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## INSURANCE—WHERE BARGAINING AUTHORITY OF LOCAL UNIONS ENTERS INTO CONTRACT WITH EMPLOYERS AS TO HOURS, WAGES AND WORKING CONDITIONS—EMPLOYERS TO CONTRIBUTE 4% OF WEEKLY PAYROLL INTO "THE HEALTH INSURANCE FUND"—CERTAIN DESIGNATED BENEFITS—EMPLOYES DO NOT CONTRIBUTE TO FUND—TRANSACTIONS DO NOT AMOUNT TO ENGAGING IN INSURANCE BUSINESS.

SYLLABUS:

Where the bargaining authority of a number of local unions enters into a contract with various employers employing members of the union governing hours, wages and working conditions, and also providing that the employers contribute an amount equal to 4% of the weekly payroll of all workers into a fund known as "The Health Insurance Fund" for the benefit of the members and for the following objectives: (1) the establishment of a sick benefit fund; (2) the establishment of a plan to secure medical advice; (3) the distribution of funds as a contribution toward vacation benefits; and (4) some plan of group insurance, and also providing that the management and ownership of the fund are to be in a Board of Trustees appointed by the union and the employers and where the employes make no contributions to the fund, said transaction does not amount to engaging in an insurance business.

Columbus, Ohio, July 26, 1946

Hon. Walter Dressel, Superintendent of Insurance
Columbus, Ohio

Dear Sir:

I am in receipt of your letter requesting my opinion as to whether the facts set forth therein amount to engaging in the business of insurance. Since the request and accompanying material are rather lengthy and it would serve no useful purpose to set them out in detail, I desire to summarize briefly the statement of facts presented, as follows:

The International .....Union is a labor union with its principal office in New York City, with five local unions in ....., Ohio. Each of the local unions appoints a delegate; these five delegates make up the.....Joint Board, which board is the supreme authority in....., Ohio, but subordinate to the International.....Union. The ..... Joint Board, in the interest of the five local unions, entered into a contract with the .....Manufacturers Association and other individual companies employing members of the union, governing hours, wages and working conditions and also providing that the employers contribute an amount equal to 4% of the weekly payroll of all workers into a fund known as the "..... Industry Health Insurance Fund" for the benefit of the members and for the following objectives: (1) the establishment of a sick benefit fund; (2) establishment of a plan to secure medical advice; (3) the distribution of funds as a contribution toward vacation benefits; and (4) some plan of group insurance.

This contract also provided that the management and ownership of the fund are to be in a Board of Trustees appointed by the employers and by the union. Under this contract the employer is to give up all title to the fund and the employe members of the union have no interest in the fund, except as may be provided by the by-laws adopted by the board of trustees. The membership in the union is to be determined by the union. However, the recipients of the benefits are to be determined by the Board of Trustees from this membership so determined.

The statutes of Ohio do not define the term "insurance." However, Section 665, General Code, provides in part 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. * * *"

Where there is no statutory definition of the term "insurance," the term must be applied as generally understood in the law of the state. Appleman on Insurance, Vol. 12, Section 7001.

With reference to various factual situations, the Supreme Court of Ohio has given several definitions of insurance, but has in no instance given what could be considered as an "all-inclusive" one.

In Ohio Farmers Insurance Co. v. Cochran, 104 O. S. 427, insurance is defined as follows:

> "An insurance policy is a contract between the insured and the insurer, whereby for an agreed premium one party undertakes to compensate the other for loss on a specified subject by specified perils."

And in State, ex rel. Duffy v. Western Auto Supply Co., 134 O. S. 163, insurance is defined as follows:

> "Insurance, as related to property and liability, is a contract by which one party promises, upon 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 cause."

In State, ex rel. Herbert v. Standard Oil Co., 138 O. S. 376, the following definition was given:

> "Insurance, in the common acceptance of the term, is a contract whereby a promisor, for a consideration usually called a premium, becomes bound to indemnify or compensate the promisee or to one designated by him, for loss or damage from stated causes in a definite or ascertainable amount."

