

Opinion No. 33-569

April 1, 1933

BY: QUINCY D. ADAMS, Asst. Attorney General

TO: Mr. Alfonso Aguilar, Superintendent of Insurance, Santa Fe, New Mexico.

{*33} This is in reply to your letter of March 30, 1933, in which you enclose a letter from Mr. John F. Simms of Albuquerque. I have read Mr. Simms' letter carefully and believe that I understand in general the plan which he has in mind. It is proposed to organize a company in the nature of a Mutual Benefit Society. Members will be charged a certain annual due or fee, for which they will be entitled to hospital service, nursing care, etc.

So far as I am able to determine, there has been no decision of the New Mexico Supreme Court which is of any assistance in deciding whether or not this kind of a business constitutes an insurance business within the meaning of our law regarding such business. Section 71-101 of the 1929 Code defines "insurance" as follows:

"The word 'insurance' shall be held to mean any form of insurance, bond or indemnity contract the issuance of which is legal in the State of New Mexico; * * *"

A study of the general law and the decisions of other states discloses a wide variety of opinion on the question of whether or not mutual companies and benefit associations constitute insurance companies. See Couch's Cyclopedia of Insurance Law Vol. I, Sec. 253, et seq. However, it is said by Mr. Couch in Sec. 253, Vol. I of his Cyc. of Ins. Law that "in the absence of statutory influence, the general test is What is the real purpose and nature of the society? and if the prevalent purpose is to make contracts which are in effect contracts of 'insurance' within the general accepted meaning of that word they are insurance companies."

It has been held that certificates of membership issued by mutual benefit societies may under certain conditions constitute contracts of insurance. *Williams v. Supreme Conclave Improved Order of Heptasophs*, 90 SE 888, 172 N. C. 787. It has also been held that it is the business which the company is engaged in rather than the mere form of the organization which determines whether a particular company is a benefit society or an insurance company, so as to come within a statute applying to insurance companies.

It would, therefore, seem to me that the test to be applied in the case mentioned by Mr. Simms is, Does the certificate of membership or other contract which it is proposed to issue constitute a contract of insurance or indemnity within the meaning of our statute? I cannot answer this question without having a copy of the proposed certificate or contract before me.

As I have pointed out, the courts are not wholly in accord upon the question involved in this discussion. Many decisions are affected by local statutes. Our statutes are not particularly helpful in this regard. However in the absence of special statutory authorization I am of the opinion that a company which sells any "form of insurance, bond or indemnity contract" in this state, regardless of the nature of its organization or its manner of doing business, is subject to the supervision of the Insurance Commissioner, and must {^{*}34} comply with the insurance laws of this state.