

Hall of the House of Representatives

86th General Assembly - Regular Session, 2007

Amendment Form

Subtitle of House Bill No. 2691

"TO ESTABLISH A LEGAL FRAMEWORK FOR THE REGULATION OF SERVICE
CONTRACTS."

Amendment No. 1 to House Bill No. 2691.

Amend House Bill No. 2691 as originally introduced:

"SECTION 1. Arkansas Code Title 4 is amended to add an additional chapter to read as follows:

CHAPTER 112 – SERVICE CONTRACTS ACT

4-112-101. Title.

This chapter shall be known and may be cited as the "Service Contracts Act".

4-112-102. Scope and purpose.

(a) The purpose of this chapter is to:

(1) Create a legal framework within which service contracts are defined, may be sold, and are regulated in this state;

(2) Add significant consumer protections; and

(3) Eliminate unnecessary administration.

(b) A service contract under § 4-112-103 is not insurance and is not subject to the Arkansas Insurance Code.

(c) This chapter does not apply to:

(1) Warranties;

(2) Maintenance agreements;

(3) Commercial transactions;

(4) Warranties, service contracts, or maintenance agreements offered by public utilities on their transmission devices to the extent they are regulated by the Arkansas Public Service Commission;

(5) Service contracts sold or offered for sale to persons other than consumers;

(6) Motor vehicle service contracts as defined in and regulated pursuant to the Motor Vehicle Service Contract Act, § 4-90-501, et seq.; or

(7) Mechanical breakdown insurance.

(d) Manufacturer's service contracts on the manufacturer's products are subject only to §§ 4-112-106(a), 4-112-106(d) – (g), 4-112-107, and 4-112-111.

(e) Other than mechanical breakdown insurance, the types of agreements



referred to in subsections (c) and (d) of this section, and service contracts governed under this chapter are not insurance and are not subject to compliance with any provision of the insurance laws of this state.

4-112-103. Definitions.

As used in this chapter:

(1) "Administrator" means the person who is responsible for the administration of a service contract;

(2) "Consumer" means an individual who buys other than for purposes of resale any tangible personal property that is distributed in commerce and that is normally used for personal, family, or household purposes and not for business or resale purposes;

(3) "Maintenance agreement" means a contract of limited duration that provides for scheduled maintenance only;

(4) "Manufacturer" means a person that:

(A) Manufactures or produces property and sells the property under its own name or label;

(B) Is a wholly owned subsidiary of the person that manufactures or produces that property;

(C) Is a corporation that owns one hundred percent (100%) of the person that manufactures or produces the property;

(D) Does not manufacture or produce the property, but the property is sold under its trade name label;

(E) Manufactures or produces the property and the property is sold under the trade name or label of another person; or

(F) Does not manufacture or produce the property but licenses the use of its trade name or label under a written contract with another person that sells the property under the licensor's trade name or label;

(5) "Mechanical breakdown insurance" means a policy, a contract, or an agreement issued by an authorized insurer that provides for the repair, replacement, or maintenance of property, or indemnification for repair, replacement, or service, for the operations or structural failure of the property due to a defect in materials or workmanship or to normal wear and tear;

(6) "Nonoriginal manufacturer's parts" means replacement parts not made for or by the original manufacturer of the property, commonly referred to as "after market parts";

(7) "Person" means an individual, a partnership, a corporation, an incorporated or unincorporated association, a joint stock company, a reciprocal, a syndicate, or any similar entity or combination of entities acting in concert;

(8) "Premium" means the consideration paid to an insurer for a reimbursement insurance policy;

(9) "Provider" means a person that is contractually obligated to the service contract holder under the terms of the service contract;

(10) "Provider fee" means the consideration paid for a service contract;

(11) "Reimbursement insurance policy" means a policy of insurance issued to a provider to either:

(A) Provide reimbursement to the provider under the terms of the insured service contracts issued or sold by the provider; or

(B) In the event of the provider's nonperformance, to pay on behalf of the provider all covered contractual obligations incurred by the provider under the terms of the insured service contracts issued or sold by the provider;

(12)(A) "Service contract" means a contract or an agreement for a separately stated consideration and for a specific duration to perform the service, repair, replacement, or maintenance of property or indemnification for service, repair, replacement, or maintenance, for the operational or structural failure of property due to a defect in materials, workmanship, or normal wear and tear, with or without additional provision for incidental payment of indemnity under limited circumstances, including without limitation, unavailability of parts, obsolescence, food spoilage, rental, or shipping.

(B) "Service contract" does not include mechanical breakdown insurance or maintenance agreements.

(C) A service contract may provide for the repair, replacement, or maintenance of property for damage resulting from power surges or accidental damage from handling.

