RENDERED: OCTOBER 10, 2008; 2:00 P.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000661-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 02-CI-00837

E. JOHN REINHOLD, D/B/A AMERICAN EVANGELISTIC ASSOCIATION; MEDI-SHARE; CHRISTIAN CARE MINISTRY — APPELLEES

OPINION
AFFIRMING

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: This case arises from a judgment of the Franklin Circuit Court finding that Medi-Share does not constitute insurance under Kentucky Law and is exempt from state regulation under the religious publication exclusion. The Commonwealth appeals both findings. Although we recognize

[1] Retired Judge Paul W. Rosenblum presiding as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution.

many similarities between Medi-Share and the business of insurance, we find that Medi-Share does not constitute insurance under Kentucky Law because all risks and obligations to pay remain with the subscriber. Further, we find that Medi-Share does constitute a religious entity free from state regulation under KRS 304.1-120. Therefore, we affirm the judgment of the Franklin Circuit Court.

The American Evangelistic Association (AEA) and the Christian Care Ministry (CCM) distribute Medi-Share, a nonprofit publication designed to help subscribers with medical expenses. Medi-Share acts as a matching service for those subscribers who have medical expenses and donors who are willing to pay those expenses. Subscribers are able to join Medi-Share by completing a detailed application process that affirms his/her commitment to the Christian religion. Each applicant must live by biblical principles, regularly attend church, and must abstain from tobacco, illegal drugs, and the abuse of legal drugs, including alcohol. In addition, each applicant must submit his/her pastor's contact information so that the applicant's profession of faith may be verified. Upon acceptance, subscribers must pay a monthly subscription fee.

By joining Medi-Share, subscribers with financial needs arising from medical expenses are matched with subscribers who are willing to donate money to meet those financial needs. When subscribers submit a request for financial assistance with their medical expenses, Medi-Share creates a subaccount, similar to an escrow account. Donors send the contributions directly to Medi-Share, where the donations are placed in the subaccount created for the specific claim.

Medi-Share does not guarantee that any requests will be matched by donors. In fact, Medi-Share warns subscribers in both the application and in the Medi-Share guidelines that Medi-Share is not insurance and that it does not guarantee payment of any claim. It merely facilitates the donation process. The Medi-Share application and guidelines state:

> ATTENTION- This publication is not issued by an insurance company nor is it offered through an insurance company. This publication does not guarantee or promise that your medical bills will be published or assigned to others for payment. Whether anyone chooses to pay your medical bills will be strictly voluntary. This publication should never be considered as a substitute for an insurance policy. Whether or not you receive any payments for medical expenses and whether or not this publication continues to operate, you are responsible for payment of your own medical bills.

Although Medi-Share claims not to be in the "business of insurance," the Medi-Share publication has many similarities to insurance. Subscribers pay a monthly subscription cost similar to a premium. If subscribers do not pay the monthly fee, their subscription is cancelled. Subscribers must meet deductibles before their claim is paid, and denied claims are submitted to a review board. Further, Medi-Share employs claims adjusters and spends over a million dollars annually on marketing.

The Commonwealth of Kentucky filed suit in the Franklin Circuit Court on June 21, 2002, alleging that Medi-Share, AEA, and CCM were engaging in the unauthorized sale of insurance. The Circuit Court held a bench trial on October 25-26, 2006, which resulted in its findings that Medi-Share does not

constitute insurance under Kentucky law and is exempt from state regulation because it is a religious publication. The final judgment was entered January 18, 2007. On January 26, 2007, the Commonwealth filed a motion to vacate the circuit court judgment, which was later denied by the circuit court. This appeal follows.

The Commonwealth contends that, although Medi-Share claims that it is not an insurance company, the publication nevertheless constitutes insurance under Kentucky Law. We agree with the Commonwealth that an organization may be in the business of insurance even though it denies the label of insurance. However, the question is not whether an organization describes itself as insurance, but whether the actions of the organization function to insure its members. *Wheeler v. Ben Hur Life Ass'n*, 264 S.W.2d 289, 291 (Ky. 1953); *Allin v. Motorists' Alliance of America*, 29 S.W.2d 19, 23 (Ky. 1930). "It is elementary that the law looks at substance instead of form, and is not deceived by the gloss of words." *Wheeler* at 291.

