

BILL ANALYSIS

Senate Research Center

S.B. 778
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Business & Commerce
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The rise in identity theft has prompted many companies to sell noninsurance services to help a consumer prevent or minimize the consumer's risk of identity theft, and if identity theft occurs, to recover the consumer's identity. Some of these services are designed to be sold to consumers and financed into an auto loan when a vehicle is purchased.

Currently, these services are not regulated and it is not sufficiently clear that they can be financed as part of certain car loans.

S.B. 778 requires that certain identity theft prevention and recovery services be under the jurisdiction of the Texas Department of Licensing and Regulation pursuant to its existing authority to regulate service contracts, also known as extended warranties, and vehicle protection products. The bill authorizes the identity theft prevention and recovery services to be financed as part of certain car loans.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Commission of Licensing and Regulation in SECTION 3 (Sections 1306.054 and 1306.055, Occupations Code) and in SECTION 5 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 348.208(b), Finance Code, to authorize a retail installment contract to include as a separate charge an amount for certain items including an identity recovery service contract defined by Section 1306.003, Occupations Code. Makes a nonsubstantive change.

SECTION 2. Amends Section 1304.003(b), Occupations Code, to authorize a service contract to also provide for identity recovery, as defined by Section 1306.002, if the service contract is financed under Chapter 348 (Motor Vehicle Installment Sales), Finance Code. Makes a nonsubstantive change.

SECTION 3. Amends Title 8, Occupations Code, by adding Chapter 1306, as follows:

CHAPTER 1306. IDENTITY RECOVERY SERVICE CONTRACT PROVIDERS AND ADMINISTRATORS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 1306.001. **SHORT TITLE.** Authorizes this chapter to be cited as the Identity Recovery Service Contract Regulatory Act.

Sec. 1306.002. **DEFINITIONS.** Defines "administrator," "commission," "consumer," "department," "executive director," "identity recovery," "identity recovery service contract holder," "person," "provider," and "reimbursement insurance policy."

Sec. 1306.003. **IDENTITY RECOVERY SERVICE CONTRACT.** Defines "identity recovery service contract."

Sec. 1306.004. CONTROLLING PERSON. (a) Defines "controlling person."

(b) Provides that an individual who is a controlling person of a corporation or other business entity that is the general partner of a limited partnership is a controlling person of the limited partnership.

Sec. 1306.005. EXEMPTIONS. Provides that this chapter does not apply to an identity recovery service contact (contract) sold or offered for sale to a person who is not a consumer or a contract sold by a motor vehicle dealer on a motor vehicle sold by that dealer, if the dealer is the provider, is licensed as a motor vehicle dealer under Chapter 2301 (Sale or Lease of Motor Vehicles), and covers its obligations under the contract with a reimbursement insurance policy.

Sec. 1306.006. EXEMPTIONS FROM CERTAIN OTHER LAWS. Exempts marketing, selling, offering for sale, issuing, making, proposing to make, and administering a contract from the Insurance Code and other laws of this state regulating the business of insurance.

Sec. 1306.007. PURCHASE REQUIREMENT PROHIBITED. Prohibits a person regulated by Chapter 2301 from requiring the purchase of a contract as a condition of a loan or the sale of a vehicle.

Sec. 1306.008. GENERAL INVESTIGATIVE POWER OF EXECUTIVE DIRECTOR. (a) Authorizes the executive director of the Texas Department of Licensing and Regulation (executive director) to investigate a provider, administrator, or other person as necessary to enforce this chapter and protect contract holders in this state.

(b) Requires a provider, on request of the executive director, to make the records required by Section 1306.105 available to the executive director as necessary to enable the executive director to reasonably determine compliance with this chapter.

[Reserves Sections 1306.009-1306.050 for expansion.]

SUBCHAPTER B. REGISTRATION REQUIREMENTS

Sec. 1306.051. REGISTRATION REQUIRED; EXEMPTION FROM OTHER LICENSING REQUIREMENTS. (a) Prohibits a person from operating as a provider or administrator of contracts sold in this state unless the person is registered with the Texas Department of Licensing and Regulation (TDLR).

(b) Exempts a provider, contract seller, administrator, or other person who markets, sells, or offers to sell contracts, except for the registration requirement of this subchapter, from any licensing requirement of this state that relates to an activity regulated under this chapter.