In Cleveland Hospital Service Association v. Ebright, 142 O. S. 51, the Supreme Court approved the definitions of insurance previously quoted herein, stating the law as follows:

> "A corporation organized under the provisions of Sections 669 to 669-13, inclusive, General Code, for the purpose of establishing, maintaining and operating a nonprofit hospital service plan whereby hospital care may be provided by a nonprofit hospital or a group of such hospitals, is engaged in a business substantially amounting to insurance."

A much more comprehensive definition of the term "insurance," and one that seems to be consistent with the expressions of our Supreme Court above quoted, is found in Vance—The Law of Insurance, Second Edition, Chapter 1, page 2, as follows:

> "3. The contract of insurance, made between parties called the insured and the insurer, is distinguished by the presence of five elements:
>
> (a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
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> (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.
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> A contract possessing only the three elements first named is a risk-shifting device, but not a contract of insurance, which is a risk-distributing device; but, if it possesses the other two as well, it is a contract of insurance, whatever be its name or its form."

Considering the contract mentioned in your letter, it is to be noted that we do have a contract entered into between the employer on one side and the.....Joint Board of the..... Workers Union, which contract is obviously for the benefit of the per-

sonnel comprising the five local unions in....., Ohio, which personnel, it should be added, is an ever-changing one; this contract also provides for the appointment of a Board of Trustees to carry out the general objectives expressed in the contract, which Board shall administer the fund "and for this purpose shall draw up a set of rules and regulations governing the fund."

Let us now proceed to test this contract to see if it contains the five necessary elements, as quoted in the above definition from Vance on Insurance.

> "(a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest."

If we say that the various employe members of the union are the insured individuals, then it is not difficult to find an insurable interest susceptible of pecuniary estimation such as income, medical benefits and in continuing to live.

> "(b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils."

The insured employes are subject to a risk of loss through the destruction or impairment of earnings through accident, sickness, the payment of medical bills and their dependents suffer through the loss of lives. The plan of distribution of the fund as to details and amounts are subject to control of the Board of Trustees and are not completely worked out in the contract.

> "(c) The insurer assumes that risk of loss."

Who is the insurer? Not the employer, for the contributions, when they leave his hands, are gone. He has no further control over them and he assumes no risk of loss. Not the board of Trustees, for it has not obligated itself to pay anyone a sum certain on the happening of any event. When the members of the Board of Trustees accept their appointment as trustees they are bound, under the terms of the contract, but are only bound to the beneficiaries after they have selected the recipients of

the fund and then according to the plan of administration which they have adopted, which plan can be altered according to the Board's ideas.

> "(d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing similar risks."

There is no plan of loss distribution or sharing between the insureds. Such employes make no contribution in money, nor do they give up any rights. The plan, at best, calls only for loss shifting from the employes to the employers who, in turn, shift such loss to the consuming public. This distinction should be kept clearly in mind.

> "(e) As consideration for the insurer's promise, the insured makes a ratable contribution to a general insurance fund, called a premium."

The insured (employe) makes no ratable contribution to a fund; he pays no premium.

Assuming that we could find an insured possessing an insurable interest, a risk of loss, a destruction or impairment of the insurable interest by the happening of designated perils, and also find an insurer who assumes that risk of loss, there are still two essential elements lacking to make the contract one of insurance, namely, loss distribution among a group of persons bearing similar risks and a ratable contribution by this group of persons.

It would seem that the contract is not one of insurance, but rather is one which, among other things, provides for the establishment of a trust, the employer agreeing to contribute a sum of money equal to 4% of wages paid to a Board of Trustees which Board, on the receipt of the money, becomes the legal owner of the same, at which time all interest of the employer to the fund ceases and the Board becomes obligated to carry out the terms of the trust to accomplish the general objectives mentioned in the contract but having the right to administer the trust according to a plan worked out by their own by-laws.

