

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 H3/19/07

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) A person or entity or the affiliate of a person or entity
5 licensed or certificated by the Arkansas Public Service Commission or the
6 Federal Communications Commission with respect to warranties, service
7 contracts, or maintenance agreements covering wiring, transmission devices,
8 equipment, or services offered or provided by the person, entity, or
9 affiliate to their customers.

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

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

14 (7) Mechanical breakdown insurance.

15 (d) Manufacturer's service contracts on the manufacturer's products
16 are subject only to §§ 4-112-106(a), 4-112-106(d) – (g), 4-112-107, and 4-
17 112-111.

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

22
23 4-112-103. Definitions.

24 As used in this chapter:

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

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

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

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

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

36 (B) Is a wholly owned subsidiary of the person that

1 manufactures or produces that property;

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

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

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

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

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

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

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

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

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

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

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

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

35 (B) In the event of the provider's nonperformance, to pay
36 on behalf of the provider all covered contractual obligations incurred by the

1 provider under the terms of the insured service contracts issued or sold by
2 the provider;

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

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

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

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

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

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

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

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

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

30
31 4-112-104. Requirements for doing business.

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

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

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

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

6 (3) Complied with this chapter.

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

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

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

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

21 (1) Insure all service contracts under a reimbursement insurance
22 policy issued by an insurer licensed, registered, or authorized to transact
23 insurance in this state, or a surplus lines insurer that is authorized under
24 § 23-65-310 and maintains statutory capital and surplus of at least fifteen
25 million dollars (\$15,000,000) at all times while the reimbursement insurance
26 policy is in force;

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

29 (B) The reserves shall not be less than forty percent
30 (40%) of gross consideration received less claims paid on the sale of all
31 unexpired service contracts.

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

34 (3) Place in trust with the commissioner a financial security
35 deposit having a value of not less than five percent (5%) of the gross
36 consideration received less claims paid on the sale of all unexpired service

1 contracts, but not less than twenty-five thousand dollars (\$25,000),
2 consisting of a surety bond issued by an authorized surety; or

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

7 (B) Upon request, the provider shall provide the
8 commissioner with a copy of the provider's or, if the provider's financial
9 statements are consolidated with those of its parent company, the provider's
10 parent company's most recent Form 10-K or Form 20-F filed with the Securities
11 and Exchange Commission within the last calendar year, or if the company does
12 not file with the Securities and Exchange Commission, a copy of the company's
13 audited financial statements, which shows an independent net worth of the
14 provider or its parent company of at least one hundred million dollars
15 (\$100,000,000).

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

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

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

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

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

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

34
35 4-112-105. Required disclosures – Reimbursement insurance policy.

36 (a) Reimbursement insurance policies insuring service contracts

1 issued, sold, or offered for sale in this state shall state that the insurer
2 that issued the reimbursement insurance policy shall:

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

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

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

13
14 4-112-106. Required disclosure – Service contracts.

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

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

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

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

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

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

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

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

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

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

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

19 (g) A service contract shall:

20 (1) Disclose the deductible amount;

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

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

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

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

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

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

34 (ii) Prior notice is not required if the reason for
35 cancellation is nonpayment of the provider fee, a material misrepresentation
36 by the service contract holder to the provider, or a substantial breach of

1 duties by the service contract holder relating to the covered product or its
2 use.

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

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

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

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

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

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

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

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

27
28 4-112-107. Prohibited acts.

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

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

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

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

1 of this chapter.

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

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

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

14
15 4-112-108. Recordkeeping requirements.

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

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

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

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

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

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

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

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

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

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

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

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

11
12 4-112-109. Cancellation of reimbursement insurance policy.

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

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

20
21 4-112-110. Obligation of reimbursement insurance policy insurers.

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

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

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

34
35 4-112-111. Enforcement provisions.

36 (a) The Insurance Commissioner may conduct investigations or

1 examinations of providers, administrators, insurers, or other persons to
2 enforce the provisions of this chapter and protect service contract holders
3 in this state.

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

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

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

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

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

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

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

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

29 (5)(A) A person in violation of this chapter or a rule or an
30 order of the commissioner may be assessed a civil penalty not to exceed five
31 hundred dollars (\$500) per violation and no more than ten thousand dollars
32 (\$10,000) in the aggregate for all violations of a similar nature.

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

1 chapter has occurred.

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

4
5 4-112-112. Rules.

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

8
9 4-112-113. Effective date – Exception.

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

19
20 /s/ Maloch
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