STATE OF NEW YORK

3643

2019-2020 Regular Sessions

IN SENATE

February 11, 2019

Introduced by Sens. BRESLIN, SEWARD -- read twice and ordered printed, and when printed to be committed to the Committee on Insurance

AN ACT to amend the insurance law, in relation to theft protection products

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

Section 1. The insurance law is amended by adding a new article 79-A to read as follows:

ARTICLE 79-A

THEFT PROTECTION PRODUCTS

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§ 7951. Scope and purpose. (a) The purpose of this article is to create a legal framework within which theft protection program warranties, as defined in this article, are regulated and may be offered in this state. Notwithstanding any other section of law, including but not

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

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limited to section three thousand four hundred forty-six of this chapter, theft protection program warranties shall not be subject to any laws, rules, or regulations related to the offering, sale, or issuance of insurance in this state.

(b) The following are exempt from this article:

(1) Maintenance agreements as defined under section three hundred ninety-five-a of the general business law;

(2) Service contracts as defined in article seventy-nine of this chapter;

(3) Motor clubs; and

(4) GAP waiver agreements as covered under section three hundred twoA of the personal property law.

§ 7952. Definitions. As used in this section: (a) "Administrator" means the person who is responsible for the administration of the theft protection program warranty.

(b) "Incidental costs" means expenses specified in a theft protection program warranty that are incurred by the warranty holder due to the failure of a theft protection program to perform as provided in the theft protection program warranty. Incidental costs may include, without limitation, insurance policy deductibles, rental vehicle charges, the difference between the actual value of the stolen vehicle at the time of theft and the cost of a replacement vehicle, sales taxes, registration fees, transaction fees, and mechanical inspection fees. Incidental costs may be reimbursed in either a fixed amount specified in the theft protection program warranty or by use of a formula itemizing specific incidental costs incurred by the warranty holder.

(c) "Motor vehicle" means self-propelled or towed vehicles designed for personal or commercial use, including but not limited to automobiles, trucks, motorcycles, recreational vehicles, all-terrain vehicles, snowmobiles, campers, boats, personal watercraft, and motorcycle, boat, camper, and personal watercraft trailers.

(d) "Theft protection program" means a device or system that (1) is installed on or applied to a motor vehicle, (2) is designed to prevent loss or damage to a motor vehicle from theft, and (3) includes a theft protection program warranty. For purposes of this section, the term theft protection program shall include, but not be limited to, alarm systems, body part marking products, steering locks, window etch products, pedal and ignition locks, fuel and ignition kill switches, and electronic, radio, and satellite tracking devices. Theft protection program does not include fuel additives, oil additives, or other chemical products applied to the engine, transmission, or fuel system, or interior or exterior surfaces of a motor vehicle.

(e) "Theft protection program warranty" means a written agreement by a warrantor that provides if the theft protection program fails to prevent loss or damage to a motor vehicle from theft, that the warrantor will pay to or on behalf of the warranty holder specified incidental costs as a result of the failure of the theft protection program to perform pursuant to the terms of the theft protection program warranty.

(f) "Person" means an individual, company, association, organization, partnership, business trust, corporation, or any other form of legal entity.

(g) "Reimbursement insurance policy" means a policy of insurance issued to a warrantor to either provide reimbursement to the warrantor under the terms of the designated theft protection program warranties issued by the warrantor, in the event of the warrantor's non-performance, to pay on behalf of the warrantor all covered theft protection

program warranty obligations incurred by the warrantor under the terms of the insured theft protection program warranties.

(h) "Warranty holder" means the person who purchases a theft protection program, any authorized transferee or assignee of the purchaser, or any other person legally assuming the purchaser's rights under the anti-theft protection program theft protection program warranty.

(i) "Warrantor" means a person who is obligated to the warranty holder under the terms of the theft protection program warranty.

§ 7953. Warrantor registration required. (a) Each warrantor intending to issue theft protection program warranties in this state shall file a registration with the superintendent consisting of their name, full corporate address, telephone number and contact person and designate a person in this state for service of process. Each warrantor shall pay to the superintendent a fee in the amount of two hundred dollars upon initial registration and every year thereafter. Said registration need only be updated by written notification to the superintendent if material changes occur in the registration on file.

(b) A warrantor may, but is not required to, appoint an administrator or other designee to be responsible for any or all of the administration of its theft protection program warranties and compliance with this article.

(c) Other than the warrantor registration requirements in this section, warrantors and related theft protection program sellers, administrators, and other persons marketing, selling, offering to sell or issuing theft protection programs are exempt from any licensing requirements of this state in order to conduct theft protection program warranty business.

