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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTER OF

RENT-A-CENTER, INC.,
RENT-A-CENTER WEST, INC.,

Unlicensed Entities,

and

BENEFIT MARKETING SOLUTIONS, LLC;
BENEFIT SERVICES ASSOCIATION,

Unregistered and Unauthorized Entities.

Respondents.

ORDER NO. 14-0082

INSURANCE COMMISSIONER'S
REPLY TO MOTION FOR
SUMMARY JUDGMENT

On May 7, 2014, the Office of the Insurance Commissioner ("Insurance Commissioner") issued an Amended Notice of Request for Hearing for Imposition of Fines. The Insurance Commissioner requested a hearing to impose a fine of \$100,000, liability for which would be joint and several among the named Respondents. The Respondents are deemed by the Insurance Commissioner to have engaged in the business of insurance without proper licensure or other authorization by the Commissioner. The Insurance Commissioner requested a finding that it is entitled to judgment, and that the sole issue at hearing will be the amount of any fine to be imposed upon Respondents.

Often an insurance product may not have been intended as insurance, but is nonetheless an insurance product over which the Insurance Commissioner has jurisdiction. As recently as September 19, 2007, the Insurance Commissioner concluded in a letter to State Senator Margarita Prentice (Exhibit 1) that private share credit union insurance was indeed insurance. Senator Prentice was the Chair of the Senate Financial Institutions Committee when the credit union share insurance statute was passed, and she did not intend for the program to be

1 regulated as insurance. There, credit unions would pay an amount of money for the promise
2 that, should a contingency occur, such as a default of the credit union, the insurer covers the
3 loss. The risk is spread among all the credit unions that are covered under the program. After
4 declaring such a program to be insurance, the Insurance Commissioner also noted:

5 The fact that there may be a single payment, the opportunity for refunds if there is
6 no loss, or **services provided by the insurer** does not negate the nature of the
7 transaction. It is not unusual in commercial types of insurance for there to be
8 financial or service arrangements that do not typically exist in personal lines
9 insurance. [Emphasis added.]

10 RCW 48.01.250(1) requires that any person, firm, partnership, corporation or
11 association promising, in exchange for dues, assessments, or periodic or lump-sum payments,
12 to furnish members or subscribers with assistance in matters relating to trip cancellation, bail
13 bond service or any accident, sickness, or death insurance benefit program must have a
14 certificate of authority, issued by the insurance commissioner, authorizing the person, firm,
15 partnership, corporation or association to sell that coverage in this state, or purchase the service
16 or insurance from a company that holds a certificate of authority, issued by the insurance
17 commissioner, authorizing the company to sell that coverage in this state. Neither BMS nor
18 BSA had such a certificate of authority when they sold accidental death and dismemberment
19 coverage to Washington consumers through Rent-a-Center, and the Insurance Commissioner
20 never approved the Life of the South group AD&D coverage sold by the Respondents. Rent-a-
21 Center likewise has no such certificate or license of any kind permitting it to sell memberships
22 including death and dismemberment insurance.

23 Insurance is a contract whereby one undertakes to indemnify another or pay a specified
24 amount upon determinable contingencies. RCW 48.01.040. "Indemnify" traditionally is used to
25 mean reimbursement, and reimbursement is the usual mechanism that insurers employ when an
26 insured individual puts in a claim for a covered loss of or damage to property. But a look at
27 Washington case law and insurance treatises reveals that in Washington, reimbursement in cash
28 is not the only meaning of or method of indemnification.

29 The seminal Washington case in regard to provision of services as indemnification for
30 loss is *State ex. rel. Fishback v. Globe Casket & Undertaking Co.*, 82 Wash. 124 (1914).
31 Insurance Commissioner Fishback demanded that Globe Casket stop conducting an insurance

1 business since it was not chartered as an insurance company. There, a for-profit company
2 offered, for a fee, to perform a service that would become obligatory upon the happening of a
3 hazard, the death of the certificate holder, i.e., the provision of casket and burial services. The
4 Supreme Court stated that such an arrangement was clearly insurance. It noted that although
5 there did not appear to be a traditional beneficiary, in reality one did exist, and could be
6 ascertained with as much certainty as if directly and specifically named. It is the person who
7 would otherwise be obligated to pay the expenses of the burial. The Court noted that:

8 . . . whoever such person may be, he is relieved of his obligation to the extent
9 of the value of the service agreed to be performed by the terms of the
10 certificate. There is therefore the promise by one person to perform a valuable
11 service on the death of another, a valuable consideration paid for the promise,
12 and a person to whom the benefit of the promise will inure. Had the ordinary
13 insurance nomenclature been used to designate the person making the
14 promise, the person to whom the promise is made, the person who will receive
15 the benefit of the promise, and the consideration paid for the promise, no one
16 would question that it was an insurance contract.

