

STATE OF OKLAHOMA

1st Session of the 49th Legislature (2003)

CONFERENCE COMMITTEE SUBSTITUTE
FOR ENGROSSED
SENATE BILL 524

By: Snyder of the Senate

and

O'Neal of the House

CONFERENCE COMMITTEE SUBSTITUTE

An Act relating to contracts; defining term; requiring notice be provided; providing exemption; amending 36 O.S. 2001, Section 6602, as last amended by Section 3, Chapter 409, O.S.L. 2002, 6607, 6615, 6619, as amended by Section 4, Chapter 409, O.S.L. 2002, 6624, 6625, 6628 and 6631 (36 O.S. Supp. 2002, Section 6602 and 6619), which relate to the Service Warranty Insurance Act; modifying definitions; deleting exemption from certain insurance requirement; defining term; modifying requirements of specified policy; deleting certain premium level requirement; authorizing specified premium to net asset ratio under specified conditions; deleting administrative fee on service warranties; applying sales tax to service warranties and directing distribution by Oklahoma Tax Commission; providing for entity registration as sales representative; requiring minimum number of registered sales representatives at specified locations; providing for revocation of registration of person or entity; limiting right to apply for new registration for entity whose registration has been revoked; modifying disclosure requirement; providing for mediation in lieu of civil action under specified circumstances; creating the Construction Defect Remediation Act; providing short title; defining terms; requiring certain procedures and establishing time period for notice of defects; setting out contents of notice of defects; providing for dismissal without prejudice under certain conditions; providing procedures for counter claim or cross claim; requiring contractor to make good faith response within specified time period; requiring purchaser to make good faith response within specified time period; authorizing contractor to make final offer; requiring purchaser to make residence available for inspection; authorizing contractor to inspect property and document repairs; requiring contractor to respond within specified time period; establishing inadmissible and admissible evidence; limiting contractor's liability; awarding fees and costs to prevailing party; providing for extension of time periods; providing exclusive remedy; specifying that no cause of action is created; amending 68 O.S. 2001, Section 1354, which relates to the Oklahoma Sales Tax Code; applying sales tax to service warranties;

providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 903 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. As used in this section, "service contract" means a contract in writing to perform, over a fixed period of time or for a specific duration, services relating to the maintenance or repair, or both, of a consumer product.

B. A service contract executed after the effective date of this act shall contain conspicuous notice that the contract is subject to transfer, assignment or sale. Upon such transfer, assignment or sale, the seller of the service contract shall provide notice to the contract holder that the contract has been transferred, assigned or sold, and of the name, address, and telephone number of the purchaser. Such notice to service contract holders shall not be required if the transfer, assignment or sale occurs between companies under common ownership or control.

SECTION 2. AMENDATORY 36 O.S. 2001, Section 6602, as last amended by Section 3, Chapter 409, O.S.L. 2002 (36 O.S. Supp. 2002, Section 6602), is amended to read as follows:

Section 6602. As used in the Service Warranty Insurance Act:

1. "Commissioner" means the Insurance Commissioner;
2. "Consumer product" means tangible personal property primarily used for personal, family, or household purposes;
3. "Department" means the Insurance Department;
4. "Gross income" means the total amount of revenue received in connection with business-related activity;

5. "Gross written premiums" means the total amount of premiums, inclusive of commissions, for which the association is obligated under service warranties issued in this state;

6. "Impaired" means having liabilities in excess of assets;

7. "Indemnify" means to undertake repair or replacement of a consumer product or a newly-constructed residential structure, including any appliances, electrical, plumbing, heating, cooling or air conditioning systems, in return for the payment of a segregated premium, when the consumer product or residential structure becomes defective or suffers operational failure;

8. "Insolvent" means any actual or threatened delinquency including, but not limited to, any one or more of the following circumstances:

a. an association's ~~net~~ total liabilities exceed total assets ~~exceed the total liabilities of the association,~~

b. the business of any such association is being conducted fraudulently, or

c. the association has knowingly overvalued its assets;

9. "Insurer" means any property or casualty insurer duly authorized to transact such business in this state;

