

ACT 221

S.B. NO. 2729

A Bill for an Act Relating to Service Contracts.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to protect service contract holders in this State by creating a regulatory framework governing the sale, terms, and administration of service contracts sold to consumers.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
SERVICE CONTRACTS**

§ **-1 Application.** (a) This chapter shall not apply to:

- (1) Express or implied warranties;
- (2) Maintenance agreements; and
- (3) Warranties, service contracts, and maintenance agreements offered by public utilities on their transmission devices to the extent they are regulated by the public utilities commission or the department of commerce and consumer affairs.

(b) The marketing, sale, offering for sale, issuance, making, proposing to make, and administration of service contracts by providers and related service contract sellers, administrators, and other persons shall be exempt from regulation under the insurance laws of this State other than laws included in this chapter.

§ **-2 Definitions.** As used in this chapter:

“Administrator” means a person appointed or designated by a provider who administers service contracts and service contract plans on behalf of the provider and subject to the requirements of this chapter.

“Commissioner” means the insurance commissioner.

“Consumer” means a natural person who buys, other than for purposes of resale, any tangible personal property that is distributed in commerce and that is normally used for personal, family, or household purposes, and not for business or research purposes.

“Contract holder” means a person who is the purchaser or holder of a service contract.

“Contractual liability insurance policy” means a policy of insurance that is issued to a provider, insures the provider’s service contracts, and may provide:

- (1) Reimbursement to the provider for sums that the provider is legally obligated to pay under the insured service contract; or
- (2) The service that the provider is legally obligated to perform under the insured service contract.

“Maintenance agreement” means a contract of limited duration that provides scheduled maintenance only.

“Nonoriginal manufacturer’s parts” means replacement parts not made for or by the original manufacturer of the property, commonly referred to as “after market parts”.

“Person” means an individual, partnership, limited liability company, corporation, incorporated or unincorporated association, joint stock company, reciprocal, syndicate, or any similar entity or combination of entities acting in concert.

“Premium” means the consideration paid to an insurer for a contractual liability insurance policy.

“Provider” means a person who is contractually obligated to the service contract holder under the terms of the service contract, including all sellers of motor vehicle service contracts.

“Provider fee” means the consideration paid for a service contract.

“Service contract” means a contract or agreement for a separately stated consideration and a specific duration, to perform or indemnify the repair, replacement, or maintenance of property for operational or structural failure due either to a defect in materials or artisanship, or to normal wear and tear, with or without additional provision for incidental payment or indemnity under limited circumstances, including but not limited to towing, rental, and emergency road service. Service contracts may provide for the repair, replacement, or maintenance of property damaged by power surges, or accidentally damaged during handling.

“Warranty” means a warranty made without consideration, solely by the manufacturer, importer, or seller of property or services, that is not negotiated or separated from the sale of the product and is incidental to the sale of the product, that provides repair or replacement for defective parts, mechanical or electrical breakdown, labor, or other remedial measures.

§ **-3 Registration.** (a) Before conducting business in this State, a provider shall register with the commissioner on a form prescribed by the commissioner, and shall pay to the commissioner a fee as provided under section 431:7-101.

(b) Provider registration shall be updated annually and shall contain the following information:

- (1) The address of the principal office of the provider;
- (2) The name and address of the provider’s agent for the service of process in this State, if other than the provider;
- (3) The identities of the provider’s executive officer or officers directly responsible for the provider’s service contract business;
- (4) The name, address, and telephone number of any administrators designated by the provider to be responsible for the administration of service contracts in this State;
- (5) A copy of each service contract form the provider proposes to use in this State; and
- (6) A statement that the provider is in compliance with the financial responsibility requirements of section -4 and that details how the provider intends to meet the requirements, and proof of compliance with the requirements.