17 At the time of *Fishback v. Globe Casket*, Section 1 of the insurance code (Laws 1911,
18 Ch. 49, p. 161; 3 Rem. & Bal. Code, Sec. 6059-1), Rem. Rev. Stat., Sec. 7032 read as follows:
19 "Insurance is a contract whereby one party called the 'insurer,' for a consideration, undertakes
20 to pay money or its equivalent, or to do an act valuable to another party called the 'insured,' or
21 to his 'beneficiary,' upon the happening of the hazard or peril insured against, whereby the
22 party insured or his beneficiary suffers loss or injury." But with the definition we now find in
23 RCW 48.01.040, is *Fishback v. Globe Casket* still good law after 1947? Indeed, one year
24 later, when the new definition of insurance was codified, the Washington Supreme Court
25 decided *In re Estate of Martha J. Knight*, 31 Wn. 2d 813 (1948). Noting the new statutory
26 language of RCW 48.01.040, the Court ruled that insurance continued to be defined as "an
agreement by which one person, for a consideration, promises to pay money or its equivalent,
or to perform some act of value, to or for the benefit of another person, upon the destruction,
death, loss, or injury of someone or something as the result of specified perils." The insurance
policies at issue in the case were payable upon the death of the insured, the very much alive

1 Mr. Knight, not the deceased Mrs. Knight. The case was an inheritance tax matter that hinged
2 on whether the cash surrender value of an insurance policy was property passed by will.

3 Treatises confirm that insurance contracts are contracts of indemnity, other than those
4 of life and accident where the result is death. *I G. Crouch, Cyclopedia of Insurance Law §*
5 *1:9(2d ed. 1984)*. And although ordinarily thought of as requiring the payment of money, an
6 insurance contract need not require the payment of money but may require compensation of
7 another by giving the equivalent of money or rendering some act of value to the insured. *I G.*
8 *Crouch, Cyclopedia of Insurance Law § 1:10 (2d ed. 1984)*. It is not necessary to constitute
9 an insurance contract that the insurer's obligation is one for the payment of money, since it
10 may be its equivalent or some act of value to the insured on the occurrence of the loss.
11 *Appleman, Insurance Law and Practice § 7001(Revised Volume 12 1981)*. Insurance being a
12 contract of indemnity, the loss must be adjusted with the principle of replacing the insured as
13 nearly as possible as he was when the risk began, the object being to make the insured whole at
14 the insurer's expense. *Id.*

15 It is true that some arrangements securing health and other benefits to consumers for a
16 fee are not insurance. A company that agreed, for a fee, to procure medical services, drugs
17 and merchandise from a physician and retailers at lower prices for its subscribers, but not
18 guaranteeing performance by them, was not engaged in the insurance business. *State ex rel.*
19 *Fishback v. Universal Service Agency, 87 Wash. 413 (1915)*. In that case, there was no peril
20 or risk whereby purchasers of the contracts could have suffered loss. The case reiterated that
21 the essential elements of an insurance contract are an insurer, a consideration, a person insured
22 or his beneficiary, and a hazard or risk whereby the insured may suffer injury or loss. *Ibid.* at
23 424. As far back as 1976, the Washington State Attorney General had concluded that motor
24 vehicle service contracts were in fact contracts of insurance rather than warranties. AGLO
25 1976 No.17 (Exhibit 2). As the Final Bill Report of Senate House Bill 2553 in 2006 (Exhibit
26 3) also clearly reflects, the Legislature realized that certain transactions that "fall within the
definition of insurance" have been addressed by exemptions from the Insurance Code or the
creation of a specific regulatory framework other than that for traditional insurance companies.
The Legislature felt that issuers of some insurance products, motor vehicle service contracts,
for example, did not need to comply with the onerous capitalization and reserve requirements

1 that other insurers did so long as other solvency and performance protections were in place.
2 Therefore, a specific regulatory framework was established for them. The prefatory section of
3 the codified motor vehicle service contract provider statute, RCW 48.110.010 (Exhibit 4) states
4 that the purpose of the law was to “create a legal framework within which service contracts
5 may be sold in this state and to set forth requirements for conducting a service contract
6 business.” The Legislature did not extend the Commissioner’s jurisdiction to include non-
7 insurance entities. Indeed, the issuance of vehicle service contracts is indeed quite similar in
8 practice and principle to the paid-out account product service protection plan. Both
9 “reimburse” in reverse by way of providing the services up front, the expenses for which
10 would otherwise be incurred by the insured or his or her family but for the agreement/contract.
11 That a motor vehicle service contract provider is a purveyor of an insurance product is clearly
12 demonstrated by the fact that when enforcement action is taken against an unregistered service
13 contract provider, the Insurance Commissioner orders the respondent to cease violating RCW
14 48.15.020, the statute that forbids an unauthorized insurer from engaging in the insurance
15 business, as well as the statute requiring registration.

