

STATE OF ARIZONA

STATE OF ARIZONA
FILED

DEPARTMENT OF INSURANCE

JAN 3 1997

DEPT. OF INSURANCE
BY Kath

In the Matter of:)	Docket No. 96A-080-INS
)	
THOMAS-DAVIS MEDICAL)	ORDER
CENTER,)	
Petitioner.)	
)	
)	

On December 5, 1996, the Office of Administrative Hearings, through Administrative Law Judge Lewis D. Kowal, submitted the "Recommended Decision of Administrative Law Judge" (the "Recommended Decision"), a copy of which is attached and incorporated by this reference. The Director of the Arizona Department of Insurance has reviewed the Recommended Decision and enters the following order:

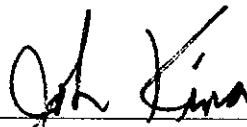
1. The recommended findings of fact and conclusions of law are adopted.
2. Thomas-Davis Medical Center is an industrial insured subject to premium taxation pursuant to A.R.S. §20-401.07.

NOTIFICATION OF RIGHTS

The aggrieved party may request a rehearing with respect to this Order by filing a written petition with the Office of Administrative Hearings within 30 days of the date of this Order, setting forth the basis for such relief pursuant to A.A.C. R20-6-114(B).

1 The final decision of the Director may be appealed to the Superior Court of Maricopa
2 County for judicial review pursuant to A.R.S. § 20-166.

3 DATED this 3rd day of JANUARY, 1997

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6 John King
Director of Insurance

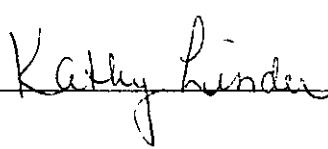
7
8 A copy of the foregoing mailed
this 3rd day of JANUARY 1997

9 Charles R. Cohen, Deputy Director ✓
10 John Gagne, Assistant Director
11 Catherine O'Neil, Assistant Director
12 Maureen Catalioto, Supervisor
Department of Insurance
2910 N. 44th Street, Suite 210
Phoenix, AZ 85018

13 Office of Administrative Hearings
14 1700 W. Washington, Suite 602
Phoenix, AZ 85007

15 W. Mark Sendrow
16 Assistant Attorney General
1275 W. Washington
Phoenix, AZ 85007

17 John P. Flynn
18 Low & Childers, P.C.
2999 N. 44th Street, Suite 250
19 Phoenix, AZ 85018

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1 3. FHC is a Delaware corporation with its principal place of business in
2 California.

3 4. TDMC is a related corporation of FHC in that it is included within FHC's
4 consolidated state and federal tax returns.

5 5. Russell O'Donnell is a full-time employee of FHC providing services as the
6 Director of Risk Management. Mr. O'Donnell is employed and resides in the state of
7 California. In the capacity as FHC Director of Risk Management, Mr. O'Donnell
8 supervises risk management and insurance matters for FHC, as well as other
9 subsidiaries and affiliated corporations, including TDMC.

10 6. FHC management determined in 1994 that it would be appropriate to form
11 a wholly-owned Cayman Islands insurer, FH Assurance Company ("FH Assurance"), for
12 the purpose of providing workers' compensation and professional liability insurance
13 coverage for FHC, certain subsidiaries, as well as TDMC.

14 7. During the last half of 1994, Mr. O'Donnell and other representatives of
15 FHC participated in meetings in the State of California for the purpose of determining
16 the business efficacy of forming a Cayman Islands captive insurer.

17 8. The development of the insurance policies, negotiation of reinsurance/
18 stop-loss coverage, and the formation of FH Assurance all took place outside of the
19 State of Arizona. Mr. O'Donnell, as well as other representatives of FHC and TriStar
20 Risk Management (Tri-Star"), a California corporation retained as claims administrator
21 and manager for FH Assurance, traveled to the Cayman Islands for the purpose of
22 forming FH Assurance.

23 9. FH Assurance was incorporated under the laws of the Cayman Islands on
24 January 31, 1995, as a wholly-owned subsidiary of FHC. FH Assurance represents it is
25 financially solvent. As part of its insuring structure, FH Assurance continues to have
26 reinsurance/stop-loss coverage in place with insurers. FH Assurance has provided the
27 Department with a listing of participating excess insurers.

