

STATE OF OKLAHOMA

1st Session of the 49th Legislature (2003)

5TH CONFERENCE COMMITTEE SUBSTITUTE
FOR ENGROSSED
SENATE BILL 524

By: Snyder of the Senate

and

O'Neal of the House

5TH CONFERENCE COMMITTEE SUBSTITUTE

An Act relating to contracts; defining term; requiring notice be provided; providing exemption; amending 36 O.S. 2001, Sections 6602, as last amended by Section 3, Chapter 409, O.S.L. 2002, 6607, 6619, as amended by Section 4, Chapter 409, O.S.L. 2002, 6624, 6628 and 6631 (36 O.S. Supp. 2002, Sections 6602 and 6619), which relate to the Service Warranty Insurance Act; modifying definitions; modifying requirements of specified policy; deleting certain premium level requirement; authorizing specified premium to net asset ratio under specified conditions; updating references; requiring minimum number of registered sales representatives at specified locations and providing exception; clarifying term and providing for revocation of registration of person; modifying disclosure requirement; providing for mediation in lieu of civil action under specified circumstances; creating the Task Force on Service Warranty Insurance; stating membership and providing for officers; providing for meetings and staffing; stating purpose of Task Force; requiring recommendations; providing for travel reimbursement; 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; 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; providing for codification; providing for noncodification; 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 as a result of any cause including normal wear and tear or defects in materials or workmanship;

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, alone or in combination with a parent company, 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 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 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 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 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 shall solicit, negotiate, advertise, or effectuate service warranty contracts in this state unless such person 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. Provided, however, such requirement shall not apply to an individual licensed to practice law in the State of Oklahoma, or licensed under the Oklahoma Real Estate License Code, Oklahoma Mortgage Broker Licensure Act, or Home Inspection Licensing Act.

SECTION 5. 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 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 6. 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 7. 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 8. NEW LAW A new section of law not to be codified in the Oklahoma Statutes reads as follows:

A. There is hereby created until December 12, 2003, the Task Force on Service Warranty Insurance. The Task Force shall consist of the following members:

1. The Oklahoma Insurance Commissioner;

2. Three members to be appointed by the President Pro Tempore of the Oklahoma State Senate, as follows:

a. two members of the Oklahoma State Senate, one of whom shall be designated by the President Pro Tempore of the Senate to serve as chair of the Task Force, and

b. one member representing a service warranty association; and

3. Three members to be appointed by the Speaker of the Oklahoma House of Representatives, as follows:

a. two members of the Oklahoma House of Representatives, one of whom shall be designated by the Speaker of the House to serve as co-chair of the Task Force, and

b. one member representing the service contract industry.

B. The first meeting of the Task Force shall take place no later than October 6, 2003. The Task Force shall meet at such times and places as deemed necessary to perform its duties. Meetings shall be held at the call of the chair. Staffing for the Task Force

shall be provided by the staff of the House of Representatives and the Senate, and by the State Department of Insurance.

C. The purpose of the Task Force is to study issues raised by exclusions from the Service Warranty Insurance Act, including statutory definitions, consumer protection and industry practices.

D. The Task Force shall make recommendations to the Legislature by December 12, 2003, regarding any statutory changes which might be necessary to protect consumers and provide regulatory certainty to the industry.

E. The members of the Task Force shall receive no compensation for serving on the Task Force, but shall receive travel reimbursement as follows:

1. Legislative members of the Task Force shall be reimbursed for their necessary travel expenses incurred in the performance of their duties in accordance with Section 456 of Title 74 of the Oklahoma Statutes, from the legislative body in which they serve;

2. Agency members of the Task Force shall be reimbursed for travel expenses incurred in the performance of their duties by the employing agency in accordance with the State Travel Reimbursement Act; and

3. Other members of the Task Force shall be reimbursed for travel expenses incurred in the performance of their duties by their respective appointing authorities in accordance with the State Travel Reimbursement Act.

SECTION 9. 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 9 through 17 of this act shall be known and may be cited as the "Construction Defect Remediation Act".

SECTION 10. 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 11 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 11. 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 personal delivery, regular mail or certified mail with return receipt requested to the contractor's last known address

no less than thirty (30) 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 all known items which comprise 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 thirty-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 14 of this act and the parties shall follow the procedures provided in Sections 12 and 13 of this act. Either party may move the court to abate the lawsuit pending responses and offer.

SECTION 12. 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 ten (10) 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 13 of this act applies; or

2. Requests an inspection of the residence, in which case Section 14 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 13. 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 ten (10) days of the contractor's response as provided for in Section 12 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 ten (10) 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 14. 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 ten (10) 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 ten (10) 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 15. 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. 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, or the contractor's agent, employee or subcontractor:

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 not directly caused by the contractor;

4. Normal shrinkage, swelling or expansion; or

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.

B. A claim seeking damages for construction defects shall be limited to actual damages and shall not include punitive damages.

C. Damages with respect to all defects in a residence shall not exceed the fair market value of the residence.

SECTION 16. 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:

In a construction defect lawsuit, the prevailing party shall be awarded attorney fees, expert witness fees and taxable litigation costs. In determining the prevailing party, the contractor shall be given credit for the fair market value, at the time of the determination, of the proposed repairs contained in the contractor's offer to repair.

SECTION 17. 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:

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 18. This act shall become effective November 1, 2003.

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