

**INCORPORATION BY PRO
FORMA DECREE:**

An organization by an association of persons under a mutual benefit proposal, where its Articles of Association and By-Laws show the proposed corporation would be making a profit for some of the members at the expense of other members, in insurance. Such association may not be incorporated under Section 5437, Article 10, Chapter 33, R.S.Mo. 1939, under a pro forma decree.

July 9, 1947



Honorable Owen G. Jackson
Superintendent of Insurance
Jefferson City, Missouri

Attention: Hon. A. R. Troxell, Counsel

Dear Mr. Jackson:

This will acknowledge your request for an opinion from this department respecting the right of an association calling itself, under a proposed pro forma decree, Unit Casualty Service, Inc., to be incorporated as a non-profit corporation.

Your letter requesting the opinion of this department on the subject, is as follows:

"The Articles of Association and By-Laws of the Unit Casualty Service, Incorporated are enclosed for your inspection.

"The Articles of Association are now pending in the Circuit Court of St. Louis, and were forwarded to me by Mr. Harry Gershenson, Amicus Curiae. It appears that the intention is to have the company incorporated as a non-profit company, but the provisions set out do not appear to come within the confines of the subject companies.

"An opinion from your office will be appreciated as to whether this application for charter complies with the laws pertaining thereto."

Subsequent to receiving your letter, in company with your Mr. Ralph C. Lashly, this department had a conference with the counsel for said proposed company and two of its proposed officers.

Complete copies of the Articles of Association, and the By-Laws

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of said proposed corporation were submitted to the writer of this opinion for inspection at the time of said conference.

We have inspected and considered said Articles of Incorporation and By-Laws with the most careful attention we have been able to give to them.

The proposed incorporation of this body of persons under a pro forma decree by the Circuit Court manifestly is a proceeding under Section 5437, Article 10, Chapter 33, R. S. Mo. 1939.

The title to Article 10, permitting and authorizing persons in any number not less than three to associate themselves together and obtain from the Circuit Court having jurisdiction, a pro forma decree of incorporation, is as follows:

"Benevolent, Religious, Scientific, Fraternal-Beneficial, Educational and Miscellaneous Associations."

It has been impossible for the writer to reconcile or harmonize the proceedings here proposed as coming under, or responsive to, the provisions of Article 10, Chapter 33, R. S. Mo. 1939, providing for the incorporation by pro forma decree of "benevolent, religious, scientific, fraternal-beneficial, educational and miscellaneous associations."

The whole of Article 10, Chapter 33, R. S. Mo. 1939 respecting the organization of corporations by pro forma decree must, we believe, be read and all of its sections and provisions must be considered together in determining its effect. Section 5444, under the subject of "what associations not to incorporate under this article-- * * *" states:

"No association, society or company formed for manufacturing, agricultural or business purposes of any kinds, or for pecuniary profit in any form, nor any corporation having a capital stock divided into shares, shall be incorporated under this article: * * * * *"

Section 2 of Article 1 of the Articles of Association submitted to us for inspection and construction, is as follows:

"Section 2. Objects and Purposes

"This Association is formed for the purpose of providing to its members the sick

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benefits, disability benefits, jury service benefits, death benefits, and such other benefits as may be set out and provided for in the By-Laws of the Association."

Section 1 of Article 9 of the proposed Articles of Association respecting the amendment of the Articles of Association, is as follows:

"Section 1. Amendment

"This Constitution shall be subject to amendment but such amendment shall be adopted only upon strict compliance with the By-Laws of the Association."

It would eventuate, therefore, under said Article 9, itself, that the Articles of Association of the organization would be controlled by the By-Laws whereby the Articles of Association might be amended so that the purposes and object of the organization may be changed at will by the management of the organization rather than by the statutes governing such associations.

We think it proper here to quote that part of Section 6003, Article 10, Chapter 37, R. S. Mo. 1939, which is as follows:

"No company shall transact in this state any insurance business unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with authorizing it to do business; * * * "

By-Law 3 of the proposed By-Laws of the organization subdivided in sub-sections a, b, c, and d, is as follows:

"BY-LAW THREE

"a. ANY MEMBER OR MEMBERS WHO BECOME DELINQUENT IN HIS OR HER DUES, SHALL THEREBY CEASE TO BE ENTITLED TO ANY BENEFITS OF MEMBERSHIP; A MEMBER IS DELINQUENT WHO FAILS TO PAY HIS OR HER

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DUES BEFORE THE END OF THE SECOND CONTRACT MONTH DURING WHICH TIME AND FOR WHICH PERIOD SUCH DUES HAVE NOT BEEN PAID.

"b. NON PAYMENT WITHIN THE ABOVE STATED GRACE PERIOD SHALL BE DEEMED A VIOLATION AND SHALL AUTOMATICALLY TERMINATE THE MEMBERSHIP WITHOUT NOTICE OR DEMAND.

