STATE OF NEW YORK

6058

2019-2020 Regular Sessions

IN ASSEMBLY

February 26, 2019

Introduced by M. of A. ENGLEBRIGHT -- Multi-Sponsored by -- M. of A. ABBATE, GALEF, RIVERA -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law and the tax law, in relation to warranties for vessels

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

Section 1. The article heading of article 11-A of the general business law, as added by chapter 900 of the laws of 1956, is amended to read as follows:

MOTOR VEHICLE **AND VESSEL** MANUFACTURERS **AND SELLERS**

§ 2. The general business law is amended by adding two new sections 198-d and 198-e to read as follows:

§ 198-d. Vessel warranties. (a) As used in this section:

(1) "Consumer" means the purchaser, lessee or transferee, other than for purposes of resale, of a vessel which is used primarily for personal, family or household purposes and any other person entitled by the terms of the manufacturer's warranty to enforce the obligations of such warranty.

(2) "Vessel" means a new vessel, propelled by power other than muscular power, which is sold in this state to transport persons or property, and includes a vessel used as a demonstrator or leased vessel if a manufacturer's warranty was issued as a condition of sale, or the lessee is responsible for repairs. The term "vessel" includes the engine which powers the vessel. The term "vessel" also includes personal watercraft and specialty prop-craft as defined in the navigation law.

(3) "Manufacturer's express warranty" or "warranty" means the written warranty, so labeled, of the manufacturer of a vessel, including any terms or conditions precedent to the enforcement of obligations under that warranty.

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

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(4) "Hours of use deduction formula" means the hours of use amount which is in excess of fifty hours times the purchase price or the lease price, if applicable, of the vessel divided by five hundred hours.

(5) "Lessee" means any consumer who leases a vessel pursuant to a written lease agreement which provides that the lessee is responsible for repairs to such vessel.

(6) "Lease price" means the aggregate of:

(i) the lessor's actual purchase cost;

(ii) the freight cost, if applicable;

(iii) the cost for accessories, if applicable;

(iv) any fee paid to another to obtain the lease; and

(v) an amount equal to five percent of the lessor's actual purchase cost as prescribed in subparagraph (i) of this paragraph.

(7) "Service fees" means the portion of a lease payment attributable to:

(i) an amount for earned interest calculated on the rental payments previously paid to the lessor for the leased vessel at an annual rate equal to two points above the prime rate in effect on the date of the execution of the lease; and

(ii) any insurance or other costs expended by the lessor for the benefit of the lessee.

(8) "Capitalized cost" means the aggregate deposit and rental payments previously paid to the lessor for the leased vessel less service fees.

(b) (1) If a vessel which is sold in this state does not conform to all express warranties during the first seventy-five hours of operation or during the period of two years following the date of original delivery of the vessel to such consumer, whichever is the earlier date, the consumer shall during such period report the nonconformity, defect or condition to the manufacturer, its agent or its authorized dealer. If the notification is received by the manufacturer's agent or authorized dealer, the agent or dealer shall within seven days forward written notice thereof to the manufacturer by certified mail, return receipt requested, and shall include in such notice a statement indicating whether or not such repairs have been undertaken. The manufacturer, its agent or its authorized dealer shall correct such nonconformity, defect or condition at no charge to the consumer, notwithstanding the fact that such repairs are made after the expiration of such period of operation or such two year period.

(2) If a manufacturer's agent or authorized dealer refuses to undertake repairs within seven days of receipt of the notice by a consumer of a nonconformity, defect or condition pursuant to paragraph one of this subdivision, the consumer may immediately forward written notice of such refusal to the manufacturer by certified mail, return receipt requested. The manufacturer or its authorized agent shall have twenty days from receipt of such notice of refusal to commence such repairs. If within such twenty day period, the manufacturer or its authorized agent fails to commence such repairs, the manufacturer, at the option of the consumer, shall replace the vessel with a comparable vessel or accept return of the vessel from the consumer and refund to the consumer the full purchase price or, if applicable, the lease price and any trade-in allowance plus fees and charges. Such fees and charges shall include but not be limited to all license fees, registration fees and any similar governmental charges, less an allowance for the consumer's use of the vessel in excess of the first fifty hours of operation pursuant to the hours of use deduction formula and a reasonable allowance for any damage not attributable to normal wear or improvements.

