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# Distinguishing Characteristics of Insurance Contracts; Hospitalization

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2. The right of resolution is an accessory of the purchase money note representing the price so that such right is transferred by the vendor without any other act than the mere assignment of the note to another, and this right ceases to exist after the note has prescribed.

W. T. PEGUES

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## DISTINGUISHING CHARACTERISTICS OF INSURANCE CONTRACTS; HOSPITALIZATION

Courts always have great difficulty in distinguishing contracts of insurance<sup>1</sup> from other contracts containing obligations contingent upon the happening of certain events. Examples of the latter are contracts for the performance of personal services, contracts which provide for contingent incidental benefits, and contracts of warranty and guaranty.<sup>2</sup> This discussion is confined chiefly to the problem involved in those insurance contracts in which the promisor, for a consideration, undertakes to do some act valuable to the insured upon the happening of a specified event. Because of the vital importance to the general public of the recent rapid increase in the number of plans for the distribution of the costs of hospitalization,<sup>3</sup> special consideration will be given to that type of contract.

The problem focuses on the application of the varying defi-

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1. The decisions involving the question of whether a company is transacting the business of insurance arise principally under the state regulatory acts, the question being presented in diverse ways: *Hunt v. Public Mut. Benefit Foundation*, 94 F. (2d) 749 (C.C.A. 3rd, 1938) (injunction sought by company); *South Georgia Funeral Homes v. Harrison*, 184 S.E. 875 (Ga. 1936) (injunction sought by state); *State v. Towle*, 80 Me. 287, 14 Atl. 195 (1888) (action for penalty); *Fikes v. State*, 87 Miss. 251, 39 So. 783 (1906) (prosecution of agent); *State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 90, 76 N.E. 567 (1905) (mandamus by company); *State v. Western Auto Supply Co.*, 134 Ohio St. 163, 16 N.E. (2d) 256 (1933) (quo warranto). However, the action may be a private one: *Sisters of the Third Order of St. Francis v. Guillaume*, 222 Ill. App. 543 (1921); *Marcus v. Heralds of Liberty*, 241 Pa. 429, 88 Atl. 678 (1913).

2. For a complete discussion of the difficulties in distinguishing between contracts of insurance and other contracts of contingent obligation, see Vance, *Insurance* (2 ed. 1930) 57-65, §§ 23-25.

3. The largest group hospitalization insurance plan in the United States was announced on June 9th by Alfred P. Sloan, Jr., chairman of General Motors Corporation. *Times-Picayune*, June 10, 1939, p. 2, col. 7.

nitions<sup>4</sup> of insurance evolved by courts<sup>5</sup> and legislatures,<sup>6</sup> for the different concepts of insurance may account to a large extent for the apparent conflict in cases wherein attempts have been made to distinguish between insurance and other contracts. Professor Vance has stated the five distinguishing elements of a contract of insurance to be:

"(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."<sup>7</sup>

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4. It is probably best that the definitions of insurance be sufficiently broad and general to cover changing phases in which the problem may be presented. In re Hogan, 8 N.D. 301, 78 N.W. 1051 (1899).

5. Vredenburg v. Physicians Defense Co., 126 Ill. App. 509, 511 (1906): "A contract for insurance is still neither more nor less than a contract to indemnify for loss or injury or for damage to the person or thing which is the subject matter of the contract." Commonwealth v. Wetherbee, 105 Mass. 149, 160 (1870): "A contract of insurance is an agreement, by which one party, for a consideration . . . promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." But a warning against pressing the idea of indemnity too far is given in Home Title Ins. Co. v. United States, 50 F. (2d) 107 (C.C.A. 2nd, 1931), affirmed 285 U.S. 191, 52 S.Ct. 319, 76 L.Ed. 695 (1932).

6. Mass. Ann. Laws (1933) c. 175, § 2, provides: "A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest." Okla. Stats. Ann. (1937), tit. 36, § 2 provides: "A contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent or to do an act valuable to the assured, or to procure others to do an act, or to make a reduction in their rates or charges, which action or reduction is valuable to the assured, upon the destruction, loss or injury of something in which the other party has an interest." Wash. Laws 1911, c. 49, § 1, defines insurance as follows: "Insurance is a contract whereby one party called the 'insurer,' for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the 'insured,' or to his 'beneficiary,' upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury."