28 10. According to an Industrial Insured Certification Statement ("Certification
29 Statement") filed by TDMC with the Arizona Department of Insurance ("Department") on
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1 March 1, 1996, TDMC procured general and professional liability insurance from FH
2 Assurance. Further, according to the Certification Statement, Mr. O'Donnell provided
3 the risk management services in procuring the insurance policy. Subsequent to the
4 filing of the Certification Statement, TDMC sought to challenge the Department's
5 determination that TDMC is an industrial insured.

6 11. The insurance procured by TDMC is of the type that appears in the
7 January 26, 1994 Order of the Director of the Department, pursuant to A.R.S. §20-409
8 concerning recognized surplus lines (i.e. coverages not readily procurable from
9 authorized insurers).

10 12. Many claims filed under the FH Assurance policy are adjusted and may
11 be litigated in Arizona.

12 13. Following the formation and funding of FH Assurance, representatives of
13 FHC management developed the structure and terms of the insurance policy to be
14 issued to TDMC. The master policy issued to TDMC was transmitted from FH
15 Assurance to FHC in the State of California. The policy was procured by FHC, on
16 behalf of TDMC, without the involvement or retention of an insurance agent or
17 representative, other than Russell O'Donnell.

18 14. Pursuant to the TDMC-Foundation Health Medical Services, Inc. ("FHMS")
19 administrative service agreement, TDMC revenue and an administrative service fee are
20 regularly deposited in the California account of FHMS. Following FHMS's verification of
21 the policy information as stated in the premium statement, FHMS remits premium
22 payments from the State of California to Tri-Star as FH Assurance's manager and
23 claims administrator, for subsequent deposit in the appropriate California account of the
24 Cayman Islands insurer.

25 15. At policy inception, FHC forwarded a sample boiler-plate policy and claims
26 reporting guidelines to TDMC in Arizona for dissemination to insured and additional
27 insured persons and entities.

28 16. Tri-Star, formerly TOPA Risk Management, was incorporated and has its
29 principal place of business in the State of California. Additionally, Tri-Star maintains an
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1 office in Phoenix, Arizona which is staffed by a licensed Arizona adjuster. In the event
2 of a loss by TDMC or an additional named insured, Tri-Star assists in the administration
3 of the claim, either from its California office or its satellite office located in Phoenix,
4 Arizona. In the event of a claim or notification of a potential claim, notice is generally
5 provided to Mr. O'Donnell at FHC in California by FHMS. Mr. O'Donnell subsequently
6 provides notice to Tri-Star in California, which is responsible for administering the claim,
7 with the assistance of its Phoenix satellite office.

8 17. In the event a covered claim is required to be paid, Tri-Star provides for
9 the payment and the draft is remitted from the State of California to the claimant in
10 whatever jurisdiction the claimant is located or residing.

11 18. After a Department examination of Intergroup revealed that TDMC
12 procured medical malpractice insurance from FH Assurance, an unauthorized insurer,
13 the Department sought to collect a premium tax from TDMC in connection with the FH
14 Assurance policy pursuant to A.R.S. §20-401.07.

15 19. The declaration page of the FH Assurance policy lists the named insured
16 as TDMC, 655 North Alvernon, Suite 200, P.O. Box 12650, Tucson, Arizona 85732.
17 The policy also lists as additional insureds a number of Arizona physicians who are or
18 were employed by TDMC. The policy provides for "claims made" coverage and is
19 retroactive to October 1, 1980.

20 20. Premium taxes have not been paid to the Department with respect to the
21 insurance coverage issued to TDMC by FH Assurance.

22 21. On February 26, 1996, representatives of FHC and Tri-Star met with
23 Department staff members to discuss the FH Assurance policy and the Department's
24 initial determination that TDMC was an industrial insured.

25 22. As a result of the February 26, 1996 meeting with Department
26 representatives, FHC representatives directed TDMC to complete a Certification
27 Statement as an Industrial Insured.
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1 23. According to the Certification Statement, TDMC has 223 full-time
2 employees and an annual aggregate insurance premium payment in the amount of
3 \$3,000,000.00.

