MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MICHAEL ROWDEN, Plaintiff, v. AMERICAN EVANGELICAL ASSOCIATION and its DIVISION CHRISTIAN CARE MINISTRY d/b/a MEDI-SHARE, Defendants, THE STATE OF MONTANA by and through the MONTANA STATE AUDITOR'S OFFICE, Rule 19 Defendant.	Cause No. BDV-2006-109 **ORDER ON VARIOUS MOTIONS**

Before the Court are the following motions:

1. In April 2006, Defendant American Evangelical Associatio (hereafter AEA) and its division Christian Care Ministry (hereafter CCM) doing business as Medi-Share (hereafter Medi-Share) filed its motion to compel arbitra and to stay these proceedings. In response, Plaintiff Michael Rowden filed a mo

requesting that the Court withhold ruling on the motion to compel arbitration pending additional discovery.

2. In October 2006, Rowden filed a motion for summary judgment requesting that the Court rule as a matter of law that Defendants' Medi-Share programs meets the definition of "insurance" in Montana, and that Medi-Share is an unauthorized insurer.

3. In November 2006, Rowden filed a motion to extend the December 16, 2006 discovery deadline.

A hearing was held on November 8, 2006, and the motions are ready for decision. As Rowden has requested oral argument on his motions to compel discovery, and his motion for summary judgment on the preexisting condition/attorney fee issues, the Court will reserve ruling on those motions until after oral argument on January 10, 2007.

BACKGROUND

AEA was founded as an association of churches, pastors, missionaries, staff, and trained lay-persons. In 1958, it obtained nonprofit tax exemption status under 26 U.S.C. § 501(c)(3). In 1993, AEA organized CCM to create a formalized approach to sharing medical expenses.[1] CCM developed Medi-Share's health reimbursement programs to execute planned sharing in accordance with Galatians 6:2, wherein Christians are encouraged to carry each other's burdens. Unlike other medical insurance coverage, members of Medi-Share agree as a group to pay one another's eligible medical expenses. Medi-Share counsels its members that is not an insurance company, but an alternative to insurance based on the biblical concept of Christian

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[1] CCM also accepts donations for disaster relief efforts for tsunami and hurricane relief.

mutual sharing. The decision whether Christian members will agree to pay the needy person's medical bills is allegedly voluntary. All Medi-Share members are required to agree that their medical bills may, or may not, be paid, and CCM is not liable for payment of any bills. Finally, members are required to agree that any payment decision may only be appealed through CCM's appeal procedure and no lawsuit may be filed against CCM, other than a claim for binding arbitration.

At the time he signed his application with Medi-Share in October 2003, Rowden was a senior pastor at a Christian church in Big Fork, Montana. Rowden was allegedly accepted for membership by Medi-Share in December 2003. Approximately six months later, in June 2004, Rowden underwent treatment for a heart condition. Medi-Share denied payment of Rowden's medical bills because of his failure to disclose a preexisting heart murmur on his Medi-Share application.

Rowden's complaint was filed in February 2006, and an amended complaint was filed in August 2006. Rowden's amended complaint seeks compensatory and punitive damages for Medi-Share's failure to pay insurance benefits allegedly owed by the company. It avers that in June 2004, Rowden contracted a systemic infection which resulted in endocarditis and damage to his aortic heart valve which necessitated heart valve replacement surgery and other medical treatment. Medi-Share denied payment on the basis that Rowden's heart condition was a pre-existing condition for which benefits were not allowed. On May 19, 2006, roughly two years after the medical bills were incurred, Medi-Share reconsidered its denial of payment, and reimbursed Rowden's medical providers. (Pl.'s Mot. Partial Summ. J. Re: Preexisting Condition & Atty's Fees, Ex. O.) Medi-Share also terminated Rowden's medical insurance coverage effective May 31, 2006, because of his failure to disclose his heart murmur on his application for coverage. (Id.)

