

CONCURRENCE IN SENATE AMENDMENTS

AB 1221 (Flora)

As Amended September 1, 2021

Majority vote

SUMMARY

This bill clarifies that service contracts can cover a single product or a class of products, and provides explicit authorization for a service contractor to enter into automatically renewing month-to-month service contracts with consumers, subject to certain requirements.

Senate Amendments

- 1) Specify that vehicle service contracts are not subject to the provisions of this bill permitting the offering of service contracts that continue until cancelled.
- 2) Define the terms "affiliate" and "affirmative consent" for the purposes of this bill.
- 3) Make non-substantive technical and conforming changes.

COMMENTS

Service contracts, sometimes referred to as extended warranties, extended service plans, or maintenance agreements, are generally agreements that give purchasers of consumer electronics, appliances, motor vehicles, and homes some assurance of protection for their purchase in the event something goes wrong. Though similar to warranties, service contracts differ in that while warranties are product protections that are included in the price of the item, service contracts are an additional purchase on top of the item, and accordingly incur an extra cost.

California regulates service contracts and service contractors in both the Business and Professions Code and in the Civil Code. Business and Professions Code Section 9855, et seq., specifies the regulatory requirements with which a service contractor must comply to continue to offer service contracts in this State, including registration with the Bureau of Household Goods and Services, maintenance of a reimbursement insurance policy meeting certain specifications, and filing of certain documents with the Director of Consumer Affairs, including the actual service contract form to be used for the agreement. In the Civil Code, the Song-Beverly Consumer Warranty Act (SB 272 (Song), Chapter 1333, Statutes of 1970; henceforth, "Song-Beverly"), which this bill amends, defines "service contract" to mean a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair of a consumer product, not including a policy of automobile insurance, as specified. Like federal law, Song-Beverly requires a seller of a service contract to fully and conspicuously disclose in simple and readily understood language the terms, conditions, and exclusions of that contract.

However, Song-Beverly extends far beyond the protections provided by federal law, by, among other things, requiring all service contracts to contain specified information, including "a clear description and identification of the covered product," and "the point in time or event when the term of the service contract commences, and its duration measured by elapsed time or an objective measure of use," along with any exclusions from the scope of the service contract, a step-by-step explanation of the procedure the buyer should follow to obtain performance of an obligation under the service contract, and a description of any right to cancel the contract under

exigent circumstances, or, if there is no such right, a statement of that fact. In addition, Song-Beverly guarantees a buyer of a service contract certain cancellation and refund rights, as well as the opportunity to inspect the contract itself prior to purchase and to obtain a copy of the contract within a specified amount of time.

Despite the extensiveness of California statutes regulating service contracts, however, certain aspects of the law are not entirely clear. For instance, because the definition of "service contract" in Song-Beverly indicates that it is a contract "relating to the maintenance or repair of a *consumer product*" and requires the contract to provide a "a clear description and identification of *the covered product*," singular, some confusion has resulted as to whether a service contract in this state can cover multiple products. Additionally, though the definition specifies a service contract to apply "over a fixed period of time or for a specified duration," and requires the contract to indicate the contracts "duration measured by elapsed time or an objective measure of use," it is not clear whether a month-to-month contract that automatically renews, or a contract that continues until it is cancelled, is permissible.

Automatic renewal service agreements and continuous service agreements are two forms of contracts that continue indefinitely unless the one of the parties intervenes to terminate the agreement. In the case of automatic renewal agreements, the service is provided, and remuneration is garnished, for a definite term, but a new term begins automatically following one's expiration unless renewal is actively declined. Continuous service agreements lack a definite term, and instead continue indefinitely until a party actively terminates the agreement. In practice, these agreements often involve regular charges on a monthly or even yearly basis. These types of agreements (henceforth referred to collectively as "auto-renewals") have increasingly pervaded most aspects of daily life. Californians have come to rely on subscription services for a plethora of goods and services, including meal/ingredient delivery, entertainment, clothing selection and procurement, and even the regular replenishment of household goods, and a significant portion of these subscription services employ an auto-renewal model.

Auto-renewal is viewed by businesses as a valuable tool for both the business and the consumer, as it allows the consumer to maintain uninterrupted, and often highly convenient access to a good or service that they want or need, without the hassle of repeatedly submitting payment information. For businesses, auto-renewal facilitates the practicalities of customer retention. However, many consumer advocates contend that auto-renewals place a burden on consumers and are prone to abuse, both because consumers are often uninformed as to, or fail to fully comprehend, the nature of the agreement, and because the process for cancelling these agreements can be confusing, needlessly complex, or otherwise onerous.

This bill would make two significant clarifications to existing law relating to service contracts in order to permit the coverage of a class of products in a single service contract and to permit periodic contracts that automatically renew. As the sponsors point out, service contracts pertaining to a class of products are permissible in every state except California, wherein, as an artifact of statutory interpretation, the use of singular articles to refer to the product covered make the permissibility unclear. In other words, because a service contract is defined as a contract for services relating to the maintenance or repair of "a consumer product," and must include a clear description and identification of "the covered product," a service contract may or may not be able to cover a class of products, such as all televisions in a person's home or all of the cellular devices on a family wireless plan. To clarify California law as consistent with laws in other states without compromising the intent of the consumer protections provided, this bill

would add "if the service contract covers a single product," to the requirement that the covered product is clearly described, and then explicitly provide that if a service contract covers a class of products, the class of products covered must be described in a manner sufficiently clear so that the buyer can discern the products covered. This would seemingly accomplish the intent of the existing provision by ensuring that the consumer understands the scope of the contract into which they are entering, even if that scope includes multiple products.