4 24. TDMC employs approximately 267 physicians in providing medical
5 services in Arizona. As part of the TDMC employment contract with its physicians, it
6 provides medical malpractice insurance. TDMC has satisfied this agreement by
7 procuring the general professional liability insurance from FH Assurance, an insurer
8 domiciled in the Cayman Islands and not authorized to transact the business of
9 insurance in the State of Arizona.

10 25. Within 24 hours of the direction provided to TDMC, FHC determined to
11 contest the Department's stated position that TDMC was required to submit the
12 aforementioned Certification and remit premium taxes pursuant to A.R.S. §20-107(B).
13 TDMC had, however, expeditiously forwarded the Certification to the Department in the
14 interim.

15 26. TDMC subsequently filed with the Department a Demand for Hearing
16 contesting the Department's decision that premium taxes were required to be remitted
17 pursuant to A.R.S. §20-401.07. The legal support stated in the Demand for Hearing
18 was A.R.S. §20-107(B) and constitutional principles of due process.

19 27. Russell O'Donnell is listed in the Certification Statement as the qualified
20 insurance consultant regularly and continuously retained by TDMC.

21 28. The Certification Statement was signed by Glen Randolph, CEO of
22 TDMC, who asserted that the statements and information contained in the Certification
23 Statement were true and accurate to the best of his knowledge and belief.

24 29. Pursuant to A.R.S. §20-601, the Director of the Department must hold a
25 hearing when a person aggrieved by any act or threatened act of the Director of the
26 Department has filed a written demand for a hearing.

27 30. In this instance, TDMC had the right to demand a hearing prior to filing the
28 Certification Statement with the Department but did not do so until after such filing had
29 occurred.
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1 31. TDMC's contention that A.R.S. §20-401.07 is unconstitutional will not be
2 addressed by the Administrative Law Judge as it is outside the jurisdiction of this
3 tribunal to address such constitutional issues. However, TDMC's contention and the
4 Department's response is noted and preserved for the record.

5 32. Pursuant to A.R.S. §20-401.07(B) the term "industrial insured" means an
6 insured:

- 7 1. Which procures the insurance of any risk or risks other
8 than life, disability and annuity contracts by use of the
9 services of a full-time employee acting as an insurance
10 manager or buyer or the services of a regularly and
11 continuously retained qualified consultant.
- 12 2. Whose aggregate annual premiums for insurance on all
13 risks total at least twenty-five thousand dollars.
- 14 3. Which has at least twenty-five full-time employees.

15 33. A.R.S. §20-401.07(A) provides in part that:

16 "Every industrial insured under a contract procured from an
17 unauthorized insurer shall pay to the director...a premium
18 receipts tax of three per cent of the gross premiums, less
19 premiums returned on account of cancellation or reduction
20 of premium, charged for insurance on subjects resident,
21 located or to be performed in this state...."

22 34. A.R.S. §20-107 states:

23 A. No person shall transact a business of insurance
24 in this state, or relative to a subject of insurance resident,
25 located or to be performed in this state, without complying
26 with the applicable provisions of this title.

27 B. No provision of this title shall be deemed to
28 require any license or other authority, or impose any penalty
29 or requirement except as provided by §20-421, of or upon
30 any person for negotiation or procurement of insurance by
him upon his own insurable interests, with or from an insurer
not authorized to transact insurance in this state.

1 35. TDMC contends that by virtue of the provisions of A.R.S. §20-107(B),
2 TDMC is not subject to the premium tax requirements of A.R.S. §20-401.07. The
3 Department asserts that the provisions of A.R.S. §20-107(B) only pertains to licensure
4 and is not legally sufficient to create an exemption from premium taxation. Further, the
5 Department argues that the provisions for premium taxation of industrial insureds did
6 not exist when A.R.S. §20-107(B) was enacted and therefore, it can not be reasonably
7 inferred that the legislature intended to exempt industrial insureds under that statute.

8 36. Counsel for TDMC asserts that A.R.S. §20-107(B) provides an exception
9 to premium taxation if a person qualifies under that statute. A.R.S. §20-107(B) requires
10 that: a) a person has negotiated or procured insurance for himself; b) the insurance is
11 for the person's own insurable interests; and c) that the insurance be negotiated with or
12 procured from an unauthorized insurer.