I have reached the above conclusion without relying upon the case of State, ex rel. v. Pittsburg, Cincinnati, Chicago & St. Louis Railway Co., 68 O. S. 9, although that decision also supports my conclusion. The

facts in that case are well set out in part one of the syllabus, which reads as follows:

> "An association established by a railway company, composed of some or all of its employes and the company, for the purpose of accumulating and maintaining a relief fund created by the voluntary contributions from their wages by employes who apply for membership in said fund and are admitted, the railway company to take charge of and be responsible for the funds, make up deficiencies in the same, supply facilities for conducting the business and pay the operating expenses, supply surgical attendance for injuries received in its service, and to pay the members or their designated beneficiaries the stated share of the benefit fund so raised from wages retained by the company, is not an insurance company or association; and in agreeing to perform, and in performing each and all of said acts, such railway company is not engaged in the transaction of insurance business."

The facts in the above case, if tested by the definition of insurance which I have heretofore given and adopted, would clearly place the transaction within the business of insurance. However, as above noted, our Supreme Court said that the railroad company was not engaged in the transaction of insurance business. Just on what principle this conclusion was reached is not entirely clear. Beginning at page 33, the court said:

> "Is this an insurance business? It is not held out to be such. The objects stated in the organization and regulations are clearly otherwise. Neither the railway company nor its relief department advertises for, or in any other way solicits patronage. The members of the fund are volunteers.
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> The business transacted, while in part done by an officer of the company, aided by representatives of the members, is not mingled with the business and accounts of the railway company. It has no offices set apart for an insurance business, and has no agents to promote its interests. It does not undertake to insure or indemnify against either sickness, accident, or death. Such is not the language or spirit of the relation between the member and the fund. On the contrary, in case of sickness or injury, the members may draw from the relief fund what they mutually have created from a portion of their wages retained for that purpose, and the payment of the benefit, is not the payment of a loss on a risk named in a policy or other instrument of insurance.
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> This differs from an insurance business as commonly, and we might say, universally conducted. It is organized on an insur-

> ance basis; advertised as such. It needs and uses agents to represent it, and it solicits from the general public. It has offices and current expenses, etc., and to protect the public, insurance laws have been enacted requiring publicity of its resources and methods of business, and in most cases periodical sworn statements of the condition and extent of the business being transacted. All this to prevent imposition upon the public, which might be misled by the representations of agents, or by published inducements for patronage. Another marked distinction between the relief department and insurance business is, that there is no profit to the railway company, and no profit, in the business or commercial sense, to the members of the fund, except such increase of the fund as may arise by way of interest on its investment, in case of a surplus. Those who organize or embark in insurance business have profit in view as a recompense for the industry, ability and capital invested, and it would be a strange insurance business that would omit this great incentive from its plans and purposes."

It is submitted that the above mentioned differences do not mark the boundary between the business of insurance and non-insurance business under modern concepts of insurance. These types of transactions have been held not to be insurance, rightly or wrongly, under the theory that a "contract made for a general purpose other than insurance may contain an incidental provision by which, under certain contingencies, an added benefit may accrue to one of the parties, will not be held to make it a contract of insurance, and subject to the statutory requirements for such contracts. Thus it is generally held that the relief departments of railroads, through which certain payments are made from a fund made up by contributions of the company and employee members, to members or their dependents, in case of death, injury, or sickness, are not within the insurance laws." See Vance on Insurance, Second Edition, page 61.

It would seem though that if the plan in the above railroad case, where the employes do distribute the risks among themselves by making ratable contributions to the fund, is not the business of insurance, then a fortiori, the plan under consideration where the employer makes the entire contribution is not an insurance business.

I am, therefore, of the opinion that where the bargaining authority of a number of local unions enters into a contract with various employers employing members of the union governing hours, wages and working

conditions, and also providing that the employers contribute an amount equal to 4% of the weekly payroll of all workers into a fund known as "The Health Insurance Fund" for the benefit of the members and for the following objectives: :(1) the establishment of a sick benefit fund; (2) the establishment of a plan to secure medical advice; (3) the distribution of funds as a contribution toward vacation benefits; and (4) some plan of group insurance, and also providing that the management and ownership of the fund are to be in a Board of Trustees appointed by the union and the employers and where the employes make no contributions to the fund, said transaction does not amount to engaging in an insurance business.

Respectfully,

HUGH S. JENKINS,
Attorney General