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

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ARGUMENT

I

THE ALTRUA HEALTHSHARE MEMBERSHIP PLAN DOES NOT TRANSFER ANY RISK OF LOSS TO ALTRUA AND THEREFORE DOES NOT CONSTITUTE A CONTRACT OF INSURANCE.

- A. The Department concedes that the terms of Altrua HealthShare's Membership Plan are 'clear and unambiguous', and that it is not asking this Court to rewrite or reform that contract.**

The Department states in its Brief that "The Department is not asking this Court to rewrite or reform Altrua HealthShare's contract for membership. The terms of the contract for membership are clear and unambiguous..." *Respondent's Brief, p. 6.*

- B. The Department agrees that Idaho's insurance law requires that risk be transferred to the insurer for a membership contract to constitute a contract of insurance and that the Hearing Officer's decision was based on the finding of risk transfer to Altrua.**

The Department contends and the Hearing Officer found that Altrua HealthShare's contract for membership was a contract of insurance. A.R. p. 165 (¶ 32); *Respondent's Brief, p. 6.* Under Idaho law, "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.

It is at least implicit in this definition that both of these statutory criteria require that the risk of loss be shifted to an 'insurer' for the contract to be one of insurance. Either the insurer must indemnify the member for his loss, or the insurer must use its funds to "pay or allow" an amount or benefit upon agreed underwriting standards. The Department agrees that the Hearing Officer's decision in this case was based on his determination that the risk of loss was shifted from members to Altrua HealthShare. The Department's Brief states: "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." *Respondent's Brief*, p. 10. The Department cites the Court's ruling in *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho 88, 397 P.2d 34 (1964) that "a contract of [] insurance must contain an element of risk insofar 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)).

Altrua HealthShare and the Department agree that the one essential component of an insurance contract must be the transfer of the risk of loss from the individual "insured" to the "insurer." That position is also consistent with the holdings of the U.S. Supreme Court cases on this issue. *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); *Group Health & Life Ins. Co. v. Royal Drug, Inc.*, 440 U.S. 205, 212, 99 S.Ct. 1067, 59 L.Ed.2d 261(1979) That is the only issue to be resolved in this case because absent a transfer of risk of loss to the purported 'insurer,' no contract between Altrua HealthShare and its members can constitute a contract of insurance.

C. Altrua HealthShare's Membership Plan is not a contract of insurance because Altrua HealthShare does not assume any risk of loss for its members, nor does it agree to pay or allow their claims with its own funds.

By focusing its argument entirely on the presence of underwriting guidelines in the Altrua Membership Agreement, the Department impermissibly blurs the line that distinguishes all medical expense sharing plans from all health insurance contracts. The fundamental difference between Altrua HealthShare's Membership Plan and a health insurance contract is clear and dispositive: (1) a transfer of risk from an individual member to the group of members, occurs under the Altrua Membership Plan, while (2) a transfer of risk from an individual 'insured', to the 'insurer,' occurs in every health insurance contract.

As noted above, the Department has conceded that Altrua HealthShare's Membership Plan is a clear and unambiguous contract that the Department does not seek to reform or rewrite. It is undisputed that Altrua HealthShare's Membership Plan makes no guarantee of payment of a member's claims. More importantly, the Plan expressly states that Altrua HealthShare will not pay any claims from its own funds. The only promises made by Altrua HealthShare to its members are that it will administer their claims under guidelines to which all of the members have agreed, and will negotiate the resolution of the members' claims, using and dispersing the members' funds to pay those claims. R. Ex. p. 457 - 458; R. Ex. p. 464

The Department has not shown that Altrua assumes any risk of loss under the terms of its membership plan. What the Department argues instead is that Altrua administers an underwriting function through its guidelines. But even if Altrua decides which of its members' claims are eligible for sharing by all of the members, that does not make Altrua an insurer of its members. The essential pre-requisite for Altrua HealthShare's Membership Plan to be held a contract of insurance is Altrua's assumption of the risk of loss of its members. It is undisputed that the members' funds held in escrow by Altrua HealthShare are not the assets of Altrua, but are the property of its members. It is also undisputed that Altrua HealthShare has never used its own funds to pay a member's claim. No evidence was presented that Altrua was ever required or ever offered to use its own assets to pay its member's claims. To the contrary, all of the evidence presented proved that Altrua paid claims from the escrow funds of its members, administered by Altrua for its members. That fact, that it has used its members' funds to faithfully pay member's claims pursuant to its guidelines, supports only one inference, - that Altrua HealthShare has a duty to administer its member's claims pursuant to their agreed guidelines and pay member's

claims with the members' funds. That is also consistent with the express terms of the Altrua HealthShare Membership Plan.

Even though the Department claims that it does not seek reformation or rewriting of " Altrua HealthShare's Membership Agreement, adoption of the Department's position in this case requires this Court to do exactly that. Although Altrua HealthShare has not agreed to accept any risk of loss under its Membership contract, the Department argues that the contract should be interpreted to impose that risk upon it, contrary to its express terms. although Altrua HealthShare's Membership Agreement includes the agreement to escrow member's funds and for Altrua to act as a trustee with respect to those funds. The Department seeks a ruling that Altrua HealthShare's payments from those trust funds are in fact, payments from its own monies, contrary to the express disclaimers in the Altrua HealthShare Membership Agreement, and contrary to the the escrow agreement between Altrua HealthShare and its members. The Department seeks to nullify both of these express contracts.

Finally, while claiming that all it seeks to do is enforce Altrua's Membership contract, the Department in fact seeks to impose a new duty on Altrua HealthShare to indemnify its members with its own funds. That is something that Altrua HealthShare has never agreed to do and has never done -- pay member's claims from its own funds.


The Department's position in this case violates Idaho law on contract interpretation, which requires a court to construe the clear and unambiguous terms of the contract according to its own language. It also conflicts with the precedent established by the U.S. Supreme Court on the essential element of an insurance contract -- transfer of risk to the insurer.

CONCLUSION

Because the clear and unambiguous terms of the Altrua HealthShare Membership Plan do not provide for any transfer of risk of loss to Altrua HealthShare from its members, that Plan is not a contract of insurance, and is not subject to regulation by the Idaho Department of Insurance. The Appellant asks the Idaho Supreme Court to reverse the ruling of the District Court and 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 11th day of June, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2012, I served two (2) copies of the foregoing *Appellant's Reply Brief* by U.S. Mail, first class postage prepaid, addressed to the following persons:

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