

Date of Hearing: May 4, 2021

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 1221 (Flora) – As Amended April 5, 2021

PROPOSED CONSENT (As Proposed to be Amended)

SUBJECT: CONSUMER WARRANTIES: SERVICE CONTRACTS: CANCELLATION:
DISCLOSURES

KEY ISSUE: SHOULD CALIFORNIA AMEND THE SONG-BEVERLY CONSUMER WARRANTY ACT TO PERMIT THE SALE OF SERVICE CONTRACTS THAT GOVERN A CLASS OF PRODUCTS, RATHER THAN A SINGLE PRODUCT, AND THAT RENEW AUTOMATICALLY, RATHER THAN ONLY COVERING A FIXED TERM?

SYNOPSIS

A service contract—sometimes referred to as an extended warranty, extended service plan, or maintenance agreement—is an agreement that protects the purchaser of a consumer product in case something goes wrong with the product during the term of coverage. Service contracts are similar to product warranties. But while a warranty is typically included in an item’s purchase price, service contracts must generally be bought separately at additional cost. Retailers commonly offer service contracts to consumers when they purchase expensive products like cell phones, home appliances, and computers.

This bill would modify California law governing service contracts in two ways. First, the bill would allow service contractors to sell a service contract that covers a class of products rather than a single product. For example, a consumer could purchase a single service contract covering all kitchen appliances, rather than three separate service contracts for their refrigerator, dishwasher, and microwave.

Second, the bill would authorize the sale of automatically renewing service contracts. Rather than paying upfront for a service contract that covers a product for a fixed term of years, consumers could, for example, pay monthly for a service contract that renews each month.

The bill includes a number of consumer protections meant to ensure that consumers knowingly enter into automatically renewing service contracts, and have meaningful cancellation and refund rights under these contracts. Author’s amendments, described herein, would both strengthen these consumer protections, and resolve several ambiguities introduced by the bill in print. This bill is sponsored by the Service Contract Industry Council, has no opposition, and previously passed the Privacy and Consumer Protection Committee on consent.

SUMMARY: Allows the sale in California of service contracts that govern a class of products, rather than a single product, and that renew automatically, rather than covering a fixed term. Specifically, **this bill:**

- 1) Requires, if a service contract covers a single product, that the contract contain a clear description and identification of the covered product.

- 2) Requires, if a service contract covers a class of products, that the contract contain a description that is sufficiently clear so the buyer is able to discern the products covered by the contract.
- 3) Permits service contracts to be offered on a month-to-month or other periodic basis and to continue until cancelled by the buyer or service contractor.
- 4) Defines “clear and conspicuous,” when referring to a written disclosure, as any of the following, in a manner that clearly calls attention to the language used:
 - a) A larger type than the surrounding text.
 - b) In a contrasting type, font, or color to the surrounding text of the same size.
 - c) Set off from the surrounding text of the same size by symbols or other marks.
- 5) Defines “clear and conspicuous” and “clearly and conspicuously,” when referring to an audio disclosure, as being in a volume and cadence that is readily audible and understandable.
- 6) Specifies that an automatically renewing service contract must disclose to the buyer in a clear and conspicuous manner, as defined, that the service contract shall continue until cancelled by the buyer or service contractor.
- 7) Provides that the buyer’s purchase of an automatically renewing service contract after receiving the disclosure in 6) shall be deemed affirmative consent to automatic renewal.
- 8) Requires an automatically renewing service contract to disclose to the buyer if an alternative to automatic renewal is available, including a fixed-term service contract or another type of service contract that does not continue until it is canceled.
- 9) Requires an automatically renewing service contract to provide, at a minimum, a toll-free number, email address, postal address, and, if one exists, an internet website the buyer can use to cancel the service contract.
- 10) Specifies that cancellation shall not require the use of more than one of the methods provided in 9), and that the cancellation is effective immediately upon completion of the current period.
- 11) Clarifies that if an automatically renewing service contract was entered into online, the buyer has the option to cancel the service contract exclusively online, without engaging in any unnecessary steps that obstruct or delay the buyer’s ability to so cancel.
- 12) Requires that if an automatically renewing service contract is canceled, that it provide for the buyer to receive a refund of any unearned amounts in accordance with existing law.