Rowden's motion to amend his complaint was granted in August 2006. In his amended complaint, Rowden joined the American Evangelical Association International, Inc. (hereafter AEAI) as a Defendant and set forth the following causes of action against all Defendants: Count One - Unauthorized Insurer; Count Two - Breach of Contract; Count Three - Actual and Constructive Fraud; Count Four - Unfair Claim Settlement Practice; Count Five - Alternative Count of Bad Faith; Count Six - Alternative Count of Violation of Consumer Protection Act; Count Seven - Punitive Damages; and Count Eight - Attorney Fee Lien.

DISCUSSION

Motion to Compel Arbitration

In the application he signed on October 28, 2003, Rowden agreed to follow Medi-Share's Appeal Process as to any decision precluding payment of insurance benefits. In February 2005, Medi-Share's members agreed to arbitrate any benefits dispute:

> **Mandatory Binding Arbitration**
>
> Members voted that in cases where all administrative appeals have been exhausted, any and all disputes will be settled exclusively by mandatory binding arbitration, not in a secular court. The mandatory binding arbitration process is governed by the United States Code and each party will bear their own costs and attorney's fees, with the cost of the arbitration to be divided equally between the parties. The protocol for the mandatory binding arbitration process is available upon request.

(Robert Y. Baldwin Aff., Ex. D – Medi-Share Guidelines, Revised: Oct. 2005, at 9.)

In Montana, arbitration provisions in insurance policies are void. Section 27-5-114(2)(c), MCA, states,

> (2) A written agreement to submit to arbitration any controversy arising between the parties after the agreement is made is valid and enforceable except upon grounds that exist at law or in equity for the revocation of a contract. Except as permitted under subsection (3) [relating to trade or professional organizations], this subsection does not

apply to:

. . .

(c) any agreement concerning or relating to insurance policies or annuit contracts except for those contracts between insurance companies; . . .

The definition of insurance is found in Section 33-1-201(5)(a), MCA, which states, "'Insurance' is a contract whereby one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies." The definition of the business of health insurance is found in Section 33-1-207, MCA, and includes indemnification for medical expenses resulting from accidents or sickness.

Medi-Share instructs its members that all premium contributions are tax deductible and no guarantees exist that by paying their insurance premiums, medical bills will be paid. Medi-Share claims that because the written materials it provides to its members specify that it is not an insurance company and is not transacting the business of insurance, the Court need look no further. Medi-Share avers that the statutory exception to arbitration of insurance claims found it Section 27-5-114(2)(c), MCA, does not apply because of the voluntary nature of membership in Medi-Share which is based on Christian sharing, and the warning to members that their medical claims may, or may not, be paid.

It is undisputed, however, that Medi-Share does undertake to indemnify members by paying "a specified or determinable amount or benefit upon determinable contingencies" based on claims handling guidelines, as referenced in the statutory definition of "insurance" set forth in Section 33-1-201(5)(a), MCA. Medi-Share's literature which reiterates that reimbursement for medical expenses is not guaranteed, appears to be stated solely to avoid regulation by the Insurance Commissioner, as Medi-Share representatives proudly testified at the hearing in this matter that no

eligible medical bill has gone unpaid. In addition, members who do not pay their monthly "shares" or premiums are subject to late penalties, ineligibility for medical bill reimbursement, and potential termination of coverage.

Here, Medi-Share initially argued that Rowden's claim was not a covered claim because of an undisclosed preexisting heart condition. The decision as to whether Rowden's claim should be paid triggers an issue of law which directly involves Montana insurance jurisprudence. That question is apparently no longer at issue, as the Defendants acknowledge that Rowden's heart surgery bills have now been paid in accordance with Medi-Share's sharing guidelines. (Defs.' Resp. Pl.'s Mot. Compel, at 2, n. 1.)

If there was any doubt as to whether Medi-Share meets the Montana definition of insurance, it is quelled by the additional facts that Medi-Share offers different insurance plans with different benefit packages at different premium rates; determines individual rates based on actuarial principles and health histories; purchases stop-loss insurance to transfer its risk as to medical claims which exceed $50,000; and uses a well-known health insurance claims processing computer software known as "Eldorado" to process claims for medical benefits. There is no doubt that Medi-Share meets the definition of a company which is transacting the business of insurance found in Sections 33-1-201(5)(a) and -207, MCA, thereby subjecting Medi-Share to all state and federal regulation applicable to health insurance companies.

