

DISSENTING AND CONCURRING OPINION BY WATANABE, J.

I respectfully dissent from Part III.A. of the majority's opinion, which concludes that the Vehicle Theft Registration systems (VTRs) sold by Defendants-Appellees Cutter Management Co.; Cutter Motor Cars, Inc.; Cutter Dodge, Chrysler, Plymouth, Jeep of Pearl City, Inc. dba Cutter Dodge Chrysler Plymouth Jeep of Pearl City; Cutter Dodge Inc.; Rainbow Chevrolet, Inc.; Cutter Ford, Inc.; Cutter Imports, Inc.; Cutter of Waipahu, Inc.; Cutter Pontiac, Buick, GMC of Waipahu Inc. (collectively, Cutter); Red Swan, Incorporated (Red Swan), and Safe-Guard Products International, Inc. (Safe-Guard) (collectively, Defendants) do not constitute insurance.

Under the Hawai'i Insurance Code, which is codified at Hawaii Revised Statutes (HRS) chapter 431, "[n]o person shall transact a business of insurance in this State without complying with the applicable provisions of this code." HRS § 431:1-101 (2005). The term "[i]nsurance" is defined as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." HRS § 431:1-201 (2005). The "[t]ransaction of an insurance business" is further defined as

any of the following acts in this State effected by mail or otherwise by or on behalf of an insurer. . . .

- (1) The making of or proposing to make, as an insurer, an insurance contract;
- (2) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety;
- (3) The taking or receiving of any application for insurance;
- (4) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for any insurance or any part thereof;
- (5) The issuance or delivery of contracts of insurance to residents of this State or to persons authorized to do business in this State;
- (6) The transaction of any kind of insurance business specifically recognized as transacting an insurance business under this code; or

- (7) The transacting or proposing to transact any insurance business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this code.

HRS § 431:1-215 (2005). Those who transact any insurance business in Hawai'i are subject to the regulatory oversight of the state insurance commissioner. HRS chapter 431 (2005 & Supp. 2008). They are required to deposit and maintain, in a federally insured financial institution within the State of Hawai'i, paid-up capital stock or unimpaired surplus in amounts specified by statute. HRS § 431:3-205 (2005), 431:3-206 (2005), 431:3-208 (2005), and 431:3-209 (2005). Additionally, they must submit annual and quarterly financial statements, HRS § 431:3-301 (2005), and are subject to annual audits. HRS § 431:3-302.5 (2005). These requirements protect the public interest and provide some protection that funds will be available to fulfill an insurer's obligations under an insurance contract.

Here, Plaintiffs paid between \$169 to \$399 to purchase a VTR for their vehicles, on the representation that the VTR is "an effective deterrent against vehicle theft." The contracts for the sale of the VTRs expressly stated that "[i]n the event the [VTR] . . . fails to deter theft and the described vehicle herein is stolen and not recovered within thirty (30) days," a specified amount (\$1,500 or \$2,500) will be paid to "the registered owner . . . towards the replacement of another comparable vehicle[,]" provided that the purchaser complied with all the conditions¹ specified in the applicable VTR contract.

¹ The VTRs, which were marketed as a "three (3) year limited anti-theft warranty," were subject to the following conditions:

1. Parties: This warranty, which is not an insurance policy, is between Vehicle Theft Administrator (VTA) and you, the original owner of the registered vehicle listed herein.
2. Terms: This warranty shall be in effect for three (3) years from the date of installation of the VTR window Etch System, or for Five (5) years from the date of installation if the SI (starter interrupt) option is selected (as shown on front of warranty form), whichever is applicable. A total benefit of \$1,500 (VTR only), or \$2,500 (VTR/SI combination) will be paid should your vehicle be stolen and not recovered within thirty (30) days, as follows:

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3. Benefit: If the selected VTR system, or VTR/SI combination fails to prevent the theft of the vehicle listed in the registration and said vehicle is stolen within three (3) years (VTR only), or within five (5) years (VTR/SI combination) from the date of installation, and not recovered within thirty (30) days, VTA will pay the registered owner either \$1,500 (VTR only) or \$2,500 (VTR/SI combination), towards the purchase of a similar replacement vehicle.

Note: If the registered vehicle is stolen within three (3) years (VTR only) or five (5) years (VTR/SI combination), and is recovered within thirty (30) days, VTA will reimburse the registered owner 50%, up to a maximum of \$ 500 towards your insurance deductible.

Note: This warranty shall become null and void, if any part of the VTR, or VTR/SI is altered, modified or damaged by the customer.

In order to qualify for these benefits, the following conditions must be met.

1. If the registered vehicle is stolen, the original registered owner must notify VTA within thirty (30) days of the actual date of loss. Failure to do so will cause the warranty to become null and void.
2. The original registered owner must have comprehensive insurance in force at the time of theft of said vehicle.

In addition, you must present the following to VTA.