16 The same theory applied to health maintenance organizations (“HMO”), which were
17 brought into a separate chapter of the Insurance Code, RCW 48.46, back in 1975. In
18 Washington, both HMOs and health care service contractors (“HCSC”) are engaged in the
19 business of health insurance. The Ninth Circuit Court of Appeals stated in *Washington*
20 *Physicians Service Association v. Gregoire*, 147 F.3d 1039,1046 (9th Cir., 1998):

21 The only distinction between an HMO (or HSCS) and a traditional insurer is that
22 the HMO provides medical services directly, while a traditional insurer does so
23 indirectly by paying for the service, *Anderson v. Humana, Inc.*, 24 F.3d 889, 890
24 (7th Cir. 1994), but this is a distinction without a difference. . . . In the end,
25 HMOs function the same way as a traditional health insurer: The policyholder
26 pays a fee for a promise of medical services in the event that he should need them.
It follows that HMOs (and HCSCs) are in the business of insurance.

See *McCarty v. King County Medical Service Corporation*, 26 Wn.2d 660 (1946).

Another example is in the chapter regulating Discount Plan Organizations (DPO).
RCW 48.155.130 specifies that willfully operating as a Discount Plan Organization, which

1 offers discounts on health care, not standard health insurance policies, without a license
2 subjects that operator to RCW 48.15.020 and RCW 48.15.023, as if the unlicensed DPO were
3 an unauthorized insurer and consideration collected were premiums. The inference is clear
4 that DPOs are in essence “insurers” as defined by RCW 48.01.050. Like motor vehicle
5 service contract providers, HMOs/HCSs, and Discount Plan Organizations, the paid-up
6 account product service protection offered by BMS/BSA provides a valuable service on the
7 happening of a contingency, rather than reimbursing the insured after the fact for expenses
8 that would have been incurred upon the happening of the contingency. Either way, it is
9 insurance. Insurance is a contract whereby one undertakes to indemnify another or pay a
10 specified amount upon determinable contingencies. RCW 48.01.040. That it does not
11 reimburse the member after the repair or replacement of an item does not make it any less an
12 insurance product.

13 Neither of the RAC Respondents is licensed as an insurance producer in this state.
14 Neither of the RAC Respondents has submitted to the Insurance Commissioner any
15 appropriate certificate, license, or other document issued by another agency of this state, any
16 subdivision thereof, or the federal government permitting or qualifying the Respondents to
17 sell, solicit, or negotiate insurance in this state.

18 RAC began selling the accidental death and dismemberment insurance part of the
19 benefits package to Washingtonians in 2004, according to RAC Public Affairs. It ceased
20 doing so in late 2013. Prior to July 1, 2009, there was no express definition in the insurance
21 code of the term “solicit” in regard to insurance. However, the Washington Supreme Court
22 previously ruled in *National Federation of Retired Persons v. Insurance Commissioner*, 120
23 Wn.2d 101, 838 P.2d 680 (1992) that “solicits” as part of an insurance transaction under RCW
24 48.01.060 included inviting, requesting, urging, or advising a person to subscribe to insurance,
25 endeavoring to obtain such a subscription, or approaching a person for the purpose of
26 receiving an application for insurance coverage.

27 The Court found that requiring licenses for insurance solicitors or those engaging in
28 insurance solicitations enables the Insurance Commissioner to monitor the content and quality
29 of insurance information distributed in Washington, as well as the identity of those
30 distributing the information. Licensing is also a means of providing accountability for those in

1 the insurance business in the state. While perhaps not the sole method for addressing the
2 problem of fraud in the insurance business, a licensing requirement does directly advance the
3 state's interest. Like RAC does now, the National Federation of Retired Persons did not
4 consider its mailing of "lead cards" regarding Medicare to be solicitations to insurance. But
5 according to the Supreme Court, between 2004 and July 1, 2009, RAC was indeed soliciting
6 insurance when it explained and invited customers to enroll as members in the BSA/RAC
7 benefits program that included accidental death and dismemberment insurance. And if RAC
8 did not receive any remuneration for such solicitations, that fact does not prevent the
9 membership materials and descriptions from qualifying as a "solicitation," an "insurance
10 transaction" under the insurance code, according to the Court. That the insurance coverage
11 was only one of the benefits provided by membership does not vitiate its being insurance the
12 solicitation to which requires a license.

13 Neither of the BMS/BSA Respondents has applied for or been granted registration as
14 a service contract provider or a Certificate of Authority to act as an insurer in Washington.
15 Respondents have not submitted to Insurance Commissioner any appropriate certificate,
16 license, or other document issued by another agency of this state, any subdivision thereof, or
17 the federal government, permitting or qualifying Respondents to provide service contracts or
18 insurance of any kind in this state. Except as to an appropriate fine amount, Respondents'
19 administrative hearing should result in a judgment in favor of the Office of the Insurance
20 Commissioner.

