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JOHN PRESTON CREER, DAVID F. EVANS; Attorneys for Plaintiff-Appellant;WILLIAM G. GIBBS; Attorney for Defendant-Respondent;

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

PREPAID DENTAL SERVICES, INC., a Utah corporation,

Plaintiff-Appellant,

vs.

ROGER C. DAY, Commissioner of Insurance of the State of Utah,

Defendant-Respondent.

Case No. 16826

BRIEF OF APPELLANT

AN APPEAL FROM THE DECISION
AND ORDER OF
THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE DEAN E. CONDER, JUDGE, PRESIDING

JOHN PRESTON CREER
DAVID F. EVANS
SENIOR & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellant

WILLIAM G. GIBBS
351 South State Street
Salt Lake City, Utah 84111
Attorney for Defendant-Respondent

FILED

FEB 15 1980

Clerk, Supreme Court, Utah

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vs.	:	
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JOHN PRESTON CREER
DAVID F. EVANS
SENIOR & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellant

WILLIAM G. GIBBS
351 South State Street
Salt Lake City, Utah 84111
Attorney for Defendant-Respondent

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Attorney General's Opinions

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I.

NATURE OF THE CASE

In this case, Prepaid Dental Services, Inc., Appellant herein, petitioned the court below for a Declaratory Judgment declaring that the Findings and Order of Roger C. Day, Commissioner of Insurance of the State of Utah, herein Respondent, were inconsistent with the definition of "Insurance" set forth in Section 31-1-7 of the Utah Code Annotated (1953) and the definition of a "Health Maintenance Organization" within the provisions of Title 31, Chapter 42, Utah Code Annotated (1953).

II.

DISPOSITION OF THE CASE IN THE LOWER COURT

The court below issued a Memorandum Opinion which sustained the Findings and Order of the Insurance Department and dismissed Appellant's Petition.

III.

NATURE OF RELIEF SOUGHT ON APPEAL

The Appellant seeks a reversal of the decision by the lower court which sustained the Findings and Order of the Insurance Commissioner, together with a Declaration by the court that the Appellant's proposed plan constitutes neither Insurance within the meaning of Utah Code Annotated Section 31-1-7 or a Health Maintenance Organization within the meaning of Title 31, Chapter 42 of the Utah Code Annotated (1953).

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IV.

STATEMENT OF FACTS

The Appellant and Respondent have stipulated to the following facts:

1. Appellant is a Utah corporation in good standing.

2. Respondent is the Commissioner of Insurance of the State of Utah.

3. The Respondent issued Findings and Order dated August 8, 1979, regarding the proposed operations of Appellant stating in effect that the plan proposed by Appellant constitutes "insurance" within the definition set forth in Section 31-1-7, Utah Code Annotated (1953), and that the proposed operations of Appellant also fall within the definition of a "Health, Maintenance Organization" within the provisions of Title 31, Chapter 42, Utah Code Annotated (1953).

4. Appellant has not commenced to do business within the State of Utah.

5. The business operations which Appellant desires to carry on within the State of Utah are as follows:

a. Appellant would contract with employers to arrange for specific dental services to be provided to the employer's employees (hereinafter "Participants") on a prepaid basis.

b. Appellant would contract with dentists licensed to practice dentistry in Utah to perform the specific dental services listed in the Dental Group Agreement, annexed hereto

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as Exhibit "A", at no charge to the Participants other than the fixed monthly charge set forth in the Dental Group Agreement.

c. The Dental Health Care Plan would operate on a system where the Participants would be required to have the Available Dental Services and Co-Payment Services provided by Specific Dentists rather than by a dentist chosen by the Participant.

d. The documents attached hereto as Exhibits "A", "B" and "C", and entitled, respectively, "Dental Group Agreement", "Employer Group Agreement" and "Master Contract", are the legal documents that would govern the operation of Appellant's dental health care plan and set forth the rights and obligations of the parties involved. [Copies of Exhibits "A", "B", and "C" are found in the record at page 73, 90, 93, respectively.]