(c) Provides that if a person registered under Chapter 1304 (Service Contract Providers and Administrators) registers under Chapter 1306, the financial security used to comply with Section 1304.151 (Financial Security Requirements) fulfills the requirements of Section 1306.101.

Sec. 1306.052. APPLICATION FOR REGISTRATION OR RENEWAL; GENERAL REQUIREMENTS. (a) Requires an applicant for registration or registration renewal to submit an application to the executive director.

(b) Requires that the application be in the form prescribed by the executive director and include evidence satisfactory to the executive director of compliance with the applicable financial security requirements prescribed by Section 1306.101, if the application is for a provider registration or renewal.

(c) Authorizes TDLR to refuse to issue or renew a registration if the applicant or a controlling person of the applicant has violated this chapter or a rule adopted or order issued by the Texas Commission of Licensing and Regulation (TCLR) or executive director.

(d) Provides that a person who makes a false statement in an application or in any document provided with an application is subject to disciplinary action under Subchapter D, including denial of the application or suspension or revocation of a registration.

Sec. 1306.053. **ADDITIONAL REGISTRATION AND RENEWAL REQUIREMENTS FOR PROVIDERS.** (a) Requires an applicant for issuance or renewal of a provider registration, in addition to the requirements of Section 1306.052, to file with the application the reimbursement insurance policy required by Section 1306.102, if the provider is using a reimbursement insurance policy; and a biographical affidavit, in a form prescribed by the executive director, for each controlling person of the provider.

(b) Prohibits the executive director from issuing or renewing a registration to a provider unless the provider provides evidence to the executive director that each controlling person of the provider is trustworthy and can competently manage the affairs of the provider in compliance with this chapter, and the provider can meet the provider's obligations under contracts and this chapter.

Sec. 1306.054. **FEES.** (a) Requires a provider, as prescribed by this section, to pay annual registration and renewal fees and quarterly fees based on the number of contracts sold or issued and in force in this state. Requires an administrator, as prescribed by this section, to pay annual registration and renewal fees.

(b) Requires a provider or administrator, to register or renew a registration, to pay the appropriate fee. Requires TCLR to set by rule the amounts of the registration and renewal fees required to cover the costs of administering this chapter.

(c) Requires a provider, not later than the 30th day after the date each calendar quarter ends, to report to TDLR the number of contracts sold or issued to consumers in this state during the calendar quarter and submit to TDLR a fee equal to \$1 for each of those contracts.

(d) Provides that the information concerning the number of contracts sold or issued by a provider that is submitted under Subsection (c) is a trade secret to which Section 522.110 (Exception: Trade Secrets; Certain Commercial or Financial Information), Government Code, applies; and is authorized to be used only by the executive director and TDLR for the purposes of this section.

(e) Requires TCLR to adopt rules to implement this section.

Sec. 1306.055. **RENEWAL.** Requires TCLR to adopt rules regarding the renewal of a registration issued under this chapter.

[Reserves Sections 1306.056-1306.100 for expansion.]

SUBCHAPTER C. PRACTICE BY IDENTITY RECOVERY SERVICE CONTRACT PROVIDERS AND ADMINISTRATORS

Sec. 1306.101. **FINANCIAL SECURITY REQUIREMENTS.** (a) Requires each provider, to ensure the faithful performance of a provider's obligations to its contract holders, to:

(1) insure the provider's contracts under a reimbursement insurance policy issued by an insurer authorized to transact insurance in this state or by a surplus lines insurer eligible to place coverage in this state under Chapter 981 (Surplus Lines Insurance), Insurance Code;

(2) maintain a funded reserve account covering the provider's obligations under its contracts that are issued and outstanding in this state and place in trust with the executive director a financial security deposit consisting of a surety bond issued by an authorized surety, securities of the type eligible for deposit by an authorized insurer in this state, a statutory deposit of cash or cash equivalents, a letter of credit issued by a qualified financial institution, or another form of security prescribed by rules adopted by the commission; or

(3) maintain, or have a parent company that maintains, a net worth or stockholders' equity of at least \$100 million.