10. "Net assets" means the amount by which the total assets of an association, excluding goodwill, franchises, customer lists, patents or trademarks, and receivables from or advances to officers, directors, employees, salesmen, and affiliated companies, exceed the total liabilities of the association. For purposes of the Service Warranty Insurance Act, the term "total liabilities" does not include the capital stock, paid-in capital, or retained earnings of an association;

11. "Person" includes an individual, company, corporation, association, insurer, agent and any other legal entity;

12. "Premium" means the total ~~consideration received or to be received, by whatever name called, by an insurer or service warranty association for, or related to, the issuance and delivery of~~ amount paid by a consumer for a service warranty, including any charges designated as assessments or fees for membership, policy, survey, inspection, or service or other charges by the insurer or service warranty association. However, a repair charge is not a premium unless it exceeds the usual and customary repair fee charged by the association, provided the repair is made before the issuance and delivery of the warranty. Any repair charge paid by a service warranty association or an insurer necessary to perform service under a service warranty does not constitute a premium;

13. "Sales representative" means any person utilized by an insurer or service warranty association for the purpose of selling or issuing service warranties and includes any individual possessing a certificate of competency who has the power to legally obligate the insurer or service warranty association or who merely acts as the qualifying agent to qualify the association in instances when a state statute or local ordinance requires a certificate of competency to engage in a particular business. However, in the case of service warranty associations selling service warranties from five or more business locations, the store manager or other person in charge of each such location shall be considered the sales representative;

14. "Service warranty" means any warranty, home warranty, guaranty, extended warranty or extended guaranty, contract agreement, or other written promise entered into between a consumer and a service warranty association under the terms of which there is an undertaking to indemnify against the cost of repair or replacement of a consumer product or newly-constructed residential structure, including any appliances, electrical, plumbing, heating,

cooling or air conditioning systems, in return for the payment of a segregated charge by the consumer; however:

- a. maintenance service contracts under the terms of which there are no provisions for such indemnification are expressly excluded from this definition,
- b. those contracts ~~issued solely~~ distributed by the manufacturer, distributor, importer or seller of the product, or any affiliate or subsidiary of the foregoing entities, whereby such entity has contractual liability insurance in place, from a company licensed in the state, which covers one hundred percent (100%) of ~~its~~ the claims exposure on all contracts written without being predicated on the failure to perform under such contracts, are expressly excluded from this definition,
- c. the term "service warranty" does not include service contracts entered into between consumers and nonprofit organizations or cooperatives the members of which consist of condominium associations and condominium owners, which contracts require the performance of repairs and maintenance of appliances or maintenance of the residential property, and
- d. the term "service warranty" does not include warranties, guarantees, extended warranties, extended guarantees, contract agreements or any other service contracts issued by a company which either:
 - (1) performs at least seventy percent (70%) of the service work itself or through the parent or wholly owned subsidiary of the company and not through subcontractors, ~~which~~ and has been selling and honoring such contracts in Oklahoma for at least twenty (20) years, or

(2) which has net assets in excess of One Hundred Million Dollars (\$100,000,000.00);

15. "Service warranty association" or "association" means any person, other than an authorized insurer, issuing service warranties; provided, this term shall not mean any person engaged in the business of erecting or otherwise constructing a new home;

16. "Warrantor" means any service warranty association engaged in the sale of service warranties and deriving not more than fifty percent (50%) of its gross income from the sale of service warranties; and

17. "Warranty seller" means any service warranty association engaged in the sale of service warranties and deriving more than fifty percent (50%) of its gross income from the sale of service warranties.

SECTION 3. AMENDATORY 36 O.S. 2001, Section 6607, is amended to read as follows:

Section 6607. A. An association licensed pursuant to the Service Warranty Insurance Act shall maintain a funded, unearned premium reserve account, consisting of unencumbered assets, equal to a minimum of twenty-five percent (25%) of the gross written premiums received on all warranty contracts in force, wherever written. In the case of multiyear contracts which are offered by associations having net assets of less than Five Hundred Thousand Dollars (\$500,000.00) for which premiums are collected in advance for coverage in a subsequent year, one hundred percent (100%) of the premiums for such subsequent years shall be placed in the funded, unearned premium reserve account.