(c) (1) If, within the period specified in subdivision (b) of this section, the manufacturer or its agents or authorized dealers are unable to repair or correct any defect or condition which substantially impairs the value of the vessel to the consumer after a reasonable number of attempts, the manufacturer, at the option of the consumer, shall replace the vessel with a comparable vessel or accept return of the vessel from the consumer and refund to the consumer the full purchase price or, if applicable, the lease price and any trade-in allowance plus fees and charges. Any return of a vessel may, at the option of the consumer, be made to the dealer or other authorized agent of the manufacturer who sold such vessel to the consumer or to the dealer or other authorized agent who attempted to repair or correct the defect or condition which necessitated the return and shall not be subject to any further shipping charges. Such fees and charges shall include but not be limited to all license fees, registration fees and any similar governmental charges, less an allowance for the consumer's use of the vessel in excess of the first fifty hours of operation pursuant to the hours of use deduction formula and a reasonable allowance for any damage not attributable to normal wear or improvements.

(2) A manufacturer which accepts return of the vessel because the vessel does not conform to its warranty shall notify the commissioner of motor vehicles that the vessel was returned to the manufacturer for nonconformity to its warranty and shall disclose, in accordance with the provisions of section one hundred ninety-eight-e of this article, prior to resale either at wholesale or retail that it was previously returned to the manufacturer for nonconformity to its warranty. Refunds shall be made to the consumer and lienholder, if any, as their interests may appear on the records of ownership kept by the department of motor vehicles. Refunds shall be accompanied by the proper application for credit or refund of state and local sales taxes as published by the department of taxation and finance and by a notice that the sales tax paid on the purchase price, lease price or portion thereof being refunded is refundable by the commissioner of taxation and finance in accordance with the provisions of subdivision (f) of section eleven hundred thirty-nine of the tax law. If applicable, refunds shall be made to the lessor and lessee as their interests may appear on the records of ownership kept by the department of motor vehicles, as follows: the lessee shall receive the capitalized cost and the lessor shall receive the lease price less the aggregate deposit and rental payments previously paid to the lessor for the leased vessel. The terms of the lease shall be deemed terminated contemporaneously with the date of the arbitrator's decision and award and no penalty for early termination shall be assessed as a result thereof. Refunds shall be accompanied by the proper application form for credit or refund of state and local sales tax as published by the department of taxation and finance and a notice that the sales tax paid on the lease price or portion thereof being refunded is refundable by the commissioner of taxation and finance in accordance with the provisions of subdivision (f) of section eleven hundred thirty-nine of the tax law.

(3) It shall be an affirmative defense to any claim under this section that:

(i) the nonconformity, defect or condition does not substantially impair such value; or

(ii) the nonconformity, defect or condition is the result of abuse, neglect or unauthorized modifications or alterations of the vessel.

(d) It shall be presumed that a reasonable number of attempts have been undertaken to conform a vessel to the applicable express warranties, if:

(1) the same nonconformity, defect or condition has been subject to repair four or more times by the manufacturer or its agents or authorized dealers within the first seventy-five hours of operation or during the period of two years following the date of original delivery of the vessel to a consumer, whichever is the earlier date, but such nonconformity, defect or condition continues to exist; or

(2) the vessel is out of service by reason of repair of one or more nonconformities, defects or conditions for a cumulative total of thirty or more calendar days during either period, whichever is the earlier date.

(e) The term of an express warranty, the two year warranty period and the thirty day out of service period shall be extended by any time during which repair services are not available to the consumer because of a war, invasion, strike, fire, flood or other natural disaster.

(f) Nothing in this section shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.