6. Appellant does not provide "basic health care services" as defined under Section 31-42-3(6), Utah Code Annotated (1953). Under this definition the organization is required to provide as a minimum, emergency care, in-patient hospital and physician care, out-patient medical services, and out-of-area coverage.

7. According to the Order issued by Respondent, Appellant is enjoined from operating its proposed dental health care plan without a Certificate of Authority from the Utah Insurance Department and would have to expand its proposed services offered to include "basic health care services" as defined

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in the proceeding paragraphs to be eligible to qualify for licensing as a Health Maintenance Organization.

The court, after receiving memoranda from both Appellant and Respondent and after hearing the argument of counsel, issued its Memorandum Opinion without taking additional evidence. The court below sustained the Findings and Order of the Respondent and held that the substance of the transaction proposed by Appellant is an insurance transaction and is thereby covered by Title 31 of the Utah Code Annotated. Specifically, the court found that there was both a distribution of risk and assumption of that risk under the Dental Group Agreement and the performance bond, holding that "Participants are third party beneficiaries of that contract."

It is Appellant's contention as set out below that the Finding by the court that there is an assumption of the risk by Prepaid Dental Services, Inc. is without foundation in the evidence and is, as a matter of law, erroneous. It is further Appellant's contention that Appellant's proposed plan does not subject it to regulation as a Health Maintenance Organization or in any other way subject it to regulation under the Insurance Code of the State of Utah. As such, Appellant respectfully requests the court for an Order reversing the trial court's determination that Appellant's proposed plan constitutes "Insurance", together with an Order allowing Appellant to conduct business, without further interference from Respondent.

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ARGUMENT

POINT I

THE PLAN PROPOSED BY PDS IS NOT INSURANCE

Section 31-1-7, Utah Code Annotated (1953) defines "insurance" as follows:

> Insurance is a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies.

Justice Crockett, in his concurring opinion in In Re Clark's Estate, 10 Utah 2d 427, 354 P.2d 112 (1960), and which opinion was expressly approved of and adopted by the court in Utah Funeral Directors and Embalmers Association v. Memorial Gardens of the Valley, 17 Utah 2d 227, 408 P.2d 190 (1965), set forth the basic elements of a contract of insurance:

> "Insurance" is an agreement that, for a premium it receives, the insurer will pay to a beneficiary a stated sum upon the happening of a contingency such as death, or other loss. It involves risk on the part of the insurer to pay on the happening of the contingency and a spreading of the risk over the group who pay the premiums. Or, as sometimes stated, insurance involves risk-shifting and risk-distributing. Id. at 119.

Central to the concept of insurance is indemnification, or assumption of the risk by the insurer, or as stated by Justice Crockett in "risk-shifting" from the insured to the insurer.

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Relevant case law from other jurisdictions concures in this concept and holds that even where there is a distribution of the risk over a larger group but no assumption of that risk by a party, that party is not an insurer. Thus the United States Court of Appeals for the District of Columbia in Jordan v. Group Health Association, 107 F. 2d 239 (1939), a case with facts very similar to those in the present case, stated:

> Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated concepts of insurance and indemnity require these elements. Hazard is essential and equally so a shifting of its incidence. If there is no risk, or there being one it is not shifted to another or others, there can be neither insurance nor indemnity. Insurance also, by the better view, involves a distribution of the risk, but distribution without assumption hardly can be held to be insurance. These are elemental concepts and controlling ones. Id. at 245 (emphasis added)

Assumption of the risk from the insured to the insurer is a critical factor that must be present before a contract can be deemed to be "insurance".

Under the plan proposed by PDS there is a risk. That risk is that any individual Participant will have need of the specific dental services enumerated in the Dental Group Agreement. It can be argued that there is a distribution of this risk among the several Participants who share the same risk; however, a more accurate description would be the joining

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together of a number of persons who will need dental care in order to obtain a discount price for such dental care. But assuming, arguendo, that there is a distribution of risk under the Prepaid Dental Plan, the basic insurance equation fails in that PDS does not assume that risk.