B. ~~An association shall not be required to establish an unearned premium reserve if it has purchased~~ As used in the Service Warranty Act, "contractual liability insurance" ~~which demonstrates to the satisfaction of the Insurance Commissioner that one hundred percent (100%) of its claim exposure is covered by such policy. The~~

~~contractual liability means insurance shall be obtained from an insurer that holds a certificate of authority to do business within the state or from an insurer approved by the Commissioner as financially capable of meeting the obligations incurred pursuant to the policy. For the purposes of this subsection, the~~ maintains a policyholder surplus of at least One Hundred Million Dollars (\$100,000,000.00) and is rated "A-" or higher by A.M. Best Company or an equivalent rating by another national rating service acceptable to the Insurance Commissioner. The contractual liability policy shall contain the following provisions:

1. In the event that the ~~service~~ warrantor or warranty association seller is unable to fulfill its obligation under contracts issued in this state for any reason, including insolvency, bankruptcy, or dissolution, the contract liability insurer will pay losses and unearned premiums under such plans directly to the person making a claim under the contract;

2. The insurer issuing the contractual liability policy shall assume full responsibility for the administration of claims in the event of the inability of the ~~association~~ warrantor or warranty seller to do so; and

3. The policy may not be canceled or not renewed by either the insurer or the ~~association~~ warrantor or warranty seller unless sixty (60) days' written notice thereof has been given to the Commissioner by the insurer before the date of such cancellation or nonrenewal.

C. No warrantor or warranty seller shall allow its gross written premiums to exceed seven-to-one ratio to net assets.

~~D. No warranty seller shall allow its gross written premiums to exceed a five to one ratio to net assets.~~

~~E.~~ If the gross written premiums of a warrantor or a warranty seller exceed the required net asset ratios, the Commissioner may require, in addition to other measures as the Commissioner deems necessary, any one or more of the following:

1. A complete review of financial condition;
2. An increase in deposit;
3. A suspension of any new writings; or
4. Capital infusion into the business.

E. An association which holds a license under the Service Warranty Insurance Act may allow its premiums to exceed the ratio set under subsection C of this section if the association:

1. Maintains net assets of at least Seven Hundred Fifty Thousand Dollars (\$750,000.00);
2. Utilizes a contractual liability insurance policy approved by the Commissioner which reimburses the service warranty association for one hundred percent (100%) of its claims liability;
and

3. The insurer issuing the contractual liability insurance policy:

- a. maintains a policyholder surplus of at least One Hundred Million Dollars (\$100,000,000.00),
- b. is rated "A-" or higher by A.M. Best Company or an equivalent rating by another national rating service acceptable to the Commissioner, and
- c. provides on a form prescribed by the Commissioner, in conjunction with the warranty association's filing of its quarterly and annual reports, a statement certifying the gross written premiums in force reported by the warranty association and a statement that all of the warranty association's gross written premium in force is covered under the contractual liability policy, whether or not it has been reported.

SECTION 4. AMENDATORY 36 O.S. 2001, Section 6615, is amended to read as follows:

Section 6615. A. In addition to the license fees provided in the Service Warranty Insurance Act for service warranty associations

each such association and insurer shall, annually on or before the last day of February, file with the Insurance Commissioner its annual statement in the form prescribed by the Commissioner showing all premiums or assessments received by it in connection with the issuance of service warranties in this state during the preceding calendar year and other relevant financial information as deemed necessary by the Commissioner, using accounting principles which will enable the Commissioner to ascertain whether the financial requirements set forth in Section 7 6607 of this ~~act~~ title have been satisfied.

B. The Commissioner may levy a fine of up to One Hundred Dollars (\$100.00) a day for each day an association neglects to file the annual statement in the form and within the time provided by the Service Warranty Insurance Act.

C. In addition to an annual statement, the Commissioner may require of licensees, under oath and in the form prescribed by it, quarterly statements or special reports which the Commissioner deems necessary for the proper supervision of licensees under the Service Warranty Insurance Act.

