OPINION NO. 72-034

Syllabus:

If a corporation enters into a contract with employers to furnish professional dental services to employees on a group basis for a fee to be paid by the employers, the amount of the fee being calculated to enable the corporation to furnish the services and still create a satisfactory rate of return for its shareholders, such corporation will be entering into a contract substantially amounting to insurance, as contemplated in Section 3905.42, Revised Code.

To: Kenneth E. DeShetler, Insurance Supt., Dept. of Insurance, Columbus, Ohio
By: William J. Brown, Attorney General, May 5, 1972

I am in receipt of your request for my opinion, which reads as follows:

> "A corporation organized for profit under Chapter 1701 of the Ohio Revised Code intends to contract with employers to furnish professional dental services to employees on a group basis. The services will be provided by dentists, dental hygienists, and technicians who are salaried employees of the corporation.
>
> "The corporation will charge a fee which will entitle employees who are members of the group to the services offered under the contract. The fee will be payable in whole or in part in monthly installments by the employer for the duration of the contract. The amount of the fee to be charged will be calculated by the corporation so that sufficient revenue is collected to enable the corporation to furnish all services and to create a satisfactory rate of return for its shareholders.
>
> "The following services will be available under the contract:
>
> "1. Diagnostic and preventive procedures.
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> "2. Extractions and other oral surgical procedures, including pre- and post-operative care.
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> "3. Pulpal therapy and root canal filling.
>
> "4. Construction, placement, insertion or repair of bridges, etc.
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> "Orthodontics and periodontics are temporarily not included services.

"The following services will not be available:

"1. Services ordinarily provided under existing medical and hospitalization insurance benefits.

"2. Services to which the employee may be entitled under Workmen's Compensation or Employer's Liability laws.

"3. Services provided by an agency or facility of the Federal, State, or Local Government.

"4. Dentistry that is considered to be for appearance only.

"5. Any condition, disease, ailment, injury, or diagnostic service to the extent that benefits are provided or would have been provided had the patient enrolled, applied, or maintained eligibility for such benefits under Title XVIII of the Social Security Act, including amendments thereto.

"The utilization of the services provided by the contract will not be contingent upon the occurrence of an accident nor upon the development of a dental problem. Utilization will be solely dependent upon the request of the employee from the day such employee becomes an eligible member of the group, and the services provided by the contract will be available regardless of preexisting dental conditions.

"If this corporation proceeds as outlined above, would it be engaging either directly or indirectly in this State in the business of insurance, or entering into any contracts substantially amounting to insurance, or in any manner aiding therein, or engaging in the business of guaranteeing against liability, loss, or damage, as contemplated in Section 3905.42 of the Ohio Revised Code?"

The statute to which you refer, Section 3905.42, Revised Code, provides as follows:

"No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss, or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

One of my predecessors, in Opinion No. 1039, Opinions of the Attorney General for 1946, held that a contract to provide veterin-

ary services in return for a premium was a contract of insurance under Section 665, General Code, which is identical to Section 3905.42, supra. While that Opinion is not controlling here because of some differences in the fact situations, the two tests used by my predecessor to determine whether a contract of insurance existed are equally valid here.

The first test was promulgated by The Supreme Court in State, ex rel. Duffy v. Western Auto Supply Co., 134 Ohio St. 163 (1938), when it defined insurance as follows (at pp. 168, 169):

> "* * * 'Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. As regards property and liability insurance, it is a contract by which one party promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specified cause, or to guarantee or indemnify or secure him against loss from that cuase.'
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> "* * * * * * * * *
>
> "It seems well settled that to constitute insurance the promise need not be one for the payment of money, but may be its equivalent or some act of value to the insured upon the injury or destruction of the specified property."

Applying this test to the facts in this case, we find that there is a contract by which the corporation, for a fee or premium, assumes the risk that the employees of member employers will require certain dental services, and promises to provide such services when they are required. This contract falls squarely within the terms of the first test.

The second test is set out in Vance on Insurance (third edition, 1951) at page 2. The five elements which distinguish insurance from other contracts are stated there as follows:

> "(a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
>
> "(b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.
>
> "(c) The insurer assumes that risk of loss.
>
> "(d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing similar risks.
>
> "(e) As consideration for the insurer's promise, the insured makes a ratable contribution to a general insurance fund, called a premium."

All of these elements are present in this case. Each of the insured employees has an insurable interest, namely, his teeth. Each employee would be subject to a risk of loss by the occurrence of dental problems which may cause the destruction of his teeth. This risk is assumed by the corporation, under what appears to be a general scheme to distribute actual losses among many employers who are paying premiums on behalf of their employees. In return for this assumption of risk, the employers pay premiums into a general fund from which the amount of the actual losses will be paid. The fact that the premiums in this case are paid on behalf of the insured employees is not a sufficiently significant variance to disqualify this case under the second test. Therefore all of the elements of the second test are present in the contract with which you are concerned.

I fail to see that the contract in this case becomes less than a contract of insurance because it fails to include the usual exclusion of pre-existing dental conditions fror coverage. Such exclusion is a matter between the contracting parties, and its omission is by no means unknown. 30 O. Jur. 2d 521. At any rate, it is obvious that a large element of risk will be assumed by the insurer.

In specific answer to your question it is my opinion, and you are so advised, that if a corporation enters into a contract with employers to furnish professional dental services to employees on a group basis for a fee to be paid by the employers, the amount of the fee being calculated to enable the corporation to furnish the services and still create a satisfactory rate of return for its shareholders, such corporation will be entering into a contract substantially amounting to insurance, as contemplated in Section 3905.42, Revised Code.