

SERVICE CONTRACTS MODEL ACT

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Section 1. Scope and Purposes

A. The purposes of this Act are to:

- (1) Create a legal framework within which service contracts may be sold in this state;
- (2) Encourage innovation in the marketing and development of more economical and effective means of providing services under service contracts, while placing the risk of innovation on the providers rather than on consumers; and
- (3) Permit and encourage fair and effective competition among different systems of providing and paying for these services.

Drafting Note: This model assumes that service contracts are exempt from the insurance code.

B. This Act shall not apply to:

- (1) Warranties;
- (2) Maintenance agreements;
- (3) Commercial transactions;
- (4) Warranties, service contracts or maintenance agreements offered by public utilities on their transmission devices to the extent they are regulated by [insert name of the state agency that regulates public utilities]; and
- (5) Service contracts sold or offered for sale to persons other than consumers.

C. Manufacturer's service contracts on the manufacturer's products need only comply with Sections 5A, 5D to 5N, 6 and 10, as applicable, of this Act.

Drafting Note: States should determine whether to totally exempt manufacturers' service contracts from this Act.

D. This Act shall not apply to service contracts:

- (1) Paid for with separate and additional consideration;
- (2) Issued at the point of sale, or within sixty (60) days of the original purchase date of the property; and
- (3) Where the tangible property has a purchase price of \$[insert monetary threshold] or less, exclusive of sales tax.

Section 2. Definitions

As used in this Act:

- A. “Administrator” means the person who is responsible for the administration of the service contracts or the service contracts plan and who is responsible for any filings required by the Act.
- B. “Commissioner” means the commissioner of insurance of this state.

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term “commissioner” appears.

- C. “Consumer” means a natural person who buys other than for purposes of resale any tangible personal property that is distributed in commerce and that is normally used for personal, family or household purposes and not for business or research purposes.
- D. “Maintenance agreement” means a contract of limited duration that provides for scheduled maintenance only.
- E. “Manufacturer” means a person that:
 - (1) Manufactures or produces the property and sells the property under its own name or label;
 - (2) Is a wholly owned subsidiary of the person who manufactures or produces the property;
 - (3) Is a corporation which owns 100 percent of the person who manufactures or produces the property;
 - (4) Does not manufacture or produce the property, but the property is sold under its trade name label;
 - (5) Manufactures or produces the property and the property is sold under the trade name or label of another person; or
 - (6) Does not manufacture or produce the property but, pursuant to a written contract, licenses the use of its trade name or label to another person that sells the property under the licensor’s trade name or label.
- F. “Mechanical breakdown insurance” means a policy, contract or agreement issued by an authorized insurer that provides for the repair, replacement or maintenance of property or indemnification for repair, replacement or service, for the operational or structural failure of the property due to a defect in materials or workmanship or to normal wear and tear.
- G. “Non-original manufacturer’s parts” means replacement parts not made for or by the original manufacturer of the property, commonly referred to as “after market parts.”
- H. “Person” means an individual, partnership, corporation, incorporated or unincorporated association, joint stock company, reciprocal, syndicate or any similar entity or combination of entities acting in concert.
- I. “Premium” means the consideration paid to an insurer for a reimbursement insurance policy.
- J. “Provider” means a person who administers, issues, makes, provides, sells or offers to sell a service contract, or who is contractually obligated to provide service under a service contract such as sellers, administrators and other intermediaries.
- K. “Provider fee” means the consideration paid for a service contract in excess of the premium.
- L. “Reimbursement insurance policy” means a policy of insurance issued to a provider and pursuant to which the insurer agrees, for the benefit of the service contract holders, to discharge all of the obligations and liabilities of the provider under the terms of the service contracts in the event of non-performance by the provider. “All obligations and liabilities” include, but are not limited to, failure of the provider to perform

under the service contract and the return of the unearned provider fee in the event of the provider's unwillingness or inability to reimburse the unearned provider fee in the event of termination of a service contract.