§ **-4 Financial responsibility.** A provider shall comply with the requirements under any one of the following paragraphs, and shall not be subject to any other financial security requirements under state law:

- (1) The provider shall insure all service contracts under a contractual liability insurance policy issued by an insurer authorized to transact insurance in this State or issued pursuant to part III of article 8 of chapter 431;
- (2) The provider shall:
 - (A) Maintain a funded reserve account for all obligations under service contracts issued and in force in this State. The reserves shall not be less than forty per cent of the gross consideration received from the sale of the service contract, less claims paid, for all in force contracts. The reserve account shall be subject to examination by the commissioner; and
 - (B) Place in trust with the commissioner, for all service contracts issued and in force in this State, a financial security deposit having a value that is not less than \$25,000, or five per cent of the gross consideration received less claims paid for the sale of the service contracts. The financial security deposit shall consist of one of the following:
 - (i) A surety bond issued by an authorized surety;
 - (ii) Securities of the type eligible for deposit by authorized insurers in this State;
 - (iii) Cash;
 - (iv) A letter of credit issued by a qualified financial institution; or
 - (v) Another form of security authorized by the commissioner by rule;

or

- (3) The provider or its parent company shall:
 - (A) Maintain a net worth or stockholders' equity of at least \$100,000,000; and
 - (B) Upon request, provide the commissioner with a copy of the provider's or the provider's parent company's most recent form 10-K or Form 20-F filed with the Securities and Exchange Commission within the last calendar year, or if the company does not file with the Securities and Exchange Commission, a copy of the provider's or the provider's parent company's audited financial statements.

If the financial responsibility requirement under this paragraph is to be maintained by the provider's parent company, the parent company shall guarantee the provider's obligations under service contracts sold by the provider in this State.

§ -5 Recordkeeping. (a) The provider or provider's administrator shall keep accurate accounts, books, and records of all transactions regulated under this chapter.

(b) Accounts, books, and records maintained as required by this section shall include the following:

- (1) Copies of each type of service contract sold;
- (2) The name and address of each contract holder, to the extent that the name and address have been furnished by the contract holder;
- (3) A list of the locations where the provider's service contracts are marketed, sold, or offered for sale; and
- (4) Recorded claims files which at a minimum shall contain the date and description of each claim under the provider's service contracts.

(c) The provider for each service contract shall retain records required under this section for at least one year after coverage under the contract has expired. A provider discontinuing business in this State shall maintain records required under this section until it provides the commissioner with satisfactory proof that the provider has discharged all contractual obligations to contract holders in this State.

(d) The records required under this section may be, but are not required to be, maintained on a computer disk or other recordkeeping technology. If records are maintained in a form other than hard copy, the records shall be in a form allowing duplication as legible hard copy at the request of the commissioner.

(e) Upon request of the commissioner, the provider shall make available to the commissioner all accounts, books, and records concerning service contracts sold by the provider reasonably necessary to enable the commissioner to determine compliance or noncompliance with this chapter.

§ -6 Service contracts; receipt; disclosures. (a) Providers shall provide purchasers of a service contract with:

- (1) A receipt for or other written evidence of the purchase of the service contract that shall be provided to the service contract holder;
- (2) A copy of the service contract that shall be provided within a reasonable period of time from the date of purchase; and
- (3) Except for offers or sales of service contracts by telephone, mail, or electronic means, a written copy of the basic terms and conditions of the service contract to be made available to the purchaser where the purchaser is physically present at the point of sale.

(b) Service contracts shall be written in clear, understandable language, and shall be printed or typed in a typeface and format that is easy to read.

- (c) All service contracts shall:
- (1) State the name and address of:
 - (A) The provider; and
 - (B) The administrator of the contract, if different from the provider;
 - (2) Identify:
 - (A) The service contract seller; and
 - (B) The contract holder, to the extent that the contract holder has furnished the contract seller, administrator, or provider with that information;
 - (3) The terms of the sale, including the purchase price;
 - (4) The procedure the contract holder must follow to obtain service;
 - (5) Any deductible amount that applies;
 - (6) The specific merchandise and services to be provided, and any limitations, exceptions, or exclusions;
 - (7) Where the contract covers a motor vehicle, whether the use of nonoriginal manufacturer's parts is allowed;
 - (8) Any restrictions governing the transferability of the service contract that apply;
 - (9) The terms, restrictions, or conditions governing the return or cancellation of the service contract by either the provider or contract holder prior to the contract's termination or expiration date;
 - (10) The obligations and duties of the contract holder, such as the duty to protect against any further damage, or to follow owner's manual instructions; and
 - (11) Any provision for, or exclusion of consequential damages or preexisting conditions that applies.

The information under paragraphs (1) and (2) shall not be required to be preprinted on the service contract and may be added to the service contract at the time of sale. The purchase price under paragraph (3) shall not be required to be preprinted on the service contract and may be negotiated with the contract holder at the time of sale.