21 Executed this 31st day of October, 2014.

22 

23 MIKE KREIDLER
24 Insurance Commissioner
25 By and through his designee

26 

MARCIA G. STICKLER
Insurance Enforcement Specialist
Legal Affairs Division

EXHIBITS

- 1
- 2
- 3 Exhibit 1 Letter from Commissioner Kreidler to State Senator Margarita Prentice dated
- 4 September 19, 2007. 2 pgs.
- 5
- 6 Exhibit 2 AGLO 1976 No. 17. 4 pgs.
- 7
- 8 Exhibit 3 Final Bill Report on SHB 2553, Effective October 1, 2006. 3 pgs.
- 9
- 10 Exhibit 4 Text of RCW 48.110.010 – Finding – Declaration – Purpose, 2006. 1 pg.
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CERTIFICATE OF MAILING

1 The undersigned certifies under the penalty of perjury under the laws of the state of
2 Washington that I am now and at all times herein mentioned, a citizen of the United States, a
3 resident of the state of Washington, over the age of eighteen years, not a party to or interested
4 in the above-entitled action, and competent to be a witness herein.

5 On the date given below I caused to be served the foregoing INSURANCE
6 COMMISSIONER'S REPLY TO MOTION FOR SUMMARY JUDGMENT on the
7 following individuals in the manner indicated:

8 Hon. George Finkle, Chief Hearing Officer
9 P O Box 40255
10 Olympia, WA 98504-0255

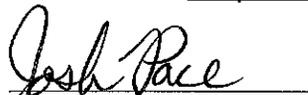
(XXX) Via Hand Delivery

11 **Counsel for Respondents**

12 Gulliver Swenson
13 Jerry Kindinger
14 Ryan, Swanson & Cleveland, PLLC
15 1201 Third Avenue, Suite 3400
16 Seattle, WA 98101-3034

(XXX) Via U.S. Regular Mail

17 SIGNED this 31st day of October, 2014, at Tumwater, Washington.
18 ~~November~~

19 
20 Josh Pace



OFFICE OF
INSURANCE COMMISSIONER

September 19, 2007

The Honorable Margarita Prentice
Washington State Senate
PO Box 40411
Olympia, WA 98504-0411


Dear Senator Prentice:

Thank you very much for your letter date June 14, 2007, regarding the alternative share insurance regulations that the Department of Financial Institutions (DFI) is adopting. Your letter was prompted by comments that the Office of the Insurance Commissioner (OIC) provided to DFI on the proposed regulations, in which the OIC stated that a private entity offering share insurance to credit unions is an Insurer under the Insurance Code (Title 48 RCW). In your letter, you stated that you were Chair of the Senate Financial Institutions Committee when RCW 31.12.408 was enacted, and it was not your intention that an alternative share insurance program be subject to state insurance laws.

I asked my staff and legal counsel to re-examine the issue to determine if the alternative share insurance that is being proposed to be sold to credit unions in this state is exempt from state insurance laws. Chief Deputy Insurance Commissioner Mike Watson and Deputy Insurance Commissioner Jim Odiorne met with various stakeholders interested in the DFI regulations, including a representative from American Share Insurance (ASI) – an entity that is expected to apply to DFI for approval under the proposed regulations – and representatives from the banking community who have been following these issues. They have also consulted the Attorney General's Office on this issue.

While I understand that you did not expect share insurance to be regulated by both DFI and the OIC, there is no specific exemption for share insurance from state insurance laws. While RCW 31.12.408 imposes certain standards that an alternative share insurance program must meet for DFI approval, it does not automatically relieve the entity providing share insurance from all other applicable state laws, including state insurance laws.

Share insurance being offered by ASI is regulated in a variety of manners in different states. Ohio, ASI's domestic state, provides dual regulation through statute by its insurance commissioner and director of financial institutions. ASI operates in eight states in addition to Ohio. In most of those states, the regulation of share insurance by the insurance commissioner is expressly limited or excluded by law. There are agreements between ASI and state insurance regulators in two states. OIC staff inquired of one of the states about its agreement with ASI and came to the conclusion that an agreement without a clear regulatory framework is not a preferred means of regulation. Even assuming that the Washington OIC had the authority to enter into such an agreement, it would have to be consistent with state law.

The Honorable Margarita Prentice
September 19, 2007
Page 2

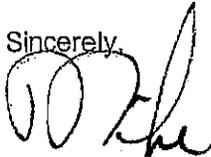
ASI has offered several reasons why its product should not be considered insurance, such as there is no transfer of risk, the payments to ASI are not premium, ASI is providing services not insurance, and the federal guaranty program is not regulated by the state insurance commissioner. However, private share insurance does meet the definition of "insurance" in RCW 48.01.040. Credit unions will be placing with the private share insurer large sums of money for the promise that, should a contingency occur, such as a default of the credit union, the insurer will cover the losses. The risk is spread among all of the credit unions that are covered under the private share insurance program.

The fact that there may be a single payment, the opportunity for refunds if there is no loss, or services provided by the insurer does not negate the nature of the transaction. It is not unusual in commercial types of insurance for there to be financial or service arrangements that do not typically exist in personal lines insurance. Finally, while the OIC recognizes that it does not have jurisdiction over the federally-created guaranty program, the alternative share insurance being proposed would be a transaction with a wholly private insurance entity doing business in this state. There is no substantive difference between a private share insurer and other private insurers doing business in Washington that are required to comply with the Insurance Code.