EXISTING LAW:

- 1) Regulates service contracts that address the maintenance, replacement, or repair of consumer goods. (Business and Professions Code Sections 9855-9855.9.)
- 2) Defines “service contract seller” as a person who sells or offers to sell a service contract, with certain enumerated exceptions. (Business and Professions Code Section 9855 (c).)

- 3) Defines “service contract administrator” as a person responsible for compensating any party to a service contract for claims or repairs. A service contract administrator also performs activities like providing service contract sellers with forms, adjusting claims, and arranging required insurance for service contract sellers. (Business and Professions Code Section 9855 (b).)
- 4) Defines “service contractor” as a service contract administrator or service contract seller. (Business and Professions Code Section 9855 (e).)
- 5) Establishes the Song-Beverly Consumer Warranty Act, which sets forth standards for warranties that govern consumer goods, and outlines remedies available to purchasers. (Civil Code Sections 1790-1797.6.)
- 6) Requires service contractors to comply with designated provisions of the Song-Beverly Consumer Warranty Act that govern service contracts, cancellation of those contracts, and refunds after cancellation. (Business and Professions Code Section 9855.5.)
- 7) Defines “service contract,” for purposes of the Song-Beverly Consumer Warranty Act, as a written contract to perform, over a fixed period of time or for a specified duration, services related to the maintenance or repair of a consumer product. The term does not include an automobile insurance policy, as that term is defined under the Insurance Code. (Civil Code Section 1791.)
- 8) Sets forth cancellation and refund rights for motor vehicle, home appliance, and home electronic products. (Civil Code Section 1794.41.)
- 9) Provides for interest to be paid if a buyer cancels a service contract under 8) and does not receive a refund within 30 days. (Business and Professions Code Section 9855.6)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: A service contract—sometimes referred to as an extended warranty, extended service plan, or maintenance agreement—is an agreement that protects the purchaser of a consumer product in case something goes wrong with the product during the term of coverage. Service contracts are similar to product warranties. But while a warranty is typically included in an item’s purchase price, service contracts must generally be bought separately at additional cost. Retailers commonly offer service contracts to consumers when they purchase expensive products like cell phones, home appliances, and computers.

According to the Service Contract Industry Council, the sponsors of this bill, service contracts can include any of the following benefits:

- Discounted product repair
- Product replacement
- Access to pre-qualified technicians
- In-home repair service
- 24-hour technical assistance
- Routine maintenance, such as cleanings and tune-ups
- Major component coverage
- Comprehensive coverage

- Accidental damage from handling during shipping
- Free shipping (Service Contract Industry Council, *Consumer Goods Service Contracts*, available at <https://go-scic.com/service-contracts/consumer-goods/>)

This bill seeks to address two issues under existing California service contract law.

Allowing service contracts to cover a class of products. The first issue this bill addresses is that California's Song-Beverly Consumer Warranty Act currently allows only for the sale of service contracts that cover single items, rather than a class of items. Per the author:

Over time, programs offered by the service contract industry have evolved to bring programs to consumers that ensure that a consumer's investment in products purchased are covered, and that a consumer is not forced to remember to purchase a service contract every single time the consumer purchases a new product. These programs are structured in such a way that a consumer could purchase a service contract today that would cover, for example, all flat screen TVs in the consumer's home, even those TVs that may be purchased by the consumer subsequent to the purchase of the service contract.

These programs are offered in every state in the country with the exception of California due to outdated language contained in California's laws governing service contracts that requires the specific identification of each individual product covered by a service contract. Because of this language, a service contract is not able to cover a class of products but must issue one contract per covered product. Such a scenario is not helpful to consumers and is inconsistent with the treatment of the service contract industry in the rest of the country.