Section 2.02 of the Master Contract, Record P. 99, clearly states that PDS' obligation to the Participant is not to indemnify him for any dental loss he might suffer, but to "use its best efforts to obtain the services of qualified, licensed professionals and their staffs to provide and perform the applicable available dental services to eligible participants." Once PDS has used its best efforts to arrange for the specific dental services to be performed, it has fulfulled its contractual obligation to the Participant. Under Section 5.03 of the Master Contract, Record P. 106-107, if PDS is unable, by using its best efforts, to obtain the services of professionals and their staffs to render the specified dental services to the Employer Group for a period of 30 days after the date upon which such services first became unavailable, the contract between PDS and the Employer Group terminates without further obligation of any of the parties to the other.

A simple way to demonstrate the absence of an assumption of the risk by PDS is to examine the hypothetical situation under PDS' plan in which PDS has arranged for a Dental Group to perform the dental services, but the Participant is unable to obtain the dental services from the

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Dental Group, and PDS, after using its best efferts is unable to arrange for a substitute Dental Group to provide the services for a period exceeding 30 days. If, in this situation, the Partcipant could hold PDS liable, then there would have been an assumption of the risk by PDS. Clearly this is not the case, as PDS would be liable to the participant only if it had failed to use its best efforts to arrange for a Dental Group to provide the services.

Not only does PDS not assume the risk but neither has the Dental Group assumed the risk. Under the provisions of Article XII of the Dental Group Agreement, Record P. 79, between PDS and the Dental Group, the Dental Group must provide a performance bond in an amount equal to the estimated annual payment due from each Employer Group. The terms of such performance bond provide that in the event the Dental Group fails for any reason to perform the required services the bonding company will pay such other licensed dentist as may be designated by the Participant to perform the specific dental services described in the Dental Group Agreement. Thus, if the Dental Group failed for any reason to perform any of the specified dental services the Participant would rely on the performance bond to have those services performed by another dentist of his choice.

The bond which is required of the Dental Group is not, as suggested in the court's opinion below, a factor which lends weight to the proposition that PDS' plan is one of insurance.

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Rather, the insurance company or other entity which issues the performance bond to the Dental Group, insuring the Dental Group's performance is already licensed and regulated. The risk is assumed by the Dental Group's performance bond not by PDS.

It is noted that the services provided by PDS are offered only to select employer groups and not the public at large. There is considerably more protection in a program only offered to employee groups who are better able to determine the adequacey of the plan than might an individual member of the public.

Clearly PDS' contractual obligation to "use its best efforts" to obtain licensed professionals to perform the dental services does not make it an insurer under the Utah statute. Section 31-1-7, Utah Code Annotated (1953) provides, in pertinent part:

> Insurance is a contract whereby one undertakes to...allow a...benefit upon determinable risk contingencies.

PDS' use of "best efforts" is not a benefit it undertakes to allow upon determinable risk contingencies. It is a contractual obligation which PDS undertakes to perform whether or not the Participant ever has need of any of the dental services. PDS' obligation to arrange for dental groups to provide dental services is the same whether any one participant ever has need for the dental services. PDS' obligation is a contractual obligation that is in no way based upon a possibility that any one participant or group of participants

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could have a serious dental problem above and beyond the routine servies PDS has arranged for. In any event PDS is not liable to perform the services or pay for them if they are not performed. Thus PDS' obligations are not based upon "determinable risk contingencies."

To hold under these Facts that the contractual obligation to use one's best efforts was contemplated under the Utah insurance statute would be to, potentially, transform all service contracts, and indeed all contracts, into insurance contracts. By way of example, a law firm which works on a retainer basis has never been considered to be an insurer that all the demands made by the retainer will be met or that they will be met timely. However, as PDS has contracted to use its best efforts to arrange for dental services on a prepaid basis, so the law firm may contract to use its best efforts to provide legal services on a prepaid basis. Neither is a guarantor or an insurer. Best efforts is all professionals can deliver.

