INSURANCE: Contract whereby Royal Provident Corporation of America agrees to replace lenses in glasses and give free adjustment on frames is insurance contract.

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Hon. Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

We have received your recent letter which reads as follows:

> "The Royal Provident Corporation of America, Title Guaranty Building, St. Louis, Missouri, has recently been incorporated and granted a charter under Article VII of Chapter 32, Revised Statutes of Missouri, 1929, which article pertains to manufacturing and business companies. The purposes for which the corporation was formed are set out in Section 7 of its articles of incorporation, which reads as follows:
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> "'That the corporation is formed for the following purposes:
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> "To solicit members in the association for the purpose of securing service on eyeglasses, eyelenses, and appurtenances, of said members; To offer adjustment service to all members on all types of eyeglass frames without any additional charge; To offer service on all types of eyeglass lenses; To buy, sell, manufacture, or otherwise deal in all types of frames, lenses, or other appurtenances pertaining to the sale,

purchase, and use of all types of eyeglasses; To own real and/or personal property and to buy and sell real and/or personal property; And to do any and all acts necessary and proper in connection therewith.'

"The Corporation solicits members and charges a membership fee of $1.00 per year. A copy of the application for membership and a membership card issued by the Corporation are enclosed herein. In return for the $1.00 membership fee, no interest in this stock company is given to the subscriber. But the Corporation offers free adjustments and minor repairs to eyeglasses and discounts for appurtenances to eyeglasses equal to at least 33-1/3% to these 'members'.

"The Corporation agrees that upon the breaking of a lens of a member's eyeglasses, it will replace such lens for 75¢ for each single vision lens and $1.25 for each bifocal lens. The member may avail himself of this service as often as necessary during the life of the contract. The Officers of the Corporation inform us that they purchase the lenses for replacement from the Bachman Optical Company, of St. Louis, Missouri, and that by purchasing said lenses in large quantities they are able to obtain them for less than 75¢ for single vision lenses and $1.25 for bifocal lenses in almost every instance. They say that there may be a very few occasions when the lenses will be more than that price. Investigation may be necessary to determine whether or not this company carries lenses in stock. They may only refer the member to the Optical Company for the service, the cost being reimbursed by the company to the Optical Company.

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"This Department respectfully requests your opinion, * * as to whether the plan of operation, as above outlined, constitutes the doing of an unauthorized insurance business * * * * ."

The application for membership blank used by the corporation, after providing blanks for the name and address of the applicant, together with a detailed description of the "present usable eyeglasses" of the applicant, then recites:

"Applicant agrees to pay to the Royal Provident Corporation of America the sum of One Dollar (-1.00) as annual membership fee, payable in advance for one year from above date, at the time of signing this application."

On the back of this membership blank, we note the following:

"The fee as stated herein entitles the member to the following benefits:

"1.-Replacement of lense or lenses at any time during the membership period, upon payment to the Association of a service charge of 75¢ for each single vision lense replaced, or $1.25 service charge for each double vision (bifocal), lense replaced.

"2.-A discount of not less than 33-1/3% in the event the member desires to purchase new lenses or frames, if the same are purchased through the Association.

"3.-Free adjustments on frames at any time during the membership period.

"It is agreed with the member -

"1.-That all replacements, adjustments, or new lenses or frames purchased through the Association will be made by the Bachman Optical Company.

"2.-That the Association may, at its option, cancel the membership herein contracted, upon giving to the member ten (10) days notice of its intention to do so, and refund to said member the membership fees paid.

"3.-That the member agrees to furnish to the Association all pieces and parts of the broken lense or lenses, regardless of condition, together with all frames or mountings formerly attached thereto, such broken pieces to remain the property of the Association. If it is impossible to replace the lense or lenses from the broken pieces furnished by the member, then the member agrees that he will furnish the Association with a copy of the prescription for such lenses, any cost of securing such prescription shall be borne by the member.

"4.-All discounts will be based upon the retail prices of the Bachman Optical Company."

