

STATE OF NEW YORK

618--B

2017-2018 Regular Sessions

IN SENATE

January 4, 2017

Introduced by Sens. BOYLE, ADDABBO, AKSHAR, AVELLA, BAILEY, CARLUCCI, CROCI, DILAN, HAMILTON, KAMINSKY, MURPHY, PERALTA, PERSAUD, ROBACH -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to the sale of digital electronic equipment diagnostic and repair information

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "fair repair act".

3 § 2. The general business law is amended by adding a new section 399-
4 nn to read as follows:

5 § 399-nn. Sale of digital electronic equipment diagnostic and repair
6 information. 1. Definitions. For the purposes of this section, the
7 following terms shall have the following meanings:

8 (a) "Original equipment manufacturer" or "OEM" means any person or
9 business who, in the ordinary course of its business, is engaged in the
10 business of selling or leasing new digital electronic equipment or parts
11 of equipment to any person or business and is engaged in the diagnosis,
12 service, maintenance or repair of digital electronic equipment or parts
13 of such equipment.

14 (b) "Authorized repair provider" means (i) a person or business that
15 has an arrangement with an OEM for a definite or indefinite period in
16 which the OEM grants to a person or business license to use a trade
17 name, service mark or related characteristic for the purposes of offer-
18 ing repair services under the name of the OEM, or (ii) a person or busi-
19 ness retained by the OEM to provide refurbishing services for the OEM's
20 product or products.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD05441-05-7

(c) "Independent repair provider" means a person or business operating in the state of New York that is not affiliated with an OEM or an OEM's authorized repair provider, which is engaged in the diagnosis, service, maintenance or repair of equipment; provided, however, that, for the purposes of this section, an OEM shall be considered an independent repair provider for the purposes of those instances when such OEM engages in the diagnosis, service, maintenance or repair of digital equipment that is not affiliated with the OEM.

(d) "Owner" means a person or business who owns or leases a digital electronic product purchased or used in the state of New York.

(e) "Documentation" means any manuals, diagrams, reporting output, or service code descriptions provided to the authorized repair provider for the purposes of effecting repair.

(f) "Digital electronic equipment" or "equipment" means a part or equipment originally manufactured for distribution and sale in the United States.

(g) "Embedded software" means any programmable instructions provided on firmware delivered with the equipment or part for the purposes of equipment operation, including all relevant patches and fixes made by the manufacturer for this purpose, including, but not limited to synonyms "basic internal operating system", "internal operating system", "machine code", "assembly code", "root code", and "microcode".

(h) "Remote diagnostics" means any remote data transfer function between equipment and the provider of repair services including for purposes of remote diagnostics, setting controls, or location identification.

(i) "Service parts" or "parts" means any replacement parts, either new or used, made available by the OEM to the authorized repair provider for the purposes of effecting repair.

(j) "Fair and reasonable terms" means an equitable price in light of relevant factors, including, but not limited to, the following:

(i) the net cost to the authorized repair provider for similar information obtained from an OEM, less any discounts, rebates, or other incentive programs;

(ii) the cost to the OEM for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the product, but including amortized capital costs for the preparation and distribution of the information;

(iii) the price charged by other OEMs for similar information;

(iv) the price charged by OEMs for similar information prior to the launch of OEM web sites;

(v) the ability of aftermarket technicians or shops to afford the information;

(vi) the means by which the information is distributed;

(vii) the extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use; and

(viii) inflation.

(k) "Motor vehicle" means any vehicle that is designed for transporting persons or property on a street or highway and that is certified by the manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States, but excluding (i) a motorcycle; or (ii) a recreational vehicle or an auto home equipped for habitation.

(l) "Motor vehicle manufacturer" means any person or business engaged in the business of manufacturing or assembling new motor vehicles.

1 (m) "Motor vehicle dealer" means any person or business who, in the
2 ordinary course of its business, is engaged in the business of selling
3 or leasing new motor vehicles to a person or business pursuant to a
4 franchise agreement and who has obtained a license, as required under
5 applicable law, and is engaged in the diagnosis, service, maintenance or
6 repair of motor vehicles or motor vehicle engines pursuant to said fran-
7 chise agreement.

