

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1221 (Flora)
Version: May 5, 2021
Hearing Date: July 13, 2021
Fiscal: Yes
Urgency: No
CK

SUBJECT

Consumer warranties: service contracts: cancellation: disclosures

DIGEST

This bill amends the law applicable to service contracts to allow for such contracts to cover a class of products, rather than a single product, and to be offered on a periodic basis and continue until canceled, as provided.

EXECUTIVE SUMMARY

The Electronic and Appliance Repair Dealer Registration Law establishes the Bureau of Household Goods and Services ("Bureau") and authorizes it to regulate registered service contractors who sell service contracts for the repair of a variety of consumer products in California. Retailers are required to hold a valid registration in order to act as a service contract seller. Service contracts generally provide for the pre-paid repair or replacement of specified consumer products. The law also requires a service contractor to comply with the provisions of the Song-Beverly Consumer Warranty Act, relating to service contracts.

The Song-Beverly Consumer Warranty Act, provides consumer warranty protection to buyers of consumer goods, including motor vehicles, home appliances, and home electronic products. The act requires service contracts to include certain elements, including a clear description and identification of the covered product and a statement detailing the service contractor's obligations.

This bill authorizes service contracts to cover a class of products rather than a single product and allows for service contractors to sell automatically renewing service contracts pursuant to specific guidelines.

The bill is sponsored by the Service Contract Industry Council. There is no known support or opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Electronic and Appliance Repair Dealer Registration Law ("EAR Law"). Therein is created the Bureau located within the Department of Consumer Affairs under the supervision and control of the Director of Consumer Affairs ("the Director"). (Bus. & Prof. Code §§ 9800 et seq., 9810.)
- 2) Regulates service contracts that address the maintenance, replacement, or repair of consumer goods. (Bus. & Prof. Code §§ 9855-9855.9.)
- 3) Defines "service contract" for purposes of the EAR Law to mean a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of consumer goods and may include provisions for incidental payment of indemnity under limited circumstances, including, but not limited to, power surges, food spoilage, or accidental damage from handling. "Service contract" shall not include a contract in writing to maintain structural wiring associated with the delivery of cable, telephone, or other broadband communications services. "Service contract" shall not include a contract in which a consumer agrees to pay a provider of vision care services for a discount on optical products or contact lenses for a specified duration. (Bus. & Prof. Code § 9855.)
- 4) Defines "service contract seller" as a person who sells or offers to sell a service contract, with certain enumerated exceptions. (Bus. & Prof. Code § 9855 (c).)
- 5) Defines "service contract administrator" as a person responsible for compensating any party to a service contract for claims or repairs. A service contract administrator also performs activities like providing service contract sellers with forms, adjusting claims, and arranging required insurance for service contract sellers. (Bus. & Prof. Code § 9855(b).)
- 6) Defines "service contractor" as a service contract administrator or service contract seller. (Bus. & Prof. Code § 9855(e).)
- 7) Establishes the Song-Beverly Consumer Warranty Act, which sets forth standards for warranties that govern consumer goods, and outlines remedies available to purchasers. (Civ. Code § 1790 et seq.)
- 8) Requires, pursuant to the EAR Law, service contractors to comply with specified provisions of the Song-Beverly Consumer Warranty Act that govern service contracts, cancellation of those contracts, and refunds after cancellation. (Bus. & Prof. Code § 9855.5.)

- 9) Defines a “service contract” for purposes of the Song-Beverly Act as a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair of a consumer product, excluding a policy of automobile insurance. (Civ. Code § 1791.)
- 10) Provides, in litigation pursuant to the Song-Beverly Act, for costs and expenses, including attorney’s fees, to be awarded to a prevailing buyer. (Civ. Code § 1794(d).)
- 11) Sets forth cancellation and refund rights for motor vehicle, home appliance, and home electronic products. (Civ. Code § 1794.41.)
- 12) Provides for interest to be paid if a buyer cancels a service contract and does not receive a refund within 30 days. (Bus. & Prof. Code § 9855.6)
- 13) Regulates automatic renewal or continuous service offers to consumers in this state, including requirements to clearly present the terms of such offers, secure the affirmative consent of consumers, and to provide adequate notice and cancellation methods. (Bus. & Prof. Code § 17600 et seq.)