It will be noted first that the Royal Provident Corporation of America is a stock company incorporated as a manufacturing or business company; that this stock business corporation issues certificates or contracts to anyone who wears eyeglasses and who desires the benefits made available by such a contract; that the annual membership fee is $1.00, payable in advance, and in return, the applicant is entitled to receive as benefits the replacement of single vision lenses (if the same are

broken or destroyed in any manner whatsoever) for the sum of 75¢ each, and in a like manner, bifocal lenses for $1.25 each. The cost of 75¢ or $1.25, as the case might be, is designated in the application as a "service charge". The applicant is entitled to a "discount of not less than 33-1/3% in the event the member desires to purchase new lenses or frames, if the same are purchased through the Association". Free adjustment on frames is also given at all times. The question is, then, whether such contracts are in fact contracts of insurance.

Section 5892, R.S. Missouri, 1929, provides in part as follows:

> "No company shall transact in this state any insurance business unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with authorizing it to do business; * * * * * * * * *."

Section 5893, R.S. Missouri, 1929, provides in part as follows:

> "No individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the state of Missouri unless he or they shall first fully comply with all the provisions of the laws of this state governing the business of insurance."

Section 5909, R.S. Missouri, 1929, states in part as follows:

> "Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance department 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 the case of State ex rel. Duffy v. Western Auto Supply Company, 134 Ohio St. 163, 16 N.E. (2nd) 256, decided in the year 1938, the respondent, Western Auto Supply Company, a Missouri company and a business corporation, was engaged in the sale of automobile parts, accessories and equipment and pneumatic rubber tires in various locations of the State of Ohio. The respondent, upon a sale of a tire, would issue one of two types of contracts, each of which were called a "guarantee" to each buyer. One form was a specific guarantee for the period stated therein "against blow-outs, cuts, bruises, rim-cuts, under-inflation, wheels out of alignment, faulty brakes or other road hazards that may render the tire unfit for further service (except fire and theft)". It then provided that:

> "In the event that the tire becomes unserviceable from the above conditions, we will (at our option) repair it free of charge, or replace it with a new tire of the same make at any of our stores, charging . . . th of our current price for each month which has elapsed since the date of purchase. The new tire will be fully covered by our regular guarantee in effect at time of adjustment. Furthermore: every tire is guaranteed against defects in material or workmanship without limit as to time, mileage or service."

In the blank spaces were inserted the trade name of the tire, the period covered by the guarantee and the fractional part thereof represented by a single months' wear. The other form constituted a guarantee "to wear" for not less than the period therein specified and then provides as follows:

> "Should the tire fail within the replacement period, return it to the nearest Western Auto Store and we will either repair it free or replace it with a new tire, charging you a proportionate part of the current price for each month you have had the tire."

In holding that the agreements were really contracts of insurance and not merely guarantees of material and workmanship, the court said:

> "Are such agreements of guarantee permissible as incidental to the sale of automobile tires; or do they constitute 'the business of insurance' or 'the business of guaranteeing against liability, loss or damage' or are these agreements of guarantee 'contracts substantially amounting to insurance' within the purview of Section 665, General Code, and therefore inhibited?
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> "What is insurance? 'Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. As regards property and liability insurance, it is a contract by which one party

promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specified cause, or to guarantee or indemnify or secure him against loss from that cause.' 32 Corpus Juris, 975. It is a contract 'to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed.' State ex rel. Sheets, Atty. Gen., v. Pittsburgh, C., C. & St. L. Ry. Co., 68 Ohio St. 9, 30, 67 N.E. 93, 96, 64 L.R.A. 405, 96 Am. St. Rep. 635; State ex rel. Physicians' Defense Co. v. Laylin, Secy. of State, 73 Ohio St. 90, 97, 76 N.E. 567.