D. Premiums and assessments received by associations and insurers for service warranties shall not be subject to the premium tax provided for in Section 624 of ~~Title 36 of the Oklahoma Statutes~~ this title, but shall be subject to an ~~administrative fee of Two Dollars (\$2.00) for each service warranty issued that provides coverage not to exceed Seventy-five Dollars (\$75.00), Five Dollars (\$5.00) for each service warranty issued that provides coverage in excess of Seventy-five Dollars (\$75.00) but not to exceed Two Hundred Fifty Dollars (\$250.00), and Ten Dollars (\$10.00) for each service warranty that provides coverage in excess of Two Hundred Fifty Dollars (\$250.00).~~ Said fees shall be paid quarterly to the ~~Insurance Commissioner.~~ All such fees, the sales tax provided for in Section 1354 of Title 68 of the Oklahoma Statutes. The Oklahoma

Tax Commission shall apportion up to a maximum of Two Hundred Seventy-five Thousand Dollars (\$275,000.00) per year, ~~received by to~~ the Insurance Commissioner ~~shall be deposited~~ for deposit into the State Treasury to the credit of the Insurance Commissioner Revolving Fund for the payment of costs incurred by the Insurance Department in the administration of the Service Warranty Insurance Act. Amounts received in excess of the annual limitation shall be deposited to the credit of the General Revenue Fund.

SECTION 5. AMENDATORY 36 O.S. 2001, Section 6619, as amended by Section 4, Chapter 409, O.S.L. 2002 (36 O.S. Supp. 2002, Section 6619), is amended to read as follows:

Section 6619. No person or entity shall solicit, negotiate, advertise, or effectuate service warranty contracts in this state unless such person or entity is registered as a sales representative or acts under the supervision of a sales representative, an attorney licensed to practice law in the State of Oklahoma, or an individual licensed under the Oklahoma Real Estate License Code, Oklahoma Mortgage Broker Licensure Act, or Home Inspection Licensing Act. Sales representatives shall be responsible for the actions of persons under their supervision. At each physical location where service warranty contracts are solicited, negotiated, advertised or effectuated, at least one person shall be registered as a sales representative.

SECTION 6. AMENDATORY 36 O.S. 2001, Section 6624, is amended to read as follows:

Section 6624. A. If any sales representative is convicted by a court of a violation of any provision of the Service Warranty Insurance Act, the registration of such ~~individual~~ person or entity shall thereby be deemed to be immediately revoked without any further procedure relative thereto by the Insurance Commissioner.

B. If, after an investigation or upon other evidence, the Commissioner has reason to believe that there may exist any one or

more grounds for the suspension, revocation, or refusal to renew or continue the registration of any sales representative, as such grounds are specified in Sections ~~22~~ 6622 and ~~23~~ 6623 of this ~~act~~ title, the Commissioner may proceed to suspend, revoke, or refuse to renew or continue the registration, as the case may be.

C. If such registered sales representative also holds a license to perform professional services of the type covered by the service warranty issued, the Commissioner shall file with the regulatory authority that issued such license a recommendation that such license be suspended or revoked. Such regulatory authority shall promptly review the recommendation and take appropriate action in accordance with its laws and rules to suspend or revoke such license.

D. Whenever it appears that any licensed insurance agent has violated the provisions of the Service Warranty Insurance Act, the Commissioner may take such action relative thereto as is authorized by the Insurance Code for a violation of the Insurance Code by such agent.

SECTION 7. AMENDATORY 36 O.S. 2001, Section 6625, is amended to read as follows:

Section 6625. A. The Insurance Commissioner shall, in any order suspending the registration of a sales representative, specify the time period during which the suspension is to be in effect. Such period shall not exceed one (1) year. The registration shall remain suspended during the period so specified, subject to any rescission or modification of the order by the Commissioner before the expiration of the suspension period. A registration which has been suspended shall not be reinstated except upon request, but the Commissioner shall not grant such reinstatement if the Commissioner finds that the circumstances for which the registration was suspended still exist or are likely to recur.

B. No person or entity whose registration has been revoked by the Commissioner shall have the right to apply for another registration within two (2) years from the effective date of such revocation or, if judicial review of such revocation is sought, within two (2) years from the date of the final court order or decree affirming the revocation. The Commissioner, however, shall not grant a new registration if the Commissioner finds that circumstance or circumstances for which the previous registration was revoked still exist or are likely to recur.

C. The Commissioner shall not grant or issue any registration to any ~~individual~~ person or entity whose registration has been revoked twice.