The United States Supreme Court described insurance as, "an arrangement for transferring and distributing risk." *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 211, 99 S.Ct. 1067, 1073, 59 L.Ed.2d 261 (1979). The Court stated that "the primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." *Id*. at 211.

In addition to defining insurance, the United States Supreme Court gave courts further guidance in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 743, 105 S.Ct. 2380, 2391, 85 L.Ed.2d 728 (1985) (*quoting Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 3008, 73 L.Ed.2d 647 (1982)), where the Court identified three criteria that indicate a company is in the "business of insurance."

> [*F]irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 743.

Central to the United States Supreme Court's analysis of the "business of insurance" is the distribution of risk between the policy holder and the insurer. Here the Commonwealth has not and cannot show a distribution of risk between Medi-Share and its subscribers. Medi-Share consistently renounces any liability or guaranteed payment of claims. In both the Medi-Share guidelines and application, subscribers are warned that the payments of claims are merely voluntary gifts from one subscriber to the other. Further, Medi-Share specifically states that the publication itself does not pay any claims. The Commonwealth contends that risk-sharing is not the only element indicative of the "business of insurance." While we agree that other factors must be considered, as stated by the Court in *Metropolitian Life Insurance*, we find that risk-sharing is a significant part of the analysis.

The Commonwealth compares Medi-Share to the case of *Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co.,* 983 S.W.2d 501, 504 (Ky. 1998), where the Kentucky Supreme Court found that the business of insurance existed when losses were distributed through the market by means of a premium. The Commonwealth argues that the subscription fee required by Medi-Share is analogous to a premium thereby indicating the business of insurance. We disagree because the monthly subscription fee does not act as a premium to spread risks. Medi-Share does not pool subscription fees and pay claims from a pool. Instead, each claim or request has a specific subaccount. Subscribers donate to those specific accounts rather than a pool. While insurance companies pay claims from company funds, Medi-Share does not. Thus, the operation of Medi-Share does not constitute the business of insurance.

While the United States Supreme Court has provided courts with guidelines to determine whether an organization is in the business of insurance, states have the authority to regulate the sale of insurance. Kentucky law defines insurance as "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils called 'risks,' or to pay or grant a specified amount or determinable benefit or annuity in connection with ascertainable risk contingencies, or to act as surety." KRS[2] 304.1-030. Although the Commonwealth argues that Medi-Share acts as insurance, under Kentucky law, the Commonwealth fails to prove that Medi-Share indemnifies subscribers against

[2] Kentucky Revised Statutes.

risks, pays or grants a specified amount or determinable benefit or annuity in connection with ascertainable risk contingencies, or acts as a surety as required by KRS 304.1-030.

In addition to the Commonwealth's claim that Medi-Share is in the business of insurance, the Commonwealth also claims that Medi-Share is not exempt from insurance state regulation because it does not qualify as a religious publication. Kentucky law excludes religious publications from regulation under the Kentucky Insurance Code. KRS 304.1-120.[3] Because we find that Medi-

[3] KRS 304.1-120(7) provides the following definition:

(7) A religious publication (as identified in this subsection), or its subscribers, that limit their operations to those activities permitted by this subsection, and;

(a) Is a nonprofit organization;

(b) Is limited to subscribers who are members of the same denomination or religion;

(c) Acts as an organizational clearinghouse for information between subscribers who have financial, physical, or medical needs and subscribers who choose to assist with those needs, matching subscribers with the present ability to pay with subscribers with present financial or medical need;

(d) Pays for the subscribers' financial or medical needs by payments directly from one (1) subscriber to another;

(e) Suggests amounts to give that are voluntary among the subscribers, with no assumption of risk or promise to pay either among the subscribers or between the subscribers and the publication; and

(f) Provides the following verbatim written disclaimer as a separate cover sheet for all documents distributed by or on behalf of the exempt entity, including all applications, guidelines, promotional or informational materials, and all periodic publications:

"This publication is not issued by an insurance company nor is it offered through an insurance company. This publication does not guarantee or promise that your medical bills will be published or assigned to others for payment. Whether anyone chooses to pay your medical bills will be totally voluntary. This publication should never be considered as a substitute for an insurance policy. Whether you receive any payments for medical expenses and whether or not this

Share is not insurance, the Commonwealth's claim that the trial court erroneously held that Medi-Share is exempt from regulation because of its status as a religious publication is moot. Nevertheless, after reviewing the record, we conclude that the trial court correctly based this finding on substantial evidence that Medi-Share's practice is directly in line with the religious publication exemption described in KRS 304.1-120.

