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When religion gets in the way of health care

Health Care Sharing Ministries still exist owing to a religious exemption in Obamacare, but when it is time to pay claims, they swear they are not insurers

By David Lilienstein and Jessica Cho

You don't need to be an expert in health insurance law to be familiar with "*Hobby Lobby*," the 2014 Supreme Court decision (5-4) upholding the sanctity of religious beliefs of owners of "closely-held" corporations.[1]

That decision carved out an exemption to the contraception mandate in the Affordable Care Act (ACA – otherwise referred to as "Obamacare). Now, if providing birth control to employees violates the business owner's "sincerely held" religious beliefs, withholding such benefits from employees will not violate ACA strictures.

Hobby Lobby is not the only religion-based exemption affecting health insurance in the age of Obamacare. Another one concerns the individual mandate – the requirement that all individuals secure health care coverage or risk a governmental fine. Written into the ACA is an exemption for those who get health care coverage from a religiously-based, Health Care Sharing Ministry – usually a nonprofit organization offering an "alternative" to the Anthems, Blue Crosses and Kaisers of the insurance marketplace.

But please, don't call this "alternative insurance." It's not.

The sharing in a Health Care Sharing Ministry

Health Care Sharing Ministries (HCSMs) have been around for decades. They were formed in accordance with, for example, Galatians 6:2 and 2 Corinthians 8:14, wherein Christians are encouraged to carry each other's burdens.[2] Boasting wholesome Christian values and bargain-basement premiums, HCSMs offer what they claim is an alternative to traditional health care coverage. Get your care, submit your bill, and get reimbursed, the HCSM sales pitch promises.

What's more, all are welcome to join a given HCSM, so long as they agree to abide by certain rules and regulations, such as being a Christian, living by "Biblical standards," attending church regularly, refraining from using tobacco or illegal drugs, and refraining from abusing legal substances such as alcohol. Many HCSMs rely on local churches to find potential members.

Members are given a policy that contains information on coverage, including but not limited to: the claims handling process, exemptions, and limitations. Although there are many variations on organizational structure, this article focuses on those HCSMs that deposit their members' monthly premiums directly into an organizational bank account. From that account the HCSM reimburses members for covered medical costs. If these monthly payments are not timely made, a member may be terminated and no longer able to receive the benefits of the coverage.

When this works – and the happy testimonials abound – HCSMs are a benevolent means for offering affordable health care to like-minded people of faith. But when it comes to large claims and for expensive and extensive medical treatments, the promised protections can all too often disappear.

The ACA and the HCSA exemption to the individual mandate

For years, Health Care Sharing Ministries represented a quiet, small niche in the world of health care. Then came the Affordable Care Act, signed into law by President Obama in 2010, and its individual mandate.

Soon, the exemptions to the individual mandate abounded. One involves those who enroll in an HCSM, which the ACA defines as an organization:

> (I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),
> (II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,
> (III) members of which retain membership even after they develop a medical condition,
> (IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and
> (V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.[3]

Based on this exemption, HCSMs began touting themselves as a legal alternative to Obamacare. Membership grew exponentially, as did the potential for abuse.

HCSMs' attempts to avoid liability

Although HCSM applicants fill out applications, answer questions about their

medical history, remit monthly payments to keep their memberships in force, and receive multi-page documents outlining terms and conditions of coverage, HCSMs routinely contend they do not provide insurance. Some HCSMs have developed a very specific nomenclature to avoid any semblance of insurance. For example, policies are classified as "guidelines." Premiums are called "monthly shares" or "monthly gifts." Members do not file claims, they have "needs," which are communicated through a "needs processing form." Deductibles are referred to as "personal responsibility."

Based on this unique vernacular, HCSMs contend they are not bound by state insurance laws, they cannot be liable for breach of an insurance contract, and they cannot be liable for the remedies available upon a finding of insurance bad faith. Some HCSM policies go further and state that members have no legal recourse in the event a "need" is not met, and that despite the monthly payment obligation, there is no contract for indemnification, either in fact or implied. At least one HCSM policy encountered by the authors contains language forbidding members from initiating any legal action whatsoever in the event of a denied claim.

Some of these conditions will shock the conscience. For practitioners, the HCSM agreement raises interesting and fundamental questions. What defines an insurance contract? What qualifies as the business of insurance? Can an entity contract around insurance with written disclaimers?

When is an insurance contract not an insurance contract?