In his Findings and Order issued August 8, 1979, the Commissioner found that if PDS' obligation to use its "best efforts" was not an assumption of the risk, it would be a meaningless consideration and the proposed plan could be a fraud. Addressing this issue, the court in Jordan, supra, stated:

> Group Health assumes no liability, if for any reason it becomes unable to procure any or all such services when called upon to do so, or to indemnify

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> the member for failure of the physician to keep his arrangement or perform it properly, and its only obligation in such a case is "to use its best efforts to procure the needed services from another source. . . ."
>
> Tenuous the obligation may be, but that does not render it illegal, or make it a contract of insurance or one of indemnity. Correlatively tenuous is the member's responsibility to Group Health. Id. at 244 (emphasis is the courts).

Under a best efforts contract, PDS has real and substantial obligations, which are not illusory nor are they, on the other hand, an assumption of the risk of providing the enumerated dental services for the Participants. In Blore v. Falstaff Brewing Corporation, 454 F.Supp. 258 (S.D.N.Y. 1978), the court had occasion to construe a best efforts contract. The court stated that "'[b]est efforts' is a term which necessarily takes its meaning from circumstances" and that the "parties' capability" who contracted to use its best efforts must be determined to see if it fulfilled its contractual obligation under the contract The court concluded that the best efforts contract obligated the promissor to act "in good faith and to the extent of its own total capabilities...." Id . at 267.

In Group Health Association v. Sheppard, 37 A.2d 749 (Mun. Ct. of App. for D.C. 1944), the court held that "inability is far different than refusal" in declaring that the Group Health Association would not be liable "for a mere inability to profect the member" under a best efforts obligation.

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Blore v. Falstaff Brewing Corporation, supra, and Group Health clearly demonstrate the parameters of the oglibation PDS has taken upon itself when it contracted to "use its best efforts" to obtain licensed professionals to perform the dental services mentioned in the contracts. Best efforts is not an illusory obligation but extends to the total capabilities of PDS. Clearly, this is a valid consideration to support a contract. It is also clearly not the obligation to procure the services in the event it is unable after using its best efforts to obtain those services. In the event it is unable to procure the described dental services for the Participants after having used its best efforts, PDS has no further obligation to Participant. PDS would, as in Group Health, be liable to a Participant in the event it refused or failed to use its best efforts. However, as the court stated in Group Health, an "inability is far different than refusal." It is also far different from the duty to procure services under any circumstances as has been claimed by Respondent.

What PDS offers to the Participant is a contract for services rather than a contract for insurance. A prepaid services plan identical in all material respects to that proposed by PDS was held not to be insurance in Fishback v. Universal Service Agency, 151 P. 768 (Wash. 1915), the court finding that:

> ...[I]t seems to be wanting in the principal essential necessary to make it an insurance contract. Clearly there is no hazard or peril whereby the

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> purchasers of these contracts may suffer loss or injury, which the respondent insures against. It does not guarantee that any of the contracting parties, even the physician, will perform the services agreed upon. On the contrary, in the paragraph lettered "V" of its offer of benefits it expressly declares that it "assumes no liability for the breach of any one or all of such contracts." It is true that it does say in the same paragraph that in the event of a breach of the agreement by the dealers or physician it will use its best efforts to procure other persons or firms to offer the same or a similar service. But this, while it may require the respondent to use reasonable diligence to procure another person to perform the services in case the contracting party for any reason fails therein, and may render it liable to the contract holder in damages if it should fail to exercise such diligence, it is in no sense a guarantor or an insurer that the service will be performed. There is therefore, as we see it, no hazard or peril insured against, and, the transaction being lacking in this essential element, it is not an engaging in the insurance business. Id. at 772. (Emphasis added.)