The Legislature could make clear the intention that you have expressed by creating an exemption for share insurance from insurance regulation either in the Insurance Code or in RCW 38.12.408. OIC staff are available to offer technical assistance on how that could be accomplished. ~~I, too, am available at your convenience to discuss any next steps you are interested in pursuing.~~

I certainly respect your views on this matter and appreciate your sharing them with me. However, after carefully re-examining this issue, I believe that I would not be fulfilling my duty as Insurance Commissioner if I were to recognize an exemption for share insurance that does not have a clear basis in the law and is quite vulnerable to legal challenge.

Sincerely,



Mike Kreidler
Insurance Commissioner

cc: Scott Jarvis, Director, DFI
Christina Beusch, Assistant Attorney General
Gary Gardner
Jim Bricker
Denny Eliason
John Bley
Dennis R. Adams



INSURANCE -- WARRANTY -- DISTINCTION BETWEEN INSURANCE AND WARRANTY CONTRACT

Criteria for determining whether an "extended vehicle warranty" contract issued in connection with the sale of a new or used car constitutes "insurance" for the purposes of the Washington state insurance code.

February 26, 1976

Honorable Karl Herrmann
Insurance Commissioner
Insurance Building
Olympia, Washington 98504

Cite as: AGLO 1976 No. 17

Dear Sir:

By letter previously acknowledged you asked whether a certain "Extended Vehicle Warranty" form commonly used by new and used car dealers constitutes an insurance contract for the purposes of the various regulatory provisions of the Washington state insurance code. In our opinion, for the reasons set forth below, it does not.

ANALYSIS

RCW 48.01.040, codifying § .01.04 of the state insurance code as enacted by chapter 79, Laws of 1947, defines the term "insurance" to mean:

"... a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."

More particularly, insofar as motor vehicles and the like are concerned, RCW 48.11.060 defines the term "vehicle insurance" to mean:

"... insurance against loss or damage to any land vehicle or aircraft or any draft or riding animal or to property while contained therein or thereon or being loaded or unloaded therein or therefrom, and against any loss or liability resulting from or incident to ownership, maintenance, or use of any such vehicle or aircraft or animal.

"(2) Insurance against accidental death or accidental injury to individuals while in, entering, alighting from, adjusting, repairing, cranking, or caused by being struck by a vehicle, aircraft, or draft or riding animal, if such insurance is issued as part of insurance on the vehicle, aircraft, or draft or riding animal, shall be deemed to be vehicle insurance."

[[Orig. Op. Page 2]]

A fundamental precept of the state insurance code is that it is unlawful to engage in the business of insurance in the state of Washington without compliance with the various regulatory provisions thereof. Thus, if the "Extended Vehicle Warranty" which you have asked us to review (as below described) were held to constitute an insurance contract the automobile dealers issuing that warranty to their new or used car customers would be in violation of the code unless licensed or certificated in accordance with its provisions.

Research has disclosed no Washington cases interpreting RCW 48.01.040, supra, or in any other manner determining where the line is properly to be drawn between an insurance contract and a manufacturer's or vendor's warranty. Yet as all consumers know, the latter, in one form or another, either express or implied, are common ingredients of most commercial transactions involving not only motor vehicles but many other consumer items including appliances, household furnishings, and even clothing. Accord, RCW 62A.2-313 through 62A.2-315 and related provisions of the Uniform Commercial Code.

This basic issue has, however, been explored by the courts of other jurisdictions. Three principal cases dealing with the question are State ex rel. Herbert v. Standard Oil Co., 138 Ohio St. 376, 35 N.E.2d 437 (1941); Ollendorff Watch Co. v. Pink, 279 N.Y. 32, 17 N.E.2d 676 (1938); and State ex rel. Duffy v. Western Auto Supply Co., 134 Ohio St. 163, 16 N.E.2d 256 (1938).^{2/} Although none of these cases involved the precise statutory definition of "insurance" which is contained in RCW 48.01.040, they did, nevertheless, utilize quite comparable definitions. For example, in State ex rel. Duffy v. Western Auto Supply Co., *supra*, the supreme court of Ohio, lacking a statutory definition of the term, adopted the following definition from a leading legal encyclopedia:

"What is insurance? 'Broadly defined, insurance is a contract by which one party, for a compensation called the premium, [[Orig. Op. Page 3]] assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. As regards property and liability insurance, it is a contract by which one party promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specified cause, or to guarantee or indemnify or secure him against loss from that cause.' 32 Corpus Juris, 975. . . ."

Accord, State ex rel. Herbert v. Standard Oil Co., *supra*. Then, in the first of these two Ohio cases the court went on to distinguish the concepts of insurance and warranty by saying:

"... A warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage resulting from perils outside of and unrelated to defects in the article itself."

At issue in State ex rel. Duffy v. Western Auto Supply Co., *supra*, was the legal status of a so-called warranty issued by a retailer of automobile tires which, in the words of the court,

"... was a specific guarantee for the period stated therein 'against blowouts, cuts, bruises, rim-cuts, under-inflation, wheels out of alignment, faulty brakes or other road hazards that may render the tire unfit for further service (except fire and theft).' . . ."

