

STATE OF NEW YORK

618--C

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 -- recommitted to the Committee on Consumer Protection in accordance with Senate Rule 6, sec. 8 -- 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-

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

LBD05441-12-8

1 ing repair services under the name of the OEM, or (ii) a person or busi-
2 ness retained by the OEM to provide refurbishing services for the OEM's
3 product or products.

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

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

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

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

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

26 (h) "Remote diagnostics" means any remote data transfer function
27 between equipment and the provider of repair services including for
28 purposes of remote diagnostics, setting controls, or location identifi-
29 cation.

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

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

35 (i) the net cost to the authorized repair provider for similar infor-
36 mation obtained from an OEM, less any discounts, rebates, or other
37 incentive programs;

38 (ii) the cost to the OEM for preparing and distributing the informa-
39 tion, excluding any research and development costs incurred in designing
40 and implementing, upgrading or altering the product, but including amor-
41 tized capital costs for the preparation and distribution of the informa-
42 tion;

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

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

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

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

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

51 (viii) inflation.

52 (k) "Motor vehicle" means any vehicle that is designed for transport-
53 ing persons or property on a street or highway and that is certified by
54 the manufacturer under all applicable federal safety and emissions stan-
55 dards and requirements for distribution and sale in the United States,

1 but excluding (i) a motorcycle; or (ii) a recreational vehicle or an
2 auto home equipped for habitation.

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

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

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

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

23 (p) "Aftermarket" means any entity that provides service parts, acces-
24 sories, second-hand equipment, tools, or diagnostic support for the care
25 or enhancement of original equipment.

26 2. For equipment and parts sold or used in this state in or after
27 calendar year two thousand twelve, the OEMs of such equipment and parts
28 shall make available to independent repair providers or owners of
29 products manufactured by such OEM in a timely manner:

30 (a) (1) documentation, diagnostic and repair information, including
31 repair technical updates, schematic diagrams, updates, corrections to
32 embedded software and safety and security patches at no cost or for the
33 same cost and in the same format such OEM makes such information and
34 material available to its authorized repair provider; and

35 (2) make available for purchase by the equipment owner, his or her
36 authorized agent or independent repair provider, parts, inclusive of any
37 updates to the embedded software of the parts, upon fair and reasonable
38 terms. Nothing in this subdivision shall require the OEM to sell parts
39 if the parts are no longer available to the OEM or the authorized repair
40 provider of the OEM.

41 (b) Any OEM that sells any diagnostic, service, or repair information
42 shall not require an authorized repair provider to purchase documenta-
43 tion, diagnostic, service, or repair information in proprietary format
44 if such information is sold or provided to any independent repair
45 provider or to any owner in a format that is standardized with other
46 OEMs, on terms and conditions more favorable than the terms and condi-
47 tions pursuant to which the authorized repair provider obtains the same
48 diagnostic, service or repair information, unless such proprietary
49 format includes documentation, diagnostic, service, or repair operations
50 information or functionality that is not available in such standardized
51 format.

52 (c) Each OEM of equipment sold or used in the state of New York shall
53 make available for purchase by owners and independent repair facilities
54 all diagnostic repair tools incorporating the same diagnostic, repair
55 and remote communications capabilities that such OEM makes available to
56 its own repair or engineering staff or any authorized repair provider.

1 Each OEM shall offer such tools for sale to owners and to independent
2 repair facilities upon fair and reasonable terms.

3 Each OEM that provides diagnostic repair information to aftermarket
4 tool, diagnostics, or third party service information publications and
5 systems shall have fully satisfied its obligations under this section
6 and thereafter not be responsible for the content and functionality of
7 aftermarket diagnostic tools or service information systems.

8 (d) OEM equipment or parts sold or used in the state of New York for
9 the purpose of providing security-related functions may not exclude
10 diagnostic, service and repair information necessary to reset a securi-
11 ty-related electronic function from information provided to owners and
12 independent repair facilities unless the information necessary to reset
13 an immobilizer system or security-related electronic module shall be
14 made available to owners and independent repair facilities through the
15 appropriate secure data release systems.

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

18 4. Notwithstanding any law, rule or regulation to the contrary, no
19 provision in this section shall be read, interpreted or construed to
20 abrogate, interfere with, contradict or alter the terms of any agreement
21 executed and in force between an authorized repair provider and an OEM
22 including, but not limited to, the performance or provision of warranty
23 or recall repair work by an authorized repair provider on behalf of an
24 OEM pursuant to such authorized repair agreement; provided, however,
25 that any provision in such an authorized repair agreement that purports
26 to waive, avoid, restrict or limit an OEM's compliance with this section
27 shall be void and unenforceable if such authorized repair agreement is
28 executed or extended on or after the effective date of this section.

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

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

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

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

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

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

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

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

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

3 9. (a) Whenever the attorney general shall believe from evidence
4 satisfactory to him or her that any person, firm, corporation or associ-
5 ation or agent or employee thereof has engaged in or is about to engage
6 in any of the acts or practices in violation of this section he or she
7 may bring a proceeding in the name and on behalf of the people of the
8 state of New York to enjoin such unlawful acts or practices and to
9 obtain restitution of any moneys or property obtained directly or indi-
10 rectly by any such acts or practices in violation of this section. In
11 such proceeding preliminary relief may be granted under article sixty-
12 three of the civil practice law and rules.

13 (b) Except as provided herein, before any violation of this section is
14 sought to be enjoined, the attorney general shall give the person
15 against whom such proceeding is contemplated notice and an opportunity
16 to show in writing, within five business days after the delivery of such
17 notice, why a proceeding should not be instituted against such person.
18 Such notice by the attorney general shall be delivered by certified mail
19 and by first-class mail with proof of mailing. In a proceeding in which
20 the attorney general seeks preliminary relief, such notice shall not be
21 required upon a finding by the attorney general that such notice is not
22 in the public interest.

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

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

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

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

43 § 3. This act shall take effect on the sixtieth day after it shall
44 have become a law.