(b) Prohibits the amount maintained in the reserve account, if the provider ensures its obligations under Subsection (a)(2), from being less than an amount equal to 40 percent of the gross consideration the provider received from consumers from the sale of all contracts issued and outstanding in this state, minus any claims paid. Authorizes the executive director to review and examine the reserve account. Prohibits the amount of the security deposit from being less than the greater of \$25,000 or an amount equal to five percent of the gross consideration the provider received from consumers from the sale of all contracts issued and outstanding in this state, minus any claims paid.

(c) Requires the provider, if the provider ensures its obligations under Subsection (a)(3), to give to the executive director on request a copy of the provider's or the provider's parent company's most recent Form 10-K or Form 20-F filed with the Securities and Exchange Commission (SEC) within the preceding calendar year, or if the provider or the provider's parent company does not file with SEC, a copy of the provider's or the provider's parent company's audited financial statements showing a net worth of the provider or its parent company of at least \$100 million.

(d) Requires the parent company, if the provider's parent company's Form 10-K, Form 20-F, or audited financial statements are filed to show that the provider meets the financial security requirement, to agree to guarantee the obligations of the provider relating to contracts sold by the provider in this state.

(e) Prohibits the executive director from requiring a provider to meet any additional financial security requirement.

Sec. 1306.102. REIMBURSEMENT INSURANCE POLICY. (a) Requires that a reimbursement insurance policy that a provider uses to comply with Sections 1306.053 and 1306.101(a)(1) state that:

(1) the insurer that issued the policy is required to reimburse or pay on behalf of the provider any covered amount the provider is legally obligated to pay, or provide the service that the provider is legally obligated to perform according to the provider's contractual obligations under the contract;

(2) the insurer is required, if the covered service is not provided to a contract holder before the 61st day after the date of proof of loss, to pay the covered amount directly to the contract holder or provide the required service; and

(3) the insurer is required, after receiving written notice, if a refund is not paid to the contract holder or credited to the holder's account as required by Section 1306.108, to pay the refund amount directly to the contract holder.

(b) Requires the insurer issuing the policy, for a reimbursement insurance policy to comply with Section 1306.101(a)(1), to

(1) maintain surplus as to policyholders and paid-in capital of at least \$15 million and annually file with the executive director copies of the insurer's audited financial statements, National Association of Insurance Commissioners (NAIC) annual statement, and actuarial certification if the certification is required and filed in the insurer's state of domicile; or

(2) maintain surplus as to policyholders and paid-in capital of at least \$10 million but not more than \$15 million, demonstrate to the satisfaction of the executive director that the insurer maintains a ratio of net written premiums, wherever written, to surplus as to policyholders and paid-in capital of not more than three to one, and annually file with the executive director copies of the insurer's audited financial statements, NAIC annual statement, and actuarial certification if the certification is required and filed in the insurer's state of domicile.

(c) Prohibits the insurer from canceling the reimbursement insurance policy until the insurer delivers to the provider and the executive director a written notice of cancellation that complies with the notice requirements prescribed by Subchapters B (Cancellation and Nonrenewal of Certain Liability Insurance Policies) and C (Declination, Cancellation, and Nonrenewal of Certain Property and Casualty Policies), Chapter 551 (Practices Relating to Declination, Cancellation, and Nonrenewal of Insurance Policies), Insurance Code, for cancellation of an insurance policy under those subchapters. Provides that cancellation of the policy does not affect the insurer's liability for a contract issued by the provider and insured under the policy before the effective date of the cancellation.

(d) Prohibits the provider named on the policy, if the insurer or provider cancels the reimbursement insurance policy, from issuing a new contract after the effective date of the cancellation unless the provider files with the executive director a copy of a new policy that meets the requirements of this section and that provides coverage after that date, or the provider complies with other financial security requirements provided by Section 1306.101(a).

(e) Provides that a provider is considered the agent of an insurer that issues a reimbursement insurance policy for purposes of obligating the insurer to the contract holder in accordance with the contract and this chapter. Provides that the insurer issuing the reimbursement insurance policy is considered to have received the premium for the policy on the date the contract holder pays the purchase price of the contract.

(f) Provides that this chapter does not prevent or limit the right of the insurer to seek indemnification or subrogation against a provider for any amount the insurer pays or is obligated to pay to a contract holder on behalf of the provider.