3. If filing a non-recovered theft claim, proof of purchase of another similar replacement vehicle must be completed within 120 days from the date of loss.
4. Copy of police report filed within thirty (30) days from the date of loss.
5. Copy of insurance claim report filed within thirty (30) days from the date of loss.
6. Copy of paid insurance claim (theft damage only), or paid insurance claim of at least \$2500, total loss payoff and all issued code keys (non-recovered theft claim).
7. Copy of your warranty.

Note: Should you experience a loss which may be covered by this warranty, you must immediately contact VTA at the number shown below for specific instructions for filing a claim.

Note: No benefit shall be conferred by this warranty if you, or someone to whom you have entrusted or given your

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Since the VTR contracts expressly required payment of "a specified amount upon determinable contingencies[,]" HRS § 431:1-201, I believe that the VTRs sold by Defendants squarely fell within the definition of insurance.

The majority's opinion relies partly on Pope v. TT of Lake Norman, LLC, 505 F. Supp. 2d 309 (W.D. N.C. 2007). In Pope, the United States District Court for the Western District of North Carolina held that Etch, the window-etching product sold to the plaintiffs by the defendant for \$349, was a warranty under N.C. Gen. Stat. § 58-1-15(b), a statute unique to North Carolina, which provided that

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vehicle participate in or is the cause of the vehicle being stolen.

4. Transfer: This warranty may be transferred to a second owner, one time only. The new owner must re-register the vehicle with VTA, within thirty (30) days of the date of transfer. There is no transfer fee, and the new owner is entitled to coverage for the remainder of the original warranty term.

5. Renewal. This warranty may be renewed by original owner at no charge by contacting VTA, at the number shown below. Contract may be renewed only within thirty (30) days of expiration.

6. If the registered owner is involved in a collision or other occurrence involving damage to your windows, the customer must notify VTA, (A) within thirty (30) days of such occurrence, or (B) within thirty (30) days of completion of repairs, whichever (A) or (B) occurs first. If notice is not given, then this warranty shall automatically become null and void. If VTA is notified within the said time period, then the authorized VTR auto dealer must inspect the vehicle, to determine that the replacement and re-etching was completed.

7. Incidental and consequential damages excluded - customer shall not be entitled to recover from VTA, the successors or assigns, any consequential damages, damage to property, damages for loss of use, loss of time, loss of profits, or income, or any other incidental damages.

8. This warranty agreement gives you specific legal rights and you may also have other rights which vary from state to state.

**VEHICLE THEFT ADMINISTRATOR
P.O. BOX 893643
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[a]ny warranty made solely by a manufacturer, distributor, or seller of goods or services without charge . . . that guarantees indemnity from defective parts, mechanical or electrical breakdown, labor, or any other remedial measure, including replacement of goods or repetition of services, shall not be a contract of insurance under Articles 1 through 64 of this Chapter[.]

Id. at 311 (emphasis added). According to the Pope court, Etch met the requirements of a warranty because Etch "includes a guarantee to pay \$5000 in the event it fails to deter theft of the car (which falls under the 'any other remedial measure' provision in § 58-1-15(b))[,]" "[t]here is no allegation of an additional, dedicated price for the guarantee[,]" and "the payment is offered by Fidelity, which [the plaintiffs] allege is also the seller of Etch." Id. at 312. Referring to the Etch form, which provided "that for three years from the date of purchase, if the vehicle is stolen and not recovered within thirty days, the purchaser is entitled to a Limited Warranty benefit of \$5000[,]" id., the court held that "Etch fits squarely within § 58-1-15(b)'s definition of a warranty." Id. The Pope court also observed that it is a "well-settled principle that a warranty covers defects in the article sold while insurance indemnifies against damage from perils outside the article[,]" id. (quotation marks omitted), and then concluded as follows:

In this case, it is clear that Etch's limited warranty protects customers in the event the product fails as a theft deterrent. Accordingly, to the extent that [the plaintiffs'] claims are based upon their allegations that Etch is insurance, these claims are dismissed.

Id.

The holding in Pope confuses me because it rests partly on the finding that "[t]here is no allegation of an additional, dedicated price for the guarantee[,]" id., although it appears to be undisputed that the Pope plaintiffs were charged \$349 for the Etch product. I also have difficulty with the Pope court's conclusion that Etch was a warranty and not insurance, since Etch clearly indemnified against damages incurred, not because the purchased Etch product was defective and needed repair or replacement, but because Etch failed to deter theft, by a third

party, of a vehicle on which Etch was installed, as the Etch manufacturers had guaranteed.

In this case, Defendants, by selling the VTRs, did not merely offer to replace a defective window etching or refund the initial purchase price for the VTR. Rather, Defendants offered to pay \$1,500 or \$2,500, an amount far in excess of the \$169 to \$399 purchase price, if theft of a vehicle for which a VTR had been purchased occurred, provided the conditions spelled out in the VTR contracts were met. I would hold that the VTRs were clearly insurance under the Hawai'i Insurance Code, vacate that part of the circuit court's order granting Defendants' motion for partial summary judgment, and remand for further proceedings.