This bill:

- 1) Requires a service contract that covers a class of products to include a description of the class of products covered by the service contract that is sufficiently clear so the buyer is able to discern the products covered.
- 2) Authorizes a service contract to be offered on a month-to-month or other periodic basis and to continue until canceled by the buyer or the service contractor in accordance with Section 1794.41 and, for electronic and appliance repair dealers, Section 9855.6 of the Business and Professions Code.
- 3) Provides that if the service contract continues until canceled by the buyer or service contractor, the service contract shall do all of the following:
 - a) disclose to the buyer in a clear and conspicuous manner that the service contract shall continue until canceled by the buyer or service contractor and require the buyer’s affirmative consent to this provision;
 - b) disclose to the buyer all alternatives that the seller offering the service contract offers, including any fixed-term service contracts or other service contract basis that does not continue until it is canceled;
 - c) provide, at a minimum, a toll-free number, email address, postal address, and, if one exists, internet website the buyer can use to cancel the service contract. Cancellation shall not require the use of more than one of these methods to be completed and shall be effective immediately upon receipt of the request for cancellation;

- d) if the service contract was entered into online, allow the buyer the option to cancel the service contract exclusively online, without engaging in any unnecessary steps that obstruct or delay the buyer's ability to cancel the continuation of the service contract;
 - e) provide for a refund to the buyer of any unearned amounts in accordance with Section 1794.41 and, for electronic and appliance repair dealers, Section 9855.6 of the Business and Professions Code.
- 4) Provides that the amount of the above refund, as well as any cancellation or administrative fees, shall be calculated based on the period, whether month to month or otherwise, for which payment is made and the amount of the payment for the period. A written notice of cancellation other than the notice as required above shall not be required to obtain a refund.
- 5) Defines "clear and conspicuous" and "clearly and conspicuously" to mean a larger type than the surrounding text, or in a contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language. For an audio disclosure, "clear and conspicuous" and "clearly and conspicuously" means in a volume and cadence sufficient to be readily audible and understandable.
- 6) Authorizes a service contractor to cancel a service contract offered on a month-to-month or other periodic basis if any of the following occurs:
- a) the buyer fails to make timely payment;
 - b) the buyer is otherwise in material breach of the service contract;
 - c) the buyer has committed fraud in connection with the service contract;
 - d) the service contractor or its affiliate is the obligor under the service contract, and the service contractor or its affiliate is discontinuing this category of service contract no later than 30 days after the effective date of the cancellation. A cancellation or administrative fee shall not be charged to the buyer for such a cancellation; or
 - e) neither the seller offering the service contract nor any of its affiliates is the obligor under the service contract, and the seller is discontinuing its offering of the service contract no later than 30 days after the effective date of the cancellation in favor of a service contract with a different obligor. A cancellation or administrative fee shall not be charged to the buyer for such a cancellation.
- 7) Provides that the above changes are only applicable to a service contract entered into on or after January 1, 2022.

COMMENTS

1. Regulation of service contracts in California

Service contracts (otherwise known as extended warranties or maintenance agreements) cover a wide range of consumer products, including furniture, electronics, appliances, home healthcare products, jewelry, fitness equipment, and eye wear, among many others. In California, the products that are included in the definition of service contracts have expanded overtime on a case-by-case basis. In order to authorize a service contract to be sold with a product, legislative approval is necessary.

The EAR Law provides for the registration and regulation of service contractors and service contracts, charging the Bureau with oversight. The law defines a “service contract” as a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of consumer goods and may include provisions for incidental payment of indemnity under limited circumstances, including, but not limited to, power surges, food spoilage, or accidental damage from handling, except as provided. (Bus. & Prof. Code § 9855(a).)

The EAR Law places requirements on service contractors to secure certain insurance policies, to file certain documents with the Director, to refund certain monies or provide interest thereupon, and subjects them to certain penalties for failure to abide by those regulations. The law also specifically requires service contractors to comply with Sections 1794.4 and 1794.41 of the Civil Code, provisions of the Song-Beverly Consumer Warranty Act. (Bus. & Prof. Code § 9855.5.)

The Song-Beverly act defines a “service contract” as a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair of a consumer product, excluding a policy of automobile insurance. It provides that nothing therein prevents the sale of a service contract to a buyer in addition to or in lieu of an express warranty if that contract fully and conspicuously discloses in simple and readily understood language the terms, conditions, and exclusions of that contract. It provides that service contracts must obligate the service contractor to provide to the buyer of the product all of the services and functional parts that may be necessary to maintain proper operation of the entire product under normal operation and service for the duration of the service contract and without additional charge.

