

[CHAPTER 481K]
ASSISTIVE TECHNOLOGY WARRANTY ACT

Section

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" **[§481K-1] Definitions.** When used in this chapter unless the context otherwise requires:

"Assistive device" means any device, including a demonstrator, that a consumer purchases or accepts transfer of in this State which is used to assist a person with a disability (as defined in 42 U.S.C. §§12101 et seq.) in connection with a major life activity including but not limited to mobility, vision, hearing, speech, communication, maneuvering, and manipulation of a person's environment. Assistive devices include but are not limited to manual wheelchairs, motorized wheelchairs, motorized scooters, and other [aids] that enhance the mobility of an individual; hearing [aids], telephone communication devices for the deaf, assistive listening devices, and other [aids] that enhance an individual's ability to hear; voice synthesized computer modules, optical scanners, talking software, braille printers, and other devices that enhance a sight impaired individual's ability to communicate; and any other device that enables a person with a disability to communicate, see, hear, speak, manipulate the person's environment, move, or maneuver.

"Assistive device dealer" means a person who is in the business of selling new assistive devices.

"Assistive device lessor" means a person who leases new assistive devices to consumers, or who holds the lessor's residual interest under a written lease, to new assistive devices leased to consumers.

"Collateral charges" means those additional charges to a consumer [wholly] incurred as a result of the acquisition of the assistive device. For the purposes of this chapter, collateral charges include but are not limited to items installed by the manufacturer, its agent, assistive device dealer or assistive device lessor, finance charges and financing costs, general excise tax, and other governmental charges, taxes, or fees.

"Consumer" means any of the following:

- (1) The purchaser of an assistive device, if the assistive device was purchased from an assistive device dealer or manufacturer for purposes other than resale;
- (2) A person to whom the assistive device is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the assistive device;
- (3) A person who may enforce any warranty applicable to the assistive device; or
- (4) A person who leases an assistive device from an assistive device lessor under a written lease.

"Demonstrator" means an assistive device used primarily for the purpose of demonstration to the public.

"Early termination cost" means an expense or obligation that an assistive device lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive device to the manufacturer. The term includes a penalty for prepayment under a finance arrangement.

"Early termination savings" means an expense or obligation that an assistive device lessor avoids as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive device to a manufacturer. The term includes any interest charge that the assistive device lessor would have paid to finance the assistive device or, if the assistive device lessor does not finance the assistive device, the difference between the total period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination.

"Incidental charges" means those reasonable costs incurred by the consumer, including but not limited to the costs of repair, the costs of return, and the costs of obtaining alternative assistance or alternative assistive devices, which are directly caused by the nonconformity or nonconformities which are the subject of the complaint, but shall not include loss of use, loss of income, or personal injury claims.

"Manufacturer" means a person who manufactures or assembles assistive devices and agents of that person, including an importer, a distributor, a factory branch, distributor branch, and a warrantor of the manufacturer's assistive device, but does not include an assistive device dealer.

"Nonconformity" means a defect, malfunction, or condition that fails to conform to any warranty applicable to an assistive device, but does not include a defect, malfunction, or condition that results from accident, abuse, neglect, modification, or alteration of the assistive device by persons other than the manufacturer, its agent, distributor, or authorized assistive device dealer, or assistive device lessor. [L 1997, c 282, pt of §1]

Case Notes

Hearing aid dealer was also acting as the hearing aid manufacturer's agent in the capacity of warrantor, and therefore, in that capacity, was governed by this chapter's requirements pertaining to a "manufacturer". 119 H. 483, 199 P.3d 72 (2009).

" **[\$481K-2] Warranties; repair.** (a) No assistive device shall be sold, leased, or delivered in this State to a consumer

unless accompanied by a written warranty under which the manufacturer warrants that the assistive device is fit for the ordinary purposes for which the device is used, and undertakes to pay the full cost of both parts and labor necessary to repair any nonconformity. This warranty shall require the manufacturer directly or through its agents to repair or, at the election of the manufacturer, reimburse the consumer for the reasonable costs of repairing the nonconformity. This warranty is supplementary and not in lieu of any other express warranties or implied warranties applicable to the assistive device.