(D) A service contract is not insurance in this state or otherwise regulated under the Arkansas Insurance Code;

(13) "Service contract holder" means a person that is the purchaser or holder of a service contract; and

(14) "Warranty" means a warranty made solely by the manufacturer, importer, or seller of property or services without charge that:

(A) Is not negotiated or separated from the sale of the product;

(B) Is incidental to the sale of the product; and

(C) Guarantees indemnity for defective parts, mechanical breakdown, or electrical breakdown, and labor or other remedial measures, such as repair or replacement of the property or repetition of services.

4-112-104. Requirements for doing business.

(a) A provider may appoint an administrator or other designee to be responsible for all or part of the administration of service contracts and compliance with this chapter.

(b) Service contracts shall not be issued, sold, or offered for sale in this state unless the provider or its designee has:

(1) Provided a receipt or other written evidence of the purchase of the service contract to the contract holder;

(2) Provided a copy of the service contract to the service contract holder within a reasonable period of time from the date of purchase; and

(3) Complied with this chapter.

(c)(1) Each provider of service contracts sold in this state shall file a registration with the Insurance Commissioner consisting of its name, full corporate address, telephone number and contact person, evidence of compliance with subsection (d) of this section, a designation of a person in this state for service of process, and any other information required to be submitted by rule of the commissioner.

(2) Each provider shall pay to the commissioner a fee in the amount of two hundred dollars (\$200) upon initial registration and every year

thereafter.

(3) The registration shall be updated by written notification to the commissioner if material changes occur in the registration.

(d) In order to assure the faithful performance of a provider's obligations to its contract holders, each provider that is contractually obligated to provide service under a service contract shall:

(1) Insure all service contracts under a reimbursement insurance policy issued by an insurer licensed, registered, or authorized to transact insurance in this state, or a surplus lines insurer that is authorized under § 23-65-310 and maintains statutory capital and surplus of at least fifteen million dollars (\$15,000,000) at all times while the reimbursement insurance policy is in force;

(2)(A) Maintain a funded reserve account for its obligations under its contracts issued and outstanding in this state.

(B) The reserves shall not be less than forty percent (40%) of gross consideration received less claims paid on the sale of all unexpired service contracts.

(C) The reserve account shall be subject to examination and review by the commissioner;

(3) Place in trust with the commissioner a financial security deposit having a value of not less than five percent (5%) of the gross consideration received less claims paid on the sale of all unexpired service contracts, but not less than twenty-five thousand dollars (\$25,000), consisting of a surety bond issued by an authorized surety; or

(4)(A) Maintain a net worth of one hundred million dollars (\$100,000,000) on its own or together with its parent company if the parent company executes a parental guarantee in a form acceptable to the commissioner.

(B) Upon request, the provider shall provide the commissioner with a copy of the provider's or, if the provider's financial statements are consolidated with those of its parent company, the provider's parent company's most recent Form 10-K or Form 20-F filed with the Securities and Exchange Commission within the last calendar year, or if the company does not file with the Securities and Exchange Commission, a copy of the company's audited financial statements, which shows an independent net worth of the provider or its parent company of at least one hundred million dollars (\$100,000,000).

(C) If the provider's parent company's Form 10-K, Form 20-F or audited financial statements are filed to meet the provider's financial stability requirement, then the parent company shall agree to guarantee the obligations of the obligor relating to service contracts sold by the provider in this state.

(e) Except for the requirements specified in subsection (d) of this section, no other financial security requirements shall be required by the commissioner for a provider.

(f)(1) Provider fees collected on service contracts shall not be subject to premium taxes.

(2) Premiums for reimbursement insurance policies shall be subject to applicable taxes.

(g) Except for the registration requirements in subsection (c) of this section, persons marketing, selling, or offering to sell service contracts for providers that comply with this chapter are exempt from this state's

licensing requirements.

(h) Providers complying with this chapter are not required to comply with other provisions of the Arkansas Insurance Code.

4-112-105. Required disclosures – Reimbursement insurance policy.

(a) Reimbursement insurance policies insuring service contracts issued, sold, or offered for sale in this state shall state that the insurer that issued the reimbursement insurance policy shall:

(1) Reimburse or pay on behalf of the provider any covered sums the provider is legally obligated to pay; or

(2) In the event of the provider's nonperformance, shall provide the service that the provider is legally obligated to perform according to the provider's contractual obligations under the service contracts issued or sold by the provider.

(b) In the event covered service is not provided by the provider within sixty (60) days of proof of loss by the service contract holder, the service contract holder is entitled to apply directly to the reimbursement insurance company.

4-112-106. Required disclosure – Service contracts.

(a) A service contract issued, sold, or offered for sale in this state shall:

(1) Be written in clear, understandable language that is easy to read; and

(2) Conspicuously disclose the applicable requirements of this section.