(g) Defines "net written premiums."

Sec. 1306.103. APPOINTMENT AND RESPONSIBILITIES OF ADMINISTRATOR.

(a) Authorizes a provider to appoint an administrator registered under this chapter to be responsible for all or any part of the administration or sale of contracts, and compliance with this chapter, except for Section 1306.101.

(b) Provides that the appointment of an administrator under this section does not affect a provider's responsibility to comply with this chapter.

Sec. 1306.104. PROVIDER REQUIREMENTS. Prohibits a provider from selling, offering for sale, or issuing a contract in this state unless the provider gives the contract holder a receipt for, or other written evidence of, the purchase of the contract and a copy of the contract within a reasonable period after the date of purchase.

Sec. 1306.105. PROVIDER RECORDS. (a) Requires a provider to maintain accurate accounts, books, and other records regarding transactions regulated under this chapter. Requires that the provider's records include a copy of each unique form of contract sold; the name and address of each contract holder who provided the holder's name and address; a list of each location at which the provider's contracts are marketed, sold, or offered for sale; and written claims files that contain at least the date and description of each claim related to the contracts.

(b) Authorizes the records required by this section to be maintained in an electronic medium or through other recordkeeping technology. Requires that the provider, if a record is not in a hard copy, to be able to reformat the record into a legible hard copy at the request of the executive director.

(c) Requires a provider, except as provided by Subsection (d), to retain the records required by this section until at least the first anniversary of the expiration date of the specified period of coverage under the contract.

(d) Requires a provider that discontinues business in this state to retain its records until the provider furnishes the executive director with proof satisfactory to the executive director that the provider has discharged all obligations to contract holders in this state.

(e) Provides that an administrator appointed to maintain the provider's records is responsible for compliance with this section to the same extent as the provider.

Sec. 1306.106. FORM OF IDENTITY RECOVERY SERVICE CONTRACT AND REQUIRED DISCLOSURES. (a) Requires that a contract marketed, sold, offered for sale, issued, made, proposed to be made, or administered in this state:

(1) be written, printed, or typed in clear, understandable language that is easy to read;

(2) state the number and address of the provider;

(3) state the purchase price of the contract and the terms under which the contract is sold;

(4) state the terms and restrictions governing cancellation of the contract by the provider or the contract holder before the expiration date of the contract;

(5) identify any administrator, the contract seller, and the contract holder, if the contract holder provides the holder's name;

(6) state the amount of any deductible;

(7) specify the services to be provided under the contract and any limitation, exception, or exclusion;

(8) specify any restriction governing the transferability of the contract; and

(9) state the duties of the contract holder, including any duty to protect against any further damage and any requirement to follow the instructions in the contract.

(b) Provides that the identity of a person described by Subsection (a)(5) is not required to be preprinted on the contract and is authorized to be added to the contract at the time of sale.

(c) Provides that the purchase price is not required to be preprinted on the contract and is authorized to be negotiated with the contract holder at the time of sale.

(d) Requires that a contract insured under a reimbursement policy under Section 1306.102 state the name and address of the insurer, state that the contract holder is authorized to apply for reimbursement directly to the insurer under certain circumstances, and contain a statement substantially similar to the following: "Obligations of the provider under this identity recovery service contract are insured under an identity recovery service contract reimbursement insurance policy."

(e) Requires that a contract that is not insured under a reimbursement insurance policy contain a statement substantially similar to the following: "Obligations of the provider under the identity recovery service contract are backed by the full faith and credit of the provider."

Sec. 1306.107. RETURNING AN IDENTITY RECOVERY SERVICE CONTRACT. Requires that a contract require the provider to allow the contract holder to return the contract to the provider not later than the 20th day after the date the contract is mailed to the contract holder, or the 10th day after the date of delivery, if the contract is delivered to the contract holder at the time of sale.

Sec. 1306.108. VOIDING AN IDENTITY RECOVERY SERVICE CONTRACT. (a) Provides that if a contract holder returns a contract in accordance with Section 1306.107 and a claim has not been made under the contract before the contract is returned, the contract is void.

(b) Authorizes a contract holder to void the contract at a later time as provided by the contract.