In the world of insurance, "coverage [arises] immediately upon completion of the application and payment of the premium."[4] This is simply common sense: the insurer makes promises and the insured pays the premiums, "the one in consideration for the other, against the risk of loss."[5] So long as membership in an HCSM is predicated on completing an application and paying a monthly fee, once the document and the payment are accepted, a contract of insurance is established.

The next question is whether HCSMs are engaged in the business of insurance. At the heart of this analysis is risk pooling – the sine qua non of the insurance industry. Thus, determining whether an HCSM acts like an insurer requires an investigation into how it uses its members' monthly premium payments.

The Supreme Court defines insurance as "an arrangement for transferring and distributing risk."[6] Essential is the shifting of risk of loss, subject to contingent or future events, by legally binding agreement.[7] While the assumption of risk is a key element, it is not the only element of insurance. Three criteria indicate whether a practice is one of insurance: "(1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry."[8]

HCSMs argue they are mere facilitators, therefore the risk stays with the insured, rather than the HCSM. However, this argument ignores the fact that many HCSMs pool monthly payments from insureds, and pay eligible claims from that pool. This means that the HCSM controls every component of the claims handling process, from processing to payment, and determines which medical conditions are excluded and what limitations exist on coverage. As has been famously said, if it walks like a duck and talks like a duck, it's a duck!

HCSMs cannot contract around liability

In California:

> All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for this own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.[9]

While courts have allowed some contractual limitations over the scope of remedies, an "unqualified prohibition against the recovery of damages" rises to the level of exemption of violation of law.[10]

When it comes to areas of public interest, such as health care, such unqualified prohibitions are strongly disfavored. In *Health Net of California, Inc. v. Department of Health Services*, a commercial prepaid health plan provider fought a contract limitation that exculpated the defendant from liability for violation of statutory law. The court held that the exculpation clause was part of a transaction that provided managed health care, which impacts public interest because such clauses deter participation in health care.[11]

A long history of decisions firmly establish the principle that insurance contracts are "characterized by elements of adhesion, public interest and fiduciary responsibility."[12] The use of blanket prohibitions on lawsuits in such adhesion contracts cannot withstand court scrutiny. In response, HCSMs pivot and cite to their ACA exemption, and special terminology, as proof they cannot be liable for alleged misconduct. Since members are merely submitting voluntary gifts, there is no contract at all, just pure charity. So much for the HCSM claims that they simply offer an economical health care alternative to conventional health insurance.

To accept an HCSM's self-definition is like comparing a member's participation in the program to one who throws a dollar into the Salvation Army tin. This is not what HCSMs are marketing and selling to the public.

Treatment of HCSMs by other states

Amazingly, there is a dearth of California case-law related to Health- Care Sharing Ministries. Fortunately, other state decisions provide some guidance.

For example, the court in *Rowden v. American Evangelical Association* granted

the plaintiff's summary judgment motion, holding that that HCSM was engaged in the business of insurance and a valid contract was formed between the HCSM and the plaintiff.[13] The court was not persuaded by the many disclaimers used by the HCSM: that monthly premiums are voluntary gifts, and that it was not selling insurance but merely offered an alternative to insurance. The court noted that "[w]hat is said by a putative insurer as to whether it is transacting insurance is irrelevant.[14] In holding the HCSM was engaging in the business of insurance, the court noted that the HCSM: (1) offered different insurance plans with different benefit packages at different premium rates, (2) applied specific conditions for payment including preexisting condition exclusions, and (3) pooled funds.[15]

In *Bosch v. Christian Care Medi-Share*, the HCSM contended there is no shifting of risk because the risk stays with the members and the HCSM is merely facilitating the process.[16] The court disagreed. It pointed out that all insurance companies could make that same argument, and that regardless of the proffered insurance disclaimers, the commitment contract was insurance as a matter of law, and there was a contract formed between the parties.[17]

In reaching its decision, that court was persuaded by the fact that the HCSM: (1) had created multiple healthcare plans with different deductibles and co-pays, (2) had information on medical needs that are excluded from the plan, (3) received and processed applications, (4) informed members of the approval or denial, (5) calculated monthly shares which include administrative costs, (5) sent monthly statements to members requesting payment, (6) collected monthly payments at its processing center, (7) received and processed insurance claims sent by medical providers, or by the members themselves who had obtained proper insurance forms, and (8) had the sole and final responsibility of determining which medical claims were eligible for payment.[18]

