

Date of Hearing: May 3, 2022

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

AB 2912 (Berman) – As Amended March 17, 2022

SUBJECT: Consumer warranties

SUMMARY: This bill would prohibit a manufacturer, distributor, or retail seller from making an express warranty with respect to a consumer good that commences earlier than the date the consumer receives the good, unless the express warranty was made before January 1, 2023.

EXISTING LAW:

- 1) Pursuant to federal law, provides that any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than \$15.00 shall clearly and conspicuously disclose, among other things, the point in time or event on which the warranty term commences, *if different from the purchase date*, and the time period or other measurement of warranty duration. (16 C.F.R. Sec. 701.3(a)(4).)
- 2) Provides that, except as specified, every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable; and, if the manufacturer, retailer, or distributor has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer, retailer, or distributor's skill or judgement to select or furnish suitable goods, provides that the sale shall be accompanied by an implied warranty of fitness for that purpose. (Civ. Code Secs. 1792-1792.2.)
- 3) Defines "express warranty" to mean:
 - a written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
 - in the event of any sample or model, that the whole of the goods conforms to such sample or model. (Civ. Code Sec. 1791.2(a).)
- 4) Provides that, except as specified, existing state laws shall not affect the right of a manufacturer, distributor, or retailer to make express warranties with respect to consumer goods, provided that the express warranties do not limit, modify, or disclaim the implied warranties guaranteed pursuant to 1), above. (Civ. Code Sec. 1793.)
- 5) Requires every manufacturer, distributor, or retailer making express warranties with respect to consumer goods to fully set forth those warranties in simple and readily understood language that clearly identifies the party making the express warranties, and that conforms to the federal standards for warranty terms and conditions. (Civ. Code Sec. 1793.1(a).)
- 6) Requires every manufacturer of consumer goods sold in this state and for which the manufacturer has made an express warranty to, among other things, do all of the following:

maintain in this state sufficient service and repair facilities reasonable close to all areas where its consumer goods are sold to carry out the terms of those warranties or designate and authorize independent repair or service facilities reasonably close to all areas where its goods are sold; commence service and repair for goods that do not conform with the express warranties within 30 days unless the buyer agrees in writing to the contrary; and replace the goods or reimburse the buyer if the manufacturer does not service or repair the goods to conform to the express warranties after a reasonable number of attempts. (Civ. Code Sec. 1793.2.)

- 7) Permits any buyer of consumer goods who is damaged by a failure to comply with any obligation under an implied or express warranty or service contract to bring an action for the recovery of damages and other legal and equitable relief, as well as court costs and attorney's fees; and specifies that if the buyer establishes that failure to comply was willful, the judgment may include, in addition to damages and other legal and equitable relief, a civil penalty which shall not exceed two times the amount of actual damages. (Civ. Code Sec. 1794.)
- 8) Provides that, except as specified, the warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods selling for \$50 or more shall automatically be tolled for the period from the date upon which the buyer notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which the repaired or serviced goods are *delivered to the buyer*. (Civ. Code Sec. 1795.6(a)(1).)
- 9) Requires that, except as specified, all new and used hearing aids sold in this state be accompanied by the retail seller's written warranty containing specified language, including that "If the hearing aid is not fit for your particular needs, it may be returned to the seller within 45 days of *the initial date of delivery* to you." (Civ. Code Sec. 1793.02(a)(2)(A).)
- 10) Requires that all new and used wheelchairs be accompanied by the manufacturer's or lessor's written express warranty that the wheelchair is free of defects, and that the duration of the warranty be for a period of at least one year *from the date of the first delivery* of a new wheelchair to the consumer, or at least 60 days *from the date of the first delivery* of a used, refurbished, or reconditioned wheelchair to the consumer. (Civ. Code Sec. 1793.025.)

FISCAL EFFECT: None. This bill has been keyed nonfiscal by the Legislative Counsel.