Because Medi-Share is in the insurance business, its motion to compel binding arbitration is denied pursuant to Section 27-5-114(2)(c), MCA, which voids arbitration provisions in insurance disputes.

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Motion for Partial Summary Judgment

Summary judgment is proper only when no genuine issue of material fa exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The movant has the initial burden to show that there is a complete absen of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existenc of any genuine issue of material fact. Minnie v. City of Roundup, 257 Mont. 429, 43 849 P.2d 212, 214 (1993). The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine issues for tria Sunset Point P'ship v. Stuc-O-Flex Int'l, 1998 MT 42, ¶ 12, 287 Mont. 388, ¶ 12, 95 P.2d 1156, ¶ 12. The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P. If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. Rogers v. Swingley, 206 Mont. 306, 312, 670 P.2d 1386, 1389 (1983), *citing* Cheyenne W. Bank v. Young, 179 Mont. 492, 587 P.2d 40 (1978), *other citations omitted.*

For the same reasons explained above, Rowden's motion for partial summary judgment on the issue as to whether Medi-Share is transacting the business insurance in Montana must be granted. Sections 33-1-201(5)(a) and -207, MCA. As the Montana Insurance Commissioner stated in its brief in support of Rowden's motio for partial summary judgment, there is no genuine issue of material fact that Medi-Share is transacting the business of insurance in Montana. (Rule 19 Def.'s Answer Pl.'s Mot. Partial Summ. J., at 3.) What is said by a putative insurer as to whether it i transacting insurance is irrelevant. At least one court has already determined that Medi-Share is conducting the business of insurance. In Bosch v. Christian Care Medi

Share (Civ. 04-492, S.D. 2006), the Second Judicial Circuit Court of South Dakota stated:

> Defendants claim that there was no transfer of risk from Plaintiff to Defendant, at most only a shift between members, because Defendant was merely "assisting the flow" between members. All insurance companies could arguably make the same claim. It is not what Defendant and its Medi-Share programs say, but what Defendant and its programs do that determines whether or not insurance is involved. Here, Defendant created two healthcare plans, which included deductibles, co-pays, and a preferred provider network, along with information on medical needs that are specifically excluded from the plan. Defendant receives and processes applications. After approval of underwriters, Defendant informs prospective members of acceptance or denial. Defendant calculates monthly "shares," which include administrative costs and a stop-loss premium. Defendant sends monthly statements to members requesting payment. Monthly payments are collected by Defendant at its processing center. Defendant receives and processes insurance claims sent by medical providers, or in some cases, by the members themselves, who have obtained proper insurance forms. Defendant pays eligible claims out of its central checking account. Defendant has the sole and final responsibility of determining which medical claims are eligible for payment.
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> There was a contract. The risk was shifted from Plaintiff to Defendant. Based on the facts, Medi-Share is insurance as a matter of law.

(Br. Supp. Pl.'s Mot. Partial Summ. J., Ex. GG, Bosch, at 4.)

Here, there is no doubt that Medi-Share meets the definition of the business of insurance found in Section 33-1-201(5)(a), MCA, and the definition of the business of health insurance found in Section 33-1-207, MCA, thereby subjecting Medi-Share to all state and federal regulations applicable to health insurance companies conducting business in Montana. As such, Defendants are subject to the jurisdiction of the Montana Insurance Commissioner pursuant to Section 33-1-1102, MCA.

Defendants' central arguments to the contrary are that: (1) "Medi-Share contracted to facilitate the sharing of medical needs among its members in accordance with its member-defined guidelines;" and, (2) Defendants assumed no risk for the

actual payment of medical claims. (Br. Opposing Pl.'s Mot. Summ. J., at 15). Medi-Share claims that because it did not directly promise each member that it would directly pay his or her covered medical claims, but instead created a pool of funds available to pay covered medical claims, no contract of insurance exists. (Id.) In the same breath, Medi-Share argues that no contract exists (at all) due to a lack of consideration under Section 28-2-102, MCA, which sets forth the four elements of a contract:

> **Essential Elements of a Contract.** It is essential to the existence of a contract that there be:
> (1) identifiable parties capable of contracting;
> (2) their consent;
> (3) a lawful object; and
> (4) a sufficient cause or consideration.