Virtually every other case which has dealt with prepaid services organizations has held that such plans do not constitute insurance. See Jordan v. Group Health Association, supra; California Physicians' Service v. Garrison, 172 P.2d 4 (Cal. 1946); and, Barmeier v. Oregon Physicians' Service, 243 P.2d 1053 (Ore. 1952). Likewise the Attorneys General of both New Mexico and Arizona have recently issued opinion letters finding plans identical to that of PDS not to be insurance Based upon the absence of an assumption of the risk by the

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prepaid dental service company, the Arizona Attorney General found that:

> The majority of cases dealing with the subject of prepaid health plans hold that a corporation, whether or not organized for profit, the object of which is to provide members of a group with health care services, is not engaged in the insurance business. See, e.g., Jordan v. Group Health Ass'n, 107 F.2d 239 (D.C. Cir. 1939).
>
> Both of the plans that you have submitted to us provide for the rendering of dental services to the members of the plans. They do not purport to indemnify anyone against risk of loss or expense growing out of occurrences requiring dental care. Accordingly, neither plan constitues insurance.

These opinion letters are included in the Record at pages 192 and 193 respectively.

Indeed, in addressing the issue of whether or not the plan proposed by PDS is "insurance" and in attempting to justify his conclusion that it is, Special Assistant to the Utah Attorney General William Gibbs stated in his opinion letter to the Commissioner of Insurance that he was "aware that this position is contrary to that which has been taken in Arizona, New Mexico, California and Washington" based on the same fact situation, record p. 197. Assumption of the risk is still a vital part of Utah's statute no matter how broad or narrow it may be.

The fact that there may be an assumption of the risk by the Dental Group when they obtain a performance bond does

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not melt the Dental Group into PDS. They are seperate, distinct organizations who have contracted with one another at arms length. The District Court suggests they are one and refers to the transaction as if the court were piercing a corporate veil. The relationship between PDS (Administrators) and the dental group (Dentists) is that of independent contractors not as principal and agent. The District Court erred in holding that the contractual duties of one was the contractual duty of the other.

This is clearly a proper and inexpensive way to deliver a limited dental service.

POINT II

PDS IS NOT A HEALTH MAINTENANCE ORGANIZATION UNDER THE UTAH CODE

The District Court did not address the issue of whether or not PDS was a HMO. The District Court affirmed that part of the Commissioner's order without comment. It is thus our intent to state the reasons we do not believe that a company that only offers dental benefits can be regulated under a statute that requires all within its reach to offer comprehensive medical, surgical, hospital benefits. Simply stated, did the legislature intend to regulate only full service HMO's; or, did they not intend to include single service organizations. It is a matter of statutory construction.

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In his Findings and Order issued August 8, 1979, Exhibit "A", the Commissioner found that the plan proposed by PDS qualified it as a "Health Maintenance Organization" under the provisions of Title 31, Chapter 42, Utah Code Annotated (1953) (hereinafter "the Utah HMO Act").

Section 31-42-3(4) of the Utah HMO Act defines "Health Maintenance Organization" as follows:

> Any person...who furnishes, either directly or through arrangements with others, health care to an enrolled member in return for periodic payments; the amounts of said payments are agreed upon prior to the time during which the health care may be furnished; and who is obligated to the member to arrange for or to directly provide available and accessable health care.

The declaration of public policy contained in Section 31-42-2 of the Utah HMO Act, and given as a guide to the interpretation thereof, demonstrates that the Act was passed to (1) allow the State to make sure that organizations purporting to provide comprehensive health care are able to deliver the wide range of benefits which they offer; (2) to remove the "legal barrier" that Health care companies are not insurance; and, (3) thus, to allow the state through the Department of Insurance to regulate these organizations:

> The legislature wishes to eliminate legal barriers to the establishment of health maintenance organizations which provide readily available accessible and quality comprehensive health care to their members and to encourage their development as an alternative method of health care delivery. The State of Utah must have reasonable assurance

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> that health maintenance organizations offering health plans within this state are financially and administratively sound and that such organizations are in fact able to deliver the benefits which they offer. (Emphasis added).