- M. "Service contract" means a contract or agreement for a separately stated consideration or for a specific duration to perform the repair, replacement or maintenance of property or indemnification for repair, replacement or maintenance, for the operational or structural failure due to a defect in materials, workmanship or normal wear and tear, with or without additional provision for incidental payment of indemnity under limited circumstances, including, but not limited to, towing, rental and emergency road service, but does not include mechanical breakdown insurance or maintenance agreements.
- N. "Service contract holder" or "contract holder" means a person who is the purchaser or holder of a service contract.
- O. "Warranty" means a warranty made solely by the manufacturer, importer or seller of property or services without charge, that is not negotiated or separated from the sale of the product and is incidental to the sale of the product, that guarantees indemnity for defective parts, mechanical or electrical breakdown, labor or other remedial measures, such as repair or replacement of the property or repetition of services.

Section 3. Requirements For Doing Business

- A. Service contracts shall not be issued, sold or offered for sale in this state unless the administrator or its designee has:
 - (1) Provided a receipt for the purchase of the service contract to the contract holder;
 - (2) Provided a copy of the service contract to the service contract holder within a reasonable period of time from the date of purchase; and,
 - (3) Complied with this Act.
- B. All administrators of service contracts sold in this state shall file a registration with the commissioner on a form, at a fee and at a frequency prescribed by the commissioner.
- C. In order to assure the faithful performance of a provider's obligations to its contract holders, each provider who is contractually obligated to provide service under a service contract shall:
 - (1) Insure all service contracts under a reimbursement insurance policy issued by an insurer authorized to transact insurance in this state or issued pursuant to [insert code section permitting surplus lines business] or;
 - (2)
 - (a) Maintain a funded reserve account for its obligations under its contracts issued and outstanding in this state. The reserves shall not be less than forty percent (40%) of gross consideration received, less claims paid, on the sale of the service contract for all in-force contracts. The reserve account shall be subject to examination and review by the commissioner; and
 - (b) Place in trust with the commissioner a financial security deposit, having a value of not less than five percent (5%) of the gross consideration received, less claims paid, on the sale of the service contract for all service contracts issued and in force, but not less than \$25,000, consisting of one of the following:
 - (i) A surety bond issued by an authorized surety;
 - (ii) Securities of the type eligible for deposit by authorized insurers in this state;
 - (iii) Cash;
 - (iv) A letter of credit issued by a qualified financial institution; or

- (v) Another form of security prescribed by regulations issued by the commissioner;
or

Drafting Note: States allowing a letter of credit to serve as security should adopt a definition of “qualified financial institution.” The definition in Section 4 of the Model Law on Credit for Reinsurance is the appropriate definition.

- (3) (a) Maintain a net worth of \$100 million; and
 - (b) Upon request, provide the Commissioner with a copy of the provider’s or, if the provider’s financial statements are consolidated with those of its parent company, the provider’s parent company’s most recent Form 10-K filed with the Securities and Exchange Commission (SEC) within the last calendar year, or if the company does not file with the SEC, a copy of the company’s audited financial statements, which shows a net worth of the provider or its parent company of at least \$100 million. If the provider’s parent company’s Form 10-K or audited financial statements are filed to meet the provider’s financial stability requirement, then the parent company shall agree to guarantee the obligations of the obligor relating to service contracts sold by the provider in this state.
- D. Premium Taxes:
- (1) Provider fees collected on service contracts shall not be subject to premium taxes.
 - (2) Premiums for reimbursement insurance policies shall be subject to applicable taxes.
- E. Except for the registration requirement in Section 3B, persons marketing, selling or offering to sell service contracts for providers that comply with this Act are exempt from this state’s licensing requirements.
- F. Providers complying with this Act are not required to comply with other provisions of Chapter [cite rate regulation and other applicable state insurance statutes], except as specifically provided.

Section 4. Required Disclosures—Reimbursement Insurance Policy

Reimbursement insurance policies insuring service contracts issued, sold or offered for sale in this state shall conspicuously state that, upon failure of the provider to perform under the contract, such as failure to return the unearned provider fee, the insurer that issued the policy shall pay on behalf of the provider any sums the provider is legally obligated to pay or shall provide the service which the provider is legally obligated to perform according to the provider’s contractual obligations under the service contracts issued or sold by the provider.