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to commence all express warranties for consumer goods at the date of receipt by the consumer, rather than the date of purchase, in order to ensure that the utility of an express warranty is not limited by delays in the shipping or delivery of the warranted good to the consumer. This bill is author sponsored.
- 2) **Author's statement:** According to the author:

Unfortunately, when a warranty effective date starts at the time of purchase, the consumer does not receive the full benefit or duration of the warranty. This was a problem prior to the pandemic and current supply chain issues, but has only grown more apparent with products being delayed weeks if not months. For example, if an express

warranty is good for one year, but the consumer does not receive the product for six months, then the consumer has essentially lost half of the warranty. [...]

There is precedent for having warranties begin on the delivery date. Carpet installers, for example, typically operate this way and a European warranty begins when a product is received, not purchased. Additionally, according to state law, the duration of warranties for wheelchairs and hearing aids already start from the date of delivery. [...] AB 2912 would build upon existing state law and require express warranties to start no earlier than the date of delivery of the product rather than the date of purchase. It is important to note that this bill would be prospective and would not impact express warranties made before January 1, 2023.

- 3) **Express warranties under federal and state law:** California law defines an express warranty as a written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or, in the event of any sample or model, that the whole of the goods conforms to such sample or model. (Civ. Code Sec. 1791.2.) Express warranties are distinct from implied warranties in that express warranties are specifically communicated by the manufacturer or seller, either orally or in writing, whereas implied warranties assign to the good whether or not the seller expresses them. Express warranties differ from service contracts in that service contracts are generally additional purchases on top of the consumer good in question and do not necessarily affirm the quality or workmanship of the good, whereas the express warranty is a component of the purchase of the good itself and generally constitutes an assertion that the good will meet certain specifications of utility.

Conditions and disclosures associated with express warranties are regulated at both the federal and state levels. At the federal level, the Magnuson-Moss Warranty Act (P.L. 93-637; 15 U.S.C. Sec. 2301, et seq.; MMWA) specifically regulates written express warranties of consumer goods costing at least \$5.00, and, among other things, requires a provider of a written warranty to disclose fully, comprehensibly, and conspicuously the terms and conditions of the warranty, as specified, “in order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products [...]” (15 U.S.C. Sec. 2302.) The MMWA also specifies certain substantive terms of a warranty necessary to advertise a “full” warranty (as distinguished from a “limited” warranty), prescribes minimum standards for any written warranty, provides remedies for consumers aggrieved by violations of its requirements, and authorizes the Federal Trade Commission (FTC) to promulgate rules further defining its provisions. (15 U.S.C. Sec. 2303, et seq.)

The MMWA explicitly withholds from the FTC the authority to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted (15 U.S.C. Sec. 2302(b)(1)(2)), but the regulations implementing the Act do require that, for consumer goods with an actual cost to the consumer greater than \$15.00, the warrantor must disclose “the point in time or event on which the warranty term commences, *if different from the purchase date*, and the time period or other measurement of warranty duration,” indicating that, if not disclosed, a written warranty is presumed to commence from the purchase date. (16 C.F.R. Sec. 701.3(a)(4).) Notably, except under limited specified circumstances pertaining to labeling or disclosure, the MMWA does not preempt state laws

regulating consumer warranties, and explicitly preserves any right or remedy of any consumer under state law or any other federal law. (15 U.S.C. Sec. 2311.)

California also extensively regulates express warranties under state law by way of the Song-Beverly Consumer Warranty Act. (Civ. Code Sec. 1790, et seq.; “Song-Beverly”.) Among other things, Song-Beverly provides certain implied warranties, and specifies that, while nothing in Song-Beverly shall affect the rights of manufacturers, distributors, and retailers to make express warranties with respect to consumer goods, an express warranty may not limit, modify, or disclaim the implied warranties it guarantees. (Civ. Code Sec. 1793.) Like the MMWA, Song-Beverly also requires specified disclosures to be made, fully, comprehensibly, and conspicuously, with respect to express warranties of consumer goods, and places certain requirements on warrantors in this state, including maintenance of sufficient service and repair facilities reasonably close to all areas where the consumer goods are sold (or provision for the shipping of the good for service); commencement of service and repair within a reasonable time of receipt of the good from the consumer, replacement or refund of the good if necessary; and extension of the duration of an express warranty for the period of time for which a consumer does not have access to the good because it has been submitted to the manufacturer or seller for service or repair. Song-Beverly further prescribes certain specifications for express warranties on particular types of products, such as wheelchairs, hearing aids, assistive devices, new motor vehicles, and electronic or appliance products. (Civ. Code Sec. 1793, et seq.)

