

INSURANCE: TV Picture Tube Guaranty No. 5001, not a contract of indemnity insurance so long as sold by seller or one servicing tubes guaranteed, but if TV Picture Tube Guaranty Co. does not service or sell tubes guaranteed, such company must be licensed as an insurance carrier.



July 21, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your request reading as follows:

"You will find attached hereto a so-called 'Guaranty Form' which is now being sold in Kansas City, Missouri. You will also find enclosed a copy of a letter which we have received from the Better Business Bureau of Kansas City, Missouri, which may be of assistance to you in rendering your opinion.

"The purpose of this letter is to respectfully ask you to examine the enclosed documents and render an opinion as to whether or not the enclosed 'Guaranty Form' constitutes a contract of insurance under the applicable statutes of this State."

A rule to guide us at the very commencement of this opinion is aptly stated at 29 Am. Jur., Insurance, Sec. 4, as follows:

"Whether a corporation or association is engaged in the insurance business must be determined by the particular objects which it has in view, and not by abstract declarations of general purposes; the business which the organization is actually carrying on, rather than the mere form of the organization, is the test for determining whether it is carrying on an insurance business."

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In order that no doubt will exist as to the written provisions of the agreement being construed, TV Picture Tube "Guaranty" No. 5001, is here quoted in its entirety:

ORIGINAL	TV PICTURE TUBE	No. 5001
Return to Office	G U A R A N T Y	

For the sole consideration of the sum of \$15.00, the receipt of which is hereby acknowledged, the TV PICTURE TUBE GUARANTY COMPANY, 314 Finance Building, Kansas City, Missouri, does hereby guarantee that the picture tube in the television set described below will not wear out or burn out or cease functioning as the result of defects inherent in the picture tube itself during one (1) year from the date hereof. If said picture tube shall cease functioning from such causes, within such period of time, the TV PICTURE TUBE GUARANTY COMPANY agrees to replace (or cause to be replaced) said tube with one new, unused picture tube of the same size and quality as contained in said set at the time of signing of this guaranty, as well as all the costs of installation of the new tube.

EXCLUSIONS

This guaranty does not cover or include color picture tubes, picture tubes which exceed 21 inches in size, nor does it cover, include or guarantee against damage to, breakage or destruction of the picture tube resulting from mishandling, tampering, or negligent acts of the owner or others, including but not limited to, dropping, striking, jarring, bumping or otherwise abusing the set, it being the intent to guarantee only against wearing or burning out under ordinary, reasonable use. Only one (1) picture tube per set will be replaced during the term of this guaranty.

CONDITIONS

This guaranty shall be void if the set described below is sold, rented, loaned, or otherwise transferred to anyone other than the owner, or if the said set or picture tube is removed from the location set forth above without the written permission of the guarantor, and this guaranty is not assignable or transferable. By signing this guaranty below, the owner agrees to give any burned out, replaced picture tube to the TV PICTURE TUBE GUARANTY COMPANY. In the event the picture tube in the television set described below ceases to function, the owner shall have the burden of proving that the failure of said tube comes within this guarantee.

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Section 375.310 RSMo 1949, contains the following language:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In State ex rel. Inter-Insurance Auxiliary v. Revelle, 165 S.W. 1084, 257 Mo. 529, l.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, l.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In reviewing the provisions of the "guaranty" agreement being construed we find the legal consideration of fifteen dollars mentioned therein as moving from the promisee to the promisor, to support the agreement for a specified term of one year. The indemnity promised is capable of admeasurement by arriving at the replacement cost of a new, unused picture tube corresponding in size and quality with the tube which is guaranteed at the time the consideration for the agreement is paid. The actual language of the guarantee is as follows:

" * * * does hereby guarantee that the picture tube in the television set described

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below will not wear out or burn out or
cease functioning as the result of defects
inherent in the picture tube itself during
one (1) year from the date hereof. * * *"
(Underscoring supplied.)

In the case of State of Ohio ex rel Duffy v. Western Auto Supply Company, 134 Ohio St. 163, 16 N. E. 2d 256, 119 A.L.R. 1236, l.c. 1240, the Supreme Court of Ohio was alluding to the difference between a seller's warranty and an insurance indemnity, and spoke as follows:

"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."

The rule quoted above from State of Ohio ex rel. Duffy v. Western Auto Supply Company is, in our opinion, to be applied to the agreement offered by TV Picture Tube Guaranty Co., only in the event that such company is a seller of the tubes guaranteed, or when the guarantee is issued after said company has repaired or inspected such tubes. To rule otherwise would allow the company to offer the public a highly speculative indemnity contract not bearing the characteristics of a seller's warranty of product or service, and would be well within the terms of a contract of insurance not to be written except by persons or corporations duly licensed to engage in such business by the State of Missouri.

CONCLUSION

It is the opinion of this office that TV Picture Tube Guaranty, No. 5001, issued by TV Picture Tube Guaranty Co., 314 Finance Building, Kansas City 5, Missouri, is to be construed as a contract of indemnity insurance, unless the object of the guarantee made thereby is sold, or serviced, by TV Picture Tube Guaranty Company. If such conditions are not complied with the agreement is one of insurance which may not be sold or offered for sale unless the promisor is licensed to conduct an insurance business in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General