Additionally, while the existing definition of service contract specifies that the contract applies "over a fixed period of time or for a specified duration," and a service contract is required to indicate "[the service contract's] duration measured by elapsed time or an objective measure of use," existing law is not clear on whether it is permissible for such a contract to automatically renew for additional fixed terms. According to the Service Contract Industry Council, "these programs have been offered in California for years under existing state law," but that "the industry would like to see more clarity in the service contract laws providing clear authorization of these service contract programs." Though it appears the law has been interpreted in practice to permit auto-renewal, this bill would explicitly indicate that "a service contract may be offered on a month-to-month or other periodic basis and continue until canceled by the buyer," provided certain conditions are met.

Acknowledging the potential for exploitation of consumers through auto-renewal and the inapplicability of existing auto-renewal laws to service contracts, the author has prudently provided several explicit requirements on behalf of consumers to mitigate the risk of unanticipated or unwanted charges. In addition to requiring clear and conspicuous disclosure that the terms of the service contract shall continue until cancelled, under AB 1221, any service contract must also disclose to the buyer if there is an alternative to enter into a fixed-term service contract or another service contract basis that does not continue until it is cancelled, so the buyer can opt for that if they prefer. The bill would also require the contract to 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, and specifies that cancellation shall not require use of more than one of those methods (e.g., telephone and postal submission), and is effective immediately upon completion of the current term. In recognizing the increasing role the internet plays in commerce, the bill would require that if a service contract was entered into online, the buyer must have the option to cancel the service contract exclusively online, and without engaging in any unnecessary steps that obstruct or delay cancellation.

Amendments taken in the Senate clarify the bill's application by defining the terms "affiliate" and "affirmative consent". The latter definition, borrowing from the robust definition for "consent" included in the California Privacy Rights Act (Proposition 24, 2020), strengthens the protections this bill provides to consumers by ensuring that a consumer enters into an auto-renewal service contract intentionally, and without any form of coercion or deception. Additionally, in response to concerns raised by the California Department of Insurance that the bill may weaken existing consumer protections for vehicle service contracts, Senate amendments exclude vehicle service contracts from the auto-renewal provisions of the bill.

According to 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 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. In addition, many consumers purchase service contracts in connection with services provided on a month-to-month or continuous until cancelled basis. [...] 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.

AB 1221 would allow service contracts or consumer warranties to cover a class of products as well as explicitly allowing these contracts to be offered month-to-month and/or "continuous until cancelled" subject to the specific disclosure requirement.

Arguments in Support

Service Contract Industry Council, the sponsors of this bill, argue:

AB 1221 is focused on the outdated language 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.

In addition, AB 1221 provides clarity as to the permissibility of month-to-month and/or continuous until cancelled service contracts in California. Many 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 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.

Arguments in Opposition

Consumer Federation of California argues:

Many consumers have been unfairly taken advantage of by companies offering free trials or monthly services that automatically renew without the consumers knowledge. These consumers often do not notice that they are being charged until it is too late, once their bank accounts have been repeatedly charged or even completely drained.

[CFC] opposes extending these same kinds of auto-renewal contracts into the service contract space by allowing contracts to continue until cancelled by the consumer. [...] While AB 1221 does specify that companies must disclose to consumers if a service contract will continue until cancelled, [under] the bill's current definition, companies can simply make the disclosure in a larger type than surrounding text. This will allow companies to bury the disclosure in long contracts and simply increase that sections type by one point (7-point type to 8-point type), which could be nearly imperceptible but arguably fulfill the requirements of the bill. We believe that this will lead to consumers overlooking the disclosure simply giving their consent without fully understanding the implications.

FISCAL COMMENTS

According to the Senate Appropriations Committee, unknown, potentially significant workload cost pressures to the courts to adjudicate alleged violations of this measure and unknown workload cost pressures to the Department of Justice to enforce the provisions of this measure.

VOTES:**ASM PRIVACY AND CONSUMER PROTECTION: 11-0-0**

YES: Chau, Kiley, Bauer-Kahan, Bennett, Carrillo, Cunningham, Gabriel, Gallagher, Irwin, Lee, Wicks

ASM JUDICIARY: 11-0-0

YES: Stone, Gallagher, Chau, Chiu, Davies, Lorena Gonzalez, Holden, Kalra, Kiley, Maienschein, Reyes

ASM APPROPRIATIONS: 15-0-1

YES: Lorena Gonzalez, Bigelow, Calderon, Carrillo, Chau, Megan Dahle, Davies, Fong, Gabriel, Levine, Quirk, Robert Rivas, Akilah Weber, Holden, Luz Rivas

ABS, ABST OR NV: Eduardo Garcia

ASSEMBLY FLOOR: 75-0-3

YES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bigelow, Bloom, Boerner Horvath, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Choi, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Davies, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kiley, Lackey, Lee, Levine, Low, Mathis, Mayes, McCarty, Medina, Muratsuchi, Nazarian, Nguyen, O'Donnell, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Seyarto, Smith, Stone, Ting, Valladares, Villapudua, Voepel, Waldron, Ward, Akilah Weber, Wicks, Wood

ABS, ABST OR NV: Maienschein, Mullin, Rendon

SENATE FLOOR: 38-0-2

YES: Allen, Archuleta, Atkins, Bates, Becker, Borgeas, Bradford, Caballero, Cortese, Dahle, Dodd, Durazo, Glazer, Gonzalez, Grove, Hertzberg, Hueso, Hurtado, Jones, Kamlager, Laird, Leyva, Limón, McGuire, Melendez, Min, Newman, Nielsen, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Umberg, Wieckowski, Wiener, Wilk

ABS, ABST OR NV: Eggman, Stern

UPDATED

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