(b)(1) A service contract insured under a reimbursement insurance policy under § 4-112-104(d)(1) shall contain the name and address of the insurer and a statement in substantially the following form: "Obligations of the provider under this service contract are guaranteed under a service contract reimbursement insurance policy. If the provider fails to pay or provide service on a claim within sixty (60) days after proof of loss has been filed, the service contract holder is entitled to make a claim directly against the insurance company".

(2) A claim against the provider may include a claim for return of the unearned provider fee.

(c)(1) A service contract not insured under a reimbursement insurance policy under § 4-112-104(d)(1) shall conspicuously state the name and address of the provider and contain a statement in substantially the following form: "Obligations of the provider under this service contract are backed only by the full faith and credit of the provider (issuer) and are not guaranteed under a service contract reimbursement insurance policy".

(2) A claim against the provider shall also include a claim for return of the unearned provider fee.

(d) A service contract shall identify the administrator, the provider obligated to perform the service under the contract, the service contract seller, and the service contract holder to the extent that the name and address of the service contract holder has been furnished by the service contract holder.

(e)(1) A service contract or a service contract holder's receipt shall state the total purchase price and the terms under which service contract is sold.

(2) The purchase price is not required to be preprinted on the service contract and may be negotiated at the time of sale with the service contract holder.

(f) If prior approval of repair work is required, a service contract shall state the procedure for obtaining prior approval and for making a claim, including a toll-free telephone number for claim service and a procedure for obtaining emergency repairs performed outside of normal business hours.

(g) A service contract shall:

(1) Disclose the deductible amount;

(2) Specify the merchandise and services to be provided and any limitations, exceptions, or exclusions;

(3)(A) State the conditions upon which the use of the nonoriginal manufacturer's parts or substitute service may be allowed.

(B) Conditions stated shall comply with applicable state and federal laws;

(4) State any terms, restrictions, or conditions governing the transferability of the service contract;

(5)(A) State the terms, restrictions, or conditions governing termination of the service contract by the service contract holder.

(B)(i) The provider of the service contract shall mail a written notice to the contract holder within fifteen (15) days of the date of termination in the event the provider terminates the service contract.

(ii) Prior notice is not required if the reason for cancellation is nonpayment of the provider fee, a material misrepresentation by the service contract holder to the provider, or a substantial breach of duties by the service contract holder relating to the covered product or its use.

(C) The notice shall state the effective date of the cancellation and the reason for the cancellation.

(D) A pro rata refund of the unearned portion of the provider fee, less the amount or value of any claims paid, shall accompany the notice unless cancellation is for nonpayment;

(6)(A) Require every provider to permit the service contract holder to return the contract within no less than twenty (20) days of the date of mailing of the service contract or no less than ten (10) days if the service contract is delivered at the time of sale or within a longer time period permitted under the service contract.

(B) If no claim has been made under the service contract, the service contract is void and the provider shall refund to the service contract holder the full purchase price of the service contract.

(C) A ten percent (10%) penalty per month shall be added to a refund that is not paid within forty-five (45) days of return of the service contract to the provider.

(D) The applicable free-look time period on service contracts shall only apply to the original service contract purchaser and only if no claim has been made prior to its return to the provider;

(7) Set forth all of the obligations and duties of the service contract holder, such as the duty to protect against any further damage and the requirement for certain service and maintenance; and

(8) Clearly state whether or not the service contract provides for or excludes consequential damages or preexisting conditions.

4-112-107. Prohibited acts.

(a)(1) A provider shall not use a name:

(A) With the words insurance, casualty, surety, mutual, or any other words descriptive of the insurance, casualty, or surety business; or

(B) Deceptively similar to the name or description of any insurance or surety corporation or any other provider.

(2)(A) This subsection shall not apply to a company that was using any of the prohibited language in its name prior to the effective date of this chapter.

(B) However, a company using the prohibited language in its name shall conspicuously disclose in its service contracts that the service contract is not an insurance contract.

(b) A provider or its representative shall not in its service contracts or literature make or permit or cause to be made any false or misleading statement or deliberately omit any material statement that would be considered misleading if omitted in connection with the sale, offer to sell, or advertisement of a service contract.

(c) A person, including without limitation, bank, savings and loan association, lending institution, manufacturer, or seller of any product, shall not require the purchase of a service contract as a condition of a loan or a condition for the sale of any property.

4-112-108. Recordkeeping requirements.

(a)(1) A provider shall keep accurate accounts, books, and records concerning transactions regulated under this chapter.

(2) A provider's accounts, books, and records shall include:

(A) A copy of each type of service contract issued;

(B) The name and address of each service contract holder to the extent that the name and address have been furnished by the service contract holder;

(C) A list of the provider locations where service contracts are marketed, sold, or offered for sale; and

(D) Claims files containing at a minimum the dates, amounts, and description of all receipts, claims, and expenditures related to the service contracts.

