



**STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE
OFFICE OF LEGAL COUNSEL
500 JAMES ROBERTSON PARKWAY
DAVY CROCKETT TOWER
NASHVILLE, TENNESSEE 37243
TELEPHONE: (615) 532-6830 FAX: (615) 741-4000**

September 30, 2014

**Mr. A. Mark Slater, Jr.
P.O. Box 22547
114 Lee Parkway Drive
Chattanooga, TN 37421**

Re: Interpretive Opinion No. 05-14, When a Contract for Future Services Constitutes Insurance.

Dear Mr. Slater,

This letter is written in response to your inquiry submitted, on or about June 6, 2014, to Tony Greer, Chief Counsel for Insurance with the Insurance Division of the Tennessee Department of Commerce and Insurance ("Division"). You requested guidance as to the extent of services companies without insurance licensure may provide under warranty contracts before the transactions constitute the transaction of insurance.

Your letter asked whether companies without insurance licensure, in the business of selling service line and home warranties, may pay consequential damages related to structural damage repair or replacements as part of these warranties. Specifically, you asked if a warranty designed to cover the repair or replacement of a sewer line may also cover any excess water charges incurred from a warranty-covered leak. In addition, you asked whether such a warranty may pay the cost of a homeowner's alternative accommodations while warranty repairs are completed.

It is the current position of the Division that the aforementioned contract for payment of excess water charges may or may not constitute insurance under Tennessee Insurance Law depending on the specific nature of the incident giving rise to the claim. Further, a contract for compensation for hotel accommodations and like expenses is a contract for insurance under Tennessee Insurance Law. Tennessee Code Annotated ("Tenn. Code Ann.") § 56-7-101(a) (2012) defines a contract for insurance, in pertinent part, as "an agreement by which one party, for consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss or damage of something in which the other party has an insurable interest[.]" Despite this expansive definition, the State of Tennessee has not historically considered all contracts for future services to be contracts for insurance. *H&R Block*

E. Tax Servs. v. State, 267 S.W. 3d 848, 861 (Tenn. Ct. App. 2008); Tenn. Op. Atty. Gen. No. 85-038, 1986 WL 222674.

To ascertain whether a specific contract for future services is a contract for insurance, a test contemplating the predominant nature of a contract, the service-indemnity test, must be applied. The service-indemnity test, in considering the contract as a whole, questions whether the contract intends to serve as a guarantee of some service or as a promise of indemnity. *H&R Block* at 863. Further, it is necessary to also contemplate the nature of the underlying business transaction giving rise to the disputed future services contract. *Id.* A contract predominantly providing a service will not be considered insurance, whereas a contract for indemnity is considered insurance under Tennessee Insurance Law. *Id.*

If a contract for future services is ancillary to some service provided in the underlying business relationship between the parties, that service is the essence of the contract in question, and will not be considered insurance. *See id.* at 865. Conversely, if the guarantee is independent of the parties' original contract or provides some protection greater than the remedy of an issue arising from the original contract, the future services will be considered insurance. *See id.* Essentially, if the disputed contract for future services is contingent upon the occurrence of some outside event, the contract is insurance. *Id.* Absent the element of contingency, the futures services do not rise to the level of insurance. *Id.*

Without further factual information, a definitive determination as to whether a warranty may cover excess water charges cannot be made. It is possible a contract warranting the payment of excess water charges stemming from a leak or break in a homeowner's water or sewer line would not be a contract for insurance, provided the leak stemmed from some issue arising from the installation or repair of that water or sewer line. The underlying business relationship between the company selling the warranty and the homeowner is the service of repairing or replacing a damaged water or sewer line. If the payment of excess water charges stems from some defect or mistake in the water or sewer line, this supplemental payment would serve as an additional service under the existing warranty. However, if the payment is contingent upon some damage caused by an unforeseeable event, the provision of funds for excess water charges would be considered insurance.

Payment of hotel accommodations or other like expenses incurred as a result of a leak or break in a water or sewer line is insurance in the State of Tennessee. While the warranty covers the repair or replacement of a faulty line, provisions such as hotel accommodations are contingent upon excess damage to the homeowner's residence. Hotel accommodations and other like expenses exceed that which is necessary to remedy any issue arising from the warrant that the sewer and water lines will function properly, and thus constitute insurance.

Please note that the Division has not made an independent investigation of the facts to determine the accuracy or completeness of the information supplied, but has instead relied solely upon the information you have provided. If such information is incorrect or changes substantially, it would be necessary for the Division to reconsider the matter and the position stated herein would be void. This letter expresses the Division's position on enforcement action only and does not purport to express legal conclusions on the issues presented. This position is furnished solely for

the benefit and use of the entities described herein. Please be advised that further publication or use of this position may only be made with the Division's prior written consent.

This response by the Division is to a specific fact situation relating to the interpretation of Tenn. Code Ann. §56-7-101(a) and should not be construed as a legal position or opinion of the Commissioner of the Tennessee Department of Commerce and Insurance or of any other official in the Department. Please note that the conclusions contained herein are based upon the representations that have been made to the Division, and any different facts or conditions might require a different response. As each inquiry is reviewed on the specific facts presented, this response is based only on such facts and may not be used as precedent by any person or entity. Any variation in the facts presented to the Division by Mr. A. Mark Slater could result in a different conclusion than asserted herein.

If you have further questions or concerns regarding this letter, please feel free to contact me.

Chlora Lindley-Myers,
Deputy Commissioner
and Acting General Counsel

By:



Kathleen Dixon, BPR # 32072
Assistant General Counsel
Department of Commerce and Insurance
Davy Crockett Tower
500 James Robertson Parkway
Nashville, TN 37243
615-532-6830
kathleen.dixon@tn.gov