(g) If a manufacturer has established an informal dispute settlement mechanism, such mechanism shall comply in all respects with the provisions of this section and the provisions of subdivision (c) of this section concerning refunds or replacement shall not apply to any consumer who has not first resorted to such mechanism. In the event that an arbitrator in such an informal dispute mechanism awards a refund or replacement vessel, he or she shall not reduce the award to an amount less than the full purchase price or the lease price, if applicable, or a vessel of equal value, plus all fees and charges except to the extent such reductions are specifically permitted under subdivision (c) of this section.

(h) A manufacturer shall have up to thirty days from the date the consumer notifies the manufacturer of his or her acceptance of the arbitrator's decision to comply with the terms of that decision. Failure to comply with the thirty day limitation shall also entitle the consumer to recover a fee of twenty-five dollars for each business day of noncompliance up to five hundred dollars. Provided, however, that nothing contained in this subdivision shall impose any liability on a manufacturer where a delay beyond the thirty day period is attributable to a consumer who has requested a replacement vessel built to order or with options that are not comparable to the vessel being replaced or otherwise made compliance impossible within said period. In no event shall a consumer who has resorted to an informal dispute settlement mechanism be precluded from seeking the rights or remedies available by law.

(i) Any agreement entered into by a consumer for the purchase of a new vessel which waives, limits or disclaims the rights set forth in this section shall be void as contrary to public policy. Such rights shall inure to a subsequent transferee of such vessel.

Any provision of any agreement entered into by a consumer for the purchase of a vessel which includes as an additional cost for such vessel an expense identified as being for the purpose of affording such consumer his or her rights under this section, shall be void as contrary to public policy.

(j) Any action brought pursuant to this section shall be commenced within four years of the date of original delivery of the vessel to the consumer.

(k) Each consumer shall have the option of submitting any dispute arising under this section upon the payment of a prescribed filing fee to an alternate arbitration mechanism established pursuant to regulations promulgated pursuant to this section by the attorney general. Upon application of the consumer and payment of the filing fee, all manufacturers shall submit to such alternate arbitration.

Such alternate arbitration shall be conducted by a professional arbitrator or arbitration firm appointed by and under regulations established by the attorney general. Such mechanism shall insure the personal objectivity of its arbitrators and the right of each party to present its case, to be in attendance during any presentation made by the other party and to rebut or refute such presentation. In all other respects, such alternate arbitration mechanism shall be governed by article seventy-five of the civil practice law and rules.

(l) A court may award reasonable attorney's fees to a prevailing plaintiff or to a consumer who prevails in any judicial action or proceeding arising out of an arbitration proceeding held pursuant to subdivision (k) of this section. In the event a prevailing plaintiff is required to retain the services of an attorney to enforce collection of an award granted pursuant to this section, the court may assess against the manufacturer reasonable attorney's fees for services rendered to enforce collection of said award.

(m) (1) Each manufacturer shall require that each informal dispute settlement mechanism used by it provide, at a minimum, the following:

(i) that the arbitrators participating in such mechanism are trained in arbitration and familiar with the provisions of this section, that the arbitrators and consumers who request arbitration are provided with a written copy of the provisions of this section, together with the notice set forth below entitled "NEW VESSEL LEMON LAW BILL OF RIGHTS", and that consumers, upon request, are given an opportunity to make an oral presentation to the arbitrator;

(ii) that the rights and procedures used in the mechanism comply with federal regulations promulgated by the federal trade commission relating to informal dispute settlement mechanisms; and

(iii) that the remedies set forth in subdivision (c) of this section are awarded if, after a reasonable number of attempts have been undertaken under subdivision (d) of this section to conform the vessel to the express warranties, the defect or nonconformity still exists.

(2) The following notice shall be provided to consumers and arbitrators and shall be printed in conspicuous ten point bold face type:

NEW VESSEL LEMON LAW BILL OF RIGHTS

(1) IN ADDITION TO ANY WARRANTIES OFFERED BY THE MANUFACTURER, YOUR NEW VESSEL, IF PURCHASED AND REGISTERED IN NEW YORK STATE, IS WARRANTED AGAINST ALL MATERIAL DEFECTS FOR SEVENTY-FIVE HOURS OF USE OR TWO YEARS, WHICHEVER COMES FIRST.