The warranty then provided that:

"... 'In the event that the tire becomes unserviceable from the above conditions, we will (at our option) repair it free of charge, or replace it with a new tire of the same make at any of our stores, charging of our current price for each month which has elapsed since the date of purchase. . . ."

[[Orig. Op. Page 4]]

The court held this warranty to constitute an insurance contract saying, at pages 259-260:

"We are unable to discern any essential difference in the character or effect of the various forms of agreement of indemnity made by the respondent and advertised in its catalogue. Each constitutes an undertaking to indemnify against failure from any cause except fire or theft and therefore covers loss or damage resulting from any and every hazard of travel, not excepting negligence of the automobile driver or another. It is substantially an unconditional promise of indemnity, and that is insurance."

Three years later in State ex rel. Herbert v. Standard Oil Co., *supra*, however, the same Ohio supreme court, utilizing the same definition of "insurance," held another dealer's tire warranty form not to constitute an insurance contract. In this case the warranty read, in material part, as follows:

"The Standard Oil Company (an Ohio corporation) hereby warrants to the above purchaser that the materials and labor incorporated into the tire listed hereon are of such quality that the tire may be expected to render service, if Atlas or Atlas Lug Grip brand, for a minimum period of twelve months from the date of purchase for passenger car service, or six months from the date of purchase for commercial car service; if Junior Atlas Brand, for a minimum period of six months from the date of purchase for passenger car service, or three months from the date of purchase for commercial car service, provided same is used under usual conditions in such respective service, and The Standard Oil Company (an Ohio corporation) warrants the tire to give the purchaser satisfactory service under the usual conditions of wear and tear, except as hereinafter stated, during such respective minimum periods of time.

"If the tire fails to give the purchaser satisfactory service under any usual conditions of wear and tear, except as hereinafter stated, the liability of The Standard Oil Company (an Ohio corporation) under this Warranty and Adjustment Agreement is strictly

limited either to repairing the tire without charge or to replace it [[Orig. Op. Page 5]] with a new tire of same brand at its option. If so replaced, purchaser is to be charged and agrees to pay, if Atlas or Atlas Lug Grip brand, one-twelfth (1/12) of the current retail price if in passenger car service, or one-sixth (1/6) of the current retail price if in commercial car service, for each month or fraction thereof which has elapsed since the date of purchase; if Junior Atlas brand, one-sixth (1/6) of the current retail price if in passenger car service, or one-third (1/3) of the current retail price if in commercial car service, for each month or fraction thereof which has elapsed since the date of purchase.

"This Warranty and Adjustment Agreement does not cover punctures, tires ruined in running flat, tires injured or destroyed by fire, wrecks or collisions, tires cut by chains, or by obstruction on vehicle, theft, clincher tires, tubes used in any form, or tires used in taxicab or common carrier bus service.

"This Warranty and Adjustment Agreement does not cover consequential damages."

In holding this latter warranty not to constitute an insurance contract the court noted and distinguished its earlier ruling in Duffy, supra, and said:

"As we read the instant warranty, the seller represents to the purchaser that the materials and labor incorporated into its tires are of such quality that the tires will render satisfactory service for a designated period of time under the usual conditions of wear and tear, and that if the tires fail because of faulty construction or materials, repairs will be made free of charge or new tires substituted at a reduced price based on the length of time which has elapsed since the original purchase. Then follows a specific list of tire injuries, not ordinarily associated with faulty construction or materials, and other items for which the seller disclaims any responsibility whatsoever.

"We find difficulty in construing this agreement as more than a representation [[Orig. Op. Page 6]] that the tires being sold are so well and carefully manufactured that they will give satisfactory service under ordinary usage for a specified number of months, excluding happenings disassociated from imperfections in the tires themselves."

In the third case above cited, Oleendorf Watch Co. v. Pink, supra, a manufacturer of watches issued, with each watch sold, a certificate under which he promised to replace the watch with a new one of like quality if the first watch was lost through burglary or robbery within one year of purchase. Although the lower court had held this contract not to be an insurance contract, the New York court of appeals reversed, stating that since the theft was not an occurrence within the control of the party promising the indemnity it could not be construed as a contract of warranty.

Lacking anything more definite by way of local, Washington, case law or statutory provisions, we are here inclined to go along with what we discern to be the basic principle to be derived from these three cases. Thus, if an automobile manufacturer, dealer, or anyone else, agrees to indemnify an automobile owner against loss or damage resulting from theft, fire, collision, or any other risk not related to the quality or fitness of the parts or workmanship involved in the vehicle itself, the result will be an insurance contract. Likewise, if someone other than the manufacturer or dealer purports to indemnify an automobile owner against loss resulting from defects in the vehicle itself, the line between warranty and insurance will also be crossed because the risk insured against will not be one within the control of the insurer. But, instead, if the risk covered by the contract is exclusively one relating to the parts and workmanship involved in the vehicle itself, and if the contract is issued either by the manufacturer of that vehicle or by a dealer in connection with a specific sale, the rationale of State v. Standard Oil Co., supra, will apply and the contract will not, accordingly, constitute an insurance contract within the meaning of our state insurance code.