"c. FOR VIOLATIONS OTHER THAN NON PAYMENT, SUCH AS REFUSAL TO TRANSFER TO AN ESTABLISHED UNIT, AS AN EMPLOYEE OF A FIRM OR MEMBER OF AN ORGANIZATION, WHERE SUCH UNIT IS IN OPERATION - UNIT CASUALTY SERVICE, INC. RESERVES THE RIGHT TO CANCEL THE MEMBERSHIP AT THE END OF ANY MONTHLY PERIOD FOR WHICH PAYMENT HAS BEEN ACCEPTED, BY MAILING OF NOTICE OF SUCH CANCELLATION TO THE MEMBER, AT HIS OR HER LAST ADDRESS SHOWN ON THE RECORDS OF THE UNIT CASUALTY SERVICE, INC.

"d. IN CASES OF NON PAYMENT OF DUES AS STATED IN THIS BY-LAW, WHERE MEMBERSHIP HAS BEEN TERMINATED, LAPSED OR VIOLATED IN ANY MANNER AS HEREIN PROVIDED - UNIT CASUALTY SERVICE, INC., MAY REINSTATE SUCH FORMER MEMBERSHIP AT ITS SOLE DISCRETION AND UPON SUCH CONDITIONS AND TERMS AS MAY BE DETERMINED BY UNIT CASUALTY SERVICE, INC."

This said By-Law 3 undoubtedly provides in all of said subsections, and in each of them, for the profiting and advantage of certain members of the association at the expense and loss of others against whom such forfeitures would be imposed. This, it is believed, shows that this association, if permitted to operate under a pro forma decree, would be operating solely upon an insurance basis, and that it would be, and is, prohibited under that part of said Section 6003, Article 10, Chapter 37, R. S. Mo. 1939, hereinabove quoted, because it would be operating without having procured from the Superintendent of the Insurance Department of this State the certificate required by said Section.

Moreover, we think this proposed organization comes within the prohibition of the holding in the case of State vs. Black, 145 S. W. (2d) 406, 1. c. 409, where the opinion states the following:

"Moreover, the evidence in this case shows that this association, against which these proceedings were brought, is operating solely upon an insurance basis, and is not by any means one 'where all pecuniary profit is excluded.' Some members can profit at the expense of others from the forfeitures (hereinafter shown to be provided) included in its policies. It certainly offends the purposes of the benevolent corporation laws in all the respects pointed out by the Kansas City Court of Appeals in the case of In re Henry County Mutual Burial Association, supra. * * *"

Said opinion in quoting Section 2 of the By-Laws of the organization there being considered, in the righthand column on page 409 of said decision, and for the purpose of pointing out that part of the By-Laws which provided for forfeitures, and by which forfeitures some members of the association would profit at the expense and loss of some of the other members, said:

"12. Any person to be eligible for membership and certificate of benefit of the Association shall be at the time of making application for membership be in good health and free from any chronic disease and within the age limits hereinafter specified, and any misrepresentations as to age or health condition forfeits all rights to benefits from the Association.

We have paid particular attention to By-Law 15 of said proposed association respecting the employment by the board of directors of a managing director for the association. Said By-Law 15, in part, is as follows:

"SUCH MANAGING DIRECTOR SHALL BE PAID, AS MONTHLY COMPENSATION, A SUM EQUAL TO FOURTEEN PER CENT (14%) OF THE AMOUNT OF DUES COLLECTED FROM THE MEMBERS IN THAT MONTH, BUT SUCH COMPENSATION SHALL NOT EXCEED THE SUM OF FIVE HUNDRED DOLLARS (\$500.00) FOR ANY ONE MONTH."

By-Law 16 of the proposed organization is in like vein, and with like object, respecting the compensation of an assistant managing director, and said By-Law 16 is, in part, as follows:

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"SUCH ASSISTANT MANAGING DIRECTOR SHALL BE PAID, AS MONTHLY COMPENSATION, A SUM EQUAL TO EIGHT PERCENT (8%) OF THE AMOUNT OF DUES COLLECTED FROM THE MEMBERS IN THAT MONTH, BUT SUCH COMPENSATION SHALL NOT EXCEED THE SUM OF FIVE HUNDRED DOLLARS (\$500.00) FOR ANY ONE MONTH."

It will be observed that these proposed salaries shall be computed upon a percentage basis in each said By-Laws 15 and 16, upon the "amount of dues collected from the members in that month." That means upon the gross dues paid by the membership of the association. This would be taking no account of losses, benefits and other liabilities of the organization. This would be, to say the least, a very unusual procedure. That plan itself shows that it must inevitably result in a profit to these persons in the management of the proposed organization at the expense and loss of the membership generally.

We believe this proposed organization comes definitely within the provisions of the insurance laws of this State, and is subject to supervision and control by them.

CONCLUSION

It is, therefore, the opinion of this department, from the facts stated in the Articles of Association, and the By-Laws, and the authorities and statutes hereinabove quoted, that this is a plan for doing an insurance business for the benefit and profit of the persons conducting and managing the organization and for the benefit of some of the membership at the expense of others of the membership of the organization, and is not entitled to a pro forma decree in the premises.

Respectfully submitted

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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