D. During the period of suspension, or after revocation of the registration, the former registrant shall not engage in or attempt to engage in any transaction or business for which a registration is required under the Service Warranty Insurance Act.

SECTION 8. AMENDATORY 36 O.S. 2001, Section 6628, is amended to read as follows:

Section 6628. ~~If a A service warranty is issued by a person or entity that is not the manufacturer of the product or a wholesale company marketing the product, shall contain~~ a disclosure statement containing substantially the following information in ten-point or larger type shall be attached to the buyer's copy of the service warranty: ~~"This service warranty is not issued by the manufacturer or wholesale company marketing the product. This warranty will not be honored by such manufacturer or wholesale company."~~ No other information shall be placed on the disclosure statement.: "Coverage afforded under this contract is not guaranteed by the Oklahoma Insurance Guaranty Association."

SECTION 9. AMENDATORY 36 O.S. 2001, Section 6631, is amended to read as follows:

Section 6631. A. Any person damaged by a violation of the provisions of the Service Warranty Insurance Act may bring a civil action against a person violating such provisions in the district court of the county in which the alleged violator resides or has ~~his~~ a principal place of business or in the county in which the alleged violation occurred. Upon adverse adjudication, the defendant shall be liable for actual damages or Five Hundred Dollars (\$500.00) whichever is greater, together with court costs and reasonable attorney's fees incurred by the plaintiff.

B. This section shall not be construed to authorize a civil action against the Insurance Department, its employees, or the Insurance Commissioner.

C. In lieu of the requirements of subsection A of this section, the terms and conditions of a service warranty may require that any dispute, controversy or claim arising out of or relating to the service warranty be first subjected to mediation pursuant to the provisions of Sections 1801 through 1813 of Title 12 of the Oklahoma Statutes.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 840 of Title 60, unless there is created a duplication in numbering, reads as follows:

Sections 10 through 19 of this act shall be known and may be cited as the "Construction Defect Remediation Act".

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 841 of Title 60, unless there is created a duplication in numbering, reads as follows:

As used in the Construction Defect Remediation Act:

1. "Construction defect" means a defect arising directly or indirectly out of the design, construction or repair of a new residence, or an alteration or repair or addition to an existing residence, or of an appurtenance to a residence, upon which a purchaser has a complaint against a contractor;

2. "Contractor" means a person or entity contracting with a purchaser for the design, construction or repair of a new residence, or alteration or repair or addition to an existing residence, or of an appurtenance to an existing residence;

3. "Notice of defects" means written notice from a purchaser to a contractor alleging construction defects. Such notice must comply with the requirements of Section 3 of this act;

4. "Purchaser" means a person or entity who purchases a residence from a contractor or engages a contractor to design, construct, alter or repair a new residence, or alter or repair an existing residence, or an appurtenance to a residence; and

5. "Residence" means any structure designed and used only for residential purposes, together with all attached and unattached structures, constructed by the contractor, regardless of whether the real property upon which the residence is located was purchased from the contractor. Such term also includes a residence upon which alterations or repairs were performed by the contractor at the direction of the purchaser.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 842 of Title 60, unless there is created a duplication in numbering, reads as follows:

A. A purchaser who has a complaint against a contractor for construction defects shall send a written notice of defects to the contractor via certified mail with return receipt requested to the contractor's last known address no less than ninety (90) days prior to commencing a lawsuit alleging construction defects.

B. The notice of defects must include:

1. The name, address and telephone number of the purchaser;
2. The address of the residence;
3. An itemized list of every item which comprises the construction defects; and

4. Copies of any and all documentation concerning the defects produced by a third party who inspected the construction defects for the purchaser.

C. If the purchaser commences a lawsuit against the contractor alleging damages as a result of construction defects before the end of the ninety-day period set forth in subsection A of this section, or if the notice of defects does not contain the items set forth in subsection B of this section, the court shall dismiss the lawsuit without prejudice.