(d) Service contracts insured under a contractual liability insurance policy shall include the name and address of the insurer and contain a statement substantially similar to the following:

“Obligations of the provider under this service contract are insured under a service contract contractual liability insurance policy.”

(e) Service contracts not insured under a contractual liability insurance policy shall contain a statement substantially similar to the following:

“Obligations of the provider under this service contract are backed by the full faith and credit of the provider.”

§ -7 Service contract returns and refunds. (a) Service contracts shall state that the contract holder may return the contract within:

- (1) Thirty days of the date that the contract was mailed to the contract holder;
- (2) Twenty days of the date the contract was delivered to the contract holder, if the contract was delivered at the time of sale; or
- (3) A longer time period as specified in the service contract.

(b) Upon return of the service contract to the provider within the applicable time period, and if no claim has been made under the service contract prior to its return to the provider, the service contract shall be void and the provider shall refund to, or credit the account of, the contract holder with the full purchase price of the service contract. A ten per cent penalty per month shall be added to a refund that is not paid or credited within forty-five days after the return of the service contract to the provider.

(c) The right to void a service contract under subsection (b) shall not be transferred and shall apply only to the original service contract purchaser upon the terms and conditions provided in the contract and consistent with this chapter.

(d) Upon cancellation of a service contract by the provider, the provider, at least five days prior to cancellation, shall mail to the contract holder at the contract holder's last known address, a written prior notice of cancellation that states the effective date of the cancellation; provided that prior notice under this subsection shall not be required if cancellation is for:

- (1) Nonpayment of the provider's fee for the service provided under the service contract;
- (2) A material misrepresentation by the contract holder to the provider; or
- (3) A substantial breach of duties of the contract holder under the service contract, relating to a covered product or its use.

§ -8 Contractual liability insurance policies. (a) Contractual liability insurance policies in this State shall provide that if covered service is not provided by the service contract provider or administrator within sixty days of proof of loss by the contract holder, the contract holder is entitled to apply directly to the contractual liability insurance company for services under the service contract that are covered under the policy.

(b) A contractual liability insurance policy insurer shall not terminate the policy until it has issued a notice of termination required by the commissioner under the insurance laws of this State. The termination of a contractual liability insurance policy shall not reduce the insurer's responsibility for service contracts issued by providers prior to the date of termination.

(c) A provider covered by a contractual liability insurance policy shall be considered the agent of the contractual liability insurance policy insurer, for purposes of determining duties owed by the insurer to contract holders in accordance with the service contract and this chapter.

(d) Insurers issuing reimbursement insurance to providers are deemed to have received the premiums for the insurance upon the payment of provider fees by consumers for service contracts issued by the insured provider.

§ -9 Applicability of premium taxes. Service contract provider fees shall not be subject to premium taxes. Contractual liability insurance policies shall be subject to premium taxes.

§ -10 Prohibited acts. (a) No provider shall use in its name, the word "insurance", "casualty", "surety", "mutual", or any other word descriptive of the insurance, casualty, or surety business, or a name deceptively similar to the name or description of any insurance or surety corporation, or to the name of any other provider; provided that the word "guaranty" or similar word may be used by a provider. This section shall not apply to a provider using any language prohibited by this section in its name prior to the effective date of this Act.

(b) A provider or its representative shall not in its service contracts or literature make, permit, or cause to be made, any false or misleading statement, or deliberately omit any material statement that would be considered misleading if omitted.

(c) No person shall condition a loan or the sale of any property on the purchase of a service contract.

§ -11 Rules. The commissioner may adopt rules pursuant to chapter 91 to implement this chapter.

§ -12 **Enforcement.** (a) The commissioner may take any action necessary or appropriate to enforce this chapter, and the rules adopted and orders issued hereunder. The commissioner may conduct investigations and examinations of providers, administrators, insurers, or other persons. If a provider has violated this chapter, or rules or orders under this chapter, the commissioner may issue an order:

- (1) Requiring a person to cease and desist from violating this chapter or rules or orders under this chapter;
- (2) Prohibiting a person from selling or offering for sale service contracts in violation of this chapter; or
- (3) Imposing a civil penalty on a person or any combination of the foregoing, as applicable.