7. Vance, *op. cit.* supra note 2, at 2-7, § 3.

In the greater number of decisions of the risk distributing element is not listed as a primary requisite of the contract of insurance; however, the importance of stressing the fact that insurance is not merely a design for shifting the risk but is also a means of distributing the risk cannot be over-emphasized. "Hedging" is a risk shifting device and cannot be classified as insurance for the risk of loss is merely shifted to another person.<sup>8</sup> Insurance means the acceptance of risks, some of which will be losses, and the spreading of these losses among the persons insured so that the insurer may accept each risk at a fraction of the possible liability.<sup>9</sup>

Isolated contracts of service and contracts of insurance must be distinguished. While the primary purpose of a contract of insurance is to indemnify an individual for losses resulting from the happening of a certain contingency,<sup>10</sup> the basic purpose of a contract for the performance of contingent services is to furnish, for a consideration, certain personal services.<sup>11</sup> A corporation contracting to furnish legal services to a large group of persons, is generally held to be engaged in the business of insurance.<sup>12</sup> The primary purpose of such a contract is not to render personal services but is to indemnify losses which result from defending actions brought against the insured person. All of the essential elements of the contract of insurance are present: the company agrees for a certain consideration to perform certain services for the promisee upon the happening of a specified contingency and the contract is part of a general scheme to spread the losses among the individuals who are entitled to similar services and subject to the same risks. However, there are contrary decisions<sup>13</sup>

8. *Bolting v. Schoener*, 144 Minn. 425, 175 N.W. 901 (1920).

9. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 412, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A. 1915C 1189 (1914). Cf. *Home Title Ins. Co. v. United States*, 50 F. (2d) 107 (C.C.A. 2nd, 1931), affirmed 285 U.S. 191, 52 S.Ct. 319, 76 L.Ed. 695 (1932).

10. "To grant indemnity or security against loss for a consideration is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance." *Commonwealth v. Equitable Beneficial Ass'n*, 137 Pa. 412, 18 Atl. 1112, 1113 (1890). Cf. *State v. Pittsburgh, C., C. & St. L. Ry. Co.*, 68 Ohio St. 9, 67 N.E. 93, 96 Am. St. Rep. 635 (1903).

11. *Commonwealth v. Provident Bicycle Ass'n*, 178 Pa. 636, 36 Atl. 197, 36 L.R.A. 589 (1897) (contract for keeping a bicycle in repair for a fixed fee and replacing it if stolen).

12. *Physicians' Defense Co. v. Cooper*, 199 Fed. 576, 47 L.R.A. (N.S.) 290 (C.C.A. 9th, 1912); *Allin v. Motorist's Alliance*, 234 Ky. 714, 29 S.W. (2d) 19, 71 A.L.R. 688 (1930); *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N.W. 396 (1907).

13. *Vredenburgh v. Physicians Defense Co.*, 126 Ill. App. 509 (1906); *State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 90, 76 N.E. 567 (1905).

based on the argument that, when the company does not agree to pay the judgment, an essential element of insurance—indemnity—is lacking.<sup>14</sup> The liability of the company is said to cease at the point where indemnity begins. In some jurisdictions, the issue has been avoided by holding that these corporations are illegally engaged in the practice of law.<sup>15</sup> From the social standpoint, the holding that such corporations are engaged in insurance seems a good one. This is so because of the desirability to protect from fraudulent management the reserves which the policyholders have contributed and from which services will be furnished.

There have been a number of cases in which the insurance feature has been used as a device to increase business,<sup>16</sup> and an example is found in the recent decision of *Ollendorff Watch Co. v. Pink*.<sup>17</sup> Included in this form of sales promotion are those cases in which, under the terms of a conditional sales contract, the vendor promises to cancel the promisee's debt upon the latter's death.<sup>18</sup> This means of inducing the public to patronize certain businesses has been termed insurance by the courts, and the attitude has been taken that if one acquires insurance benefits he is entitled to be protected by state regulation.<sup>19</sup> In some instances, such agreements have been condemned as being in violation of usury laws.<sup>20</sup>

The social expediency of bringing these sales contracts under state supervision is probably not as marked as in other insurance

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14. However, if the contract provides that the contractor shall pay any judgment rendered, it has been held to be a policy of liability or indemnity insurance. *Schambs v. Fidelity & Casualty Co.*, 259 Fed. 55, 6 A.L.R. 1231 (C.C.A. 6th, 1919).

15. *People ex rel. Chicago Bar Ass'n v. Motorists' Ass'n*, 354 Ill. 595, 188 N.E. 827 (1933); *In re Maclub of America*, 3 N.E. (2d) 272 (Mass. 1936); *Seawell v. Carolina Motor Club*, 209 N.C. 624, 184 S.E. 540 (1936).