The bill would address this issue by amending Civil Code Section 1794.4 (c)(1) as follows:

(c) The service contract shall contain all of the following items of information:

(1) ~~A~~ ***If the service contract covers a single product, a clear description and identification of the covered product. If the service contract covers a class of products, a description of the class of products covered by the service contract that is sufficiently clear so the buyer is able to discern the products covered.***

This change should ensure that retailers may lawfully sell service contracts governing a class of products to California consumers. The phrase "a description...sufficiently clear so the buyer is able to discern the products covered" is intended as a consumer protection for multi-product service contracts equivalent to the phrase "a clear description and identification of the covered product" for single product service contracts.

Allowing service contracts to automatically renew. This bill would also legalize the offer and sale of service contracts that renew automatically until canceled. As explained by the author:

[M]any consumers purchase service contracts in connection with services provided on a month-to-month or continuous until cancelled basis. For example, cell phones are often purchased through a monthly pay option and it is convenient for a consumer to be able to include service contract coverage on their cell phone and have the cost for that coverage billed on the consumer's monthly cell phone bill along with the wireless minutes and cell phone purchase price. While these programs have been offered in California for years under

existing state law, the industry would like to see more clarity in the service contract laws providing clear authorization of these service contract programs.

The bill effects this change by adding the following provision to Civil Code Section 1794.4 (c)(2):

(c) The service contract shall contain all of the following items of information:

(2) [...] ***A service contract may be offered on a month-to-month or other periodic basis and continue until canceled by the buyer or the service contractor in accordance with Section 1794.41 and, for electronic and appliance repair dealers, Section 9855.6 of the Business and Professions Code. If the service contract continues until canceled by the buyer or service contractor, the service contract shall do all of the following:***

The bill then sets forth a number of consumer protections that must be included in automatically renewing service contracts.

Distinguishing other types of automatically renewing contracts. It is important to distinguish the service contracts addressed by this bill from the automatically renewing contracts that were the subject of SB 340 (Yee, Chap. 350, Stats. 2009) and SB 313 (Hertzberg, Chap. 356, Stats. 2017). Those bills put into place a number of consumer protections for contracts that renew automatically, such as gym memberships. These protections include requiring the purchaser's affirmative consent to the terms of the contract (Business and Professions Code Section 17602 (a)(2)) and ensuring that consumers who accept an auto-renewal offer online must also be able to terminate the service online (Business and Professions Code Section 17602 (c)). However, these bills explicitly excluded service contracts under the Song-Beverly Consumer Warranty Act from their provisions, thus necessitating this bill. (*See* Business and Professions Code Section 17605.)

Topics addressed in the Privacy and Consumer Protection Committee's analysis. The Privacy and Consumer Protection Committee's analysis of this bill thoroughly explains the relationship between this bill and existing federal and state laws, governing both service contracts and contracts subject to automatic renewal. Readers seeking a deeper understanding of those relationships are directed to the Privacy Committee's analysis.

Author's amendment—requiring affirmative consent for automatic renewal. As currently in print, the bill would require a "clear and conspicuous" disclosure of the fact that the service contract automatically renews. It would then treat the fact that the buyer purchased the service contract, after the disclosure was made, as affirmative consent to automatic renewal.

This method of consent is somewhat undesirable. Some buyers may not actually read the disclosure and understand that they are consenting to automatic renewal. Further, in the event of litigation, a seller may be unable to prove that it actually provided the required disclosure to the buyer (e.g., if the contract is in electronic form).

