altrua HealthShare documents and "escrow instructions." It also declares that "[t]o date, all eligible medical needs have been shared according to the membership guidelines and escrow instructions." A.R., p. 287.

(6) Altrua HealthShare claims that its members report that eligible medical needs shared by Altrua compare very favorably to their prior medical coverage. A.R., p. 293.

(7) The Altrua HealthShare contract for membership contains forms and terms that have the character of an insurance policy or contract. A "policy" is defined as "the written contract of or written agreement for or effecting insurance, by whatever name called, and includes all clauses, riders, endorsements and

papers which are a part thereof.” Idaho Code § 41-1802. “No . . . disability insurance contract upon an individual . . . shall be made or effectuated unless at the time of the making of the contract the individual insured . . . applies therefor or has consented thereto in writing . . .” Idaho Code § 41-1808. The Altrua HealthShare contract includes:

- a. Medical Application and Medical History and Medical Review Questionnaire. A.R., pp. 16-18; and pp. 32-34.
- b. Application, Acceptance, and Effective Date. A.R., pp. 17-20.
- c. Lifetime limits, annual limits, membership responsibility amounts (MRAs) [deductibles], non-affiliated and affiliated providers, recreational and occupational limits, eligible and non-eligible needs [exclusions], pre-notification, case management, office visit MRAs, appeal procedures, membership categories according to states and levels of benefits, height and weight guidelines, Altrua HealthShare’s final authority to clarify rules of manual and assignment of appropriate codes, etc. A.R., pp. 25-36.

As Eileen Mundorff testified at hearing, the Altrua HealthShare contract sets forth criteria to determine the element of risk, as these are “the type of risks that are determined in advance for any type of contingency of loss, injury, sickness that would combine to make this a contract of insurance.” Tr., p. 22, LL. 19-22 (Transcript of Proceedings September 1, 2010 (A.R., p. 439, *et seq.*)).

“Underwriting is the [] process by which insurance companies determine whether the risk assumed is worth the premium received.” *Vincent v. Safeco Ins. Company of America*, 136 Idaho 107, 109, 29 P.3d 943, 945 (2001). Another informative definition of the term “underwriting” is the “process of examining, accepting, or rejecting insurance risks, and classifying those selected, in order to charge the proper premium for each. The purpose of underwriting is to spread the risk among a pool of insureds in a manner that is equitable for the insured and profitable for the insurer.” *Dictionary of Insurance Terms*, 4th Edition, p. 537 (2000).

As the factors above demonstrate, Altrua HealthShare is engaged in the practice of underwriting. Further, the Altrua HealthShare contract provides that “monthly contributions do not fluctuate from month to month. However, [] subject to review by the [Altrua HealthShare] Board of Trustees, adjustments may be made periodically, usually on an annual basis, to meet the needs of the membership.” A.R., p. 292 (underscore here). These “monthly contributions” are pooled into one escrow account.

At the Department hearing of September 1, 2010, Eileen Mundorff, the expert that testified on behalf of the Department, was asked by opposing counsel to interpret the Altrua contract phrase where it states that an Altrua HealthShare membership provides “an opportunity for you to care for one another in time of need and to present your medical needs to others . . .” Tr. p. 31, LL. 17-22 (Transcript of Proceedings of September 1, 2010 (A.R., p. 439, *et seq.*)). Ms. Mundorff intelligibly responded, “I think it’s interesting phrasing, it is ‘an opportunity for someone to care for another and to present your medical needs to others.’ You’re not presenting them to other members, but to Altrua HealthShare for payment of medical needs.” Tr., p. 31, LL.


23-25; p. 32, LL. 1-4. (Transcript of Proceedings of September 1, 2010 (A.R., p. 439, *et seq.*)) (underscore here). In other words, Altrua HealthShare is pooling contributions into a fund for payment of medical needs in furtherance of its underwriting processes.

IV. CONCLUSION

The Respondents herein ask the Idaho Supreme Court to uphold the ruling of the District Court, thereby upholding the Department's order finding that Altrua HealthShare is in violation of Idaho Code § 41-305(1) by transacting insurance within the state of Idaho without a certificate of authority.

RESPECTFULLY submitted this 25th day of May, 2012.

OFFICE OF ATTORNEY GENERAL

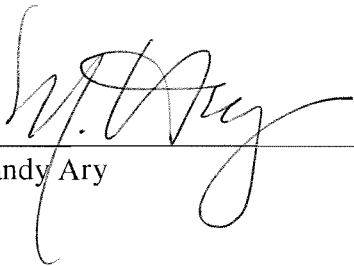
By: 
John C. Keenan,
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of May, 2012, I caused two (2) true and correct copies of the foregoing document to be served upon the following by the designated means:

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Mandy Ary