(2) YOU MUST REPORT ANY PROBLEMS TO THE MANUFACTURER, ITS AGENT OR AUTHORIZED DEALER.

(3) UPON NOTIFICATION, THE PROBLEM MUST BE CORRECTED FREE OF CHARGE.

(4) IF THE SAME PROBLEM CANNOT BE REPAIRED AFTER FOUR OR MORE ATTEMPTS; OR IF YOUR VESSEL IS OUT OF SERVICE TO REPAIR A PROBLEM FOR A TOTAL OF THIRTY DAYS DURING THE WARRANTY PERIOD; OR IF THE MANUFACTURER OR ITS AGENT REFUSES TO REPAIR A SUBSTANTIAL DEFECT OR CONDITION WITHIN TWENTY DAYS OF RECEIPT OF NOTICE SENT BY YOU TO THE MANUFACTURER BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED; THEN YOU MAY BE ENTITLED TO EITHER A COMPARABLE VESSEL OR A REFUND OF YOUR PURCHASE PRICE, PLUS LICENSE AND REGISTRATION FEES, MINUS AN HOURS OF USE ALLOWANCE ONLY IF

THE VESSEL HAS BEEN OPERATED MORE THAN FIFTY HOURS. SPECIAL NOTIFICATION REQUIREMENTS MAY APPLY TO HOUSEBOATS.

(5) A MANUFACTURER MAY DENY LIABILITY IF THE PROBLEM IS CAUSED BY ABUSE, NEGLECT OR UNAUTHORIZED MODIFICATIONS OF THE VESSEL.

(6) A MANUFACTURER MAY REFUSE TO EXCHANGE A COMPARABLE VESSEL OR REFUND YOUR PURCHASE PRICE IF THE PROBLEM DOES NOT SUBSTANTIALLY IMPAIR THE VALUE OF YOUR VESSEL.

(7) IF A MANUFACTURER HAS ESTABLISHED AN ARBITRATION PROCEDURE, THE MANUFACTURER MAY REFUSE TO EXCHANGE A COMPARABLE VESSEL OR REFUND YOUR PURCHASE PRICE UNTIL YOU FIRST RESORT TO THE PROCEDURE.

(8) IF THE MANUFACTURER DOES NOT HAVE AN ARBITRATION PROCEDURE, YOU MAY RESORT TO ANY REMEDY BY LAW AND MAY BE ENTITLED TO YOUR ATTORNEY'S FEES IF YOU PREVAIL.

(9) NO CONTRACT OR AGREEMENT CAN VOID ANY OF THESE RIGHTS.

(10) AS AN ALTERNATIVE TO THE ARBITRATION PROCEDURE MADE AVAILABLE THROUGH THE MANUFACTURER, YOU MAY INSTEAD CHOOSE TO SUBMIT YOUR CLAIM TO AN INDEPENDENT ARBITRATOR, APPROVED BY THE ATTORNEY GENERAL. YOU MAY HAVE TO PAY A FEE FOR SUCH AN ARBITRATION. CONTACT YOUR LOCAL CONSUMER OFFICE OR ATTORNEY GENERAL'S OFFICE TO FIND OUT HOW TO ARRANGE FOR INDEPENDENT ARBITRATION.

(3) All informal dispute settlement mechanisms shall maintain the following records:

(i) the number of purchase price and lease price refunds and vessel replacements requested, the number of each awarded in arbitration, the amount of each award and the number of awards that were complied with in a timely manner;

(ii) the number of awards where additional repairs or a warranty extension was the most prominent remedy, the amount or value of each award, and the number of such awards that were complied with in a timely manner;

(iii) the number and total dollar amount of awards where some form of reimbursement for expenses or compensation for losses was the most prominent remedy, the amount or value of each award and the number of such awards that were complied with in a timely manner; and

(iv) the average number of days from the date of a consumer's initial request to arbitrate until the date of the final arbitrator's decision and the average number of days from the date of the final arbitrator's decision to the date on which performance was satisfactorily carried out.

