STATE OF MAINE

Insurance: Lens Guarantees

Inter-Departmental Memorandum Date September 27, 1976

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

From S. Kirk Studstrup, Assistant Dept. Attorney General

Subject: Contact lens plan as "insurance"

This memorandum responds to your inquiry as to whether certain contact lens plans constitute "insurance" subject to regulation by the Bureau of Insurance. The two plans in question are basically the same in operation, as described later in this memorandum. However, there is one crucial difference between the plans which leads us to the opinion that one plan (Contact Lens Guarantee, Inc. - "CLG") is insurance, while the other (Professional Lens Plan, Inc. - "PLP") is not insurance. This difference is the "risks" which are covered by each plan.

Both the "CLG" and "PLP" plans contain a three-party relationship between and among the company, the doctor, and the consumer. The role of the company is essentially promotional and administrative since the most important agreement is the one between the patient and the doctor. The patient pays an annual fee which is split between the company and the doctor. In return, the doctor promises that the consumer may purchase new lenses from him at a set price which is less than the price would be without the plan. The company does not become involved in any of the individual purchase transactions between the doctor and the consumer. In one plan, "PLP," the consumer may purchase at the set price as many lenses as he wishes, without limitation. The new lenses may be a replacement for lost or damaged lenses, but may also be simply a spare set of lenses. In the other plan, "CLG," the purchase is limited to replacement of lenses which are lost, damaged or worn. If the replacement is due to loss, the consumer is required to report such loss. If the replacement is due to damage to or wear and tear of the lens, the consumer must return the old lens at the time of replacement.

The term "insurance" is defined by statute in Maine 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.

This statutory definition stresses the "indemnification" aspect of insurance, which is also stressed in Maine case law on this point. In Getchell v. Mercantile and Manufacturer's Fire Insurance Co., 109 Me. 274 (1912), the Court said, "A contract of insurance is a contract of indemnity, the object being to reimburse the insured for his actual loss not exceeding an agreed sum." In Associated Hospital Service of Maine v. Mahoney, 213 A.2d 712 (Me. 1975), the Court adopted a

similar definition, emphasizing that the indemnification is for specified contingencies, perils or risks.

In order to determine whether a given program constitutes "insurance" for regulatory purposes, it is necessary to examine what the program does, not what it is called. Associated Hospital Service of Maine v. Mahoney, supra. The "CLG" plan acts to indemnify the consumer to the extent that the normal price of a replacement lens exceeds the fixed replacement charge under the plan. The fixed charge could be viewed in this regard as a deductible amount which the consumer/insured must pay in the event of a claim. The specified contingencies for which indemnification is made are loss, damage or wear and tear of the lenses. The financial loss incurred by the happening of these contingencies, above the fixed charge or deductible, is the risk which is transferred from the consumer to the doctor, if not to the company. These factors lead us to the opinion that the "CLG" plan does include sufficient indicia of insurance to be treated as such under 24-A M.R.S.A. § 3 and regulated on this basis.

On the other hand, the "PLP" plan more closely resembles a future sales agreement where the seller guarantees the future price in return for a present consideration. The plan would be applicable in the case of loss, damage or wear and tear of the lenses, as would the "CLG" plan. However, the "PLP" plan goes further and applies any time the consumer wants new lenses, whatever the reason. There does not have to be a loss or the occurrance of a specified contingency before the consumer may benefit from the plan. The "PLP" plan may contain a technical element of indemnity in the event of loss of a lens, but it does not necessarily follow that this is an insurance contract for regulatory purposes. Cf. State v. Anderson, 408 P.2d 864 (Kan., 1966). Such element of indemnity may be present in many contracts which are not considered "insurance." For these reasons, it is our opinion that the "PLP" plan does not constitute "insurance" for purposes of Title 24-A.

It should be noted that our opinion concerning the "PLP" plan is consistent with a prior opinion of counsel for the Kansas Insurance Department on the same plan. In that opinion counsel advised that PLP should strike reference to "replacement" in its literature and contracts to avoid any implication that the plan is insurance. We believe this is sound advice and should be considered by PLP if they have not already done so.

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