(c) Requires the provider, if a contract is voided under Subsection (a), to refund to the contract holder or credit to the account of the contract holder the full purchase price of the contract. Provides that if the provider does not pay the refund or credit the contract holder's account before the 46th day after the date the contract is returned to the provider, the provider is liable to the contract holder for a penalty each month an amount remains outstanding. Prohibits the monthly penalty from exceeding 10 percent of the amount outstanding.

(d) Provides that the right to void a contract is not transferable.

Sec. 1306.109. CANCELING AN IDENTITY RECOVERY SERVICE CONTRACT. (a) Authorizes a provider to cancel a contract by mailing a written notice of cancellation to the contract holder at the contract holder's last known address according to the records of the provider. Requires the provider to mail the notice before the fifth day preceding the effective date of the cancellation. Requires that the notice state the effective date of the cancellation and the reason for the cancellation.

(b) Provides that the provider is not required to provide prior notice of cancellation if the contract is canceled because of nonpayment of the consideration for the contract, a material misrepresentation by the contract holder to the provider, or a substantial breach of a duty by the contract holder.

Sec. 1306.110. LIMITATIONS ON PROVIDER NAME. (a) Prohibits a provider from using a name that includes "insurance," "casualty," "surety," or "mutual" or any other word descriptive of the insurance, casualty, or surety business or is deceptively similar to the name or description of an insurance or surety corporation or to the name of any other provider.

(b) Authorizes a provider to include in its name "guaranty" or a similar word.

(c) Provides that this section does not apply to a provider that, before September 1, 2009, included a word prohibited under this section in its name. Requires a provider described by this subsection to include in each contract a statement substantially similar to the following: "This agreement is not an insurance contract."

Sec. 1306.111. MISLEADING STATEMENTS PROHIBITED. Prohibits a provider or the provider's representative from, in the provider's contracts or literature making, permitting, or causing to be made any false or misleading statement or deliberately omitting a material statement if the omission would be considered misleading.

[Reserves Sections 1306.112-1306.150 for expansion.]

SUBCHAPTER D. DISCIPLINARY ACTION

Sec. 1306.151. DISCIPLINARY ACTION. Authorizes TCLR, on a finding that a ground for disciplinary action exists under this chapter, to impose an administrative sanction, including an administrative penalty as provided by Subchapter F (Administrative Penalty), Chapter 51 (Texas Department of Licensing and Regulation).

Sec. 1306.152. INJUNCTIVE RELIEF; CIVIL PENALTY. (a) Authorizes the executive director to institute an action under Section 51.352 (Injunctive Relief; Civil Penalty) for injunctive relief to restrain a violation or a threatened violation of this chapter or an order issued or rule adopted under this chapter.

(b) Authorizes the executive director, in addition to the injunctive relief provided by Subsection (a), to institute an action for a civil penalty as provided by Section 51.352. Prohibits the amount of a civil penalty assessed under this section from exceeding \$2,500 for each violation or \$50,000 in the aggregate for all violations of a similar nature.

Sec. 1306.153. MULTIPLE VIOLATIONS. Provides that for purposes of this subchapter, violations are of a similar nature if the violations consist of the same or a similar course of conduct, action, or practice, regardless of the number of times the conduct, act, or practice occurred.

Sec. 1306.154. ADMINISTRATIVE PROCEDURE. Provides that Sections 51.305 (Hearing on Recommendations), 51.310 (Administrative Procedure), and 51.354 (Right to Hearing; Administrative) apply to disciplinary action taken under this chapter.

SECTION 4. Amends Section 2306.003, Occupations Code, by adding Subsection (c) to authorize a vehicle protection product to also include identity recovery, as defined by Section 1306.002, if the vehicle protection product is financed under Chapter 348, Finance Code.

SECTION 5. (a) Makes application of this Act prospective to January 1, 2010.

(b) Requires TCLR, not later than November 1, 2009, to adopt rules to implement Chapter 1306, Occupations Code, as added by this Act.

SECTION 6. (a) Effective date, except as provided by Subsection (b) of this section: September 1, 2009.

(b) Effective date, Section 1306.051 and Subchapter D, Chapter 1306, Occupations Code, as added by this Act: January 1, 2010.