(n) Special provisions applicable to houseboats:

(1) To the extent that the provisions of this subdivision are inconsistent with the other provisions of this section, the provisions of this subdivision shall apply.

(2) For purposes of this section, the "manufacturer of a houseboat" is any person, partnership, corporation, factory branch or other entity engaged in the business of manufacturing or assembling houseboats for sale in this state.

(3) This section shall not apply to nonconformities, defects or conditions in houseboat systems, fixtures, components, appliances, furnishings or accessories that are residential in character.

(4) If, within the period specified in subdivision (b) of this section, the manufacturer of a houseboat or its agents or its authorized dealers or repair shops to which they refer a consumer are unable to repair or correct any defect or condition which substantially impairs the value of the houseboat to the consumer after a reasonable number of attempts, the houseboat manufacturer, at the option of the consumer,

shall replace the houseboat with a comparable houseboat or accept return of the houseboat from the consumer and refund to the consumer the full purchase price or, if applicable, the lease price and any trade-in allowance plus fees and charges as well as the other fees and charges set forth in paragraph one of subdivision (c) of this section.

(5) If an agent or authorized dealer of a houseboat manufacturer or a repair shop to which they refer a consumer refuses to undertake repairs within seven days of receipt of notice by a consumer of a nonconformity, defect or condition pursuant to paragraph one of subdivision (b) of this section, the consumer may immediately forward written notice of such refusal to the houseboat manufacturer by certified mail, return receipt requested. The houseboat manufacturer or its authorized agent or a repair shop to which they refer a consumer shall have twenty days from receipt of such notice of refusal to commence such repairs. If within such twenty day period, the houseboat manufacturer or its authorized agent or repair shop to which they refer a consumer, fails to commence such repairs, the houseboat manufacturer, at the option of the consumer, shall replace the houseboat with a comparable houseboat, or accept return of the houseboat from the consumer and refund to the consumer the full purchase price or, if applicable, the lease price, and any trade-in allowance or other charges or allowances as set forth in paragraph two of subdivision (b) of this section.

(6) If within the period specified in subdivision (b) of this section, the same nonconformity, defect or condition in a houseboat has been subject to repair three times or a houseboat has been out of service by reason of repair for twenty-one days, whichever occurs first, the consumer must have reported this to the houseboat manufacturer or its authorized dealer by certified mail, return receipt requested prior to instituting any proceeding or other action pursuant to this section; provided, however, that the special notification requirements of this paragraph shall only apply if the manufacturer or its authorized dealer provides a prior written copy of the requirements of this paragraph to the consumer and receipt of the notice is acknowledged by the consumer in writing. If the consumer who has received notice from the manufacturer fails to comply with the special notification requirements of this paragraph, additional repair attempts or days out of service by reason of repair shall not be taken into account in determining whether the consumer is entitled to a remedy provided in paragraph four of this subdivision. However, additional repair attempts or days out of service by reason of repair that occur after the consumer complies with such special notification requirements shall be taken into account in making that determination.

(7) Nothing in this section shall in any way limit any rights, remedies or causes of action that a consumer or houseboat manufacturer may otherwise have against the manufacturer of the houseboat's chassis, or its propulsion and other components.

(o) At the time of purchase or lease of a vessel from an authorized dealer in this state, the manufacturer shall provide to the dealer or leaseholder, and the dealer or leaseholder shall provide to the consumer a notice, printed in not less than eight point bold face type, entitled "New Vessel Lemon Law Bill of Rights". The text of such notice shall be identical with the notice required by paragraph two of subdivision (m) of this section.