(Id., at 13, *quoting* Section 28-2-102, MCA.) For Defendants to admit that "Medi-Share contracted to facilitate the sharing of medical needs among its members in accordance with its member-defined guidelines" and to correspondingly argue that no contract exists between Medi-Share and its members belies logic.

In addition, if Medi-Share has assumed no risk for the payment of medical costs, as it avers, while aggressively advertising in the insurance marketplace, it has perpetuated a fraud against its members who religiously pay monthly "shares" or premiums. Fortunately for Medi-Share, in consideration for the premiums it receives, it has paid all covered claims to date, including Rowden's claims. Otherwise, its conduct would be objectionable.

Medi-Share's attempts to match members through the use of correspondence explaining where incoming premiums have met individual member needs, does not change the fact that member needs are being paid from a pooled fund, similar to any insurance arrangement.

Finally, Medi-Share has presented no authority to the Court which squares with its position that it is not in the business of insurance. SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959), involved determining whether a variable annuity product was primarily an investment product or an insurance product. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979), dealt with the contractual relationship between an insurance company and pharmacies, not an insurance company and its members, as in this case. In Union Labor Life Ins. Co. v. Pireno, 458 U.S.119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the United States Supreme Court simply determined that a health insurer's use of a peer review committee to review chiropractic statements did not itself constitute the business of insurance. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), and Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S.724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985), both deal with the preemption of state law claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC § 1001, et seq. Those cases are obviously inapposite as to whether Medi-Share is in the business of insurance. In Gordon v. U.S. Dep't of Treasury, 846 F.2d 272 (4th Cir. 1988), the Fourth Circuit Court of Appeals ruled that the liquidation of an insolvent insurance company and the determination of the priority of payment of claims against the company did not constitute the business of insurance under federal law.

Defendants do cite one supportive case, Barberton Rescue Mission v. Insurance Div., 586 N.W.2d 352 (Iowa 1998). In that case, the Supreme Court of Iowa determined that a Christian newsletter was not practicing the business of insurance. Id., at 356-57. The court found that the newsletter actually applied the Christian sharing principles represented in this case in that monthly shares or premiums were not

3. Rowden's motion to extend the discovery deadline is GRANTEI

4. Pursuant to Section 33-1-615, MCA, within 30 days of this Orde Defendants SHALL APPLY with the Montana Insurance Commissioner to obtain a certificate of authority to transact insurance in Montana.

DATED this 2 day of Jan, 2007

JEFFREY M. SHERLOCK
District Court Judge

pcs: Joe Bottomly/Jeffrey D. Ellingson/Amy Eddy
Maxon R. Davis
Michael Winsor

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based on actuarial principles (but were instead uniform for all members regardless of each member's health risks), and shares or premiums were not pooled. The court determined that based on Iowa's statutes, since the newsletter did not assume the risk of payment and Christian sharing was occurring as advertised, the business of insurance was not being conducted by the newsletter. Id.

Here, Defendants are clearly conducting the business of insurance by determining eligibility for membership, using actuarial principals and health histories to determine premium amounts, applying specific conditions for payment including preexisting condition exclusions, pooling funds, using computer software to process claims, and using stop-loss insurance to insure against large claims. Because Defendants are in the insurance business, they are subject to the same state and federal regulation applicable to other nonprofit health insurers.

Pursuant to Section 33-1-615, MCA, within 30 days of this Order, Defendants shall apply with the Insurance Commissioner to obtain a certificate of authority to transact insurance in Montana.

Plaintiff's Motion to Extend the Discovery Deadline

Pursuant to the Scheduling Order filed in this matter, the discovery deadline of December 16, 2006, shall be extended to February 16, 2007. All other deadlines shall remain the same.

CONCLUSION

For the above reasons, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Defendants' motion to compel arbitration is DENIED.

2. Plaintiff's motion for partial summary judgment as to whether Medi-Share is an insurance company is GRANTED.