In order to address this issue, the author proposes to amend the bill as follows:

Civil Code 1794.4

(c) The service contract shall contain all of the following items of information:

(2) [...] If the service contract continues until canceled by the buyer or service contractor, the service contract shall do all of the following:

(A) Disclose to the buyer in a clear and conspicuous manner that the service contract shall continue until canceled by the buyer or service contractor, **and require the buyer's affirmative consent to this provision.** ~~The buyer's purchase of the service contract after receiving this disclosure shall be deemed affirmative consent to this provision.~~

Requiring affirmative consent to automatic renewal increases the chances that the buyer understands what they are purchasing, and in the event of a dispute, reduces evidentiary difficulties for the seller.

Author's amendment—disclosing alternatives to automatically renewing service contracts offered by the seller. The bill, as currently in print, would require an automatically renewing service contract to disclose whether an alternative to automatic renewal is available. It is unclear whether knowing this fact would actually be of much help to a buyer, who would have to ask what the alternative is. Moreover, the alternative might be sold by a different vendor.

Accordingly, the author proposes to amend the relevant bill provision as follows:

Civil Code 1794.4

(c) The service contract shall contain all of the following items of information:

(2) [...] If the service contract continues until canceled by the buyer or service contractor, the service contract shall do all of the following:

(B) Disclose to the buyer ~~if an~~ **all alternatives that the seller offering the service contract offers, including any to enter into a fixed-term service contracts, or another service contract basis that does not continue until it is canceled, is available.**

As amended, the contract would have to disclose all alternatives offered by the seller, presumably allowing the buyer to make a more informed decision as to whether to buy an automatically renewing service contract.

Author's amendment—clarifying the effect of cancellation. As currently in print, the bill provides that cancellation of an automatically renewing service contract is “effective immediately upon completion of the current period.” But this phrasing is difficult to reconcile with subparagraph (E) of the same section of the bill, which “[p]rovide[s] for a refund to the buyer of any unearned amounts....” Consider the situation in which a buyer pays on the first of every month for an automatically renewing cell phone service contract. If the buyer cancels the contract on April 15, can the buyer still make a claim if the cell phone stops working before May 1? Such a right is implied by the phrase “effective immediately upon completion of the current period.” And if the buyer doesn't make a claim before May 1, should they receive a refund of one-half of their April payment? For that is what is implied by “a refund to the buyer of any unearned amounts.”

In order to resolve these ambiguities, the author proposed to amend the bill as follows:

Civil Code 1794.4

(c) The service contract shall contain all of the following items of information:

(2) [...] If the service contract continues until canceled by the buyer or service contractor, the service contract shall do all of the following:

(C) Provide, at a minimum, a toll-free number, email address, postal address, and, if one exists, internet website the buyer can use to cancel the service contract. Cancellation shall not require the use of more than one of these methods to be completed, and shall be effective immediately upon ***receipt of the request for cancellation*** ~~completion of the current period~~.

This wording makes clear that (i) cancellation is effective as soon as the service contractor receives it, (ii) the buyer should receive a refund for the time remaining in the current period, and (iii) the buyer does not retain a residual right to make a claim between when the buyer cancels the service contract and when the current period ends.

Author's amendment—eliminating ambiguities in handling refunds. The bill, as currently in print, provides that if the buyer cancels the contract, that buyer is entitled to a refund pursuant to existing Civil Code Section 1794.41. Section 1794.41, however, addresses refunds upon cancellation of a service contract that runs for a fixed term, not one that renews automatically. It is therefore arguably unclear whether the relevant period for calculating the refund begins when the buyer first purchased an automatically renewing contract, or at the beginning of the current term (i.e., when the buyer made their most recent payment). Section 1794.41 also makes reference to a “written notice of cancellation,” whereas this bill provides that cancellation can be made by telephone, email, or through a website.

In order to address these inconsistencies, the author proposes to amend the bill as follows:

Civil Code 1794.4

(c) The service contract shall contain all of the following items of information:

(2) [...] If the service contract continues until canceled by the buyer or service contractor, the service contract shall do all of the following:

(E) (i) Provide for a refund to the buyer of any unearned amounts in accordance with Section 1794.41 and, for electronic and appliance repair dealers, Section 9855.6 of the Business and Professions Code.