(b) The duration of the warranty provided in this section shall not be less than one year after first possession of the assistive device by the consumer. The terms of this warranty shall be tolled for and extended by any period of time during which:

- (1) The assistive device is out of service by reason of repair under any other warranty;
- (2) The assistive device is in the possession of the manufacturer or its authorized agent, representative, assistive device dealer, or assistive device lessor for the purpose of repairing the assistive device under the terms of this warranty;
- (3) Repair services are not available to the consumer because of war, invasion, strike, fire, flood, or other natural disaster; or
- (4) The consumer has notified the manufacturer or its authorized agent or representative that the assistive device is inoperable, but cannot reasonably present the assistive device to the manufacturer or its authorized agent or representative and the manufacturer has refused to pay the charges to transport the assistive device to the manufacturer, its authorized agent, representative, or repair agency.

(c) The applicable warranty period shall end thirty days from the date of completion of any repair required by this chapter as to the defect repaired if the warranty would otherwise have expired during that period.

(d) If a manufacturer fails to give the written warranty as required by this section, the manufacturer nevertheless shall be deemed to have given the warranty as a matter of law.

(e) If a new assistive device does not conform to all applicable warranties and the consumer reports the nonconformity to the manufacturer, the assistive device lessor, or any of the manufacturer's agents, distributors, or authorized assistive device dealers, and makes the assistive device available for repair before the end of the warranty period, then the

manufacturer, or, at its option and expense, its agent, representative, distributor, authorized assistive device dealer, or authorized assistive device lessor shall make any repairs that are necessary to conform the assistive device to the warranties, notwithstanding the fact that the repairs are made after the expiration of the warranty.

(f) A consumer shall make an assistive device available for repair by presenting it to the manufacturer, its agent, representative, authorized assistive device dealer, or authorized assistive device lessor prior to the expiration of the warranty period and providing the manufacturer, its agent, representative, authorized assistive device dealer, or authorized assistive device lessor written notice of the nonconformity. The manufacturer or authorized person shall immediately accept return of the assistive device when it is so presented. The assistive device shall be deemed out of service commencing the day it is presented, notwithstanding any failure to accept its return on that day.

During the applicable warranty period and the return period, the manufacturer shall pay the reasonable costs of transporting or shipping the assistive device to the manufacturer, agent, representative, authorized assistive device dealer, authorized assistive device lessor, or repair agency located nearest to the consumer.

(g) The written warranty to be provided pursuant to this chapter shall be a full warranty as the term is described in the Magnuson-Moss Warranty Act, 15 U.S.C. §2301, and shall be designated as such on the face of the warranty. Nothing in this subsection should be construed to limit the manufacturer's obligation to comply with all requirements set forth in this chapter. [L 1997, c 282, pt of §1]

Case Notes

Hearing aid dealer was also acting as the hearing aid manufacturer's agent in the capacity of warrantor, and therefore, in that capacity, was governed by this chapter's requirements pertaining to a "manufacturer". 119 H. 483, 199 P.3d 72 (2009).

Where there was substantial evidence that plaintiff's hearing aids were functioning poorly and inadequately, so much so that despite plaintiff's hearing disability, plaintiff never used the devices for a full day and determined that plaintiff was better off not using them at all, and based on plaintiff's testimony, plaintiff was only able to hear sounds that were close, at times only those that were far away, and all kinds of noises, the trial court could properly conclude that plaintiff's hearing

aids were nonconforming and not fit for their ordinary purpose. 119 H. 483, 199 P.3d 72 (2009).