This bill, as it is currently in print, would further regulate express warranties on consumer goods under Song-Beverly to specify an express warranty cannot commence prior to the date the consumer receives the good.

- 4) **AB 2912 and commencement of express warranties upon date of purchase:** Song-Beverly does not generally specify whether commencement of an express warranty in this state begins at the time of purchase or otherwise, except with respect to some of the specified products where it explicitly does not (i.e., wheelchairs: “the date of first delivery” (Civ. Code Sec. 1793.025); and hearing aids: “the initial date of delivery” (Civ. Code Sec. 1793.02(a)(2))). Accordingly, based on the regulations implementing the MMWA, unless otherwise specified either in a written warranty or in statute, express warranties on consumer goods in this state presumably commence at the time of purchase, whether or not the product is provided to the consumer at that time.

The need for this bill is in part due to the growing prevalence of e-commerce and the consequent long-distance shipping of consumer goods, where the time between purchase and receipt can vary more dramatically based on supply chain and shipping logistics. According to the United States Department of Commerce, e-commerce constituted 19.1% of all retail sales in 2021, increasing 50.5% since 2019, with Amazon accounting for more than 40% of all U.S. e-commerce.¹ Particularly as supply chains have become more globalized and production of components for consumer goods more specialized, even small disruptions at critical points in production and shipping of goods can snowball into lengthy delays in both restocking of supply of goods and in the ultimate delivery of those goods to the consumer. Even in cases where all parts of the supply chain operate optimally, the shipping of goods

¹ Jessica Young, “US ecommerce grows 14.2% in 2021,” *Digital Commerce 360*, Feb. 18, 2022, <https://www.digitalcommerce360.com/article/us-ecommerce-sales/> [as of Apr. 30, 2022].

over long distances, often internationally, means most goods are not received until several days after purchase at least.

These issues predated the COVID-19 pandemic², but have become even more consequential as California and the rest of the world face protracted global supply chain disruptions resulting from reduced health and robustness of the workforce, unreliable consumer demand, pandemic mitigation policies, and fuel shortages.³ This means domestic warehouses and retailers are less likely to have desired products in stock at the time of purchase, and, with rising gas prices and workforce shortages raising shipping costs, are far more likely to see lengthier intervals from initiating shipping to delivery. In cases in which delivery, for whichever reason, is delayed by weeks or months, the elapsed period of an express warranty can be considerable before the consumer is even capable of identifying deficiencies in the utility or performance of the good. As a 2015 Los Angeles Times article documenting a consumer's warranty woes with a Whirlpool dryer rhetorically inquired, "What if you're remodeling your house and don't receive an appliance for six months? [...] Have you lost half your warranty?"⁴

AB 2912 seeks to resolve this issue by prohibiting an express warranty for a consumer good from commencing earlier than the date the consumer receives the good, eliminating the presumption that the express warranty commences from the date of purchase unless otherwise specified for express warranties made in this state. This would allow the consumer to avail themselves of the entire express warranty duration, rather than being at the mercy of shipping logistics. As the Consumer Federation of California argues in support of the bill:

Currently, express warranties typically begin on the date of purchase, not the date of delivery. This has been an ongoing issue for consumers, who often do not receive a product the same day. This causes the consumer to not receive the full benefit or duration of the warranty. Supply chain issues related to COVID have significantly exacerbated this problem, as consumers have waited months for products to be delivered to them.

AB 2912 calls attention to this ongoing problem and will hold manufacturers more accountable by requiring express warranties to start no earlier than the date of delivery rather than the date of purchase.

- 5) **Date the consumer receives the good vs. date of delivery of the good:** Contrary to the assertion of the Consumer Federation of California that the bill commences express warranties on the date of delivery, as it is currently in print, AB 2912 prohibits an express warranty from commencing earlier than *the date the consumer receives the good*. In most cases of brick-and-mortar commerce, receipt of the good by the consumer is simultaneous with purchase. In cases of shipping and delivery, however, "receipt of the good" is not necessarily a straightforward concept. If a package is delivered to a residence and left on the porch, for instance, is the good contained in the package received when the package is

² See, e.g., David Lazarus, "Warranties usually start on purchase date, not delivery date," *Los Angeles Times*, Feb. 9, 2015, <https://www.latimes.com/business/la-fi-lazarus-20150210-column.html> [as of Apr. 30, 2022].