16. *Hunt v. Public Mut. Benefit Foundation*, 94 F. (2d) 749 (C.C.A. 3rd, 1938) (promise to pay benefits in case of death or emergencies to those holding coupons obtained with certain goods); *Commonwealth v. Philadelphia Inquirer*, 15 Pa. Co. Ct. 463 (1892), as cited in Note (1929) 63 A.L.R. 711, 765, n. 228 (plan whereby a certain payment would be made to the representative of anyone accidentally killed while bearing a signed copy of a certain newspaper).

17. 279 N.Y. 32, 17 N.E. (2d) 676 (1938), where the court found a contract of insurance in the vendor's undertaking to replace each vendee's watch if stolen within a year.

18. *Attorney General v. C. E. Osgood Co.*, 249 Mass. 473, 144 N.E. 371, 35 A.L.R. 1037 (1924); *State v. Beardsley*, 88 Minn. 20, 92 N.W. 472 (1902); *Barna v. Clifford Country Estates*, 143 Misc. 813, 258 N.Y. Supp. 671 (1932).

19. *Hunt v. Public Mut. Benefit Foundation*, 94 F. (2d) 749 (C.C.A. 3rd, 1938).

20. *Missouri, K. & T. Trust Co. v. McLachlan*, 59 Minn. 468, 61 N.W. 560 (1894); *Equity Service Corp. v. Agull*, 156 Misc. 552, 281 N.Y. Supp. 292 (1935).

cases, since the individuals purchasing from such businesses do get some return from the money invested. However, in addition to protecting the purchasers entitled to insurance benefits, the courts as societal agents are in a measure protecting the business men who are in competition with the enterprising companies which devised the insurance scheme as a lure to the buying public.<sup>21</sup> The insurance feature may be considered an inducement to the purchaser to buy, and part of the profits so derived may be deemed to constitute the consideration for the promise of the company.<sup>22</sup> The risk distributing feature may be found in larger sales which will mean an increase in the amount of profits, thus constituting a reserve.

It is of vital importance to distinguish between guaranty, warranty and insurance in determining whether the device used to increase sales is a contract of insurance.<sup>23</sup> A guaranty is a promise that the amount contracted to be paid will be paid or that the services contracted for will be performed;<sup>24</sup> a warranty promises indemnity against defects in the article sold;<sup>25</sup> and insurance indemnifies against damage resulting from perils outside of the article itself.<sup>26</sup> Insurance is subject to state regulation, while guaranties and warranties are merely parts of accepted business conduct and are governed by their own peculiar rules.

Although innumerable schemes have been used in the attempt to conceal actual insurance transactions,<sup>27</sup> the courts have

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21. *Hunt v. Public Mut. Benefit Foundation*, 94 F. (2d) 749 (C.C.A. 3rd, 1938).

22. *Herbert v. Shanley Co.*, 242 U.S. 591, 37 S.Ct. 232, 61 L.Ed. 511 (1917); *Palmetto Fire Ins. Co. v. Conn.*, 272 U.S. 295, 47 S.Ct. 88, 71 L.Ed. 243 (1926); *Hunt v. Public Mut. Benefit Foundation*, 94 F. (2d) 749 (C.C.A. 3rd, 1938); *Ollendorff Watch Co. v. Pink*, 279 N.Y. 32, 17 N.E. (2d) 676 (1938).

23. *Ollendorff Watch Co. v. Pink*, 279 N.Y. 32, 17 N.E. (2d) 676 (1938).

24. *Cole Bros. & Hart v. Haven*, 7 N.W. 383 (Iowa 1880), where a lightning rod dealer agreed to pay all the damages resulting to purchaser's building from lightning it was held to be a contract of guaranty. For a consideration of the differences between warranty, guaranty and insurance, see *Ollendorff Watch Co. v. Pink*, 279 N.Y. 32, 34, 17 N.E. (2d) 676, 677 (1938).

25. *Evans & Tate v. Premier Refining Co.*, 31 Ga. App. 303, 120 S.E. 553 (1923), where a vendor of oil agreed to replace the gears of customers' cars if broken by natural wear and tear it was held to be a warranty.

26. *State ex rel. Duffy v. Western Auto Supply Co.*, 134 Ohio St. 163, 16 N.E. (2d) 256 (1938), where the vendor of automobile tires guaranteed against defects in material or workmanship and contracted to indemnify the purchaser regardless of the kind of injury, the former part of the contract was a warranty and the latter was insurance.