As required by the statute, Medi-Share clearly proved that it is a nonprofit organization that acts as a matching service for Christians with medical expense needs with Christians willing to donate toward those medical expenses. Furthermore, Medi-Share adequately warns subscribers that the donation process is completely voluntary and that Medi-Share does not guarantee the payment of any claim. Medi-Share also provides subscribers with an adequate disclaimer that complies with the disclaimer requirement of KRS 304.1-120. In order to satisfy the requirements of a religious publication and to be exempt from state regulation under KRS 304.1-120, Kentucky law also requires that donations are directly sent from donors to the subscribers in need of assistance. Medi-Share, however, does not allow donor subscribers to donate directly to members in need. Instead, donors must send contributions to Medi-Share which in turn deposits the donations in the specific subaccount. Although the subscribers must send their donations to Medi-Share for placement in the subaccounts, the process simply acts as a trust for subscribers, an amalgamation of the Medi-Share members/subscribers. Therefore,

> publication continues to operate, you will always remain liable for any unpaid bills."

Medi-Share complies with all requirements for religious publications exempt from state regulations under the Kentucky Insurance Code.

Because the questions of whether a contract of insurance exists and whether an entity constitutes a religious publication are issues to be determined by a trier of fact, we must assess whether the trial court's judgments were based upon substantial evidence. *James Graham Brown Fdn. v. St. Paul Fire & Marine Ins. Co*., 814 S.W.2d 273 (Ky. 1991); *Nat'l Insurance Underwriters v. Lexington Flying Club*, 603 S.W.2d 490 (Ky.App. 1979). We find that the trial court's findings that Medi-Share does not constitute insurance and that Medi-Share is a religious publication exempt from regulation under the Kentucky Insurance Code are supported by substantial evidence.

Accordingly, we affirm the judgment of the Franklin Circuit Court.

NICKELL, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING IN RESULT ONLY. I reluctantly agree with the majority's conclusion that the health care contrivance manifested in Medi-Share is not insurance as defined by KRS 304.1-030 which requires a sharing of risk. Medi-Share has cleverly insulated itself from shouldering any risk on behalf of its subscribers, and therefore cannot be characterized as insurance under our current statutory definition.

My review of this self-described alternative health care plan indicates Medi-Share accepts monthly contributions from people of faith and distributes

those donations as its claims adjusters and plan administrators see fit. Medi-Share assumes no risks for payment of medical expenses incurred by its subscribers, though it does take a hefty cut of the funds to operate and promote its purportedly biblically based ministerial service. In this fashion, Medi-Share operates as an informational clearinghouse while processing contributions of the faithful and distributing payments to those it deems worthy pursuant to its complicated and confusing policies and procedures and unfettered discretion.

All risk arising under this arrangement is borne by the individual participants. Those participants desiring to offer financial assistance to help like-minded members of their faith give their well-intentioned money to Medi-Share and trust it to make sound business, financial, and health care decisions in dispersing their collective funds. For them, Medi-Share is an administrator for the collection, protection, and disbursement of their charitable donations. Those participants hoping for financial assistance to pay health care bills also give their money to Medi-Share, but they alone bear the risk of having their requests denied as unworthy and noncompensable, as subscribers in other states have learned firsthand.

After close inspection of KRS 304.1-030, I am forced to conclude that absent a sharing of risk on its part, Medi-Share does not satisfy Kentucky's current statutory definition of insurance, and therefore is not subject to regulation under our insurance code. To that extent, I concur with the majority opinion.