"It seems well settled that to constitute insurance the promise need not be one for the payment of money, but may be its equivalent or some act of value to the insured upon the injury or destruction of the specified property. It is well settled, also that the business of insurance is impressed with a public use and consequently its regulation, supervision and control are authorized and required to protect the general public and safeguard the interests of all concerned. * * * * * * * * * *

"The respondent, in one of its forms of contract, specifically guarantees 'against defects in material and workmanship without limit as to time, mileage or service;' but it goes further and undertakes to indemnify the owner of such tires against all road hazards (except fire and theft) which may render his tire unfit for service. The terms employed in the guarantee

are sufficiently broad to include not only damage from blow-outs, cuts and bruises, whether resulting from under-inflation, faulty brakes or misalignment, but any and every hazard, including collisions, whether resulting from negligence of the owner or another. It clearly embraces insurance upon the property of the owner, such as is authorized by the provisions of Section 9556, General Code, to be written by companies required to comply with the insurance laws of the state.

"The ultimate force and effect of the contract of indemnity embraced in this guarantee may be appreciated if extended to cover not only the automobile tire but the automobile itself. Surely no one would contend that an undertaking by an automobile manufacturer to replace an automobile damaged or destroyed (excepting only by fire and theft) within a specified period after its purchase is not a contract to reimburse one if he suffers loss from a specified cause or to indemnify him against such loss.

"The fact that such contract of indemnity is made only with the purchaser of the indemnitor's product does not relieve the transaction of its insurance character. When the sale is complete, title passes and the property which is the subject of insurance or indemnity belongs to the purchaser. If the contracts of indemnity involved here are not violative of the insurance laws, then every company may, in consideration of the purchase price paid therefor, furnish its product and also undertake to insure it against all hazards for a specified period. Even if such contract is an incident in

> the sale of merchandise and its use therein does not constitute the business of insurance, it in effect is a contract 'substantially amounting to insurance' within the restrictive provisions of Section 665, General Code.
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> "We are unable to discern any essential difference in the character or effect of the various forms of agreement of indemnity made by the respondent and advertised in its catalogue. Each constitutes an undertaking to indemnify against failure from any cause except fire or theft and therefore covers loss or damage resulting from any and every hazard of travel, not excepting negligence of the automobile driver or another. It is substantially an unconditional promise of indemnity, and that is insurance."

In the contract involved in the above Western Auto Supply case, the company agreed to replace a tire damaged as a result, for instance, of the owner's carelessness in not keeping the same properly inflated, provided the owner paid a certain monthly depreciation charge. In other words, the owner was to pay for the service he had received from the tire and the company furnished him with new equipment.

In the instant matter, the applicant pays $1.00 as an annual membership fee and then pays 75¢ or $1.25 for each replacement of a lens, regardless of how much the lens might actually cost the company. If the applicant carelessly or negligently breaks his lenses, he is entitled to this service provided he pays the stipulated amount.

The instant matter appears to be stronger than the Western Auto Supply case because there the seller was issuing the contract ostensibly as a "guarantee". In the instant matter, the Royal Provident Corporation of America

is not the seller, but is entirely a third party issuing the contract of replacement and adjustment after the sale has been completed.

Also, it was held in the Western Auto Supply case that an insurance contract, in order to be classified as such, need not promise the payment of money. The equivalent of money or some act of value to the insured upon the injury or destruction of the specified property was held to be sufficient. In that case the replacement or partial replacement of tires was considered sufficient to designate the same contract as an insurance contract. This is undoubtedly the general rule.