27. *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N.W. 396 (1907) (contracts for legal services); *State v. Bean*, 193 Minn. 113, 258 N.W. 18 (1934) (contract to furnish bond and defend against litigation); *People v. Roschli*, 275 N.Y. 26, 9 N.E. (2d) 763 (1937) (contract to replace glass and to keep it puttied); *National Auto Service Corp. v. State*, 55 S.W. (2d) 209 (Tex. Civ. App. 1932) (contract for garage service).

discarded the forms of the contracts and, looking at the acts to be performed, have held them to be insurance contracts.<sup>28</sup> These attempts at subterfuge have merited the express disapproval of the courts. In this class is the contract whereby the promisor obligates himself to perform services upon the happening of certain contingencies—for example, the agreement by an undertaker, for small periodical payments or for assessments at the death of each member, to furnish burial, is held to be an insurance contract.<sup>29</sup> It has been suggested that companies offering such contracts should come under the close supervision of the state because the policies are usually issued to persons who are poor and improvident and who need to be protected against the possibilities of insolvency and fraud.<sup>30</sup>

A question likely to be of considerable importance in the near future is whether insurance statutes should be applied to plans for the distribution of the costs of hospitalization among a large number of people. Courts have held certain agreements not to be insurance contracts, when they were clearly such.<sup>31</sup> Where the hospitalization plans are not specifically included within the scope of the insurance laws of the various states, the courts may stress many factors in order to avoid subjecting hospitalization to ex-

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28. *State v. Beardsley*, 88 Minn. 20, 92 N.W. 472, 474 (1902): "The real character of this promise, or of the act to be performed, cannot be concealed or changed by the use or absence of words in the contract itself; and it is wholly immaterial that on its face this contract does not expressly purport to be one of insurance, and that this word nowhere appears in it. Its nature is to be determined by an examination of its contents, and not by the terms used." Cf. *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N.W. 396 (1907); *State v. Spalding*, 166 Minn. 167, 207 N.W. 317 (1926); *Commonwealth v. Fidelity Land Value Assur. Co.*, 312 Pa. 425, 167 Atl. 300 (1933).

29. *South Georgia Funeral Homes v. Harrison*, 182 Ga. 60, 184 S.E. 875 (1936); *State v. Willett*, 171 Ind. 296, 86 N.E. 68, 23 L.R.A. (N.S.) 197 (1908); *State v. Wichita Mut. Burial Ass'n*, 73 Kan. 179, 84 Pac. 757 (1906); *Young Men's Protestant Temperance and Ben. Soc. v. City of Fall River*, 160 Mass. 409, 36 N.E. 57 (1894); *Fikes v. State*, 87 Miss. 251, 39 So. 783 (1906); *Renschler v. State*, 90 Ohio St. 363, 107 N.E. 758, L.R.A. 1915D 501, Ann. Cas. 1916C 1014 (1914); *Oklahoma S.W. Burial Ass'n v. State*, 135 Okla. 151, 274 Pac. 642, 63 A.L.R. 704 (1928); *Sgro v. Pennsylvania Burial Co.*, 113 Pa. Super. 20, 171 Atl. 425 (1934); *Sisson v. Prata Undertaking Co.*, 49 R.I. 132, 141 Atl. 76 (1928); *State v. Mutual Mortuary Ass'n*, 166 Tenn. 260, 61 S.W. (2d) 664 (1933); *State v. Globe Casket & Undertaking Co.*, 82 Wash. 124, 143 Pac. 878 (1914). Cf. *State v. Gooch*, 165 Tenn. 97, 52 S.W. (2d) 143 (1932) (a burial association with benefits limited to \$100 is not subject to regulation by the insurance department).

In Louisiana, Act 136 of 1938 [Dart's Stats. (Supp. 1938) § 4170.32-4170.49] was passed with regard to such associations, even though no litigation had taken place prior to its enactment.

30. *State v. DeWitt C. Jones Co.*, 108 Fla. 613, 147 So. 230 (1933); *Fikes v. State*, 87 Miss. 251, 39 So. 783 (1906).