Notwithstanding seller's failure to provide buyer with the required written warranty of fitness for ordinary purposes under subsection (a), where buyer failed to establish that buyer suffered any damages caused by that violation, the violation did not support the trial court's award of damages in the case. 118 H. 285 (App.), 188 P.3d 799 (2008).

Where neither manufacturer's warranty card nor seller's guarantee document stated that "the manufacturer warrants that the assistive device is fit for the ordinary purposes for which the device is used", or words to that effect, as is required by subsection (a), trial court did not err in finding that the warranties failed to comply with subsections (a) and (b). 118 H. 285 (App.), 188 P.3d 799 (2008).

" **§481K-3 Assistive device replacement or refund.** (a) If the manufacturer or its agents fail to correct a nonconformity as required by a warranty after a reasonable opportunity to repair, the manufacturer shall accept return of the assistive device from the consumer and refund the full purchase price or replace the assistive device, as follows:

(1) If the consumer requests a refund, the manufacturer shall accept return of the assistive device from the consumer and, as the case may be, either:

- (A) Refund to the consumer and to a holder of a perfected security interest in the consumer's assistive device, as their interests may appear on the records kept by the bureau of conveyances, the full purchase price plus all collateral charges and incidental charges, with adjustments for any modifications that either increase or decrease the market value of the assistive device, less a reasonable allowance for use; or
- (B) Refund to the assistive device lessor and to a holder of a perfected security interest in the assistive device, as their interests may appear on the records kept by the bureau of conveyances, the current value of the written lease, and refund to the consumer the amount that the consumer paid under the written lease plus all collateral charges and incidental charges, with adjustment for any modifications that either increase or decrease the market value of the assistive device, less a reasonable allowance for use;

- (2) If the consumer requests an assistive device replacement, the manufacturer, within thirty days of the request, shall provide the consumer with a comparable new assistive device. Within ten days after receipt of the assistive device replacement, the consumer shall return the assistive device having the nonconformity to the manufacturer, along with any endorsements necessary to transfer legal title thereto.
- (b) For purposes of subsection (a):
 - (1) The "current value of the written lease" equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination, plus the assistive device lessor's early termination costs and the value of the assistive device at the lease expiration date if the lease sets forth that value, less the assistive device lessor's early termination savings;
 - (2) A "reasonable allowance for use" shall not exceed the amount obtained by multiplying the total amount the consumer paid or for which the written lease obligates the consumer to pay by a fraction, the denominator of which is one thousand eight hundred twenty-five and the numerator of which is the number of days that the consumer used the assistive device before first reporting the nonconformity to the manufacturer, its agent, assistive device lessor, or assistive device dealer; and
 - (3) It shall be presumed that a manufacturer has had a "reasonable opportunity to repair" if the manufacturer or its agents fails to repair the same nonconformity within two attempts, or the assistive device is out of service, including by reason of attempts to repair one or more nonconformities, for a cumulative total of more than thirty business days after the consumer has returned it for repair.
- (c) No person shall enforce the lease against the consumer after the consumer receives a refund. [L 1997, c 282, pt of §1; am L 2008, c 19, §27]

Case Notes

An "adjustment" is included within the term "repair" inasmuch as the purpose of the "repair" is to "correct" a nonconformity; the trial court could thus find, under the circumstances of the case, that plaintiff's efforts to return for "adjustments" were a factor, among others, in determining whether plaintiff

provided hearing aid dealer with a reasonable opportunity to "repair" the nonconformity. 119 H. 483, 199 P.3d 72 (2009).

Where plaintiff's testimony that plaintiff (1) returned the device four or five times prior to the May repair, (2) was without the device for about a month during the May repair, (3) came in for another "adjustment" when the device was returned from the manufacturer in late May and (4) throughout the course of these adjustments, plaintiff noticed no change in the device but continued to experience the same problems, evidence supported the conclusion that plaintiff provided dealer with a reasonable opportunity to repair. 119 H. 483, 199 P.3d 72 (2009).