The Song-Beverly Act further provides that a service contract must contain all of the following items of information:

- a clear description and identification of the covered product;
- the point in time or event when the term of the service contract commences, and its duration measured by elapsed time or an objective measure of use;

- if the enforceability of the service contract is limited to the original buyer or is limited to persons other than every consumer owner of the covered product during the term of the service contract, a description of the limits on transfer or assignment of the service contract;
- a statement of the general obligation of the service contractor in the same language set forth above, with equally clear and conspicuous statements of the following:
 - any services, parts, characteristics, components, properties, defects, malfunctions, causes, conditions, repairs, or remedies that are excluded from the scope of the service contract;
 - any other limits on the application of the language in subdivision (b) such as a limit on the total number of service calls;
 - any additional services that the service contractor will provide;
 - whether the obligation of the service contractor includes preventive maintenance and, if so, the nature and frequency of the preventive maintenance that the service contractor will provide; and
 - whether the buyer has an obligation to provide preventive maintenance or perform any other obligations and, if so, the nature and frequency of the preventive maintenance and of any other obligations, and the consequences of any noncompliance;
- a step-by-step explanation of the procedure that the buyer should follow in order to obtain performance of any obligation under the service contract, as provided;
- an explanation of the steps that the service contractor will take to carry out its obligations under the service contract;
- a description of any right to cancel the contract if the buyer returns the product or the product is sold, lost, stolen, or destroyed, or, if there is no right to cancel or the right to cancel is limited, a statement of the fact; and
- information respecting the availability of any informal dispute settlement process. (Civ. Code § 1794.4.)

The Song-Beverly Act also provides that no service contract that covers any motor vehicle, home appliance, or home electronic product may be offered for sale unless the contract is cancelable by the purchaser under specified conditions. (Civ. Code § 1794.41.) Those cancellation provisions generally permit an individual to cancel a service contract within the first 30 or 60 days, unless the contract provides for a longer period of time. The contract must clearly disclose these cancellation rights, as well as the buyer's refund rights.

Any person who fails to comply with the provisions of the EAR Law, or of the regulations made pursuant to it, is guilty of a misdemeanor and punishable by a fine not exceeding \$1,000 or by imprisonment not exceeding six months, or by both such fine and imprisonment. (Bus. & Prof. Code § 9850.)

2. Expanding and clarifying the scope of service contracts in California

This bill makes two changes to the existing law detailed above. First, it explicitly provides for service contracts that cover a class of products, rather than simply a single product. The Song-Beverly Act defines a service contract as a contract for “services relating to the maintenance or repair of a *consumer product*” and requires it to contain a “clear description and identification of *the covered product*.” Because of this phrasing, it is unclear whether a service contract could cover more than one specific product.

The Service Contract Industry Council, the sponsor of the bill, explains the need for the provision:

AB 1221 is focused on the outdated language in California’s laws governing service contracts that requires the specific identification of each individual product covered by a service contract. Because of this language, a service contract is not able to cover a class of products but must issue one contract per covered product. Such a scenario is not helpful to consumers and is inconsistent with the treatment of the service contract industry in the rest of the country.

As the sponsors point out, California stands alone in (arguably) restricting the ability to provide service contracts that cover a class of products. The bill amends the provision of the act to add “if the service contract covers a single product,” to the requirement that the covered product is clearly described, and then explicitly provides that if a service contract covers a class of products, the class of products covered must be described in a manner sufficiently clear so that the buyer can discern the products covered.

The second change involves the period for which service contracts can run. The existing definition of service contract specifies that the contract applies “over a fixed period of time or for a specified duration,” and a service contract is required to indicate “[the service contract’s] duration measured by elapsed time or an objective measure of use.” This language can be read to suggest that it is impermissible for a service contractor to offer a contract that automatically renews for additional fixed terms.

According to the Service Contract Industry Council:

AB 1221 provides clarity as to the permissibility of month-to-month and/or continuous until cancelled service contracts in California. Many consumers purchase service contracts in connection with services provided on a month-to-month or continuous until cancelled basis. For example, cell phones are often purchased through a monthly pay option and it is convenient for a consumer to be able to include service contract coverage on their cell phone and have the cost for that coverage billed on the consumer’s monthly cell phone bill along with the wireless minutes

and cell phone purchase price. While these programs have been offered in California for years under existing state law, the industry would like to see more clarity in the service contract laws providing clear authorization of these service contract programs under California law.

The bill explicitly authorizes a service contract to be “offered on a month-to-month or other periodic basis and continue until canceled by the buyer or the service contractor.” The bill does provide certain consumer protections for continuous service contracts. It requires the contracts to:

- disclose to the buyer in a clear and conspicuous manner that the service contract shall continue until canceled by the buyer or service contractor and require the buyer’s affirmative consent to this provision;
- disclose to the buyer all alternatives that the seller offering the service contract offers, including any fixed-term service contracts or other service contract basis that does not continue until it is canceled;
- provide, at a minimum, a toll-free number, email address, postal address, and, if one exists, internet website the buyer can use to cancel the service contract. Cancellation shall not require the use of more than one of these methods to be completed and shall be effective immediately upon receipt of the request for cancellation;
- if the service contract was entered into online, allow the buyer the option to cancel the service contract exclusively online, without engaging in any unnecessary steps that obstruct or delay the buyer’s ability to cancel the continuation of the service contract;
- provide for a refund to the buyer of any unearned amounts in accordance with the EAR Law and the Song-Beverly Act and restrict requiring additional written notice of cancellation to qualify for such refund.