§ 7954. Warrantor financial requirements. (a) In order to assure the faithful performance of a warrantor's obligations to its warrant holders, each warrantor shall be responsible for complying with the requirements of one of the following provisions:

(1) Insure all theft protection program warranties under a reimbursement insurance policy issued by an insurer licensed, registered, or otherwise authorized to do business in this state, and either:

(A) at the time the policy is filed with the superintendent, and continuously thereafter, (i) maintain surplus as to policyholders and paid-in capital of at least fifteen million dollars and (ii) annually file copies of the insurer's financial statements, its NAIC annual statement, and the actuarial certification required by and filed in the insurer's state of domicile; or

(B) at the time the policy is filed with the superintendent, and continuously thereafter, (i) maintain surplus as to policyholders and paid-in capital of less than fifteen million dollars but at least equal to ten million dollars, (ii) demonstrate to the satisfaction of the superintendent that the company maintains a ratio of net written premiums, wherever written, to surplus as to policyholders and paid-in capital of not greater than three to one, and (iii) annually file copies of the insurer's audited financial statements, its NAIC annual statement, and the actuarial certification required by and filed in the insurer's state of domicile; or

(2)(A) Maintain a funded reserve account for its obligations under its theft protection program warranties issued and outstanding in this state. The reserves shall not be less than forty percent of gross consideration received, less claims paid, on the sale of the theft protection program warranty for all in-force theft protection program

warranties. The reserve account shall be subject to examination and review by the superintendent; and

(B) Place in trust with the superintendent a financial security deposit, having a value of not less than five percent of the gross consideration received, less claims paid, on the sale of the theft protection program warranty for all theft protection program warranties issued and in-force, but not less than twenty-five thousand dollars 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 superintendent.

(b) Except for the requirements specified in this section, no other financial security requirements shall be required by the superintendent for warrantors.

§ 7955. Theft protection program warranty receipt required. (a) Theft protection program warranties shall not be issued in this state unless the warrantor provides a copy of the theft protection program warranty to the warranty holder within a reasonable period of time from the date of purchase. A warranty may comply with this provision by providing the holder with a physical copy of the complete terms and conditions of the theft protection program warranty, by directing the consumer to a website containing a copy of the complete terms and conditions of the theft protection program warranty, or by delivering a copy of the complete terms and conditions of the theft protection program warranty via electronic mail.

(b) A warrantor shall provide a consumer with a complete sample copy of the theft protection program warranty terms and conditions prior to the time of sale upon a request for the same by the consumer. A warrantor may comply with this provision by providing the consumer with a complete sample copy of the terms and conditions or by directing the consumer to a website containing a complete sample of the terms and conditions of the theft protection program warranty.

§ 7956. Required disclosures. (a) Theft protection program warranties offered, issued, made, proposed to be made, or administered in this state shall be written, printed, or typed in clear, understandable language that is easy to read, and shall disclose the following requirements, as applicable:

(1) the name and address of the warrantor, the seller of the theft protection program, and the warranty holder;

(2) the total purchase price of the theft protection program and the terms under which it is to be paid, however, the purchase price is not required to be preprinted on the theft protection program warranty and may be negotiated with the consumer at the time of sale;

(3) the procedure for making a claim, including a telephone number for the warrantor or administrator responsible for processing the claim;

(4) the payments or performance to be provided under the warranty including payments for incidental costs, the manner of calculation or determination of payments or performance, and any limitations, exceptions or exclusions. Incidental costs may be reimbursed under the provisions of the warranty in either a fixed amount specified in the

warranty or sales agreement or by the use of a formula itemizing specific incidental costs incurred by the warranty holder;

(5) the obligations and duties of the warranty holder such as the duty to protect against any further damage to the vehicle, the obligation to notify the warrantor in advance of any repair, or other similar requirements, if any;

(6) any terms, restrictions, or conditions governing transferability and cancellation of the warranty, if any;

(7) a disclosure that reads substantially as follows: "This agreement is not insurance."

(b) A theft protection program warranty that is insured by a reimbursement insurance policy under section seven thousand nine hundred fifty-four of this article shall conspicuously state all of the following:

(1) "This theft protection program warranty is not insurance and is not subject to the insurance laws of the State of New York."

(2) That the obligations of the warrantor are insured under a reimbursement insurance policy;

(3) That if a warrantor fails to perform or make payment due under the terms of the warranty within sixty days after the warranty holder requests performance or payment pursuant to the terms of the warranty, the warranty holder may request performance or payment directly from the warrantor's reimbursement insurance policy insurer;

(4) The name, address, and telephone number of the warrantor's reimbursement insurance policy insurer.