8 (n) "Manufacturer of motor vehicle equipment" means a person or busi-
9 ness engaged in the business of manufacturing or supplying components
10 that are used in the manufacture, servicing or repair of a motor vehi-
11 cle.

12 (o) "Medical device" means an instrument, apparatus, implement,
13 machine, contrivance, implant, or other similar or related article,
14 including a component part, or accessory, as defined in the federal
15 Food, Drug and Cosmetic Act, 21 USC, Section 321 (h) as amended from
16 time to time, which is intended for use in the diagnosis of disease or
17 other conditions, or in the cure, mitigation, treatment, or prevention
18 of disease, in man or other animals.

19 2. (a) For equipment and parts sold or used in this state, the OEMs of
20 such equipment and parts shall (i) make available to independent repair
21 providers or owners of products manufactured by such OEM diagnostic and
22 repair information, including repair technical updates, schematic
23 diagrams, updates, corrections to embedded software and safety and secu-
24 rity patches timely, and for no charge or for the same charge and in the
25 same format such OEM makes available to its authorized repair provider;
26 and

27 (ii) make available for purchase by the equipment owner, his or her
28 authorized agent or independent repair provider, parts, inclusive of any
29 updates to the embedded software of the parts, upon fair and reasonable
30 terms. Nothing in this subdivision shall require the OEM to sell parts
31 if the parts are no longer available to the OEM or the authorized repair
32 provider of the OEM.

33 (b) Any OEM that sells any diagnostic, service, or repair information
34 to any independent repair provider or to any owner in a format that is
35 standardized with other OEMs, and on terms and conditions more favorable
36 than the terms and conditions pursuant to which the authorized repair
37 provider obtains the same diagnostic, service or repair information,
38 shall be prohibited from requiring any authorized repair provider to
39 continue purchasing diagnostic, service, or repair information in a
40 proprietary format, unless such proprietary format includes diagnostic,
41 service, or repair operations information or functionality that is not
42 available in such standardized format.

43 (c) Each OEM of equipment sold or used in the state of New York shall
44 make available for purchase by owners and independent repair facilities
45 all diagnostic repair tools incorporating the same diagnostic, repair
46 and remote communications capabilities that such OEM makes available to
47 its own repair or engineering staff or any authorized repair provider.
48 Each OEM shall offer such tools for sale to owners and to independent
49 repair facilities upon fair and reasonable terms.

50 Each OEM that provides diagnostic repair information to aftermarket
51 tool, diagnostics, or third party service information publications and
52 systems shall have fully satisfied its obligations under this section
53 and thereafter not be responsible for the content and functionality of
54 aftermarket diagnostic tools or service information systems.

55 (d) OEM equipment or parts sold or used in the state of New York for
56 the purpose of providing security-related functions may not exclude

diagnostic, service and repair information necessary to reset a security-related electronic function from information provided to owners and independent repair facilities. If excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic module shall be obtained by owners and independent repair facilities through the appropriate secure data release systems.

3. Nothing in this section shall be construed to require an OEM to divulge a trade secret.

4. Notwithstanding any law, rule or regulation to the contrary, no provision in this section shall be read, interpreted or construed to abrogate, interfere with, contradict or alter the terms of any agreement executed and in force between an authorized repair provider and an OEM including, but not limited to, the performance or provision of warranty or recall repair work by an authorized repair provider on behalf of an OEM pursuant to such authorized repair agreement; provided, however, that any provision in such an authorized repair agreement that purports to waive, avoid, restrict or limit an OEM's compliance with this section shall be void and unenforceable.

5. Nothing in this section shall be construed to require OEMs or authorized repair providers to provide an owner or independent repair provider access to non-diagnostic and repair information provided by an OEM to an authorized repair provider pursuant to the terms of an authorizing agreement.

