1979 WL 14250 (S.E.C. No - Action Letter)

(SEC No-Action Letter)

***1 Medical**
Device
Mutual
Assurance
and
Reinsurance
Company, Limited

Publicly Available August 23, 1979

SEC LETTER

1933 Act / s 2(1); 5

July 31, 1979
Publicly Available August 23, 1979

James Cameron, Esq.
Baker & McKenzie
375 Park Avenue
New York, New York 10022Re: Medical Device Mutual Assurance and

Reinsurance Company Limited (Recon.)

Dear Mr. Cameron:

This is in response to your letter dated June 13, 1979 concerning the offer and sale of memberships in **Medical Device Mutual Assurance** and **Reinsurance** Company Limited (the 'Company') without compliance with the registration requirements of the Securities Act of 1933. This Division sent a no-action letter to you on December 23, 1978 in response to your letter of November 20, 1978 concerning the same issue. However, your client proposes to change the facts and conditions upon which the prior no-action letter was based.

As stated more fully in the original letter of November 20, 1978, each member insured is obligated to pay an initial premium, which is the same for each member insured, in order to establish and help maintain a reserve fund required by Bermuda law. This initial premium for each member consists of $7,500 paid concurrently with the insured becoming a member and a further $22,500 callable by the Board of Directors of the Company and secured by a letter of credit. It is further indicated that returns for good underwriting experience would be made among the member insureds based on their premium contributions for the year involved. Included with the standard premiums in determining the underwriting experience of the Company would be the initial premiums.

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The Board of the Company has now determined that it would be more equitable not to include the initial premiums with the other premiums in determining and allocating the underwriting experience, but rather to allocate them separately among the member insureds in accordance with the relative size of initial premium contributions made in that year. The Board of the Company felt that since initial premiums were equal in size for each member insured and the other premiums payable varied in accordance with the size of the exposure insured, they should be allocated separately. Further, if the initial premiums were allocated with the regular premiums, quite different allocations could result depending on the year in which the insured became a member and paid its initial premium. You indicate that such a result was not intended.

Based upon the facts presented, this Division will not recommend any enforcement action to the Commission if the Company uses the modified arrangement for the offer, sale and delivery of memberships in the Company and of insurance covered by the Company without compliance with the registration requirements of the Securities Act of 1933.

Because this position is based upon representations made to this Division in your letter, it should be noted that any different facts or conditions might require a different conclusion. Further, this letter only expresses the Division's position on enforcement action and does not purport to express any legal conclusion on the questions presented.

***2** Sincerely,

John Heneghan
Chief Counsel

LETTER TO SEC

June 13, 1979

Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549
Attn: Office of Chief Counsel,
Division of Corporation FinanceRe: Medical Device Mutual Assurance

and Reinsurance Company Limited

Gentlemen:

We act as special counsel for **Medical Device Mutual Assurance** and **Reinsurance** Company Limited (the ‘Company’), a Bermuda mutual insurance company. On November 20, 1978 we wrote to you and on December 28, 1978 you responded advising us that your Division would not recommend any enforcement action to the Securities and Exchange Commission (the ‘Commission’) if the Company used the arrangements described for the offer, sale and delivery of memberships in the Company and of insurance by the Company without compliance with the registration requirements of the Securities Act of 1933 (the ‘1933 Act’).

The Company began its operations on January 1, 1979 with more than thirty members and a number of additional members have since joined the Company. After a further examination of the provisions of its Bye-laws deal-

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ing with good experience returns, the Board of Directors of the Company is considering recommending to the member insureds of the Company an amendment to its Bye-laws which would alter the treatment of the initial premiums paid into the Company in order to establish and maintain its reserve fund.

As stated in our original letter to you of November 20, 1978, each member insured is obligated to pay an initial premium, which is the same for each member insured, in order to establish and help maintain a reserve fund required by Bermuda law. This initial premium for each member consists of $7,500 paid concurrently with the insured becoming a member and a further $22,500, callable by the Board of Directors of the Company and secured by a letter of credit. As further stated in the original letter, returns for good underwriting experience would be made among the member insureds based on their premium contributions for the year involved. Included with the standard premiums in determining the underwriting experience of the Company would be the initial premiums.