Turning, finally, to the "Extended Vehicle Warranty" which you have asked us to review, we find that it falls within the last of these three categories. The relevant terms of this warranty read as follows:

[[Orig. Op. Page 7]]

"WARRANTY COVERAGE OF ISSUING DEALER

"Administered By

"AMERICAN AUTO DEALER SERVICES, INC.

"EXTENDED WARRANTY COVERAGE: The issuing dealer warrants, subject to the terms and conditions as itemized herein that it will: (A) From the first day of retail usage for the period of time or miles above indicated (whichever shall first occur) reimburse the warranty holder for reasonable costs incurred by the warranty holder for the repair or replacement of any of the below listed mechanical parts of the vehicle described hereon, provided that such repair or replacement is required due to a mechanical breakdown which results from the failure of a defective part or faulty workmanship as supplied by the manufacturer, and will,

"READY RESERVE COVERAGE: (B) In the event of a mechanical breakdown, as described in paragraph (A) above, either provide the warranty holder with substitute transportation or reimburse the warranty holder for actual expenses incurred for said substitute transportation. Such expenses shall be limited to a maximum of ten dollars (\$10.00) per calendar day, not to exceed five (5) days, nor total more than fifty dollars (\$50.00) per occurrence. For each given repair one (1) day's transportation expense shall be allowed for the first eight (8) hours of factory flat rate labor time (or portion thereof) and one (1) day's expense shall be allowed for the second eight (8) hours of factory flat rate labor time (or portion thereof), etc. The above described substitute transportation coverage also applies while said vehicle is under factory warranty."^{3/}

Therefore, it is our opinion that this document does not constitute an insurance contract for the purposes of [[Orig. Op. Page 8]] the insurance code of our state.

At least, this is how we presently view the question. We would, however, think it well if this matter were to be clarified by specific amendatory legislation and we would, of course, be happy to assist you in that regard if desired. In the meantime, it is hoped that the foregoing will be of some assistance and guidance to you and your office in dealing with this subject.

Very truly yours,

SLADE GORTON
Attorney General

PHILIP H. AUSTIN
Deputy Attorney General

ERNEST M. FURNIA
Assistant Attorney General

*** FOOTNOTES ***

^{1/}See, RCW 48.01.020, RCW 48.01.080 and RCW 48.05.030.

^{2/}These cases and others are discussed at some length in 101 University of Pennsylvania Law Review at pp. 243-256, in an article dealing, specifically, with manufacturers' or dealers' warranties in connection with the sale of television sets.

^{3/}Thereafter, the warranty form lists, under the heading "Covered Components," all of the various engine and other mechanical parts of a vehicle to which the warranty applies.

FINAL BILL REPORT

SHB 2553

C 274 L 06

Synopsis as Enacted

Brief Description: Regulating service contracts and protection product guarantees.

Sponsors: By House Committee on Financial Institutions & Insurance (originally sponsored by Representatives Kirby and Morrell; by request of Insurance Commissioner).

House Committee on Financial Institutions & Insurance

Senate Committee on Financial Institutions, Housing & Consumer Protection

Background:

Insurance and insurance transactions are governed by the Insurance Code (Code). Among other things, this Code requires: (1) that insurers meet certain financial requirements; and (2) that agents, solicitors, and brokers of insurance comply with specified licensing standards. Financial and criminal penalties may result from noncompliance.

Certain transactions that fall within the definition of insurance have been addressed by exemptions from the Code or the creation of a specific regulatory structure. Entities regulated under these chapters may not be required to comply with the same capitalization and reserve requirements, reporting and solvency oversight, and claims handling practices as are required of an insurer selling a traditional insurance product.

In 1990, the Legislature created a chapter in the Code to regulate motor vehicle service contracts. A motor vehicle service provider is required to have a reimbursement insurance policy that covers all obligations and liabilities incurred by the motor vehicle service contracts issued by the provider.

In 1999, a chapter in the Code was created for the regulation of service contracts. A service contract provider may choose one of the following options to ensure that all obligations and liabilities are paid:

- insure its service contracts with a reimbursement insurance policy;
- maintain a reserve account that includes a portion of the gross consideration received for all service contracts and give the Insurance Commissioner (Commissioner) a financial security deposit; or
- maintain or have the parent company maintain a net worth or stockholder's equity of \$100 million.

Summary:

The chapter in the Code regulating service contracts, is expanded to include motor vehicle service contracts. Numerous definitions are created including a definition of a protection product. "Protection product" means any product offered or sold with a guarantee to replace,

repair, or pay incidental costs if it fails to perform as stated in a written contract. "Protection product guarantee" is the written contract to repair, replace, or pay the incidental costs. "Protection product guarantee provider" is the person or entity that is contractually obligated to the purchaser of a "protection product."