31. See cases cited in notes 32, 33, 34, 36 and 49, *infra*.

cessively strenuous restrictions. Some of the factors thus emphasized by the courts are: (1) the company does not guarantee the performance of the individuals who are to furnish the services;<sup>32</sup> (2) it does not perform the services itself;<sup>33</sup> (3) it operates within a limited area;<sup>34</sup> and (4) the happening of the contingency is dependent upon the will of the promisee.<sup>35</sup>

In the early case of *Commonwealth v. Provident Bicycle Ass'n*,<sup>36</sup> the court held that the absence of an agreement to pay money precluded the contract from being one of insurance.<sup>37</sup> A makeweight factor considered by the court was that the consideration was not graded according to the risks involved.<sup>38</sup> At present, it is well settled that a stipulation for the payment of money is not a requisite of an insurance contract.<sup>39</sup> Obviously, a person may contract for some act of value to secure himself against charges which may become necessary.<sup>40</sup> If the makeweight argument used by the court in *Commonwealth v. Provi-*

32. In *State v. Universal Service Agency*, 87 Wash. 413, 151 Pac. 768, Ann. Cas. 1916C 1017 (1915), the court held that a corporation contracting to procure medical service and drugs for patients was not engaged in the insurance business on the ground that it did not guarantee or insure performance by the individuals who were to furnish the services or goods.

33. *Vredenburg v. Physicians Defense Co.*, 126 Ill. App. 509 (1906).

34. *Moresch v. O'Regan*, 120 N.J. Eq. 534, 187 Atl. 619 (1936).

35. *State v. Towle*, 80 Me. 237, 14 Atl. 195 (1888), where an agreement by which bachelors who agreed to pay a certain fee would receive a maximum of \$1000 if they did not marry within two years was held to be in the nature of a gambling contract and illegal.

36. 178 Pa. St. Rep. 636, 36 Atl. 197 (1897).

37. Insofar as *Commonwealth v. Provident Bicycle Ass'n* was based on an absence of an agreement to pay money, it was followed in *Moresch v. O'Regan*, 120 N.J. Eq. 534, 187 Atl. 619 (1936).

38. *Commonwealth v. Provident Bicycle Ass'n*, 178 Pa. St. Rep. 636, 642, 36 Atl. 197, 199-200 (1897): "The defendant . . . receives the same sum from each person, although it undertakes to perform services which may vary widely in value among the members served. . . . whatever may be the loss or injury which each member may sustain, he is entitled to have it made good in consideration of the same unvarying sum."

39. *Hunt v. Public Mut. Benefit Foundation*, 94 F. (2d) 749 (C.C.A. 3rd, 1938) (company giving coupons with certain goods and promising to pay benefits in case of death or emergencies); *State v. Willett*, 171 Ind. 296, 86 N.E. 68, 23 L.R.A. (N.S.) 197 (1908) (contract to furnish funeral services); *Attorney General v. C. E. Osgood Co.*, 249 Mass. 473, 144 N. E. 371, 35 A.L.R. 1037 (1924) (cancellation of debt upon death of purchaser); *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N.W. 396 (1907) (contracts for legal services); *State v. Bean*, 193 Minn. 113, 258 N.W. 18 (1934) (agreement to furnish garage service, legal services and bail bond); *People v. Standard Plate Glass & Salvage Co.*, 174 App. Div. 501, 156 N.Y. Supp. 1012 (1916) (agreement to keep glass puttied, or replaced if broken); *Ollendorff Watch Co. v. Pink*, 279 N.Y. 32, 17 N.E. (2d) 676 (1938) (agreement to replace stolen watches). Contra: *Moresch v. O'Regan*, 120 N.J. Eq. 534, 187 Atl. 619 (1936) (agreement to replace glass held not to be insurance).

40. See cases cited in note 38, supra.



*dent Bicycle Ass'n*<sup>41</sup> were sound, it would lead to the conclusion that hospitalization is not insurance. However, this argument is fallacious since the insurer may or may not grade the risks depending upon whether he can make a profit.

In determining whether a corporation is conducting an insurance business, the courts sometimes draw a distinction between the corporations conducted for profit and those operated solely for philanthropic motives.<sup>42</sup> If a company is designed to make profits, it is classified as an insurance company; if it is a philanthropic organization, it is not subjected to insurance laws. Hospitals engaging in hospitalization service plans might be included in the latter category if the courts should deem it undesirable to subject such organizations to the insurance statutes. Where the courts draw a distinction between philanthropic and profit organizations, it is probably due to different statutory enactments with reference to benevolent organizations and insurance companies.<sup>43</sup> Therefore, this distinction cannot be said to be universally applicable.

An isolated contract in which a hospital undertakes to furnish board and care to a single individual for the remainder of her life is not an insurance contract,<sup>44</sup> for the risk distributing element essential to insurance is absent.<sup>45</sup> However, there is a great public interest in the regulation of the capital and in the supervision of the management of those corporations which, for a consideration and in accordance with a general plan, agree to furnish hospital services to a large number of persons upon the happening of certain contingent events. It is submitted that, in the absence of separate statutes dealing with hospitalization, the laws governing insurance should ordinarily be applied.