D. In the event that a lawsuit is commenced by someone other than the purchaser but where the purchaser asserts a claim of construction defects in a counter claim or cross claim, then such claim shall specify the nature and extent of the construction defects as provided in subsection B of this section. In such event, the contractor shall have the same opportunity to inspect the residence as provided in Section 15 of this act and the parties shall follow the procedures provided in Sections 13 and 14 of this act. Either party may move the court to abate the lawsuit pending responses and offer.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 843 of Title 60, unless there is created a duplication in numbering, reads as follows:

A. Within fifteen (15) days after receipt of the notice of defects, the contractor shall provide a good faith written response to the purchaser which either:

1. Offers to repair, replace or compensate the purchaser, in which case Section 14 of this act applies; or

2. Requests an inspection of the residence, in which case Section 15 of this act applies.

B. The contractor's offer to repair, replace or compensate must provide reasonable details of the repairs or replacements contractor

will make and a reasonable estimate of when the repair, replacement or compensation will be made.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 844 of Title 60, unless there is created a duplication in numbering, reads as follows:

A. Within fifteen (15) days of the contractor's response as provided for in Section 13 of this act, the purchaser shall provide a good faith written response to the contractor and may include a counteroffer to the contractor's offer to compensate for, repair, or replace any alleged defects.

B. Within fifteen (15) days of the purchaser's response, the contractor shall either make a good faith final written offer to repair, replace or otherwise compensate the purchaser for alleged construction defects or reject the claim in writing.

SECTION 15. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 845 of Title 60, unless there is created a duplication in numbering, reads as follows:

A. The purchaser shall ensure that the residence is available at reasonable times for inspection by the contractor within fifteen (15) days after the purchaser receives the contractor's request for inspection.

B. The contractor may inspect the dwelling, as provided herein, and undertake reasonable measures, including but not limited to testing, to determine the nature and cause of the construction defects and the appropriate remedy.

C. A contractor who makes or provides for repairs or replacement under this act is entitled to take reasonable steps to document the repair and to have it inspected.

D. Within fifteen (15) days after inspection of the residence by the contractor, the contractor shall either make a good faith offer to repair, replace or otherwise compensate the purchaser for

the alleged defects or reject the claim. Failure of the contractor to make a final offer shall be deemed a rejection of the claim.

SECTION 16. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 846 of Title 60, unless there is created a duplication in numbering, reads as follows:

A. The following are inadmissible in a construction defect lawsuit:

1. Purchaser's notice of defects;
2. Contractor's good faith response to notice of defects;
3. Purchaser's good faith response to contractor's offer;
4. Contractor's good faith best and final offer; and
5. Any extensions of deadlines and time periods as mutually agreed upon and as provided in subsection A of Section 19 of this act.

B. The following are admissible in any construction defect lawsuit:

1. Purchaser's failure to provide notice of defects as described in Section 12 of this act;
2. Purchaser's failure to permit a reasonable inspection as described in Section 15 of this act;
3. Contractor's failure to provide a good faith, written response to notice of defects as described in Section 13 of this act; and
4. Purchaser's failure to provide a good faith, written response to the contractor's offer as described in Section 14 of this act.

SECTION 17. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 847 of Title 60, unless there is created a duplication in numbering, reads as follows:

A. In a construction defect lawsuit, the contractor shall not be liable for any damages caused by:

1. Negligence by a person other than the contractor or the contractor's agent, employee or subcontractor;
2. Failure of a person other than the contractor:
 - a. to take reasonable action to mitigate damages, or
 - b. to take reasonable action to maintain the residence;
3. Normal wear, tear and deterioration of the residence;
4. Normal shrinkage, swelling or expansion;
5. The contractor's reliance upon written information relating to the residence that was obtained from official government records or provided by an employee of a governmental entity; or
6. Any damage which does not result in actual physical damage to the residence.

B. Litigation arising as a result of construction defects shall be limited to actual damages only, and shall not include consequential or punitive damages.

C. Damages shall not exceed the reasonable cost of repair or replacement necessary to cure the construction defects, and damages with respect to all defects in a residence shall not exceed the original purchase price of the residence.

SECTION 18. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 848 of Title 60, unless there is created a duplication in numbering, reads as follows:

In a construction defect lawsuit, the prevailing party shall be awarded attorney fees, expert witness fees and taxable litigation costs. Unless the contractor does not respond to the notice of defects, the prevailing party is determined based on whether the judgment obtained is more or less favorable to the purchaser than the contractor's offer to repair.

