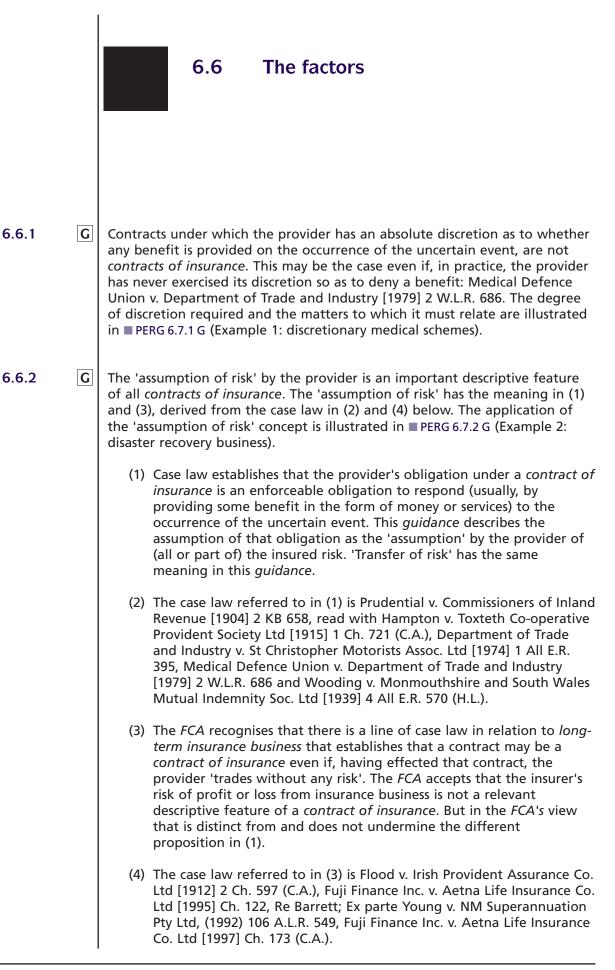
The Perimeter Guidance manual

## Chapter 6

## Guidance on the Identification of Contracts of Insurance



## **PERG 6** : Guidance on the Identification of Contracts of Insurance

6.6.3	G	Contracts, under which the amount and timing of the payments made by the recipient make it reasonable to conclude that there is a genuine pre- payment for services to be rendered in response to a future contingency, are unlikely to be regarded as insurance. In general, the <i>FCA</i> expects that this requirement will be satisfied where there is a commercially reasonable and objectively justifiable relationship between the amount of the payment and the cost of providing the contract benefit.
6.6.4	G	Contracts under which the provider undertakes to provide periodic maintenance of goods or facilities, whether or not any uncertain or adverse event (in the form of, for example, a breakdown or failure) has occurred, are unlikely to be <i>contracts of insurance</i> .
6.6.5	G	Contracts under which, in consideration for an initial payment, the provider stands ready to provide services on the occurrence of a future contingency, on condition that the services actually provided are paid for by the recipient at a commercial rate, are unlikely to be regarded as insurance. Contrast <b>PERG 6.7.21 G (Example 7: solicitors' retainers) with PERG 6.7.22 G (Example 8: time and distance cover).</b>
6.6.6	G	The recipient's payment for a <i>contract of insurance</i> need not take the form of a discrete or distinct premium. Consideration may be part of some other payment, for example the purchase price of goods (Nelson v. Board of Trade (1901) 17 T.L.R. 456). Consideration may also be provided in a non-monetary form, for example as part of the service that an employee is contractually required to provide under a contract of employment (Australian Health Insurance Assoc. Ltd v. Esso Australia Pty Ltd (1993) 116 A.L.R. 253).
6.6.7	G	Under most commercial contracts with a <i>customer</i> , a provider will assume more than one obligation. Some of these may be insurance obligations, others may not. The <i>FCA</i> will apply the principles in $\blacksquare$ PERG 6.5.4 G, in the way described in (1) to (3) to determine whether the contract is a <i>contract of insurance</i> .
		(1) If a provider undertakes an identifiable and distinct obligation that is, in substance an insurance obligation as described in ■ PERG 6.5.4 G, then, other things being equal, the FCA is likely to find that by undertaking that obligation the provider has effected a contract of insurance.
		(2) The presence of an insurance obligation will mean that the contract is a <i>contract of insurance</i> , whether or not that obligation is 'substantial' in comparison with the other obligations in the contract.
		(3) The presence of an insurance obligation will mean that the contract is a <i>contract of insurance</i> , whether or not entering into that obligation forms a significant part of the provider's business. The <i>FCA</i> generally regards a provider as undertaking an obligation 'by way of business' if he takes on an obligation in connection with or for the purposes of his core business, to realise a commercial advantage or benefit.

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6.6.8

The following factors are also relevant.

- (1) A contract is more likely to be regarded as a *contract of insurance* if the amount payable by the recipient under the contract is calculated by reference to either or both of the probability of occurrence or likely severity of the uncertain event.
- (2) A contract is less likely to be regarded as a *contract of insurance* if it requires the provider to assume a speculative risk (ie a risk carrying the possibility of either profit or loss) rather than a pure risk (ie a risk of loss only).
- (3) A contract is more likely to be regarded as a *contract of insurance* if the contract is described as insurance and contains terms that are consistent with its classification as a *contract of insurance*, for example, obligations of the utmost good faith.
- (4) A contract that contains terms that are inconsistent with obligations of good faith may, therefore, be less likely to be classified as a *contract of insurance*; however, since it is the substance of the provider's rights and obligations under the contract that is more significant, a contract does not cease to be a *contract of insurance* simply because the terms included are not usual insurance terms.