(3) Except as provided in subsection (b) of this section, a provider shall retain all records pertaining to each service contract holder for at least three (3) years after the specified period of coverage has expired.

(4)(A) A provider may keep all records required under this chapter on a computer disk or other similar technology.

(B) If a provider maintains records in other than hard copy, records shall be accessible from a computer terminal available to the Insurance Commissioner and be capable of duplication to legible hard copy.

(b) A provider discontinuing business in this state shall maintain its records until it furnishes the commissioner satisfactory proof that it has discharged all obligations to service contract holders in this state.

(c) A provider shall make all accounts, books, and records concerning transactions regulated under this chapter or other pertinent laws available to the commissioner upon request.

(d) The books and records requirement of this section may be delegated by the provider to its administrator or other designee, but such delegation shall not relieve the provider of its obligations to have the books and records maintained and produced upon the commissioner's request.

4-112-109. Cancellation of reimbursement insurance policy.

(a) An insurer that issued a reimbursement insurance policy shall not terminate the policy until at least sixty (60) days' notice of termination has been mailed or delivered to the Insurance Commissioner and in accordance with any other applicable law.

(b) The termination of a reimbursement insurance policy shall not reduce the insurer's responsibility for service contracts issued by providers prior to the date of the termination.

4-112-110. Obligation of reimbursement insurance policy insurers.

(a)(1) Providers are considered to be the agent of the insurer that issued a reimbursement insurance policy for the purpose of obligating an insurer for the acts of its agents, including the collection of moneys not forwarded.

(2) If a provider is acting as an administrator and enlists other providers, the provider acting as the administrator shall notify the insurer of the existence and identities of the other providers.

(b) This chapter shall not prevent or limit the right of an insurer that issued a reimbursement insurance policy to seek indemnification or subrogation against a provider if the insurer pays or is obligated to pay a service contract holder sums that the provider was obligated to pay pursuant to the provisions of the service contract or under a contractual agreement.

4-112-111. Enforcement provisions.

(a) The Insurance Commissioner may conduct investigations or examinations of providers, administrators, insurers, or other persons to enforce the provisions of this chapter and protect service contract holders in this state.

(b)(1) The commissioner may take any action that is necessary or appropriate to enforce the provisions of this chapter and the commissioner's rules and orders to protect service contract holders in this state.

(2) The commissioner may order a provider to cease and desist from committing violations of this chapter or the commissioner's rules or orders, may issue an order prohibiting a provider from selling or offering a service contract for sale, or may issue an order imposing a civil penalty, or any combination of these, if the provider has violated this chapter or the commissioner's rules or orders.

(3)(A) A person aggrieved by an order issued under this subsection may request a hearing before the commissioner by filing a request with the commissioner within twenty (20) days of the commissioner's order.

(B) Pending the hearing and the decision by the commissioner, the commissioner shall suspend the effective date of the order.

(C)(i) At the hearing, the burden shall be on the commissioner to show why the order is justified.

(ii) The provisions of § 23-61-301 et seq. shall apply to a hearing requested under this subsection.

(4)(A) The commissioner may bring an action in the Pulaski

County Circuit Court for an injunction or other appropriate relief for threatened or existing violations of this chapter or of the commissioner's rules or orders.

(B) An action filed under this subdivision (b)(3)(A) of this section may also seek restitution on behalf of persons aggrieved by a violation of this chapter or a rule or an order of the commissioner.

(5)(A) A person in violation of this chapter or a rule or an order of the commissioner may be assessed a civil penalty not to exceed five hundred dollars (\$500) per violation and no more than ten thousand dollars (\$10,000) in the aggregate for all violations of a similar nature.

(B) For purposes of this subdivision (b)(5), violations shall be of a similar nature if the violation consists of the same or similar course of conduct, action, or practice, irrespective of the number of times the act, conduct, or practice that is determined to be a violation of this chapter has occurred.

(c) The authority of the commissioner under this section is in addition to other authorities of the commissioner.

4-112-112. Rules.

The Insurance Commissioner may promulgate rules necessary to effectuate this chapter.

4-112-113. Effective date – Exception.

This chapter shall become effective and apply to all service contracts issued on or after October 1, 2007. However, a provider engaged in the service contract business in this state on or before the effective date of this chapter that submits an application for registration as a provider under this chapter within thirty (30) days after the Insurance Commissioner makes the application available may continue to engage in business as a provider in this state until final agency action is taken by the commissioner regarding the registration application and all rights to administrative judicial review have been exhausted or have expired."

The Amendment was read _____
By: Representative Maloch
DLP/SML - 03-09-2007 10:08
DLP388 _____ Chief Clerk