SECTION 19. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 849 of Title 60, unless there is created a duplication in numbering, reads as follows:

A. All time periods provided in this act may be extended by written agreement of the purchaser and the contractor.

B. The procedures set forth in this act shall be followed for all construction defect claims against a contractor.

C. This act does not create a cause of action or extend any applicable limitations period.

SECTION 20. AMENDATORY 68 O.S. 2001, Section 1354, is amended to read as follows:

Section 1354. A. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, Section 1350 et seq. of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following:

1. Tangible personal property, except newspapers and periodicals;

2. Natural or artificial gas, electricity, ice, steam, or any other utility or public service, and associated delivery or transmission services, except water, sewage and refuse and those specifically exempt pursuant to the provisions of Section 1357 of this title;

3. Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, pullman car companies, airlines, and other means of transportation for hire, excluding:

a. transportation services provided by a tourism service broker which are incidental to the rendition of tourism brokerage services by such broker to a customer regardless of whether or not such transportation services are actually owned and operated by the tourism service broker. For purposes of this subsection, "tourism service broker" means any person, firm, association or corporation or any

employee of such person, firm, association or corporation which, for a fee, commission or other valuable consideration, arranges or offers to arrange trips, tours or other vacation or recreational travel plans for a customer, and

- b. transportation services provided by a funeral establishment to family members and other persons for purposes of conducting a funeral in this state;

4. Telecommunications services that originate and terminate in this state and that originate or terminate in this state and are charged to the consumer's telephone number or account in this state regardless of where the billing for such service is made, all mobile telecommunications services that are sourced to this state pursuant to the federal Mobile Telecommunications Sourcing Act, 4 U.S.C., Sections 116-126, and all local telecommunications service and rental charges, including all installation and construction charges and all service and rental charges having any connection with transmission of any message or image. Provided:

- a. the term "telecommunications services" shall mean the transmission of any interactive, two-way electromagnetic communications, including voice, image, data and information, through the use of any medium such as wires, cables, microwaves, cellular radio, radio waves, light waves, or any combination of those or similar media, but shall not include the following:

- (1) sales of value-added nonvocal services in which computer processing applications are used to act on the form, content, code, or protocol of the information to be transmitted, including charges for the storage of data or information for

subsequent retrieval but not including services commonly known as voice mail,

(2) any interstate telecommunications service which is:

(a) rendered by a company for private use within its organization, or

(b) used, allocated, or distributed by a company to its affiliated group, or

(3) sales of any carrier access services, right of access services, telecommunications services to be resold, or telecommunications services used in the subsequent provision of, use as a component part of, or integrated into end-to-end telecommunications service, ~~and~~

b. the term "telecommunications services" shall include, but not be limited to sales of any interstate telecommunications services which:

(1) entitle the subscriber to inward or outward calling respectively between a station associated with an access line in the local telephone system area or a station directly connected to any interexchange carrier's facilities and telephone or radiotelephone stations in diverse geographical locations specified by the subscriber, or

(2) entitle the subscriber to private communications services which allow exclusive or priority use of a communications channel or group of channels between exchanges, and

c. the term "interstate" includes any international service that either originates or terminates outside

of the fifty (50) United States and the District of Columbia;

5. Printing or printed matter of all types, kinds, or character and, except for services of printing, copying or photocopying performed by a privately owned scientific and educational library sustained by monthly or annual dues paid by members sharing the use of such services with students interested in the study of geology, petroleum engineering or related subjects, any service of printing or overprinting, including the copying of information by mimeograph, multigraph, or by otherwise duplicating written or printed matter in any manner, or the production of microfiche containing information from magnetic tapes or other media furnished by customers;

6. Service of furnishing rooms by hotel, apartment hotel, public rooming house, motel, public lodging house, or tourist camp;

7. Service of furnishing storage or parking privileges by auto hotels or parking lots;

8. Computer hardware, software, coding sheets, cards, magnetic tapes or other media on which prewritten programs have been coded, punched, or otherwise recorded, including the gross receipts from the licensing of software programs;

9. Foods, confections, and all drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere;

10. Advertising of all kinds, types, and characters, including any and all devices used for advertising purposes except those specifically exempt pursuant to the provisions of Section 1357 of this title;