The Kentucky state supreme court in *Commonwealth v. Reinhold* reversed its lower court, which incorrectly held that the program did not shift risk because each individual member remained personally liable for paying his own medical bills.[19] The HCSM stated that members were obligated "to pay their monthly share by the first of the month because their fellow believers in Christ *rely* upon that payment to satisfy their medical needs . . . [i]n return for paying the monthly share, [HCSM] members remain eligible to receive payment for their medical needs through the program."[20]

The court stated "[t]his process clearly shifts the risk of payment for medical expenses from the individual member to the pool of sub-accounts from which his expenses will be paid. Thus, regardless of how the [HCSM] defines itself or what disclaimers it includes in its literature, in the final analysis, there is a shifting of risk."[21]

The dissenting judge in *Reinhold* even admitted that the defendant's "extraordinary control" over the funds and its decision making abilities "tend to lean toward finding that it is in the business of insurance."[22] The dissent also acknowledged that if the ministry pooled subscribers' funds into one pool, its "contract is in fact definitional insurance."[23]

Consumer protection demands stronger regulation of HCSMs

Despite all of the above analyses, in much the same way that the *Hobby Lobby* plaintiffs won an exemption from certain Affordable Care Act rules, in some states Health Care Sharing Ministries have succeeded in legislating an end-around to the insurance codes.

These are known as the safe-harbor exemptions, and they act to insulate HCSMs from application of the state's insurance laws. California, Nevada, and Oregon have no safe-harbor laws on the books. Many other states do.[24]

HCSMs often rely on the safe-harbor legislation not just to avoid application of an insurance code, but to avoid all liability. Armed with a safe-harbor exemption, they administer health care coverage with seeming impunity. And given the explosion of HCSMs under the ACA, and resulting increase in premium dollars being pumped into the system, "under the guise of religion, many [consumers] have been defrauded."[25]

This has created a regulatory vacuum. Without the oversight of Departments of Insurance, what is the proper entity to scrutinize HCSMs and their business practices? Clearly the government cannot close its eyes to its duty to safeguard the significant public policy of protecting consumers from industries rife with opportunity for fraud and mismanagement.[26] That an HCSM may "[clothe] its alternative health care protection plan in spiritual terminology" does not hide the fact that at its core it still represents a plan for payment of the health care needs of its members.[27]

California, like other states, must 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" its citizens are entitled to.[28]


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Endnotes

[1] *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014).
[2] See *Rowden v. American Evangelical Association,* 2007 Mont. Dist. LEXIS *7.
[3] 26 U.S.C. § 5000(A)(d)(2)(B)(ii)(V).
[4] *Smith v. Westland Life Ins.*, 15 Cal.3d 111, 119 (1975).
[5] *Buss v. Superior Court,* 16 Cal.4th 35, 45 (1997).
[6] *Group Life & Health Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) *quoting* 1 G. RICHARDS, THE LAW OF INSURANCE § 2 (W. Freedman 5th ed., 1952).
[7] *Richardson v. GAB Bus. Servs., Inc.,* 207 Cal.App.3d. 519, 523 (1984).
[8] *Metro Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 743 (1985).
[9] Cal. Civ. Code § 1668.
[10] *Health Net of California, Inc. v. Department of Health Services,* 113 Cal.App.4th 224, 227 (2003).
[11] *Id*. at 237.
[12] *Cates Construction, Inc. v. Talbot Partners,* 21 Cal.4th 28, 44 (1999) *citing Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 820 (1979).
[13] *Rowden v. American Evangelical Association*, 2007 Mont. Dist. LEXIS at *9, *12.
[14] *Id*. at *8.
[15] *Id*. at *8, *16-17.
[16] *Bosch v. Christian Care Medi-Share*, (Civ. 04-492, S.D. 2006).
[17] *Id*.
[18] *Id*.
[19] *Commonwealth v. Reinhold*, 325 S.W.3d 272, 273 (2010).
[20] *Id*. at 277 (emphasis original).
[21] *Id*.
[22] *Id*. at 281.
[23] *Id*.
[24] A 50 state analysis regarding HCSM safe harbor legislation can be found at: http://www.healthcaresharing.org/stateinfo/
[25] *Commonwealth v. Reinhold*, 2008 Ky. App. LEXIS 311, *22 (Thompson, J. dissenting).
[26] *Id*. at *16 (Nickell, J. concurring).
[27] *Id*. at *17.
[28] *Id*. at *18.