



Texas Department of Insurance

Liquidation Division
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RO-483

Claire Koriath-Chair
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Georgia D. Flint-Commissioner
Sandra A. Atry-Liquidator/Receiver

November 13, 1992

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~~FILED IN THE OFFICE OF THE ATTORNEY GENERAL~~

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Opinion Committee

ID # 17978

RE: State of Texas v. Members Mutual Insurance Company, Members Service Insurance Company, and Members Insurance Company; Cause No. 92-10489; In the 299th Judicial District Court of Travis County, Texas

SUBJECT: Request for Open Records Decision, under TEX. REV. CIV. STAT. 6252-17(a), regarding information held by court-appointed Receiver of Members Mutual Insurance Company, Members Service Insurance Company, and Members Insurance Company

Dear General Morales:

On November 4, 1992, the Texas Department of Insurance received an application for public information from Marilyn Haisten requesting information regarding Members Mutual Life Insurance Company, Members Service Insurance Company, and Members Insurance Company in receivership (hereafter "Members"). A copy of the application is attached as "Exhibit A."

This letter requests an opinion that the information applied for is exempt from production under the Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a. The Texas Department of Insurance requests that the Attorney General consider the following arguments and authorities separately, cumulatively or in any combination in support of its request for opinion.

The application in part demands production of reports and/or financial statements that have been filed by the Special Deputy Receiver ("SDR"). The application is vague as to the nature of the reports requested. TEX. INS. CODE ANN. Art. 21.28 § 2(a) requires two (2) reports to be filed by the SDR with the Commissioner. One report is a report of the business plan. A copy of this report is filed with the Court. The other report is a monthly report of the SDR's activities (hereafter "activities report"). This report is

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not filed with the Court. The reports referenced above are in my possession only in my capacity as court-appointed Receiver of Members in accordance with the provisions of TEX. INS. CODE ANN. art. 21.28 (Vernon Supp. 1989).

On July 21, 1992, I was appointed by the Court as Permanent Receiver of Members in Cause No. 92-10489 as a result of a lawsuit filed by the Attorney General of Texas styled The State of Texas v. Members Mutual Insurance Company, Members Service Insurance Company, and Members Insurance Company; in the 299th Judicial District Court of Travis County, Texas. In my capacity as Receiver of Members, I am not subject to the direction and control of the Texas Department of Insurance; rather, I am supervised and directed by the Court. Accordingly, I am acting as an agent of the Court, and am not a "governmental body" as defined in TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(1).

Further, subject to the foregoing, the information requested in the application for public information is not public information as defined in TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a). I maintain the records in question as a result of and subject to the Order of the Court. These records are actually in the legal custody of the court, or in custodia legis, pursuant to art. 21.28 § 2(1). Accordingly, the information has not been collected, assembled or maintained by or for a governmental body, and a governmental body does not have a right of access to or ownership of the information.

Alternatively, and without waiving the contention that the Open Records Act is inapplicable, there are additional reasons why Ms. Haisten's application for information should be denied if the Attorney General determines that the Open Records Act does apply here. The information requested is exempt from disclosure under TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(11). The SDR's activities report contains information regarding litigation and investigations. All information in the possession of the Receiver regarding litigation is subject to the attorney client privilege and the work product privilege. Section 3(a)(11) provides an exemption from disclosure for all inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency. If the Attorney General determines that the Receiver is a "governmental body" under the Open Records Act, then the Receiver's inter-agency and intra-agency memorandums or letters which constitute work product are exempt from disclosure.

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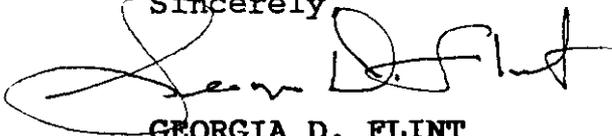
The Texas Department of Insurance asserts, again, that the Receiver is obligated by statute and by the Travis County District Court's order to act in the best interest of the receivership estate, policyholders and claimants of the insolvent company. The Receiver is governed and supervised by the Court, and must secure approval from the Court to take any action not specifically authorized by TEX. INS. CODE ANN. art. 21.28 (Vernon Supp. 1989).

For the foregoing reasons, the Texas Department of Insurance asserts that the application for information should be denied because the information requested is held by an agent of the Court and not a governmental body, or alternatively, the information requested is exempted from disclosure under TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(a)(1), 3(a)(3) and 3(a)(11).

Please provide this agency with an opinion whether the information requested is subject to the provisions of the Open Records Act.

Should you have questions or require additional information, please contact John R. Vasquez, Director of Special Deputy Receivers and Guaranty Fund Oversight, at (512) 322-0223, ext. 1-2414.

Sincerely,



GEORGIA D. FLINT
Commissioner of Insurance

GDF/JRV/jb

Enclosures

xc: Sandra A. Autry

November 4, 1992

To: Lee Jones, Acting Director
Insurance Department Public Information Office
From: Marilyn Haisten
3322 Shorecrest # 100, Dallas TX 75235
(214) 352-3680

I spoke with Dana Palmer who said I could fax requests for information under the open records act. I have been following activities regarding the Members Insurance Group (Members Mutual Insurance) for Credit Union Times, a weekly newspaper out of West Palm Beach, Fla.

May I call you later this week to find out an idea of how much documentation (in terms of bulk) is approved for release? I am scheduled to be in Austin Nov. 18 for a meeting at 11:30 a.m. If it would work out better for me to appear in person to view whatever is available, I could come to Austin the day before or early the morning of the 18th, but I need to know as soon as possible whether to plan on this.

I would like to request to see:

- * audits that may have been done of Members Mutual Insurance, Members Insurance Co., Members Life, Members Service or Members Insurance Group since audits became public records in Dec., 1991.
- * reports and/or financial statements that may have been filed so far on the above by the special deputy receiver
- * letters and/or memos from state insurance department to the above that I am told were dated May 2, 1988, and April 14, 1989, and responses from above to department. Any other letters or memos to above since 1987 regarding problem areas
- * Do you receive and keep on file copies of letters to insurance companies from National Association of Insurance Carriers or from A.M. Best, and if so can they be released? Can I contact NAIC direct? Is it a trade association or what is its function?

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PUBLIC INFORMATION OFFICE