Where there was substantial evidence that plaintiff's hearing aids were functioning poorly and inadequately, so much so that despite plaintiff's hearing disability, plaintiff never used the devices for a full day and determined that plaintiff was better off not using them at all, and based on plaintiff's testimony, plaintiff was only able to hear sounds that were close, at times only those that were far away, and all kinds of noises, the trial court could properly conclude that plaintiff's hearing aids were nonconforming and not fit for their ordinary purpose. 119 H. 483, 199 P.3d 72 (2009).

" **[\$481K-4] Nonconformity disclosure requirement.** No assistive device returned by a consumer or assistive device lessor in this State or another state shall be sold or leased in this State unless the nature of the defect experienced by the original buyer or lessee is clearly and conspicuously disclosed on a separate document that must be signed by the manufacturer and the purchaser or lessor and must be in ten-point, capitalized type, in substantially the following form:

"IMPORTANT: THIS DEVICE WAS RETURNED TO THE MANUFACTURER BECAUSE A DEFECT(S) COVERED BY A MANUFACTURER'S WARRANTY WAS NOT REPAIRED AFTER A REASONABLE OPPORTUNITY FOR REPAIR AS PROVIDED BY HAWAII LAW."

[L 1997, c 282, pt of §1]

" **[\$481K-5] Other remedies.** (a) Nothing in this chapter shall in any way limit the rights or remedies available to consumers, or to the State under any other law.

(b) Any agreement entered into by a consumer for the purchase or lease of an assistive device that waives, limits, or disclaims any of the rights set forth in this chapter shall be void as contrary to public policy.

(c) In addition to pursuing other remedies, a consumer may bring an action to recover damages caused by a violation of this chapter. The court shall award a consumer who prevails in the

action twice the amount of any pecuniary loss, together with costs, disbursements, and reasonable attorney fees, and any equitable relief that the court may determine is appropriate. A failure by a manufacturer to provide the warranty required by section 481K-2 or the notice provided by section 481K-4 shall constitute prima facie evidence of an unfair or deceptive act or practice under chapter 480. Any action brought under this chapter by a consumer must be initiated within one year following the expiration of the warranty period. [L 1997, c 282, pt of §1]

Case Notes

Where plaintiff ultimately prevailed on the principal issues on appeal concerning the definition of "nonconformity" in §481K-1 and whether defendant was given a reasonable opportunity to repair the nonconformity, plaintiff was the "prevailing party" for purposes of awarding appellate costs and attorney fees; as subsection (c) allows a court to award "reasonable attorney fees" stemming from proceedings at both the trial and appellate levels, and plaintiff provided a list of requested fees in accordance with HRAP rule 39(d)(1) which were not objected to by defendant, plaintiff's request for attorney's fees was granted. 120 H. 257, 204 P.3d 476 (2009).

Notwithstanding seller's failure to provide buyer with the required written warranty of fitness for ordinary purposes under §481K-2(a), where buyer failed to establish that buyer suffered any damages caused by that violation, the violation did not support the trial court's award of damages in the case. 118 H. 285 (App.), 188 P.3d 799 (2008).

" [§481K-6] Manufacturer's duty to provide reimbursement for temporary replacement of assistive devices; penalties.

Whenever an assistive device covered by a manufacturer's express warranty is tendered by a consumer to the manufacturer, its agent, representative, assistive device dealer, assistive device lessor, or repair agency dealer from whom it was purchased or exchanged for the purpose of repairing a nonconformity, the manufacturer shall provide directly to the consumer for the duration of the repair period a replacement assistive device or reimbursement for the cost incurred by the consumer to rent a replacement assistive device, if at least one of the following conditions exists:

- (1) The repair period exceeds or is expected to exceed ten working days, including the day on which the device is tendered for repair; or

- (2) The repair is of the same nonconformity for which the assistive device has been tendered for repair on at least two previous occasions. [L 1997, c 282, pt of §1]