(b) A person aggrieved by an order under this section may request a hearing before the commissioner, conducted subject to chapter 91. The hearing request shall be filed with the commissioner within twenty days of the effective date of the commissioner's order. Upon filing of a hearing request, the order shall be suspended from its effective date, until completion of the hearing and final decision of the commissioner. At the hearing, the commissioner shall have the burden of proof to show that the order is justified.

(c) The commissioner may bring an action in any court of competent jurisdiction, for an injunction or other appropriate relief to remedy threatened or existing violations of this chapter, rules established pursuant to this chapter, or orders of the commissioner. An action filed under this section may also seek restitution on behalf of persons aggrieved by a violation of this chapter, rules established pursuant to this chapter, or orders of the commissioner.

(d) Violations of this chapter, rules established pursuant to this chapter, or orders of the commissioner shall be considered unfair or deceptive acts or practices in the conduct of trade or commerce under section 480-2."

SECTION 3. Section 431:1-209, Hawaii Revised Statutes, is amended to read as follows:

“§431:1-209 General casualty insurance defined. General casualty insurance includes vehicle insurance as defined in section 431:1-208, disability insurance defined in section 431:1-205 and in addition is insurance:

- (1) Against legal liability for the death, injury, or disability of any human being, or from damage to property[.];
- (2) Of medical, hospital, surgical, and funeral benefits to persons injured, irrespective of legal liability of the insured, when issued with or supplemental to insurance against legal liability for the death, injury or disability of human beings[.];
- (3) Of the obligation accepted by, imposed upon, or assumed by employers under law for death, disablement, or injury to employees[.];
- (4) Against loss or damage by burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation, or wrongful conversion, disposal or concealment, or from any attempt of any of the foregoing; also insurance against loss or damage to moneys, coins, bullion, securities, notes, drafts, acceptances, or any other valuable papers or documents, resulting from any cause, except while in the mail[.];
- (5) Upon personal effects of individuals, by an all-risk type of policy commonly known as the personal property floater[.];
- (6) Against loss or damage to glass and its appurtenances resulting from any cause[.];

- (7) Against any liability and loss or damage to property resulting from accidents to or explosions of boilers, pipes, pressure containers, machinery, or apparatus[.];
- (8) Against loss of or damage to any property of the insured resulting from the ownership, maintenance or use of elevators, except loss or damage by fire[.];
- (9) Against loss or damage to any property caused by the breakage or leakage of sprinklers, water pipes or containers, or by water entering through leaks or openings in buildings[.];
- (10) Against loss or damage resulting from failure of debtors to pay their obligations to the insured (credit insurance)[.];
- (11) Against loss of or damage to any domesticated or wild animal resulting from any cause (livestock insurance)[.];
- (12) Against loss of or damage to any property of the insured resulting from collision of any other object with such property, but not including collision to or by vessels, craft, piers, or other instrumentalities of ocean or inland navigation (collision insurance)[.];
- (13) Against legal liability of the insured, and against loss, damage, or expense incident to a claim of such liability, and including any obligation of the insured to pay medical, hospital, surgical, and funeral benefits to injured persons, irrespective of legal liability of the insured, arising out of the death or injury of any person, or arising out of injury to the economic interest of any person as the result of negligence in rendering expert, fiduciary, or professional service (malpractice insurance)[.];
- (14) Against any contract of warranty or guaranty which promises service maintenance, parts replacement, repair, money, or any other indemnity in the event of loss of or damage to a motor vehicle or any part thereof from any cause, including loss of or damage to or loss of use of the motor vehicle by reason of depreciation, deterioration, wear and tear, use, obsolescence, or breakage if made by a warrantor or guarantor who or which as such is doing an insurance business[.

The making of a contract covering only defects in material and work in exchange for a separately stated charge where it is incidental to the business of selling or leasing motor vehicles, shall not be deemed insurance; provided the maker of the contract has an insurance policy, with an insurer as defined in section 431:1-202, providing coverage for the making of those contracts. The policy shall assume the legal liability created by each contract or, alternatively, the ultimate legal liability of all contracts made by the issuer. If the maker of the contract is unable to perform the duties imposed by the contract, the purchaser of the contract then shall be considered a policyholder of the insurer. The policy shall include a loss payee endorsement that provides coverage to any lending institution as its interest may appear. In addition, the contract conspicuously shall state the name and address of the licensed underwriting insurer and contain a statement that the policyholder shall be entitled to make a direct claim against the insurer upon the failure of the issuer to pay any claim within sixty days after proof of loss has been filed with the issuer. The requirement that the maker of the contract have an insurance policy with an insurer shall not apply if the maker is a manufacturer, distributor or importer of automobiles.]; provided that service contracts, as defined and meeting the requirements of chapter _____, shall not be subject to chapter 431.