(c) Theft protection program warranties not insured under a reimbursement insurance policy pursuant to section seven thousand nine hundred fifty-four of this article shall contain a statement in substantially the following form: "The obligations of the warrantor under this warranty are backed by the full faith and credit of the warrantor."

(d) A warrantor may only cancel a theft protection program warranty if the warranty holder does any of the following:

(1) fails to pay for the theft protection program;

(2) makes a material misrepresentation to the seller of the theft protection program or to the warrantor;

(3) commits fraud related to the purchase of the theft protection program, registration of the theft protection program warranty, or a claim made under the theft protection program warranty;

(4) substantially breaches the warranty holder's duties under the warranty;

(5) fails to make required payments on the vehicle such that the vehicle is repossessed; or

(6) damages the vehicle such that the vehicle is deemed a total loss.

§ 7957. Required disclosures; reimbursement insurance policy. A reimbursement insurance policy that is required to be issued under this article shall contain:

(a) A statement that if a warrantor fails to perform or make payment due under the terms of the theft protection program warranty within sixty days after the warranty holder requests performance or payment pursuant to the terms of the theft protection program warranty, the warranty holder may request performance or payment directly from the warrantor's reimbursement insurance policy insurer.

(b) A statement that in the event of cancellation of the warrantor's reimbursement insurance policy, insurance coverage will continue for all ancillary product holders whose theft protection program warranties were

issued by the warrantor and reported to the insurer for coverage during the term of the reimbursement insurance policy.

§ 7958. Theft protection program warranty not insurance. Notwithstanding section three thousand four hundred forty-six of this chapter and any other provision of law, the marketing, sale, offering for sale, issuance, making, proposing to make, and administration of theft protection programs by warrantors and related theft protection program sellers, administrators, and other persons shall be exempt from all provisions of this chapter other than this article.

§ 7959. Prohibited acts. (a) A warrantor shall not use in its name the words insurance, casualty, surety, mutual or any other words descriptive of the insurance, casualty or surety business; or a name deceptively similar to the name or description of any insurance or surety corporation or to the name of any other warrantor. The word "guaranty" or similar word may be used by a warrantor. 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 article. However, a company using the prohibited language in its name shall include in its theft protection program warranties a statement in substantially the following form: "This agreement is not an insurance contract."

(b) A warrantor or its representative shall not in its theft protection program warranties, warranties 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.

(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 theft protection program warranty as a condition of a loan or a condition for the sale of any motor vehicle or other property.

(d) A warrantor or its representative shall not, directly or indirectly, represent in any manner, whether by written solicitation or telemarketing, a false, deceptive or misleading statement with respect to:

(1) such warrantor's affiliation with a motor vehicle manufacturer;

(2) such warrantor's possession of information regarding a motor vehicle owner's current motor vehicle manufacturer's original equipment warranty;

(3) the expiration of a motor vehicle owner's current motor vehicle manufacturer's original equipment warranty; or

(4) a requirement that a motor vehicle owner register for a new theft protection program warranty with a warrantor in order to maintain coverage under the motor vehicle owner's current theft protection program warranty or manufacturer's original equipment warranty.

§ 7960. Record-keeping requirements. (a) Books and records:

(1) A warrantor shall keep accurate accounts, books, and records concerning transactions regulated under this article.

(2) The warrantor's accounts, books, and records shall include the following:

(A) Copies of each type of theft protection program warranty sold or issued;

(B) The name and address of each ancillary product holder to the extent that the name and address have been furnished by the ancillary product holder;

(C) A list of the locations where theft protection program warranties are issued, marketed, sold, or offered for sale; and

(D) Written claims files which shall contain at least the dates and description of claims related to the theft protection program warranties.

(3) Except as provided in subsection (b) of this section, the warrantor shall retain all records required to be maintained by this section for at least one year after the specified period of coverage has expired.

(4) The records required under this section may be, but are not required to be, maintained on a computer disk or other record-keeping technology. If the records are maintained in other than hard copy, the records shall be capable of duplication to legible hard copy at the request of the superintendent.

(b) A warrantor discontinuing business in this state shall maintain its records until it furnishes the superintendent satisfactory proof that it has discharged all obligations to ancillary product holders in this state.

§ 7961. Cancellation of reimbursement insurance policy. As applicable, an insurer that issued a reimbursement insurance policy required under this article shall not terminate the policy until a notice of termination has been mailed or delivered to the superintendent. The termination of a reimbursement insurance policy shall not reduce the issuer's responsibility for theft protection program warranties issued by insured warrantors prior to the date of the termination.

