

## Opinion No. 71-82

July 8, 1971

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mr. Vicente B. Jasso Deputy Superintendent Department of Insurance P.E.R.A.  
Building Santa Fe, New Mexico

### QUESTIONS

#### FACTS

Various Motor Clubs in New Mexico are providing the following services for their membership:

- A. A \$ 5,000.00 police bail bond when imprisonment is related to an automobile accident.
- B. A \$ 500.00 cash appearance bond needed because of traffic violations.
- C. \$ 500.00 for attorney fees for defense against police charges for moving traffic violations.
- D. \$ 100.00 in attorney fees to enable the member to collect any damages done to his automobile.
- E. \$ 100.00 in attorney fees to enable the member to collect any damages for personal injuries received in traffic accidents.
- F. A \$ 200.00 reward for the return of a member's stolen automobile and the conviction of the thief.
- G. \$ 100.00 in protection against the consequences of lost gasoline credit cards.
- H. Emergency road service for a member's automobile.
- I. Personalized touring and travel service for all members.
- J. Up to \$ 100.00 reimbursement for expenses incurred due to the disability of a member's automobile.

#### QUESTIONS

Do any of the above contractual arrangements between an automobile club and its membership constitute the practice of insurance?

## CONCLUSION

All of the above arrangements except for "I", personalized touring and travel services, constitute the practice of insurance.

## OPINION

### {\*119} ANALYSIS

The statutory definition of insurance in New Mexico is . . . "any form of insurance, bond or indemnity contract the issuance of which is legal in the State of New Mexico." Section 58-1-1, NMSA, 1953 Comp. This definition's only usefulness for the purpose of this opinion is that it appears to express an intent that the term "insurance" not be restrictive.

The most generally accepted definition of insurance is:

". . . an agreement by which one party for consideration promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party has an interest. **Cooley's Briefs on Insurance**, Second Edition. Volume I, page 6 (1927)."

The cases supplementing and explaining this definition require the following elements to be present in all insurance transactions.

Basically the contract has to be for security against a risk of loss. **Metropolitan Police Retiring Association v. Tobriner**, 306 P.2d 775 (1962). It is required that this risk, originally resting with the insured, be shifted and assumed by the insurer. Thus, if the contingency insured against occurs, the loss must fall upon the insurer. See **Metropolitan Police Retiring Association v. Tobriner, supra**; **United States v. Newton Livestock Auction Market, Inc.**, 336 F.2d 673 (1964); and **California Physicians Service v. Garrison**, 172 P.2d 4 (1946).

{\*120} Furthermore, the risk of possible loss must be covered by a general fund consisting of deposits made by persons having similar contractual arrangements with the insurer. **Metropolitan Police Retiring Association v. Tobriner, supra**; **Home Title Insurance Company v. the United States**, 50 F.2d 167 (1931); **Jordan v. Group Health Association**, 107 F.2d 239 (1939).

Finally, upon the happening of the contingency the insured has to be indemnified by the insurer. **Physicians Defense Company v. Cooper**, 199 Fed. 567 (1912); **Physicians Defense Company v. O'Brian**, 11 N.W. 396 (1907); **National Auto Service Corporation v. State**, 55 S.W. 2d 209 (1932); **Allin v. Motorists Alliance of America**; 29 S.W. 2d (1930). The indemnification does not necessarily have to be made directly to the insured. Payments made to third parties whose services are made necessary or at least desirable by the happening of the contingency are held to be indemnifications of the insured because he is spared this expense. See **Physicians Defense Company v.**

**Cooper, supra; Physicians Defense Company v. O'Brian, supra; National Auto Service Corporation v. State, supra; Allin v. Motorists Alliance of America, supra; Arkansas Motor Club, Inc. v. Arkansas Employees Security Division, 373 S.W.2d 404 (1963); and Maloney v. American Independent Medical and Health Association, 259 P.2d 503 (1953).**

The greatest difficulty in this area is determining whether the contract is for indemnification or services. If the contract is for services, then it is not an insurance transaction. The determination of this issue usually hinges on whether the promisor has fully assumed the risk involved and will be financially affected by the happening of the contingency. For example, if the promisor pays one fixed sum to a third party to perform any required services for the promisee, then the occurrence of the contingency produces no immediate financial consequences for the promisor, and he has not assumed risk. **Jordan v. Group Health Association, supra; California Physicians Service v. Garrison, supra.** However, if upon each happening of the contingency, the promisor is required to purchase a service for the promisee, then this is generally held to be an indemnification and not a contract for services. See **Physicians Defense Company v. Cooper, supra; Physicians Defense Company v. O'Brian, supra; National Auto Service Corporation v. State, supra; Allin v. Motorists Alliance of America, supra; Arkansas Motor Club, Inc. v. Arkansas Employees Security Division, supra; and Maloney v. American Independent Medical and Health Association, supra.**

If the promisor or his employees actually perform the required services, then the contract is for services. See **Physicians Defense Company v. Cooper, supra; Maloney v. American Independent Medical and Health Association; supra;** and Opinion of the Attorney General No. 60-58, dated March 28, 1960.

In applying the above analysis to the activities of the automobile clubs we draw the following conclusions:

**A. The \$ 5,000.00 police Bail bond and the \$ 500.00 cash appearance bond:** this is a security against the risk of being required to produce a bail bond or cash appearance bond. The risk is shifted to and assumed by the automobile clubs; If the contingency occurs, the automobile club will be required to produce the bond money. Presumably this risk is covered by a fund consisting of membership dues. Finally, this transaction constitutes an indemnification within the meaning of the above cited cases because the member will not have to incur these expenses. Consequently, this is insurance. See **State v. Bean, 258 N.W. 18 (1934); Arkansas Motor Club, Inc. v. Arkansas Employment Security Division, supra.**

**B. The \$ 500.00 personal legal fee; the \$ 100.00 legal fee for automobile damage; the \$ 100.00 personal injury legal fee; the emergency road service.** These are all instances in which the automobile club pays third parties to render services for the member upon the happening of a contingency. If these third parties are not employees of the club, and are paid for each separate service rendered, then this arrangement

constitutes insurance. The security is against having to incur these expenses. The risk is shifted to and assumed by { \*121 } the automobile club. The risk is probably covered by a fund consisting of membership dues. Finally, this constitutes an indemnification because the member will not have to incur these expenses. See **Physicians Defense Company v. Cooper, supra; Physicians Defense Company v. O'Brian, supra; Allin v. Motorists Alliance of America, supra; and Arkansas Motor Club, Inc. v. Arkansas Employees Security Division, supra.**

**C. \$ 200.00 stolen automobile reward.** It is our opinion that this is an insurance transaction. The risk is that the member's automobile may be stolen and there will be no impetus for private parties to cooperate in apprehending the thief or returning the stolen vehicle. This risk is fully shifted to and assumed by the automobile club and the member is indemnified because he does not have to expend money for a reward.

**D. \$ 100.00 gasoline credit card protection.** This is a very conventional form of insurance. If a credit card is lost or stolen and the owner is financially damaged, he will be directly indemnified up to \$ 100.00

**E. Personalized touring and travel service.** Since this service is probably performed by the employees of the motor club, it does not constitute insurance. Furthermore, this service is apparently available at the request of any member. Thus, no contingency or risk element is involved.

**F. Trip guarantee.** Here, the member is indemnified upon the happening of the contingency, and the risk is shifted to and assumed by the automobile club. Consequently, this is insurance.

By: Oliver E. Payne

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