The doing or proposing to do any business in substance equivalent to the business described in this section in a manner designed to evade the provisions of this section is the doing of an insurance business[.]; and

- (15) Against any other kind of loss, damage, or liability properly the subject of insurance and not within any other class or classes of insurance as defined in section 431:1-204 to section 431:1-211, if such insurance is not contrary to law or public policy.”

SECTION 4. Section 431:7-101, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

“(a) The commissioner shall collect in advance the following fees:

- (1) Certificate of authority: Issuance \$900
- (2) Organization of domestic insurers and affiliated corporations:
 - (A) Application and all other papers required for issuance of solicitation permit, filing \$1,500
 - (B) Issuance of solicitation permit \$150
- (3) General agent’s license:
 - (A) Issuance, regular license \$75
 - (B) Issuance, temporary license \$75
- (4) Subagent’s license:
 - (A) Issuance, regular license \$75
 - (B) Issuance, temporary license \$75
- (5) Nonresident agent’s or broker’s license: Issuance \$60
- (6) Solicitor’s license: Issuance \$60
- (7) Independent adjuster’s license: Issuance \$60
- (8) Public adjuster’s license: Issuance \$60
- (9) Workers’ compensation claims adjuster’s limited license: Issuance \$60
- (10) Limited license issued pursuant to section 431:9-214(c): Issuance . \$60
- (11) Managing general agent’s license: Issuance \$75
- (12) Reinsurance intermediary’s license: Issuance \$75
- (13) Surplus line broker’s license: Issuance \$150
- (14) Service contract provider’s registration: Issuance \$75
- [14] (15) Examination for license: For each examination, a fee to be established by the commissioner.

(b) The fees for services of the department of commerce and consumer affairs subsequent to the issuance of a certificate of authority or a license are as follows:

- (1) \$600 per year for all services (including extension of the certificate of authority) for an authorized insurer;
- (2) \$75 per year for all services (including extension of the license) for a regularly licensed general agent;
- (3) \$75 per year for all services (including extension of the license) for a regularly licensed subagent;
- (4) \$45 per year for all services (including extension of the license) for a regularly licensed nonresident agent or broker;
- (5) \$30 per year for all services (including extension of the license) for a regularly licensed solicitor;
- (6) \$45 per year for all services (including extension of the license) for a regularly licensed independent adjuster;
- (7) \$45 per year for all services (including extension of the license) for a regularly licensed public adjuster;
- (8) \$45 per year for all services (including extension of the license) for a regularly limited licensed workers’ compensation claims adjuster;

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- (9) \$45 per year for all services (including extension of the license) for a limited license issued pursuant to section 431:9-214(c);
- (10) \$75 per year for all services (including extension of the license) for a regularly licensed managing general agent;
- (11) \$75 per year for all services (including extension of the license) for a regularly licensed reinsurance intermediary;
- (12) \$45 per year for all services (including extension of the license) for a licensed surplus line broker; [and]
- (13) \$75 per year for all services (including renewal of registration) for a service contract provider; and
- [(13)] (14) The services referred to in paragraphs (1) to [(12)] (13) shall not include services in connection with examinations, investigations, hearings, appeals, and deposits with a depository other than the department of commerce and consumer affairs[;].''

SECTION 5. If any provision of this Act, or the application of the provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of the provision to person or circumstances other than those as to which it is held invalid, shall not be affected.

SECTION 6. This Act shall not apply to service contracts or contractual liability insurance policies effective prior to July 1, 2000, or to the activities of service contract providers, administrators, sellers, or contractual liability insurance policy insurers prior to July 1, 2000. The failure of a provider or other person to comply with this Act or otherwise to administer a service contract plan, in the manner required by this Act prior to July 1, 2000, shall not be admissible in any court, arbitration, or alternative dispute resolution proceeding, or otherwise used to prove that the action of any person or the service contract was unlawful or otherwise improper.

SECTION 7. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 8. This Act shall take effect on July 1, 2000.

(Approved June 14, 2000.)