In the case of National Auto Service Corporation v. State (Court of Civil Appeals of Texas), 55 S.W. (2nd) 209, the corporation issued to its members a "membership certificate". This certificate provided, among other things, that for annual dues of $25.00, it would cause to be repaired in its membership garages during that year any damage to the member's automobile caused by accident, not less than $7.50 nor more than $250.00. A certificate for a maximum repair charge not to exceed $500.00 was also issued for an annual charge of $45.00. The certificates also contained the clause that "it must be clearly understood that this is not insurance, as the corporation never pays its members any money, as indemnity, except to repair any damage to members' automobiles at the corporation's authorized repair shop, as herein above provided". The corporation claimed that this method of doing business did not constitute writing insurance, but was merely a service charge to its members. In holding that the company was actually illegally engaged in the insurance business, the court said at l.c. 210:

> "Nor is it essential that loss, damage, or expense indemnified against necessarily be paid to the contractee. It may constitute insurance if it be for his benefit and a contract on which he, in case of a breach thereof, may assert a cause of action. Allin v. Motorist's Alliance, supra; 63 A.L.R. 715. In the

> instant case we think it clearly appears that the purpose of the contract made by appellant was, for a fixed consideration, to indemnify the holder of the certificate against loss resulting from accidental damage to his car within the limits fixed by the certificate, and that it constituted an insurance contract under the rules above announced."

In the case of People v. Roschli (Court of Appeals of New York), 9 N.E. (2nd) 763, it appeared that the Manhattan and Bronx Retail Grocers' Association was a domestic membership corporation in the State of New York. It maintained a so-called "Plate Glass Fund" for members only, which fund was administered by the secretary of the association who served without compensation. Any member who paid a certain sum of money annually into the fund "according to the amount of glass he wishes protected" could obtain the protection thus afforded on plate glass. It appeared that the aggregate of contributions at all times exceeded anticipated payments and at the end of each year a saving of about 50% was paid back to the members. The certificate issued by the association asserted that the "fund is not an insurance or indemnity company, nor does it take insurance risks or issue insurance policies". It appeared that no money was ever paid out of the fund to the members, but each broken or destroyed plate glass was replaced. In holding that this arrangement constituted a Reciprocal or Inter-Insurance arrangement, the court said at l.c. 764:

> "This fund was a device whereby the contributors, through a chain of reciprocal agreements, undertook to insure each other at cost."

There are several cases which hold that a contract, in order to be termed an insurance contract, must provide for the payment of money and nothing else.

Commonwealth v. Provident Bicycle Association, 178 Pa. 636; Moresh v. O'Regan, 120 N.J. Eq. 534. These cases, however, state the minority rule.

As we understand it, the Royal Provident Corporation of America claims that these contracts cannot be termed insurance contracts because single vision lenses usually cost them less than 75¢ and double vision lenses less than $1.25 because of its wholesale buying facilities in large quantities. That the company, therefore, usually makes a profit upon each replacement and this profit takes the contract out of the realm of insurance. We do not believe that this matter of profit to the company has any such effect. The above cases show that the contract to repair and adjust at all times, constitutes an insurance benefit. In this connection, we call attention again to the fact that the 75¢ or $1.25 charge is designated in the application blank or contract form as a "service charge". The company, therefore, by the language which it has used, considers the additional costs as compensation for services performed and not to cover the costs of the lenses which might be replaced. Further, the costs of such lenses when purchased by private persons must be considerably more than 75¢ or $1.25, or otherwise there would be no incentive or reason to buy such a contract. Therefore, the benefit must be that replacements of lenses to contract holders cost much less than the same replacements would cost one who had no such contract. This must constitute a benefit or no one would care to purchase the agreement. Since such benefits accrue to the contract holder if the lenses in his eyeglasses are broken, it must be "a contract by which one party promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specific cause, or to guarantee or indemnify or secure him against loss from that cause", as stated in the Western Auto Supply Company case, supra. If the certificate holder is thus benefited, it would make no difference whether the "insurer" was also making a profit on the same transaction or not. The real test is the indemnity against loss to the "insured".

CONCLUSION.

It follows, therefore, that the contract issued by the Royal Provident Corporation of America whereby this company agrees to indemnify and save a contract holder free and harmless over and above a certain stipulated amount from loss occasioned by the breakage or destruction of lenses in his eyeglasses, and in which the company also agrees to make free adjustments on frames at any time, said contract being sold at an initial cost of $1.00, is in fact a contract of insurance.

Respectfully submitted,

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APPROVED By:

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