Section 5. Required Disclosures—Service Contracts

- A. Service contracts issued, sold or offered for sale in this state shall be written in clear, understandable language and the entire contract shall be printed or typed in easy to read ten point type or larger and conspicuously disclose the requirements in this section, as applicable.
- B. Service contracts insured under a reimbursement insurance policy pursuant to Section 3C(1) of this Act shall contain a statement in substantially the following form: “Obligations of the provider under this service contract are guaranteed under a service contract reimbursement insurance policy. If the provider fails to pay or provide service on a claim within sixty (60) days after proof of loss has been filed, the contract holder is entitled to make a claim directly against the insurance company.” A claim against the provider shall also include a claim for return of the unearned provider fee. The service contract shall also conspicuously state the name and address of the insurer.
- C. Service contracts not insured under a reimbursement insurance policy pursuant to Section 3C(1) of this Act shall contain a statement in substantially the following form: “Obligations of the provider under this service contract are backed only by the full faith and credit of the provider (issuer) and are not guaranteed under a service contract reimbursement insurance policy.” A claim against the provider shall also include a claim for return of the unearned provider fee. The service contract shall also conspicuously state the name and address of the provider.

- D. Service contracts shall identify any administrator, the provider obligated to perform the service under the contract, the service contract seller, and the service contract holder to the extent that the name and address of the service contract holder has been furnished by the service contract holder.
- E. Service contracts shall conspicuously state the total purchase price and the terms under which the service contract is sold. The purchase price is not required to be pre-printed on the service contract and may be negotiated at the time of sale with the service contract holder.
- F. If prior approval of repair work is required, the service contracts shall conspicuously state the procedure for obtaining prior approval and for making a claim, including a toll-free telephone number for claim service and a procedure for obtaining emergency repairs performed outside of normal business hours.
- G. Service contracts shall conspicuously state the existence of any deductible amount.
- H. Service contracts shall specify the merchandise and services to be provided and any limitations, exceptions or exclusions.
- I. Service contracts shall state the conditions upon which the use of non-original manufacturers' parts, or substitute service, may be allowed. Conditions stated shall comply with applicable state and federal laws.
- J. Service contracts shall state any terms, restrictions or conditions governing the transferability of the service contract.
- K. Service contracts shall state the terms, restrictions or conditions governing termination of the service contract by the service contract holder. The provider of the service contract shall mail a written notice to the contract holder within fifteen (15) days of the date of termination.
- L. Service contracts shall require every provider to permit the service contract holder to return the contract within at least twenty (20) days of the date of mailing of the service contract or within at least ten (10) days if the service contract is delivered at the time of sale or within a longer time period permitted under the contract. If no claim has been made under the contract, the contract is void and the provider shall refund to the contract holder the full purchase price of the contract. A ten percent (10%) penalty per month shall be added to a refund that is not paid within thirty (30) days of return of the contract to the provider. The applicable free-look time periods on service contracts shall only apply to the original service contract purchaser.
- M. Service contracts shall set forth all of the obligations and duties of the service contract holder, such as the duty to protect against any further damage and the requirement for certain service and maintenance.
- N. Service contracts shall clearly state whether or not the service contract provides for or excludes consequential damages or preexisting conditions.

Section 6. Prohibited Acts

- A. A provider shall not use in its name the words insurance, casualty, guaranty, surety, mutual or any other words descriptive of the insurance, casualty, guaranty or surety business; or a name deceptively similar to the name or description of any insurance or surety corporation, or any other provider. This section shall not apply to a company that was using any of the prohibited language in its name prior to the effective date of this Act. However, a company using the prohibited language in its name shall conspicuously disclose in its service contracts a statement in substantially the following: "This agreement is not an insurance contract."
- B. A provider or its representative shall not in its service contracts or literature make, permit or cause to be made any false or misleading statement, or deliberately omit any material statement that would be considered misleading if omitted, in connection with the sale, offer to sell or advertisement of a service contract.
- C. A person, such as a bank, savings and loan association, lending institution, manufacturer or seller of any product, shall not require the purchase of a service contract as a condition of a loan or a condition for the sale of any property.