Registration

Service contract providers and protection product guarantee providers must register with the Commissioner. Application procedures, requirements, and fees are set forth. The Commissioner may suspend or revoke the registration of a service contract provider or a protection product guarantee provider for failure to comply with the specific requirements.

Financial Responsibility for Service Contract Providers

In addition to the current financial responsibility options, a service contract provider may use a risk retention group (RRG) to insure the contracts of a service contract with a reimbursement insurer policy. A RRG must be in full compliance with applicable state and federal laws and meet specific financial requirements. The reimbursement policy must be filed with and approved by the Commissioner.

Financial Responsibility for Protection Product Guarantee Providers

Protection product guarantee providers must insure all protection products under a reimbursement insurer policy issued by an authorized insurer or RRG. An RRG must be in full compliance with applicable state and federal laws and meet specific financial requirements. The reimbursement policy must be filed with and approved by the Commissioner.

Financial Responsibility for Motor Vehicle Service Contract Providers

Motor vehicle service contract providers must insure all motor vehicle service contracts under a reimbursement insurer policy issued by an authorized insurer or RRG. An RRG must be in full compliance with applicable state and federal laws and meet specific financial requirements.

Record-keeping

A service contract provider or protection product guarantee provider must keep accurate accounts and records including:

- the name and address of the person who purchased a protection product;
- a list of locations where the service contract or protection product is sold or marketed; and
- written claims files with the dates, amounts, and descriptions of claims related to service contracts or protection products.

Investigations

The Commissioner may investigate a service contract provider and a protection product guarantee provider. Upon the Commissioner's request, the service contract provider or protection product guarantee provider must make the books, accounts, and records available to the Commissioner. The Commissioner may take actions to enforce the chapter and the Commissioner's rules and orders.

Motor Vehicle Service Contract Form Filings - Generally

Motor vehicle service contracts must not be sold or issued unless the form is filed with and approved by the Commissioner. This does not apply to contracts issued or sold by a motor vehicle manufacturer, an import distributor, a wholly owned subsidiary of a manufacturer, or a wholly owned subsidiary of an import distributor.

Provisions Unique to Motor Vehicle Manufacturers, Import Distributors, and Subsidiaries of Manufacturers and Import Distributors

A motor vehicle service contract does not have to be filed until 60 days after it is used if it is issued or sold by a motor vehicle manufacturer, an import distributor, a wholly owned subsidiary of a manufacturer, or a wholly owned subsidiary of an import distributor.

The service of process provision and many of the registration requirements do not apply to a motor vehicle manufacturer, an import distributor, a wholly owned subsidiary of a manufacturer, and a wholly owned subsidiary of an import distributor.

Audited financial statements are not required from publicly traded motor vehicle manufacturers or publicly traded import distributors.

Motor Vehicle Service Contracts - Disclosures and Consumer Protections

All motor vehicle service contracts must include specific disclosures. All motor vehicle service contracts must include information on how to file a claim. Purchasers must be allowed to return the contract within 30 days if no claim is filed and receive a full refund less a designated cancellation fee.

Consumer Protection Act

A violation of these provisions is a violation of the Consumer Protection Act. A purchaser of a service contract or guarantee protection product may bring suit for a violation.

Exemption from the Insurance Code

Persons selling and marketing service contracts and protection product guarantees are not required to register with the Commissioner unless they are service contract providers or protection product guarantee providers.

Repeals

The chapter in the Code regulating motor vehicle service contracts is repealed.

Votes on Final Passage:

House	97	1	
Senate	48	0	(Senate amended)
House	98	0	(House concurred)

Effective: October 1, 2006



Inside the Legislature

- * Find Your Legislator
- * Visiting the Legislature
- * Agendas, Schedules and Calendars
- * Bill Information
- * Laws and Agency Rules
- * Legislative Committees
- * Legislative Agencies
- * Legislative Information Center
- * E-mail Notifications (Listserv)
- * Students' Page
- * History of the State Legislature

Outside the Legislature

- * Congress - the Other Washington
- * TVW
- * Washington Courts
- * OFM Fiscal Note Website

[RCWs](#) > [Title 48](#) > [Chapter 48.110](#) > [Section 48.110.010](#)

Beginning of Chapter << [48.110.010](#) >> [48.110.015](#)

RCW 48.110.010

Finding — Declaration — Purpose.

The legislature finds that increasing numbers of businesses are selling service contracts for repair, replacement, and maintenance of motor vehicles, appliances, computers, electronic equipment, and other consumer products. There are risks that contract obligors will close or otherwise be unable to fulfill their contract obligations that could result in unnecessary and preventable losses to citizens of this state. The legislature declares that it is necessary to establish standards that will safeguard the public from possible losses arising from the conduct or cessation of the business of service contract obligors or the mismanagement of funds paid for service contracts. The purpose of this chapter is to create a legal framework within which service contracts may be sold in this state and to set forth requirements for conducting a service contract business.

[2006 c 274 § 1; 1999 c 112 § 1.]