After a careful review, the Board of the Company has determined that it would be more equitable not to include the initial premiums with the other premiums in determining and allocating the underwriting experience, but rather to allocate them separately among the member insureds in accordance with the relative size of initial premium contributions made in that year. The Board of the Company felt that since initial premiums were equal in size for each member insured and the other premiums payable varied in accordance with the size of the exposure insured, they should be allocated separately. Further, if the initial premiums were allocated with the regular premiums, quite different allocations could result depending on the year in which the insured became a member and paid its initial premium. Such a result was not intended.

***3** In the event this change is put into effect, the description of the member insureds' entitlement to good experience returns, as set forth on page 9 of our original letter of November 20, 1978, would be amended and be as follows:

> ‘The member insureds will be entitled to good experience returns, if any are paid, and to the assets of the Company in the event of its liquidation. The member insureds will share in the good underwriting experience (surplus), if any, of the Company for any year based upon their relative premium contribution (excluding initial premiums) for that year and in the initial premiums paid in a year based upon their relative initial premium payment for that year. The investment experience of the Company will be allocated among the underwriting years based upon the surplus, initial premiums and reserves for each year and among the member insureds on the basis of the surplus and initial premiums allocated to the member insureds in the manner set forth in the preceding sentence and on the basis of the reserves of the Company for that year, allocated in the same manner as the surplus. The member insureds will share in the Company's assets in the event of liquidation on the same basis.’

Because the original ‘no-action’ position taken by the Division was rendered solely in reliance upon the facts described in the original request, we felt it was appropriate to again request confirmation that the offer, sale and delivery of memberships in the Company and of insurance coverage by the Company, as amended by the above-described change, may continue without compliance with the registration requirements of the 1933 Act.

In our opinion the continued offer of and participation in the Company, through membership and the sale of insurance coverage and policies in the manner set forth in our letter of November 20, 1978 as modified herein, would not constitute the sale of a ‘security’ as that term is defined in Section 2(1) of the 1933 Act. The modification of the Bye-laws of the Company described above has been proposed by the Board in order to make allocation of initial premiums more equitable among members. All other facts set forth in our letter of November 20, 1978 with respect to the Company remain unchanged. The basic character of the Company as a mutual insurance

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company is unchanged and there is no profit motive or 'security'. See United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975); Tcherepnin v. Knight, 389 U.S. 322 (1967); and SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

The sole purpose of participating in the Company as a member insured is to obtain product liability insurance otherwise not available or not available at a reasonable cost. There are no certificates or other evidences of a security issued by the Company. Each member insured has one vote in the management of the Company. The memberships cannot be sold or transferred so as to realize an appreciation in value. The memberships are not transferable except upon the merger, sale of assets or other reorganization of a member insured and then only at the discretion of the Board of the Company. The right to the membership goes with the business being insured and is not separable from the insurance being offered. We believe that the legal discussion and conclusions reached in our letter of November 20, 1978 still pertain with equal force to the Company, even with the modification to its Bye-laws discussed above. We have attached to this letter a copy of our November 20, 1978 letter and your December 28, 1978 response for your convenience.

***4** Based upon the foregoing, we are of the opinion that the offer, sale and delivery of memberships in the Company and of insurance coverage by the Company in the manner set forth in our letter of November 20, 1978, as modified by this letter, would not constitute the sale of a 'security' within the meaning of the 1933 Act.

We would appreciate your advising us whether the staff agrees with our opinion stated above and would recommend to the Commission that no action should be taken if the offer, sale and delivery were continued as described and the Bye-laws of the Company were so amended.

If you desire any further information, please contact the undersigned or Janna Bellwin of this office.

Very truly yours,

James Cameron

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END OF DOCUMENT

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