Section 7. Recordkeeping Requirements

- A. Books and Records:
- (1) An administrator shall keep accurate accounts, books and records concerning transactions regulated under this Act.
 - (2) An administrator's accounts, books, and records shall include:
 - (a) Copies of each type of service contract issued;
 - (b) The name and address of each service contract holder to the extent that the name and address have been furnished by the service contract holder;
 - (c) A list of the provider locations where service contracts are marketed, sold or offered for sale; and
 - (d) Claims files which shall contain at least the dates, amounts and description of all receipts, claims and expenditures related to the service contracts.
 - (3) Except as provided in Section 7B, an administrator shall retain all records pertaining to each service contract holder for at least three (3) years after the specified period of coverage has expired.
 - (4) An administrator may keep all records required under this Act on a computer disk or other similar technology. If an administrator maintains records in other than hard copy, records shall be accessible from a computer terminal available to the commissioner and be capable of duplication to legible hard copy.
- B. An administrator discontinuing business in this state shall maintain its records until it furnishes the commissioner satisfactory proof that it has discharged all obligations to contract holders in this state.
- C. An administrator shall make all accounts, books and records concerning transactions regulated under this Act or other pertinent laws available to the commissioner upon request.

Section 8. Termination of Reimbursement Insurance Policy

As applicable, an insurer that issued a reimbursement insurance policy shall not terminate the policy until a notice of termination in accordance with [insert citation to the law that governs the termination of insurance contracts] has been mailed or delivered to the commissioner. The termination of a reimbursement insurance policy shall not reduce the issuer's responsibility for service contracts issued by providers prior to the date of the termination.

Section 9. Obligation of Reimbursement Insurance Policy Insurers

- A. Providers are considered to be the agent of the insurer which issued the reimbursement insurance policy for purposes of [insert citation to the law that obligates an insurer for the acts of its agents, including the collection of moneys not forwarded]. In cases where a provider is acting as an administrator and enlists other providers, the provider acting as the administrator shall notify the insurer of the existence and identities of the other providers.
- B. This Act shall not prevent or limit the right of an insurer which issued a reimbursement insurance policy to seek indemnification or subrogation against a provider if the issuer pays or is obligated to pay the service contract holder sums that the provider was obligated to pay pursuant to the provisions of the service contract or under a contractual agreement.

Section 10. Enforcement Provisions

- A. The commissioner may conduct investigations or examinations of providers, administrators, insurers or other persons to enforce the provisions of this Act and protect service contract holders in this state.

- B. The commissioner may take action which is necessary or appropriate to enforce the provisions of this Act and the commissioner's regulations and orders, and to protect service contract holders in this state.
- (1) The commissioner may order a service contract provider to cease and desist from committing violations of this Act or the commissioner's regulations or orders, may issue an order prohibiting a service contract provider from selling or offering for sale service contracts, or may issue an order imposing a civil penalty, or any combination of these, if the provider has violated this Act or the commissioner's regulations or orders.
 - (a) A person aggrieved by an order issued under this paragraph may request a hearing before the commissioner. The hearing request shall be filed with the commissioner within [20] days of the date the commissioner's order is effective;
 - (b) Pending the hearing and the decision by the commissioner, the commissioner shall suspend the effective date of the order; and
 - (c) At the hearing, the burden shall be on the commissioner to show why the order issued pursuant to this paragraph is justified. The provisions of [insert citation to statutes concerning hearings before the commissioner] shall apply to a hearing requested under this paragraph.
 - (2) The commissioner may bring an action in [insert court] Court for an injunction or other appropriate relief to enjoin threatened or existing violations of this Act or of the commissioner's orders or regulations. An action filed under this paragraph may also seek restitution on behalf of persons aggrieved by a violation of this Act or orders or regulations of the commissioner.
 - (3) A person in violation of this Act or orders or regulation of the commissioner may be assessed a civil penalty not to exceed \$[insert amount] per violation.
- C. The authority of the commissioner under this section is in addition to other authority of the commissioner.

Drafting Note: It is recommended that states review the enforcement procedures in their insurance laws and administrative procedure laws to ensure that adequate enforcement provisions are in place.

Section 11. Authority to Develop Regulations

The commissioner may promulgate regulations necessary to effectuate this Act.

Section 12. Separability Provision

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

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

1995 Proc. 4th Quarter 11, 33, 998, 1027-1033 (adopted).