Even more desirable than the application of insurance laws to hospitalization—in order to secure proper regulation—would be the drafting of separate legislation that gives due consideration to the peculiar problems involved in the methods of distrib-

41. 178 Pa. St. Rep. 636, 36 Atl. 197 (1897).

42. *State v. Pittsburgh, C., C. & St. L. Ry. Co.*, 68 Ohio St. 9, 67 N.E. 93, 96 Am. St. Rep. 635 (1903); *Fischer v. American Legion of Honor*, 168 Pa. St. Rep. 279, 31 Atl. 1089 (1895).

43. If its purpose is philanthropic, the company is regulated as a mutual benefit society. *Commonwealth v. Equitable Beneficial Ass'n*, 137 Pa. St. Rep. 412, 18 Atl. 1112 (1890).

44. *Sisters of the Third Order of St. Francis v. Guillaume*, 222 Ill. App. 543 (1921).

45. See the five essential elements of a contract of insurance, as stated by Professor Vance, *supra* p. 810.

uting the costs of hospitalization. Hospitals should not be compelled to furnish the same amount of bond as ordinary insurance companies;<sup>46</sup> limited capital would often make this practically impossible. Furthermore, by placing hospitalization under the supervision of the state, the interests of the public would be adequately protected without the necessity of a large bond. Non-profit hospital service plans have been included in various state regulatory laws by specific enactments for the regulation and control of hospitalization.<sup>47</sup> In some states, non-profit hospital plans are entitled to complete tax exemption.<sup>48</sup>

As in other contracts of contingent obligation, judicial and legislative definitions are of doubtful assistance in determining whether a hospitalization contract is insurance. The best solution of the problem presented by the increased number of plans for the distribution of hospitalization costs is by separate legislation on the subject. Whenever the question of whether hospitalization constitutes insurance arises in jurisdictions where the legislature has been silent, the courts will probably be guided by what they think socially expedient.<sup>49</sup>

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46. In Louisiana, the amount to be deposited by service insurance companies with the state treasurer ranges from \$500 to \$5000, varying with the number of members: La. Act 136 of 1938, § 3 [Dart's Stats. (Supp. 1938) § 4170.34]; California exempts non-profit hospital service plans from insurance laws: Cal. Gen. Laws (Deering, Supp. 1935) Act 3432, tit. 255, p. 770; New Jersey requires that fees amounting to \$16.20 be paid by hospital service corporations: N. J. Laws 1938, c. 366, p. 924; New York specifically excludes non-profit hospital service corporations from any other insurance act and no provision is made for the amount of bond: 27 N.Y. Consol. Laws (McKinney 1937) § 452, p. 716.

47. Cal. Gen. Laws (Deering, Supp. 1935) Act 3432, tit. 255, p. 770; La. Act 136 of 1938 [Dart's Stats. (Supp. 1938) § 4170.32-4170.49]; N.J. Laws 1938, c. 366, p. 924; 27 N. Y. Consol. Laws (McKinney 1937) § 452, p. 716. See also Md. Laws 1935, c. 476, p. 998 (with respect to non-profit hospital service plans in Allegany County).

48. N.J. Laws 1938, c. 366, p. 924; 27 N.Y. Consol. Laws (McKinney 1937) § 452, p. 716. See also Md. Laws 1935, c. 476, p. 998 (with respect to Allegany County).

It is to be remembered that taxation presents another problem in determining what is to be considered an insurance company. Under the federal law an insurance company is subject to an income tax by 48 Stat. 733 (1934), 26 U.S.C.A. § 204 (1935), and is entitled to an exemption from the capital stock tax by 48 Stat. 769 (1934), 26 U.S.C.A. § 1358 (1935). In *Bowers v. Lawyers Mtg. Co.*, 285 U.S. 182, 52 S.Ct. 350, 76 L.Ed. 690 (1932), where premiums amounted to less than one-third of corporation's total income it was considered not an "insurance company" exempt from capital stock tax.

49. The relief associations of railroad companies might be considered analogous to the hospitalization plans herein discussed; but the cases dealing with the railroad associations are inapplicable to the present problem since the courts have held in such cases that the insurance feature is incidental to the contract of employment. *Donald v. Chicago, B. & Q. Ry. Co.*, 93 Iowa