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Antonio O. Garza, Jr.
Secretary of State

Office of the Secretary of State

September 16, 1996

FILE # ML-39116#-96

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

RQ-917

re: Opinion request regarding construction of the Automobile Club
Services Act

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Opinion Committee

Dear General Morales:

This request, made jointly by the Texas Secretary of State (the "Secretary of State") and the Commissioner of Insurance (the "Department") seeks your opinion regarding the application of the Automobile Club Services Act, TEX. TRANS CODE § 722.01 *et seq.* ("the Act") to auto club membership contracts which provide indemnity against the risk of particular losses. This request also seeks resolution of possible conflict between the Act and the Texas Insurance Code.

In 1963, the Texas Legislature adopted the Act which permitted persons issued a certificate of authority by the Secretary of State to offer and sell membership contracts which provided certain statutorily enumerated benefits¹ relating to travel and the operation, use or maintenance of a motor vehicle. In enacting this licensing/registration statute, the Legislature apparently was responding to the 1962 opinion by the Austin Court of Appeals, which held that an auto club membership contract providing indemnification or reimbursement to the holder for expenses "incurred by the member for attorneys' fees in defense of a moving traffic violation in which the member was involved" constituted a contract of insurance. *Texas Ass'n of Qualified Drivers v. State*, 361 S.W.2d 580 (Tex. Civ. App. - Austin, 1962, *no writ*).

¹ (2) 'Automobile club' means a person who, for consideration, promises the membership assistance in matters relating to travel, and to the operation, use, or maintenance of a motor vehicle, by supplying services such as services related to:

- (A) community traffic safety;
- (B) travel and touring;
- (C) theft prevention or rewards;
- (D) maps;
- (E) towing;
- (F) emergency road assistance;
- (G) bail bonds and legal fee reimbursement in the defense of traffic offenses; and
- (H) purchase of accidental injury and death benefits insurance coverage from an authorized insurance company.

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By passing the Act, the Legislature effectively overruled the result; but not the holding in *Qualified Drivers*, by expressly including within the definition of 'automobile club,' reimbursement for legal fees incurred by members in defense of traffic offenses, and by further providing that a certificate holder is "exempt from the insurance laws of this state." TEX. TRANS CODE § 722.013. The effect of the Act was not to render providing such reimbursement to be something other than insurance, but rather to withdraw the Department's authority to regulate it.

Of the seven enumerated services permitted to be performed by an automobile club, reimbursement is expressly identified with only two: bail bonds and legal fees. Regulatory questions have arisen when an applicant proposes to provide reimbursement for an enumerated service for which reimbursement has not been expressly authorized.

A common example is towing. Rather than provide the service or contract with others to do so, the applicant offers to reimburse or indemnify a member, up to a fixed amount, for expenses incurred by the member who has independently arranged for his or her own towing with a third party contractor. A variant of this approach is found in some contracts where the auto club, through a 1-800 number arranges for the towing, but the member is obligated to pay the tow operator for which he or she can later seek reimbursement from the club up to a specified amount. In light of this background our first question is:

Other than for bail bonds and legal fees for which reimbursement to members for services provided by third parties is expressly authorized, does the phrase "supplying services" found in the definition of "automobile club" in the Automobile Club Services Act, TEX. TRANS CODE § 722.02 include reimbursement for any other service identified in the definition?

The Department has historically viewed contracts providing for the indemnification or reimbursement against specified loss upon the happening of certain, fortuitous events as constituting the business of insurance within the meaning of Tex. Ins. Code, art. 1.14-1. In this connection, the Department has promulgated forms and rates (**Exhibit A**) for towing reimbursement as a rider to the Texas Personal Auto Policy. The current rate approved by the Department for towing reimbursement is \$2.00 per automobile for a \$40 limit per disablement. Some auto clubs typically charge sums between 20 and 100 times greater than the approved rate.