13 **CONCLUSIONS OF LAW**

14 1. TDMC satisfies the three requirements of A.R.S. §20-107(B) as set forth
15 in paragraph 36 of the above Findings of Fact. First, it is undisputed that Russell
16 O'Donnell acted on behalf of FHC and TDMC when he procured the FH Assurance
17 policy. Second, the master policy lists TDMC as the named insured. Although there
18 may be additional insureds such as physicians employed by TDMC, that does not in
19 any way diminish the fact that TDMC has an insurable interest in the FH Assurance
20 policy. Third, it is undisputed that FH Assurance is an unauthorized insurer from which
21 the professional liability insurance policy was procured on behalf of TDMC.

22 2. As counsel for TDMC has stated, the legislature is presumed to know the
23 law. Therefore, when the legislature enacted A.R.S. §20-401.07, it is presumed that
24 the legislature knew of A.R.S. §20-107(B) and its application. In enacting A.R.S. §20-
25 401.07, the legislature could have specifically exempted persons falling within the
26 purview of A.R.S. §20-107(B) and did not do so. Effect is to be given to legislative
27 intent. In this instance, the legislature intended to create a premium tax for certain
28 persons who qualify as an industrial insured when it enacted A.R.S. §20-401.07.
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1 3. When the legislature enacted A.R.S. §20-107(B), it could not have
2 intended to exempt industrial insureds from premium taxation because at that time
3 there was no provision for such taxation. Further, for a tax exemption to exist under
4 statute, the exemption must be stated in unequivocal terms. People of Faith, Inc. v.
5 Arizona Dept. of Revenue, 161 Ariz. 514, 520, 779 P.2d 829, 834 (Tax Ct. 1989), aff'd
6 171 Ariz. 140, 829 P.2d 330 (App. 1992).

7 4. The thrust of A.R.S. §20-107(B) is on licensure and other regulatory
8 requirements of persons who independently procure or negotiate insurance on their
9 own behalf. Therefore, A.R.S. §20-107(B) does not exempt persons falling within that
10 statute from the provisions of A.R.S. §20-401.07


11 5. Although TDMC negotiated or procured insurance as set forth in A.R.S.
12 §20-107(B), TDMC meets all of the three criteria set forth in A.R.S. §20-401.07 to be
13 considered an industrial insured. First, Russell O'Donnell was identified in the
14 Certification Statement as the person who is the regularly and continuously retained
15 insurance consultant who procured the professional liability insurance on behalf of
16 TDMC. This is further supported by the stipulated facts submitted by the parties. Mr.
17 O'Donnell participated in the formation of FH Assurance so as to provide to FHC and its
18 subsidiaries and affiliated corporations including TDMC professional liability insurance
19 and Mr. O'Donnell actively supervises risk management and insurance matters.
20 Further, Mr. O'Donnell is notified by FHMS of a claim or a potential claim on the FH
21 Assurance policy. Subsequently, Mr. O'Donnell notifies Tri-Star which administers the
22 claim. Second, the Certification Statement states that TDMC has an annual aggregate
23 insurance premium payment of \$3,000,000.00. Third, the Certification Statement
24 represents that TDMC has 223 full-time employees.

25 6. The evidence of record established that TDMC is an industrial insured
26 within the meaning of A.R.S. §20-401.07 and that A.R.S. §20-107(B) does not exempt
27 TDMC from premium taxation by the Department.
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2 **RECOMMENDED ORDER**

3 Based on the above, the Administrative Law Judge recommends that the
4 Department's position that TDMC is an industrial insured subject to the premium
5 taxation pursuant to A.R.S. §20-401.07 be affirmed.

6 Done this day, December 5, 1996.

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8 
9 _____
10 **LEWIS D. KOWAL**
11 **ADMINISTRATIVE LAW JUDGE**

12 Original of the foregoing mailed this
13 9 day of December, 1996, to:

14 John King, Director
15 Attn: Curvey Burton
16 Department of Insurance
17 2910 North 44th Street, #210
18 Phoenix, AZ 85018-7256

19 By: 
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