³ See, e.g., Brenden Murray, "Why Supply Chains Are Entering Third Year of Chaos: QuickTake," *Washington Post*, Mar. 31, 2022, https://www.washingtonpost.com/business/why-supply-chains-are-entering-third-year-of-chaos-quicktake/2022/03/31/f55e73a6-b11f-11ec-9dbd-0d4609d44c1c_story.html [as of Apr. 30, 2022].

⁴ *Supra*, fn. 2.

delivered, when the consumer is first made aware that the package was delivered, when the package is taken inside the residence, or when the package is opened to access the good contained therein? Even with further clarification, some of these definitions would be difficult to verify, and may require that the consumer receive in person or sign for the receipt of every good delivered, creating significant additional burden on both the consumer and the delivery company.

Additionally, if an item is purchased by one member of a household and the delivery is received by their spouse or another member of the household, whether or not this nonetheless constitutes *the consumer* receiving the good is unclear. Section 1791.2(a)(1) of the Civil Code defines “express warranty” to mean “a written statement arising out of a sale *to the consumer* of a consumer good [...]” This seems to imply that the person purchasing the good is “the consumer” whether or not delivery of the good is to that person. If a delivery is paid for by one individual and sent to another, it is further unclear whether receipt by the other party would still be considered receipt by “the consumer.” Circumstances in which a consumer good is purchased by one person for delivery to another have increased substantially with the rise of e-commerce and advances in shipping logistics, which have largely transpired after the publication of most provisions of existing state law pertaining to express warranties, and thus likely were not contemplated as major considerations in the crafting of those laws.

On the other hand, the *date of delivery of the good*, whether to the residence of the purchaser or of another party, can be easily verified and is not contingent on the recipient being present for the delivery. All major delivery services record information pertaining to the date of delivery of goods in current practice, so predicating the commencement of a warranty on date of delivery would not require any significant adjustment to existing delivery practices. According to the bill’s author, “there is existing precedent in the case of wheelchairs and hearing aids where the duration of express warranties already start from the date of delivery.” (See Civ. Code Secs. 1793.02 and 1793.025.) These statutes begin express warranties from “the date of first delivery” and “the initial date of delivery,” respectively.

To resolve possible ambiguity in determining the date of commencement for an express warranty under this bill, the author has offered the following amendment:

Author’s amendment:

On page 2, line 9, strike “the consumer receives” and insert: “*of delivery of*”.

- 6) **Related legislation:** AB 1875 (Flora) would exempt alarm companies governed by the Alarm Companies Act from certain provisions of Song-Beverly pertaining to service contracts.

SB 983 (Eggman) would require manufacturers of certain electronic or appliance products that make express warranties for products worth \$50 or more to make available sufficient service literature and functional parts, on fair and reasonable terms, to owners of the equipment or products, service and repair facilities, and service dealers.

- 7) **Prior legislation:** AB 1221 (Flora, Ch. 452, Stats. 2021) clarifies that service contracts can cover a single product or a class of products, and provides explicit authorization for a service

contractor to enter into automatically renewing month-to-month service contracts with consumers subject to certain requirements.

AB 1163 (Eggman, 2019) was substantially similar to SB 983, above. AB 1163 died in the Assembly Committee on Privacy & Consumer Protection.

SB 1326 (Roth, Ch. 226, Stats. 2014) requires that all new and used hearing aids sold in this state be accompanied by a written warranty providing specified language, including, among other things, that if the device is not initially fit for the buyer's particular needs, it may be returned to the seller within 45 days of the initial date of delivery to the buyer, and requires the warranty period to resume on the date upon which a repaired or serviced hearing aid is delivered to the buyer.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Interest Research Group (CALPIRG)
Consumer Federation of California
Consumer Protection Policy Center - University of San Diego School of Law
Consumer Watchdog
Housing and Economic Rights Advocates
Public Law Center

Opposition

None on file

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