While it is true that the statutes of this state "are to be liberally construed with a view to effect the objects of the statutes and to promote justice," Section 68-3-2, Utah Code Annotated (1953), it is also the law of this state that "it is equally true that they should not be distorted beyond the intent of the legislature." Stanton Transportation Company v. Davis, 9 Utah 2d 184, 341 P.2d 207 (1959). See also Eccles Lumber Company v. Martin, 31 Utah 241, 87 P. 713 (1906).

The intent of the Utah Legislature in enacting the Utah HMO Act is clearly set forth within the Act itself: "to eliminate legal barriers to the establishment of health maintenance organizations which provide readily available accessible and quality comprehensive health care," and to enable the state to make sure "that such organizations are in fact able to deliver the benefits which they offer." Section 31-42-2, Utah Code Annotated (1953). To interpret this Act as intending to prohibit the operation of single service health organizations, such as PDS, would distort the act well beyond the intent of the legislature.

One of the chief reasons that the state desired to regulate comprehensive health care providers was that these Health care policies were being offered to the general public. In the instant case, PDS would only offer its plan to select employer groups.

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Because PDS would offer its plan only to select Employer groups, there is not the same public need to be served by regulating PDS as there would be if the plan were offered to the general public.

The legislature dealt only with the regulating of comprehensive health care providers and, for whatever reason, did not undertake to regulate single service health organizations. In Point IV of his Memorandum of Points and Authorities to the court below, the Respondent conceded that the Utah Legislature did not intend to regulate single service health organizations under the Utah Health Maintenance Organization Act:

> It is true, as PDS claims, that the legislature did not intend to regulate single service corporations under the Health Maintenance Organization Act. Respondent's Brief, page 14, Record at page 213.

The Respondent has argued in the court below that because single service health organizations are not specifically allowed under the terms of the Utah Health Maintenance Organization Act, they are therefore prohibited. The proper rule of statutory construction is to the contrary. In Hansen v. Board of Education, 116 P.2d 936 (Utah 1941) the court stated at 940:

> "It is a well established rule of construction that where a statute grants a power or right the powers not mentioned in the enumeration are intended to be excluded."

The legislature has granted the Commissioner the right to regulate comprehensive health care provides under the Utah HMO

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act, not single service organizations such as PDS. As the Utah Legislature has not undertaken to regulate single service health corporations such as PDS, any such regulation should await further legislative action unless it can be demonstrated that the proposed plan for a single service health organization is regulated by some other statute.

CONCLUSION

The Commissioner of Insurance has found that PDS would be both an insurer and an Health Maintenance Organization if it operated its proposed prepaid dental service plan in Utah. In reality it would be neither.

PDS would not be an insurer under Utah statutory and case law in that it would neither indemnify the Participant nor would it undertake to allow a benefit upon determinable risk contingencies. In short, there would not be a shifting of the risk from the Participant to PDS or any other party. Thus the plan is not insurance. To hold otherwise would be to depart from all accepted definitions of insurance and substantially broaden the Utah statutory definition thereof.

PDS is not to be subject to the provisions of the Utah HMO Act as it is a single service health organization and not an organization purporting to offer a comprehensive health care plan to the public.

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For these reasons Petitioner contends that Respondent's interpretation of Section 31-1-7 and Title 31, Chapter 42, Utah Code Annotated (1953) with respect to Petitioner's proposed plan is incorrect and respectfully requests that the Court issue an appropriate order and judgment determining PDS to be neither an insurer nor a Health Maintenance Organization under Utah Law, and order the State Insurance Commissioner to desist from interfering with the operation of PDS.

DATED this 15th day of February, 1980.

SENIOR & SENIOR

By _____
John Preston Creer

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing APPELLANTS BRIEF were mailed this 15th day of February, 1980, to William G. Gibbs Attorney for Respondent at 351 South State Street, Salt Lake City, Utah 84111.

_____

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