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STATE OF MAINE

24-A M.R.S.A. § 3

Inter-Departmental Memorandum Date June 21, 1976

To Frank M. Hogerty, Jr., Superintendent Dept. Insurance

From S. Kirk Studstrup, Assistant Dept. Attorney General

Subject Status of "Buyers' Protection Plan" as Insurance

You have asked our opinion on the question of whether a "Buyers' Protection Plan" offered by Homeowners' Repair Services, Inc. (HRS) is "insurance" for purposes of the Maine Insurance Code. The plan is basically an agreement with the owner of existing residential property that Homeowners' Repair Services, Inc. will repair or replace for a subsequent purchaser any of certain specified items of home equipment if they fail during normal and intended use within the contract period. Any necessary repair or replacement is performed only by local contractors with whom HRS has its own agreements. The home owner would not be reimbursed for services provided by any other source. The consideration of this agreement is computed on the basis of the selling price of the residential property, and is usually paid by the seller. The term of the agreement is one year from the date of sale and there is no provision for renewal. The agreement is available only with regard to property sold by an agent of HRS. In light of these facts, the answer to the question is negative for reasons set forth below.

On August 21, 1974, an assistant in this office prepared an informal memorandum concurring with your earlier conclusion that sale of the Buyer Protection Plan constituted the sale of insurance. After reconsideration of the facts and points of law, plus information subsequently made available to us, we find that we do not agree with that informal memo. It is also necessary to note an opinion of this office dated December 3, 1958, which concluded that the sale of used-car warranties was the sale of "insurance," as that term was then defined. That 1958 opinion is distinguished from the present one on the basis of the difference in the specific fact pattern being considered and the change in the statutory definition of "insurance" which was subsequently enacted.

"Insurance" is statutorily defined in the Maine Insurance Code as follows:

"Insurance" is a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, or to pay or grant a specified amount or determinable benefit or annuity in connection with ascertainable risk contingencies, or to act as surety." 24-A M.R.S.A. § 3.

The primary consideration in applying this definition to a specific 1/ program is what the plan in fact does, rather than what it is called. Associated Hospital Service of Maine v. Mahoney, 213 A.2d 712 (Me. 1965). The plan offered by HRS appears to operate in some aspects as a form of indemnification "in kind." However, not every contract which contains an element of indemnity is an insurance contract for purposes of State regulation. State v. Anderson, 408 P.2d 864 (Kan., 1966). Each contract or plan must be considered individually to see what it is intended to accomplish and how it operates. It is our opinion that the plan in question is more analogous in operation to a warranty or service/maintenance contract, and, therefore, does not come within the intended purview of the statutory definition of "insurance."

Decisions of the Supreme Judicial Court have included commentary on the nature of "insurance," and have typically stressed only the indemnity aspects. See: Associated Hospital Service of Maine v. Mahoney, supra and Getchell v. Mercantile and Mfg's Fire Ins. Co., 109 Me. 274 (1912). However, none of these decisions was made after the enactment of 24-A M.R.S.A. § 3, and none concerned the type of buyers' protection plan involved here. Nor is there any legislative history of record which would help clarify whether the Legislature intended that a plan of this sort be included under the Code.^{2/} Therefore, guidance must be sought from other sources.

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- 1/ The application form used by HRS contains the designation "Limited Warranty Pub. Law 93-637." The public law referred to is the "Magnuson-Moss Warranty - Federal Trade Commission Improvement Act" (P.L. 93-637, 88 Stat. 2183, codified as 15 U.S.C. § 2301, et seq). Although certain provisions of this Act concern analogous situations, the Act specifically applies only to personal property, not the type of property covered by the plan. Therefore, without expressing an opinion as to whether the HRS plan is a warranty, we question the use of this reference to P.L. 93-637 in light of its possible misinterpretation as federal legislation recognizing, requiring or regulating such plan.
- 2/ It should be noted that the Legislature did specifically include one form of service contract, that covering road or tourist service, within the Code and gave it special attention. 24-A M.R.S.A. § 4701, et seq. If a homebuyers' protection plan is considered a service/maintenance contract, it is logical that it would require similar legislative treatment in order to bring it within the scope of the Code.

One commentator has noted that insurance is theoretically a contractual plan for distributing the risk of individual loss among the members of a larger group with similar risk exposure. The analysis goes further to state that the elements of insurance include - among other things - a risk of loss, assumption and sharing the risk with others, and payment of a "ratable premium" for this coverage. Vance, Handbook on the Law of Insurance, 3rd ed. (1951) pp. 4-5; cited as authority in Guaranteed Warranty Corp., Inc. v. State ex rel. Humphrey, 533 P.2d 87 (Ariz., 1975). The risk involved in the "buyers' protection plan" offered by HRS is the failure of home equipment during normal use, due to some weakness or fault inherent in the equipment itself. It is not a risk, such as fire, flood, etc., which derives from an external source; in other words, the risks normally covered by homeowners' insurance. Viewed in this light, the risk is not the sort normally contemplated by insurance, but is rather the type of risk against which a consumer is protected by a warranty on the product purchased. See citations in Austine v. Lake Darling Ranch, 233 N.W.2d 723 (Minn., 1975), at p. 729, footnote 8.

In addition, the fee paid to HRS for coverage in the plan could not be considered a "ratable premium." The fee is a certain percentage of the selling price of the residential property. The fee would not be "ratable" because it has no direct relationship to the degree of "risk" present in a given house and could depend more on factors such as the local real estate market and neighborhood.

A final consideration is the context within which the plan is offered. At least one state court has decided that the nature of a contract as insurance depends upon the principal object and purpose of business for which it is offered. State v. Anderson, supra. In the present case, HRS offers the buyers' protection plan only with regard to houses which its agents sell and only for a limited time from the sale itself. The plan is part of a larger commercial effort oriented toward real estate sales. The fee for plan coverage is typically paid by the seller rather than the buyer. Coverage under the plan is advertised as a selling point for these houses. These factors clearly show that the plan, even though it will help to protect a home buyer, is primarily designed as a sales tool to induce consumers to purchase houses being sold by HRS agents. There is no indicated intent that the plan should be insurance.

In summary, it is our opinion that the Buyers' Protection Plan offered by HRS is not insurance, as that term is defined in 24-A M.R.S.A. § 3. We do not express our opinion on whether the plan is a warranty as opposed to a service/maintenance contract, there being elements of both devices present. This opinion is limited to the specific facts presented and should not be used in conjunction with other "buyers' protection plans" which materially differ in their operation