However, while I agree with the majority's holding that Medi-Share is not insurance under our current statutory definition, I disagree with its *dicta* that even if Medi-Share were deemed insurance under KRS 304.1-030, it would be exempt from state regulation because it meets the statutory requirements of a religious publication. Under KRS 304.1-120, a hallmark of a religious publication is the direct transfer of money from one party to another. "Direct" means "from point to point without deviation," "from the source without interruption or diversion," and "without an intervening agency or step." Merriam-Webster's Collegiate Dictionary 327 (10th ed. 2002). The Medi-Share schema or blueprint does not satisfy that element. Contributions are not paid directly from donor to donee. Medi-Share collects, manages, and disburses contributions donated by some subscribers, acting as donors, for the benefit of other subscribers, as donees, when health care needs arise. Contributions sent to Medi-Share by such subscribers are placed into an account to be drawn upon for the benefit of the subscriber in need of health care, and Medi-Share disburses funds on behalf of the needy subscriber, when deemed worthy, under its guidelines. Not only is there no direct transfer of funds between the donor and donee, but all control over disbursement of contributed funds is surrendered to the discretion of Medi-Share.

Thus, under the Medi-Share health care plan there is no direct transfer of money from a donor to a donee as required to qualify for the religious publication exemption under KRS 304.1-120(7)(d), and Medi-Share would not thereby be exempt from regulation under our insurance code. Even so, because we

have held Medi-Share is not insurance under our current statutory definition, whether Medi-Share qualifies for the religious publication exemption is moot.

Finally, while Medi-Share has carefully mapped its self-described alternative health care plan to reside just outside the boundaries of our current statutory definition of insurance, it no less should require governmental oversight and regulation. Medi-Share claims Paul's admonition to the church, found at *Galatians* 6:2, "Bear ye one another's burdens, and so fulfill the law of Christ," as its biblical foundation. However, I am also mindful of the admonition of Jesus found at *Mark* 12:17, "Render unto Caesar the things which are Caesar's, and unto God the things that are God's." This exhortation is widely cited to describe the proper relationship between Christianity and secular authority, and stands for the proposition that spiritual commandments supersede earthly laws but do not abolish them. Even if Medi-Share's participants take a step of blind faith by simply accepting its self-professed good intentions and purportedly sound business practices regarding its alternative health care plan, government need not close its eyes to its duty to safeguard the significant public policy of protecting consumers from industries rife with opportunity for fraud and mismanagement.

Reducing health care costs and making health care protection more widely available and affordable are commendable goals, and nothing in this concurring opinion should be taken to imply any wrongdoing by Medi-Share. However, Medi-Share's unabashed attempt to avoid regulatory oversight and review demanded of health insurers should awake suspicious eyes from slumber

and stir legislative inspection and action. Medi-Share's purveyors have obviously taken great pains to avoid using insurance jargon in their literature, and have included all the necessary disclaimers in their glossy sales pitch. However, the fact that Medi-Share has clothed its alternative health care protection plan in spiritual terminology and scriptural passages does not hide the fact that at its core it still represents, at best, a supplemental plan for payment of the health care needs of its trusting subscribers, and, at worst, a poor substitute for regulated health insurance. Likewise, religious vestments do not miraculously transform a business enterprise into a ministry.

If truly spiritually based and morally, ethically and financially sound, Medi-Share and similar alternative health care protection programs should find no enemy in reasonable regulatory oversight. Indeed, the public trust, faith and acceptance generated by such inspection and accountability should be welcomed as a means of growing this budding industry.

While I join the majority opinion in holding Medi-Share does not satisfy our current statutory definition of insurance, and therefore is not subject to state regulation, I strongly encourage Kentucky's General Assembly to consider adopting legislation to rein in this new brand of health care protection before it runs wild, stampedes and tramples the rights and reasonable health care protection Kentuckians expect. I wholeheartedly agree with the minority that our government bears a heavy and sacred duty to protect unwary consumers who may be led down the broad path of entrusting their hard-earned health care dollars to business

enterprises of this sort. Yet, regardless of how other jurisdictions have characterized Medi-Share and its siblings under their respective statutory language, we as an appellate court are constrained to apply Kentucky's distinctive statutory definitions and regulations as promulgated by our General Assembly. For the foregoing reasons, I concur with the majority in result only.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority's opinion. Its conclusion that Medi-Share is not insurance defies common sense and our statutory law. In a broader context, I fear a plethora of similar purported "religious publications" will be sold in Kentucky and remain unregulated in an insurance industry susceptible to unscrupulous tactics.