The bill also lays out bases upon which a service contractor can cancel continuous service contracts. It also provides for a definition of “clear and conspicuous” or “clearly and conspicuously.” However, the bill uses several terms that are not defined and that might benefit from further clarity. In response to this issue, the author has agreed to insert the following definitions:

Amendments

“An entity is an ‘affiliate’ of, or an entity is ‘affiliated’ with, another specified entity if it directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the other specified entity.”

“‘Affirmative consent’ means any freely given, specific, informed, and unambiguous indication of the consumer’s wishes by which the consumer, or the consumer’s legal guardian, a person who has power of attorney, or a person

acting as a conservator for the consumer, including by a statement or by a clear affirmative action, signifies agreement to the continuous until canceled nature of the service contract. Acceptance of a general or broad terms of use, or similar document, that contains descriptions of the coverages under the service contract along with other, unrelated information, does not constitute consent. Hovering over, muting, pausing, or closing a given piece of content does not constitute consent. Likewise, agreement obtained through use of dark patterns does not constitute consent.”

3. Existing protections in connection with other continuous service offers

When businesses began using automatic renewals for subscriptions and purchase agreements for products and services, consumer complaints began to surface regarding those automatic renewals. Consumers complained that they were unaware of and had not requested the automatic renewals until they either received a bill or a charge on their credit card. California enacted SB 340 (Yee, Ch. 350, Stats. 2009) to address these issues and deter such practices.

The law defines “automatic renewal” as “a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term.” “Continuous service” is defined as “a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service.”

Businesses were required to “present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer.” Businesses were also required to obtain a consumer’s affirmative consent to the agreement containing the terms of the automatic renewal or continuous service before charging the consumer. Businesses had to provide an acknowledgment that includes the terms of the offers, the relevant cancellation policy, and “information regarding how to cancel in a manner that is capable of being retained by the consumer.” When a business makes an automatic renewal or continuous service offer, it must further provide (1) a toll-free telephone number, (2) an e-mail address, (3) a postal address, or (4) “another cost-effective, timely, and easy-to-use mechanism for cancellation.”

Despite the requirements imposed by SB 340, there were still concerns that consumers were not adequately protected from the pitfalls these practices presented. Lawsuits suggested that businesses were pushing the envelope with what was lawful, and consumers were continuing to face hurdles in cancelling agreements or fully deciphering what the terms of those agreements are. To address these issues, SB 313 (Hertzberg, Ch. 356, Stats. 2017) was enacted. It inserted additional consumer protections regarding price, terms, and cancellation to ensure consumers are entering

into these types of agreements fully informed and properly enabled to cancel if they so wish.

However, this statutory scheme explicitly exempts service contractors regulated by the Bureau. (Bus. & Prof. Code § 17605.) It should be noted that the provisions providing for the Bureau's oversight of service contractors includes a sunset date. In practice, the date is continually extended, but a sunset is kept for the Legislature to review the oversight. If these statutes were to expire, service contracts would be subject to these laws.

As it stands, the bill applies a number of the consumer protections provided by the existing automatic renewal/continuous service law to service contracts. However, the Committee may wish to consider whether additional protections should be included.

SUPPORT

Service Contract Industry Council (sponsor)

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 390 (Berman, 2021) makes it unlawful for a business that makes an automatic renewal offer or continuous service offer to a consumer in this state to fail to provide a notice, as required, that explains the automatic renewal details and the process for cancellation. The bill also requires a business to allow a consumer to terminate the offers at will and without engaging in any further steps, in addition to other requirements. This bill is currently on the Senate Floor.

Prior Legislation:

SB 1483 (Hill, Ch. 578, Stats. 2018) expanded the definition of "service contract" and extended the authority of the Bureau over service contracts and contractors. It also renamed the Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation as the Bureau of Household Goods and Services.

SB 313 (Hertzberg, Ch. 356, Stats. 2017) *See* Comment 4.

SB 340 (Yee, Ch. 350, Stats. 2009) *See* Comment 4.

PRIOR VOTES:

Assembly Floor (Ayes 75, Noes 0)

Assembly Appropriations Committee (Ayes 15, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)

Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)