The second question, set forth below, depends upon an affirmative answer to the first question:

If it is determined that the phrase "supplying services" includes reimbursement for services identified in the definition, i.e., towing and emergency road assistance, does the phrase include member reimbursement for services *not specifically enumerated* in the definition but which might relate to "travel and the operation, use or maintenance of a motor vehicle?"

A review of the more than 70 automobile club membership contracts on file with the Secretary of State has uncovered a number of contracts providing benefits for which the Department has promulgated forms and rates, including: automobile comprehensive, theft, mechanical breakdown and rental car reimbursement. Representative samples of the risks covered by these motor club contracts are attached as indicated and include reimbursement or indemnification against:

(a) the loss by theft or vandalism of personal property if a member's automobile is stolen, up to \$500 per occurrence. (Exhibit B, Roadguard Motor Club) This coverage can be obtained under Texas Homeowners Form B, page 3. (Exhibit C);

(b) the loss by breakage of a member's automobile windshield, up to \$100 per occurrence. (Exhibit D, Roadside Motor Club) This coverage is available under a Texas Personal Auto Policy, Part D. (Exhibit E);

(c) the expense incurred by a member to secure an ambulance if the member is injured as a result of an accident while riding in the member's car, or a common carrier, or struck by a motor vehicle. The benefit is not part of a group insurance contract. (Exhibit E, Road America Motor Club). Indemnification for "reasonable expenses incurred for necessary medical and funeral services" is found in Texas Personal Auto Policy, Part B-2, Personal Injury Protection Coverage and in Part C, Uninsured/Underinsured Motorists Coverage. (Exhibit E);

(d) the expense incurred by a member for repair or replacement of a covered mechanical part which fails in a member's automobile (mechanical breakdown). (Exhibit F, American Fidelity). Approved forms and rates have been promulgated by the Department for the risk of mechanical breakdown involving both new and used vehicles. (Exhibit G);

(e) the expense incurred by a member to secure a rental car, lodging, meals or public transportation while the member's car is being repaired as a result of an accident or mechanical breakdown occurring a certain number of miles away from the member's residence (emergency travel expense). (Exhibit H, Ford Auto Club) Rental [Car]

Reimbursement Coverage (Exhibit I) is an approved rider to the Texas Personal Auto Policy;

(f) the expense incurred by a member to secure a rental car, taxi or public transportation in order to arrive at an immediate destination if the member's car is disabled as a result of an accident or mechanical breakdown (destination expense). (Exhibit H, Ford Auto Club) Rental [Car] Reimbursement Coverage (Exhibit I) is an approved rider to the Texas Personal Auto Policy;

(g) the expense incurred by a member to secure a rental car in the event the member's car is stolen. (Exhibit J, Roadway Auto Club) This coverage is available under a Texas Personal Auto Policy, Part D. (Exhibit E);

(h) the expense (up to \$2,000) incurred by a member to secure an attorney to prosecute a claim for personal injury or physical damage to a member's auto against an uninsured motorist who causes the member injury or physical damage. (Exhibit K, American Traveler Motor Club);

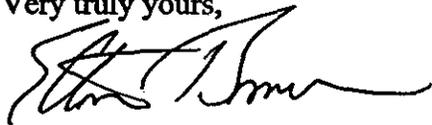
(i) the expense incurred by a member to secure an attorney to prosecute a claim for breach of a new car warranty (Exhibit L, Auto Club of America) or to recover insurance deductibles (Exhibit L, Triple P) or to defend a member from lawsuits arising from a collision involving a member's vehicle (Exhibit M);

(j) the expense incurred by a member to secure a locksmith if the member has lost or locked his or her keys inside the member's vehicle or trunk, up to \$75.00 per occurrence. (Exhibit N, Shell Motorist Club); and

(k) the loss sustained by a member through forgery or alteration of any written instrument required in connection with any gasoline credit card issued to the member. (Exhibit O).

We appreciate your response to these questions.

Very truly yours,



ELTON BOMER
Commissioner of Insurance
Texas Department of Insurance



ANTONIO O. GARZA, JR.
Secretary of State
State of Texas