6. Nothing in this section shall apply to motor vehicle manufacturers, any product or service of a motor vehicle manufacturer, manufacturer of motor vehicle equipment, or motor vehicle dealers as defined in this section.

7. Nothing in this section shall require a manufacturer of a medical device as defined in this section to implement any provision of this section that is not permitted under the federal Food, Drug and Cosmetic Act or any other federal law, rule or regulation that supersedes this section.

8. Any independent repair provider that purchases or acquires embedded software or service parts shall, prior to performing any services on digital electronic equipment, notify the owner of such equipment in writing that:

(a) consumers should review the terms and conditions of the warranty for such digital electronic equipment as repairs not performed by an authorized repair provider could affect the terms and conditions of the warranty;

(b) warrantors cannot require that only branded parts be used with the product in order to retain the warranty;

(c) warrantors shall demonstrate that a defect or damage was caused by independent repair to affect the warranty;

(d) warranties are governed by the federal Magnuson-Moss Warranty Act; and

(e) such independent repair provider is not an authorized repair provider for such digital electronic equipment.

9. Beginning in calendar year two thousand twelve, and unless otherwise specified, the provisions of subdivision two of this section shall apply to any equipment and parts sold or used in this state for not less than five years following the last date such equipment and parts were manufactured.

10. The consumer protection division shall develop, establish and implement a public outreach program directed at independent repair providers, consumers and digital electronic original equipment manufac-

1 turers to inform them of their rights and responsibilities pursuant to
2 this section. Such public outreach shall include brochures, consumer
3 guides, posters or any combination thereof and made available to consum-
4 ers and other stakeholders by any means deemed appropriate by such divi-
5 sion and may include internet, radio, and print advertising. The public
6 outreach may also identify and recruit individuals or trade organiza-
7 tions to assist in distributing this information and materials. The
8 public outreach shall begin no later than the thirtieth day after the
9 effective date of this section.

10 11. (a) Whenever the attorney general shall believe from evidence
11 satisfactory to him that any person, firm, corporation or association or
12 agent or employee thereof has engaged in or is about to engage in any of
13 the acts or practices in violation of this section he may bring an
14 action in the name and on behalf of the people of the state of New York
15 to enjoin such unlawful acts or practices and to obtain restitution of
16 any moneys or property obtained directly or indirectly by any such acts
17 or practices in violation of this section. In such action preliminary
18 relief may be granted under article sixty-three of the civil practice
19 law and rules.

20 (b) Before any violation of this section is sought to be enjoined, the
21 attorney general shall be required to give the person against whom such
22 proceeding is contemplated notice by certified mail and an opportunity
23 to show in writing within five business days after receipt of notice why
24 proceedings should not be instituted against him, unless the attorney
25 general shall find, in any case in which he seeks preliminary relief,
26 that to give such notice and opportunity is not in the public interest.

27 (c) In connection with any proposed proceeding under this section, the
28 attorney general is authorized to take proof and make a determination of
29 the relevant facts, and to issue subpoenas in accordance with the civil
30 practice law and rules.

31 (d) This subdivision shall apply to all acts or practices declared to
32 be in violation of this section, whether or not subject to any other law
33 of this state, and shall not supersede, amend or repeal any other law of
34 this state under which the attorney general is authorized to take any
35 action or conduct any inquiry.

36 (e) Any person, firm, corporation or association or agent or employee
37 thereof who engages in any of the acts or practices to be in violation
38 of this section shall be liable to a civil penalty of not more than five
39 hundred dollars for each violation, which shall accrue to the state of
40 New York and may be recovered in a civil action brought by the attorney
41 general.

42 (f) Except in the instance of a dispute arising between an original
43 equipment manufacturer and its authorized repair provider related to
44 either party's compliance with an existing authorized repair agreement,
45 an authorized repair provider shall have all the rights and remedies
46 provided in this section.

47 § 3. This act shall take effect on the sixtieth day after it shall
48 have become a law; provided, however, that subdivision 8 of section
49 399-nn of the general business law, as added by section two of this act
50 shall take effect on the ninetieth day after it shall have become a law.