FILED

2015 JAN 20 P 1:14

STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

RENT-A-CENTER, INC. RENT-A-CENTER WEST, INC. and BENEFIT MARKETING SOLUTIONS, LLC and BENEFIT SERVICES ASSOCIATION,	No. 14-0082 SUPPLEMENTAL AUTHORITY ON THE ISSUE OF PAID-OUT PRODUCT BENEFIT AS INSURANCE

Benefit Marketing Solutions, LLC, Benefit Services Association, Rent-A-Center, Inc. and Rent-A-Center West, Inc. submit the following supplemental authority (and attaches the cases) to assist the Hearing Officer in determining that the Paid-Out Product Service Protection is not insurance as defined by RCW 48.01.040:

WASHINGTON AUTHORITY

1. *Discount Tire Co. of Washington, Inc. v. State of Washington*, 121 Wash. App. 513, 85 P.3d 400 (2004): In the *Discount Tire* case the Division One Court of Appeals held that a product very similar to Benefit Services Association's Paid-Out Product Service Protection was neither a service contract nor insurance. The Court discussed distinctions between extended warranties and insurance. In *Discount Tire*, a tire retailer brought suit claiming entitlement to a tax credit for sales tax it was accessed by the State on the sale of new tires which replaced tires returned by a customer under an optional extended warranty. The State argued, among other things, that the extended warranty was analogous to an insurance contract for which the tire purchaser paid an additional fee. Thus, it claimed that the payments to the purchaser constituted insurance, as opposed to refunds subject to a tax credit. The court disagreed, finding that the State's analogy to insurance contracts did not apply, because "payments under insurance contracts are generally pro-rated or based upon depreciated values of damaged or destroyed property, often subject to a deductible borne by the insured."

OUT OF STATE AUTHORITY

2. *GAF Corporation v. County School Board of Washington County, Virginia*, 629 F.2d 981 (4th Cir. 1980): In *GAF* the 4th Circuit had to determine whether a product, sold at the time of purchasing property that guaranteed the repair of the purchased property, was a warranty or insurance. The Court held: "the question whether contracts for sale of goods or for service containing "guarantees" are insurance contracts or warranties arises in a variety of contexts and is a difficult one because these contracts involve the transfer and distribution of risk, which are two elements of insurance. *See* R. Keeton, Insurance Law § 8.2(c) (1971). Although, as the district court rightly emphasized, the guarantee here possesses some characteristics of insurance, we think that this does not sufficiently address the underlying question and that the guarantee must be viewed as a whole in determining whether it constitutes a contract of insurance or a warranty.

The guarantee does contain an "insurance" component because the risk of damage from leaks caused by faulty workmanship was transferred to GAF. This element of risk transference, however, was a relatively unimportant element of the transaction and is incidental to the essential character of the guarantee, which is that of a warranty agreement accompanying the sale of goods. *See* R. Keeton, supra, at 552. We think that the appropriate rule is that a small element of "insurance" should not be construed to bring a transaction within the reach of the insurance regulatory laws unless the transaction involves "one or more of the evils at which the regulatory statutes were aimed" and the elements of risk transfer and distribution give the transaction its distinctive character. *See* id."

3. *Rayos v. Chrysler Credit Corp.*, 683 S.W.2d 546 (Tx. 1985): In *Rayos* the Court held "the question is whether looking at the plan of operation as a whole, 'service' rather than 'indemnity' is the principal object and purpose of the agreement." The court held a buyer's protection plan is one to provide a "service" and was more in the nature of a warranty than insurance. "[A] warranty is issued to provide protection against defects or failures in a product, whereas an insurance policy is issued to provide reimbursement or indemnity based on an accident or occurrence unrelated to any defect or failure in the product."

4. *Griffin Systems, Inc. v. Ohio Department of Insurance*, 575 N.E.2d 803 (Ohio 1991): In *Griffin Systems* the Court rejected the Department of Insurance's argument and held: a motor vehicle service repair agreement, under which the promisor agreed to compensate the promisee for repairs necessitated by mechanical breakdown resulting exclusively from failures due to defects in motor vehicle parts, did not constitute an insurance contract even though the promisor was not the manufacturer, seller, or supplier of equipment to which the repair obligation applied. The Court looked at the four corners of the contract itself and held "it is clear that warranties that cover only defects within the product itself are properly characterized as warranties..., whereas warranties promising to cover damages or

losses unrelated to defects within the product itself are, by definition, contracts substantially amounting to insurance[.]"

5. *H & R Block Eastern Tax Services, Inc. v. State of Tennessee*, 267 S.W.3d 848 (Tenn. 2008): The Court in *H & R Block* rejected the state's argument that a "peace of mind" guarantee program constituted insurance. The Tennessee Court of Appeals focused on "whether the contract, as a whole, is primarily a service guarantee or a promise of indemnity" and held that it was not a contract of insurance because "after 113 years in which the courts have never been asked to treat simple warranties as insurance, we can find no legal, logical or public-policy justification for adopting a definition so expansive that it would do precisely that."

DATED this 16th day of January, 2015.

RYAN, SWANSON & CLEVELAND, PLLC

By _____
Gulliver A. Swenson, WSBA #35974

1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224
Facsimile: (206) 583-0359
swenson@ryanlaw.com