

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 86th General Assembly
3 Regular Session, 2007
4

As Engrossed: H3/13/07

A Bill

HOUSE BILL 2691

5 By: Representative Maloch
6
7

For An Act To Be Entitled

9 AN ACT TO ESTABLISH A LEGAL FRAMEWORK FOR THE
10 REGULATION OF SERVICE CONTRACTS; AND FOR OTHER
11 PURPOSES.
12

Subtitle

14 TO ESTABLISH A LEGAL FRAMEWORK FOR THE
15 REGULATION OF SERVICE CONTRACTS.
16
17

18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
19

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

CHAPTER 112 – SERVICE CONTRACTS ACT

4-112-101. Title.

25 This chapter shall be known and may be cited as the "Service Contracts
26 Act".
27

4-112-102. Scope and purpose.

29 (a) The purpose of this chapter is to:

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

32 (2) Add significant consumer protections; and

33 (3) Eliminate unnecessary administration.

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

36 (c) This chapter does not apply to:



1 (1) Warranties;

2 (2) Maintenance agreements;

3 (3) Commercial transactions;

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

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

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

11 (7) Mechanical breakdown insurance.

12 (d) Manufacturer's service contracts on the manufacturer's products
13 are subject only to §§ 4-112-106(a), 4-112-106(d) – (g), 4-112-107, and 4-
14 112-111.

15 (e) Other than mechanical breakdown insurance, the types of agreements
16 referred to in subsections (c) and (d) of this section, and service contracts
17 governed under this chapter are not insurance and are not subject to
18 compliance with any provision of the insurance laws of this state.

19
20 4-112-103. Definitions.

21 As used in this chapter:

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

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

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

30 (4) "Manufacturer" means a person that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 (12)(A) "Service contract" means a contract or an agreement for

1 a separately stated consideration and for a specific duration to perform the
2 service, repair, replacement, or maintenance of property or indemnification
3 for service, repair, replacement, or maintenance, for the operational or
4 structural failure of property due to a defect in materials, workmanship, or
5 normal wear and tear, with or without additional provision for incidental
6 payment of indemnity under limited circumstances, including without
7 limitation, unavailability of parts, obsolescence, food spoilage, rental, or
8 shipping.

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

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

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

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

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

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

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

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

27
28 4-112-104. Requirements for doing business.

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

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

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

36 (2) Provided a copy of the service contract to the service

1 contract holder within a reasonable period of time from the date of purchase;
2 and

3 (3) Complied with this chapter.

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

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

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

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

18 (1) Insure all service contracts under a reimbursement insurance
19 policy issued by an insurer licensed, registered, or authorized to transact
20 insurance in this state, or a surplus lines insurer that is authorized under
21 § 23-65-310 and maintains statutory capital and surplus of at least fifteen
22 million dollars (\$15,000,000) at all times while the reimbursement insurance
23 policy is in force;

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

26 (B) The reserves shall not be less than forty percent
27 (40%) of gross consideration received less claims paid on the sale of all
28 unexpired service contracts.

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

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

36 (4)(A) Maintain a net worth of one hundred million dollars

1 (\$100,000,000) on its own or together with its parent company if the parent
2 company executes a parental guarantee in a form acceptable to the
3 commissioner.

4 (B) Upon request, the provider shall provide the
5 commissioner with a copy of the provider's or, if the provider's financial
6 statements are consolidated with those of its parent company, the provider's
7 parent company's most recent Form 10-K or Form 20-F filed with the Securities
8 and Exchange Commission within the last calendar year, or if the company does
9 not file with the Securities and Exchange Commission, a copy of the company's
10 audited financial statements, which shows an independent net worth of the
11 provider or its parent company of at least one hundred million dollars
12 (\$100,000,000).

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

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

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

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

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

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

31
32 4-112-105. Required disclosures – Reimbursement insurance policy.

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

36 (1) Reimburse or pay on behalf of the provider any covered sums

1 the provider is legally obligated to pay; or

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

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

10
11 4-112-106. Required disclosure – Service contracts.

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

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

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

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

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

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

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

36 (d) A service contract shall identify the administrator, the provider

1 obligated to perform the service under the contract, the service contract
2 seller, and the service contract holder to the extent that the name and
3 address of the service contract holder has been furnished by the service
4 contract holder.

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

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

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

16 (g) A service contract shall:

17 (1) Disclose the deductible amount;

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

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

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

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

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

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

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

36 (C) The notice shall state the effective date of the

1 cancellation and the reason for the cancellation.

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

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

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

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

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

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

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

24
25 4-112-107. Prohibited acts.

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

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

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

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

35 (B) However, a company using the prohibited language in
36 its name shall conspicuously disclose in its service contracts that the

1 service contract is not an insurance contract.

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

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

11
12 4-112-108. Recordkeeping requirements.

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

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

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

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

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

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

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

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

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

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

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

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

8
9 4-112-109. Cancellation of reimbursement insurance policy.

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

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

17
18 4-112-110. Obligation of reimbursement insurance policy insurers.

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

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

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

31
32 4-112-111. Enforcement provisions.

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

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

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

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

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

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

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

19 (4)(A) The commissioner may bring an action in the Pulaski
20 County Circuit Court for an injunction or other appropriate relief for
21 threatened or existing violations of this chapter or of the commissioner's
22 rules or orders.

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

26 (5)(A) A person in violation of this chapter or a rule or an
27 order of the commissioner may be assessed a civil penalty not to exceed five
28 hundred dollars (\$500) per violation and no more than ten thousand dollars
29 (\$10,000) in the aggregate for all violations of a similar nature.

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

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

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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.

/s/ Maloch