§ 7962. Obligation of reimbursement insurance policy insurers. (a) Insurers issuing reimbursement insurance to warrantors are deemed to have received the premiums for such insurance upon the payment of warrantor fees by consumers for theft protection program warranties issued by such insured warrantors.

(b) This article shall not prevent or limit the right of an insurer which issued a reimbursement insurance policy to seek indemnification or subrogation against a warrantor if the insurer pays or is obligated to pay the ancillary product holder sums that the warrantor was obligated to pay pursuant to the provisions of the theft protection program warranty.

§ 7963. Enforcement provisions. (a) The superintendent may conduct examinations of warrantors, administrators, insurers or other persons to enforce the provisions of this article and protect ancillary product holders in this state. Upon request of the superintendent, the warrantor shall make available to the superintendent all accounts, books, and records concerning theft protection program warranties sold or issued by the warrantor which are necessary to enable the superintendent to reasonably determine compliance or noncompliance with this article.

(b) The superintendent may take action which is necessary or appropriate to enforce the provisions of this article and the superintendent's regulations and orders, and to protect ancillary product holders in this state.

(1) If a warrantor has violated this article or the superintendent's regulations or orders, the superintendent may issue an order directed to that warrantor to cease and desist from committing violations of this article or the superintendent's regulations or orders; may issue an order prohibiting a warrantor from issuing, selling or offering for sale theft protection program warranties in violation of this article; or may issue an order imposing a civil penalty on that warrantor, or any combination of the foregoing, as applicable.

(A) A person aggrieved by an order issued under this paragraph may request a hearing before the superintendent. The hearing request shall be filed with the superintendent within twenty days of the date the superintendent's order is effective.

(B) If a hearing is requested, an order issued by the superintendent under this section shall be suspended from the original effective date of the order until completion of the hearing and final decision of the superintendent.

(C) At the hearing, the burden shall be on the superintendent to show why the order issued pursuant to this paragraph is justified. The provisions of this section shall apply to a hearing requested under this section.

(2) The superintendent may bring an action in any court of competent jurisdiction for an injunction or other appropriate relief to enjoin threatened or existing violations of this article or of the superintendent's orders or regulations. An action filed under this paragraph may also seek restitution on behalf of persons aggrieved by a violation of this article or orders or regulations of the superintendent.

(3) A person who is found to have violated this article or orders or regulation of the superintendent may be assessed a civil penalty in an amount determined by the superintendent of not more than five hundred dollars per violation and no more than ten thousand dollars in the aggregate for all violations of a similar nature. For purposes of this section, violations shall be of a similar nature if the violation consists of the same or similar course of conduct, action, or practice, irrespective of the number of times the act, conduct, or practice which is determined to be a violation of this article occurred.

§ 7964. Premium taxes. (a) Warrantor fees collected on theft protection program shall not be subject to premium taxes.

(b) Premiums for reimbursement insurance policies shall be subject to applicable premium taxes.

§ 7965. Severability. If any provision of this article, or the application of the provision to any person or circumstance, shall be held invalid, the remainder of this article, and the application of the provision to person or circumstances other than those as to which it is held invalid, shall not be affected.

§ 7966. Applicability. This article applies to all theft protection program warranties issued, on or after January first, two thousand twenty. The failure of any person to comply with this article prior to January first, two thousand twenty, shall not be admissible in any court proceeding, administrative proceeding, arbitration, or alternative dispute resolution proceeding and may not otherwise be used to prove that the action of any person or the affected theft protection program warranty was unlawful or otherwise improper. The adoption of this article does not imply that a theft protection program warranty was insurance prior to January first, two thousand twenty. The penalty provisions of this article do not apply to any violation of this article relating to or in connection with the sale or failure to disclose in a retail installment theft protection program warranty or lease, or theft protection program warranty or agreement that provides for payments under a theft protection program warranty as long as the sale of such product, theft protection program warranty, or agreement was otherwise disclosed to the purchaser in writing at the time of the purchase or lease. In the event of a violation for which the penalty provisions of this article do not apply, the court shall award actual damages and costs, including reasonable attorney's fees. Nothing in this section shall be construed to require the application of the penalty provisions where this section is not applicable.

§ 7967. Effect on current business. A person engaged in the theft protection program warranty business, as a warrantor or otherwise, in

this state on or before the effective date of this article, who registers as a warrantor pursuant to this article within thirty days after the superintendent makes the registration form available, may continue to engage in business as a warrantor in this state until final agency action is taken by the superintendent regarding the registration and all rights to administrative judicial review have been exhausted or expired.

§ 2. This act shall take effect January 1, 2020.