I begin my analysis in the context of the statutory presumption that a person or entity that provides health coverage whether by direct payment, reimbursement, or otherwise is presumed to be subject to regulation by the insurance code. KRS 304.11-045(2). The omission of the term "insurance" in the Medi-Share contract is immaterial to our inquiry. *Allin v. Motorists' Allliance of America*, 29 S.W.2d 19, 23 (Ky.App. 1930). As observed in *National Home Ins. Co. v. King,* 291 F.Supp.2d 518, 527-528 (E.D. Ky. 2003), if only the language in a contract was determinative, "anyone could avoid regulation . . . simply through documentary disclaimers." The resolution of the issue depends on not what the contract says, but what it does. *Id.* What Medi-Share does is insure its subscribers.

Medi-Share subscribers pay an application fee and substantial monthly premiums. Although termed an "extra-blessing gift," if payments are late, the subscribers are charged a late fee. Claims are paid only after meeting certain deductibles and denied if the subscriber had a preexisting condition. If payments are not made, the coverage is cancelled. Medi-Share has a right to subrogation and reimbursement and has increased its premium costs based on claim history and actuarial analysis. Claims are submitted to claim adjustors for review and, after deduction of co-payments, eligible claims are paid by Medi-Share from monthly premiums collected from other Medi-Share members. The subscribers are provided a Preferred Provider List and are penalized if they use out-of-network providers. To solicit subscribers, the advertising budget for Medi-Share is $3,705 per day for marketing strategies and $150 per hour plus invoiced media expressed to recruit new members and improve profitability.

The Attorney General has a sacred duty to protect the consumers who trust their funds to this type of enterprise, and I must agree with the Attorney General that this organization must be regulated and supervised.

Despite the indicia that Medi-Share is insurance, the majority concludes that because there is no "risk-sharing" it is not insurance. Although Medi-Share argued that it assumes no risk for the payment of medical costs, its actions and advertisements demonstrate to the contrary. It is the prospect that the subscribers' medical costs will be paid that induces them to pay the monthly

premium. Thus, the "risk" is spread among the Medi-Share subscribers for which they pay a premium.

I also disagree that Medi-Share is within the religious publication exemption contained in KRS 304.1-120. The General Assembly enacted KRS 304.1-120 so that bill-sharing ministries would be exempt from state insurance laws. The statute specifically states that among the requirements for its application is that the religious organization act as a "clearinghouse for information between subscribers" and pay for the subscribers' financial or medical needs by payments directly from one subscriber to another. It exempts from regulation those religious organizations that act solely as a conduit for charitable giving, not those in the business of selling insurance. Because I believe Medi-Share is insurance, it is not exempt from state insurance laws.

The reality is that Medi-Share is insurance and expends over $1,000,000 per year for advertising and marketing strategy. It routinely holds in escrow large sums of money for third-party beneficiaries and, as a consequence, has a fiduciary duty to pay those funds on behalf of third-party beneficiaries. Yet, the majority has effectively given Medi-Share and similar businesses permission to operate within the Commonwealth free from regulation and supervision by the Commonwealth. As pointed out by the Attorney General, the consumers in states such as Ohio have incurred the financial consequences of the lack of regulation of such businesses. The funds provided by the consumers with the expectation that they have insurance to cover their medical needs are subject to waste and

embezzlement by the people to whom the funds are entrusted. Unfortunately, it is historically accurate to state that under the guise of religion, many have been defrauded. I agree with the Attorney General that Medi-Share and similar businesses must be regulated and supervised.

The appellant's brief contains opinions from six states that have considered the precise issue before us and have concluded that Medi-Share is insurance subject to insurance laws. By virtue of the majority opinion, Kentucky has taken a different course and, unfortunately, given permission for our citizens to be subject to potential scams and other unscrupulous tactics. I do not accuse Medi-Share of any wrongdoing but only write to express my view that it is insurance subject to our insurance regulations and laws. Accordingly, I would reverse the Franklin Circuit Court.

BRIEFS FOR APPELLANT:

Gregory D. Stumbo
Attorney General

D. Brent Irvin
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Richard L. Masters
Louisville, Kentucky

Brent L. Caldwell
Lexington, Kentucky