

INSURANCE: Contract, "Form C-104, Edition 7-152, Retail Credit Discount Warranty, E-No. 11214", offered by The Guardian Credit Indemnity Corporation is a contract of insurance. Agent acting for unauthorized company in selling contract subject to prosecution under Section 375.300, RSMo 1949.



April 17, 1953

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

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

"Inclosed herewith is a photostatic copy of a specimen contract designated 'Retail Credit Discount Warranty' and issued by the Guardian Credit Indemnity Corporation of Painesville, Ohio.

"Your opinion is respectfully requested as to whether or not this contract is one of insurance within the terms and provisions of the insurance laws of Missouri. If your answer is in the affirmative, please advise whether or not the issuance of this contract in this state is a violation of our laws since this corporation is not licensed by this office to transact an insurance business."

From the photostatic copy of the specimen contract submitted the following identification is shown: "Form C-104, Edition 7-152, Retail Credit Discount Warranty, E-No. 11214." In State ex rel. v. Revelle, 257 Mo. 529, l.c. 535, we find the essential elements of a contract of insurance described in this language:

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"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 44 C.J.S., Insurance, Sec. 10, we find "credit insurance" defined as follows:

"Credit insurance is a modern form of guaranty insurance, which provides for an indemnity, wholly or in part, to merchants or traders against the insolvency of customers to whom they extend credit."

A contract similar to the one here being construed was before the St. Louis Court of Appeals in the case of State v. Phelan, 66 Mo. App. 548, and the Court spoke as follows at l.c. 558:

"Defendant, however, insists that the bond of indemnity is a contract of guaranty and not of insurance. 'Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss.' 1 May on Insurance, sec. 1. This definition has been adopted by the appellate courts of this state. Duff v. Fire Association, 129 Mo. loc. cit. 465. A contract having these elements, and not opposed to public policy, is one of insurance. By the bond of indemnity in this record the American Credit Indemnity Company upon the payment of \$90, and in further consideration of the acceptance of all the terms and conditions made a part of said bond, guaranteed the Hunicke Glove Company, for the period of one year, against loss, to the extent of and not exceeding \$3,000 gross, resulting from insolvency of debtors, as defined in said bond, over and above a loss of \$1,000 agreed to be borne by the assured on sales, shipments and deliveries of goods to be \$75,000 or less. This contract violates no rule of public policy, and is within the scope of the above definition. That

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the contingency provided against is a proper matter of insurance has been determined in a recent opinion by the supreme court of Massachusetts (Claflin v. Credit System Co., April, 1896). The indemnity contracted for is essentially the same as that secured by insurance against risk from all forms of dishonesty. That it may have some of the features of suretyship or guaranty does not detract from its character as a contract of insurance, when, as in this case, it is within the strict terms of the latter as defined by law. The contract to indemnify against loss of claims is one of indemnity against loss of property; for it is self-evident that valid demands, although mere choses in action, are, equally with tangible effects, personal property. Hence, their loss or destruction may be provided against by a contract resting upon a sufficient consideration. Such insurance is practiced both in England and America. Beach on Insurance, secs. 331, 332, 329, and cases cited. May on Insurance, sec. 544, Mercantile Credit Co. v. Wood, 68 Fed. Rep. 529.

"Our conclusion is that the bond of indemnity in this record, in virtue of its terms, is a contract of insurance in the statutory sense, and the defendant having received the premium therefor, without any license to act as agent for his principal, was guilty of a violation of the statute warranting the judgment."

Having defined insurance and credit insurance, and having shown how a contract indemnifying against loss arising from ordinary commercial credit risks may be the proper subject of an insurance contract, it becomes necessary to review the specimen contract to determine if it has the essential elements of an insurance contract. In doing this we construe the application for the warranty along with the warranty and all of its terms and conditions.

The plan may be described as follows. A person or corporation engaged in business makes application for the

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Retail Credit Discount Warranty in a stated amount of dollars, with the warranty to be in effect for one year. With the application is remitted a "prepaid fee" in a stated sum of money as consideration for the warranty. When the company accepts the client's original remittance it will issue the Retail Credit Discount Warranty which is to be effective according to the terms, conditions and stipulations made a part thereof. Under such conditions and terms the company agrees to pay the client the principal sum shown on the face of the warranty. The company expects to realize the face of the warranty by receiving and processing, by collection, accounts which the client submits to the company. When collections are realized on said accounts such sums are applied on the principal amount of the warranty, and are so credited. The client, over and above his "prepaid fee" forwarded with his application, agrees to allow the company a charge and/or discount of 15% of the face value of any account or note coming within the provisions of the warranty. The company is obligated to pay to the client, without recourse, the face value of any account or claim less the company's charges, subject to and approved by the company for discount. The normal period during which the warranty is in effect is one year, but the same may be terminated by (a) the client's receipt of the principal amount of the warranty at an earlier date, or (b) by the company choosing to cancel the warranty upon return to the client of the "prepaid fee" which accompanied the application for the warranty.

As we view the plan, it offers the client a contract whereby the corporation, for a lawful consideration moving to it, represented by a prepaid fee in a stated amount and the forwarding to the corporation by the client of his debtor accounts in an aggregate amount not in excess of the face value of the Retail Credit Discount Warranty, agrees to pay to the client within one year the face value of such warranty. Throughout all the terms, conditions and stipulations contained in the plan the fact is inescapable that the purpose is to insure against loss of debtor accounts, and the plan is considered to be well within the scope of the ruling in *State v. Phelan*, cited supra. The contract offered is ruled to be an insurance contract, and offering of the same will constitute engaging in the insurance business in Missouri.

In the request for this opinion it is stated that The Guardian Credit Indemnity Corporation of Painesville, Ohio, is not licensed to conduct an insurance business in Missouri.

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This being so, any negotiation of the contract in question by an agent for such corporation will cause such agent to be in violation of Section 375.300, RSMo 1949, which makes it a misdemeanor for any agent to act for any individual, association of individuals or corporation engaged in the insurance business in this State before such individual, association of individuals or corporation has been licensed by the Superintendent of the Division of Insurance.

CONCLUSION

It is the opinion of this office that "Form C-104, Edition 7-152, Retail Credit Discount Warranty, E-No. 11214" offered by The Guardian Credit Indemnity Corporation of Painesville, Ohio, is a contract of insurance and may not be offered for sale in the State of Missouri by any agent of such company until the company is licensed to conduct its business in this State by the Superintendent of the Division of Insurance, and any agent so acting for the unlicensed company is subject to prosecution under Section 375.300, RSMo 1949.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

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