(ii) The amount of any refund, as well as any cancellation or administrative fees, under this paragraph (2) shall be calculated based on the period, whether month-to-month or otherwise, for which payment is made and the amount of the payment for the period.

(iii) A written notice of cancellation other than notice required by subparagraphs (C) and (D) shall not be required to obtain a refund.

These amendments make clear, first, that the relevant period for calculating a refund is the period for which the buyer pays when the contract automatically renews, and, second, that a buyer need not submit an additional written notice of cancellation to obtain a refund.

Author's amendment—clarifying the service contractor's power to cancel automatically renewing contracts. As currently in print, this bill arguably allows a service contractor the same power as the buyer to unilaterally cancel an automatically renewing service contract. Granting

the service contractor the unfettered ability to cancel a contract risks a situation in which a buyer's contract is canceled through no fault of their own, but simply because the buyer is making excessive claims on a defective product and is deemed unprofitable.

In order to preclude this possibility, the author proposes to amend the bill to add the following provision:

Civil Code 1794.4

(d) A service contractor may only cancel a service contract offered on a month-to-month or other periodic basis only if any of the following occurs:

(1) The buyer fails to make timely payment.

(2) The buyer is otherwise in material breach of the service contract.

(3) The buyer has committed fraud in connection with the service contract.

(4) (A) The service contractor or its affiliate is the obligor under the service contract, and the service contractor or its affiliate is discontinuing this category of service contract no later than 30 days after the effective date of the cancellation.

(B) No cancellation or administrative fee may be charged to the buyer for a cancellation pursuant to this paragraph.

(5) (A) Neither the seller offering the service contract nor any of its affiliates is the obligor under the service contract, and the seller is discontinuing its offering of the service contract no later than thirty (30) days after the effective date of the cancellation in favor of a service contract with a different obligor.

(B) No cancellation or administrative fee may be charged to the buyer for a cancellation pursuant to this paragraph.

Paragraphs (1) – (3) are the sole grounds for the service contractor to cancel an individual buyer's service contract. Paragraph (4) would apply when type a service contract is being discontinued. For example, a personal computer manufacturer may stop providing automatically renewing service contracts once the computers it covers exceed a certain age. Such a cancellation would apply generally to all buyers of the service contract, and could not be used to stop providing service to unprofitable or demanding customers. Paragraph (5) would apply in a situation in which a seller is continuing to offer a service contract, but changes the company that is obligated to provide services to buyers under that contract. For example, an electronics retailer may sell a service contract for DVD players which provides that ABC Corporation will repair or replace any players that break. If ABC Corporation is providing shoddy service, and the retailer decides to replace it with XYZ Corporation, paragraph (5) would allow the retailer to cancel the contracts naming ABC as the obligor, and replace them with contracts naming XYZ as the obligor. Again, such a cancellation would apply generally to all buyers of the service contract, and could not be used to stop providing services to individual customers.

One note on terminology. The term "affiliate," as used in this amendment, should be understood to mean an entity that controls, is controlled by, or is under common control with another entity.

(See Corporations Code Section 150 [“A corporation is an ‘affiliate’ of, or a corporation is ‘affiliated’ with, another specified corporation if it directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the other specified corporation.”]; 17 C.F.R. Section 230.144 (k) [“An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.”])

ARGUMENTS IN SUPPORT: Service Contract Industry Council writes:

AB 1221...would modernize the regulation of consumer goods service contracts in California consistent with their treatment in the rest of the country. AB 1221 would allow for essential programs that are offered in every state on the country to take place in California and would provide the much-needed clarity for service contract laws under California law.

REGISTERED SUPPORT / OPPOSITION:

Support

Service Contract Industry Council (sponsor)

Opposition

None on file

Analysis Prepared by: Jith Meganathan / JUD. / (916) 319-2334