11. Dues or fees to clubs including free or complimentary dues or fees which have a value equivalent to the charge that would have otherwise been made, including any fees paid for the use of

facilities or services rendered at a health spa or club or any similar facility or business;

12. Tickets for admission to or voluntary contributions made to places of amusement, sports, entertainment, exhibition, display, or other recreational events or activities, including free or complimentary admissions which have a value equivalent to the charge that would have otherwise been made;

13. Charges made for the privilege of entering or engaging in any kind of activity, such as tennis, racquetball, or handball, when spectators are charged no admission fee;

14. Charges made for the privilege of using items for amusement, sports, entertainment, or recreational activity, such as trampolines or golf carts;

15. The rental of equipment for amusement, sports, entertainment, or other recreational activities, such as bowling shoes, skates, golf carts, or other sports or athletic equipment;

16. The gross receipts from sales from any vending machine without any deduction for rental to locate the vending machine on the premises of a person who is not the owner or any other deductions therefrom;

17. The gross receipts or gross proceeds from the rental or lease of tangible personal property, including rental or lease of personal property when the rental or lease agreement requires the vendor to launder, clean, repair, or otherwise service the rented or leased property on a regular basis, without any deduction for the cost of the service rendered. If the rental or lease charge is based on the retail value of the property at the time of making the rental or lease agreement and the expected life of the property, and the rental or lease charge is separately stated from the service cost in the statement, bill, or invoice delivered to the consumer, the cost of services rendered shall be deducted from the gross receipts or gross proceeds;

18. Flowers, plants, shrubs, trees, and other floral items, whether or not produced by the vendor, sold by persons engaged in florist or nursery business in this state, including all orders taken by an Oklahoma business for delivery in another state. All orders taken outside this state for delivery within this state shall not be subject to the taxes levied in this section;

19. Tangible personal property sold to persons, peddlers, solicitors, or other salesmen, for resale when there is likelihood that this state will lose tax revenue due to the difficulty of enforcing the provisions of the Oklahoma Sales Tax Code because of:

- a. the operation of the business,
- b. the nature of the business,
- c. the turnover of independent contractors,
- d. the lack of place of business in which to display a permit or keep records,
- e. lack of adequate records,
- f. the fact that the persons are minors or transients,
- g. the fact that the persons are engaged in service businesses, or
- h. any other reasonable reason;

20. Any taxable services and tangible personal property including materials, supplies, and equipment sold to contractors for the purpose of developing and improving real estate even though said real estate is intended for resale as real property, hereby declared to be sales to consumers or users, however, taxable materials, supplies and equipment sold to contractors as provided by this subsection which are purchased as a result of and subsequent to the date of a contract entered into either prior to the effective date of any law increasing the rate of sales tax imposed by this article, or entered into prior to the effective date of an ordinance or other measure increasing the sales tax levy of a political subdivision shall be subject to the rate of sales tax applicable, as of the date

such contract was entered into, to sales of such materials, supplies and equipment if such purchases are required in order to complete the contract. Such rate shall be applicable to purchases made pursuant to the contract or any change order under the contract until the contract or any change order has been completed, accepted and the contractor has been discharged from any further obligation under the contract or change order or until two (2) years from the date on which the contract was entered into whichever occurs first. The increased sales tax rate shall be applicable to all such purchases at the time of sale and the contractor shall file a claim for refund before the expiration of three (3) years after the date of contract completion or five (5) years after the contract was entered into, whichever occurs earlier. However, the Oklahoma Tax Commission shall prescribe rules and regulations and shall provide procedures for the refund to a contractor of sales taxes collected on purchases eligible for the lower sales tax rate authorized by this subsection; ~~and~~

21. Any taxable services and tangible personal property sold to persons who are primarily engaged in selling their services, such as repairmen, hereby declared to be sales to consumers or users; and

22. Service warranties pursuant to the Service Warranty Insurance Act.

B. All solicitations or advertisements in print or electronic media by Group Three vendors, for the sale of tangible property to be delivered within this state, shall contain a notice that the sale is subject to Oklahoma sales tax, unless the sale is exempt from such taxation.

SECTION 21. This act shall become effective November 1, 2003.

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