§ 198-e. Mandatory disclosures by sellers of vessels prior to resale. (a) Certificate of prior use by dealer. Upon the sale or transfer of title by a dealer of any second-hand passenger vessel, the dealer shall

execute and deliver to the buyer an instrument in writing in a form prescribed by the commissioner of motor vehicles which shall set forth the nature of the principal prior use of such vessel which has been repurchased pursuant to section one hundred ninety-eight-d of this article, a similar statute of another state, or an arbitration or alternative dispute procedure.

(b) Certificate of prior nonconformity by manufacturer or dealer. Upon the sale or transfer of title by a manufacturer, its agent or any dealer of any second-hand vessel, previously returned to a manufacturer or dealer for nonconformity to its warranty or after final determination, adjudication or settlement pursuant to section one hundred ninety-eight-d of this article, the manufacturer or dealer shall execute and deliver to the buyer an instrument in writing in a form prescribed by the commissioner of motor vehicles setting forth the following information in ten point, all capital type: "IMPORTANT: THIS VESSEL WAS RETURNED TO THE MANUFACTURER OR DEALER BECAUSE IT DID NOT CONFORM TO ITS WARRANTY AND THE DEFECT OR CONDITION WAS NOT FIXED WITHIN A REASONABLE TIME AS PROVIDED BY NEW YORK LAW." Such notice that a vessel was returned to the manufacturer or dealer because it did not conform to its warranty shall also be conspicuously printed on the vessel's certificate of title.

(c) Violation. The failure of a dealer to deliver to the buyer the instrument required by this section or the delivery of an instrument containing false or misleading information shall constitute a violation of this section.

(d) Private remedy. A consumer injured by a violation of this section may bring an action to recover damages. Judgment may be entered for three times the actual damages suffered by a consumer or one hundred dollars, whichever is greater. A court also may award reasonable attorneys' fees to a prevailing plaintiff buyer.

(e) Action by the attorney general. (1) Upon any violation of this section, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of the violation. If it shall appear to the satisfaction of the court or justice that the defendant has violated this section, an injunction may be issued by the court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution.

(2) Whenever the court shall determine that a violation of this section has occurred, it may impose a civil penalty of not more than one thousand dollars for each violation. In connection with an application made under this subdivision, the attorney general is authorized to take proof and to make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

§ 3. Subdivision 3 of section 399-w of the general business law, as added by chapter 372 of the laws of 1995, is amended to read as follows:

3. This section shall not apply to: (a) rental purchase agreements as regulated by article eleven of the personal property law [~~and~~], (b) motor vehicle rentals under paragraph two of subdivision (a) of section one hundred ninety-eight-a and paragraph two of subdivision a of section one hundred ninety-eight-b of this chapter, and (c) vessel rentals under

paragraph two of subdivision (a) of section one hundred ninety-eight-d of this chapter.

§ 4. Subdivision (f) of section 1139 of the tax law, as amended by chapter 12 of the laws of 1990, is amended to read as follows:

(f) Where a consumer returns a motor vehicle **or vessel** to and receives a refund of the full purchase price, capitalized cost or a portion thereof from the manufacturer in accordance with the provisions of section one hundred ninety-eight-a [~~or~~], subdivision five of section three hundred ninety-six-p**, or section one hundred ninety-eight-d** of the general business law, the commissioner [~~of taxation and finance~~] shall refund to such consumer any tax paid by the consumer on the amount of the purchase price, capitalized costs and fees and charges refunded by the manufacturer which is not in excess of the receipts and proportionate to the receipts subject to tax. All the provisions of this section shall apply to the refund authorized by this subdivision, provided, however, that a request for a refund under this subdivision shall be timely made if such request for a refund is made within three years of the date the refund from the manufacturer is received by a consumer pursuant to subdivision (c) of section one hundred ninety-eight-a **or subdivision (c) of section one hundred ninety-eight-d** of the general business law and further provided that interest allowable under subdivision (d) of this section shall be payable from the date which is three months after the date the application for refund in processible form is received.

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law; provided that the commissioners of motor vehicles and taxation and finance and the attorney general are authorized to promulgate any and all rules and regulations and take any other measures necessary to implement the provisions of this act on its effective date on or before such date.