

CHAPTER 296, Laws of 1977

AN ACT to number unnumbered subchapters in chapter 289; and to create subchapter X of chapter 289 of the statutes, relating to prepaid maintenance and providing a penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. The unnumbered subchapters in chapter 289 of the statutes are numbered subchapters III to IX, respectively.

SECTION 2. Subchapter X of chapter 289 of the statutes is created to read:

CHAPTER 289

SUBCHAPTER X

PREPAID MAINTENANCE LIEN

289.85 Definitions. In ss. 289.85 to 289.94:

- (1) "Creditor" has the meaning set forth in s. 421.301 (16).
- (2) "Customer" means a person who seeks or acquires maintenance on behalf of himself or herself or another person for personal, family, household or agricultural purposes.
- (3) "Goods" has the meaning set forth in s. 402.105 (1) except that this term does not include a "motor vehicle" as defined in s. 218.01 (1) (k).
- (4) "Maintenance" means any repair or other services to be performed on goods after the goods have been initially delivered to the premises designated by a customer following its sale, but this term does not include installation, set up charges or delivery charges.
- (5) "Prepaid maintenance agreement" means any agreement in which a customer agrees to make prepayment for maintenance to be performed by a seller.
- (6) "Prepayment" means any full or partial payment received by a seller or an obligation incurred by a customer to a creditor or to a seller or to a seller's assignee for maintenance to be performed by a seller if payment is made before the maintenance is rendered or received. This term does not include prepayment for maintenance under an insurance policy. Except with regard to a warranty under s. 218.14, this term does not include prepayment for maintenance to be provided under a manufacturer's warranty on goods or maintenance unless there is a prepayment made for maintenance to be rendered under the warranty separate from the payment for the goods themselves.
- (7) "Regulated prepaid maintenance agreement" means a prepaid maintenance agreement meeting the following requirements:
 - (a) The total prepayment exceeds \$100; and
 - (b) The total period during which the seller is obligated to provide maintenance exceeds one year whether the obligation is initially for more than one year or is extended or renewed beyond one year.

289.86 Records. A seller shall retain records for 60 days following completion of the time period for which prepaid maintenance is to be performed under a prepaid maintenance agreement including but not limited to records showing the amount of prepayment, the period for which maintenance is to be performed, all contracts relating to such maintenance and all records pertaining to the escrow account or bond required under s. 289.87.

289.87 Escrow account or bond requirement. (1) **REQUIREMENT.** A seller who enters a regulated prepaid maintenance agreement shall either maintain an escrow account or maintain a bond.

(2) **ESCROW ACCOUNT.** (a) *Surety.* If a seller maintains an escrow account, all proceeds received under any regulated prepaid maintenance agreement shall be deposited in the escrow account for the benefit of any customer who suffers a loss of prepayments for maintenance due to the bankruptcy or cessation of business by the seller.

(b) *Not to be comingled.* The seller shall not comingle the proceeds received under a regulated prepaid maintenance agreement with any other funds and any other funds which are comingled become a part of and shall be deposited in the escrow account. The seller may aggregate the proceeds received under several prepaid maintenance agreements in one escrow account.

(c) *Interest.* The seller may withdraw and retain for his or her own use any interest payments received on the escrow account.

(d) *Not to be used prior to discharge.* The seller may not withdraw or use the proceeds received under a regulated prepaid maintenance agreement which are deposited in an escrow account prior to the discharge of the prepaid maintenance lien under s. 289.91.

(e) *Not subject to attachment.* Until all prepaid maintenance liens are discharged, the escrow account is not subject to garnishment, execution, levy, attachment or foreclosure except as provided under s. 289.92.

(3) **BOND.** (a) *Surety.* If a seller maintains a bond, it shall be issued by a surety company licensed to do business in this state.

(b) *Amount; filed.* The principal sum of the bond shall be \$25,000 at all times. A copy of the bond shall be filed with the secretary of state.

(c) *For benefit of customer.* The bond shall be in favor of the state for the benefit of any customer who suffers a loss of prepayments for maintenance due to the bankruptcy or cessation of business by the seller. Any customer claiming against the bond may maintain an action against the seller and the surety.

(d) *Surety's obligation.* If the seller fails to perform maintenance under a regulated prepaid maintenance agreement, the surety shall either perform or procure the performance of that maintenance or pay the customer the amount of the prepayment made under the agreement.

(e) *No lien.* If a seller maintains a bond under this subsection, a customer does not have a prepaid maintenance lien under s. 289.88.

289.88 Prepaid maintenance lien. Except as provided under s. 289.87 (3), a customer who makes a prepayment under a regulated prepaid maintenance agreement has a lien designated as a prepaid maintenance lien in the amount of the prepayment on all the proceeds contained in the escrow account, including all after acquired proceeds. This lien is preferred to all other liens, security interests and claims on such proceeds except other prepaid maintenance liens which attached at an earlier time.

289.89 Attachment and preservation. All prepaid maintenance liens attach at the time of the first prepayment and shall be preserved from the time the lien attaches. It is not necessary to file or record any notice of the lien in order to preserve or perfect the lien although a customer may file this lien in the manner prescribed for perfecting liens under ch. 409.

289.90 Notice of existence of lien. A person is deemed to have notice of a prepaid maintenance lien if:

(1) That person has actual knowledge or reason to know that the lien exists on the seller's property;

(2) That person has reason to know that the seller regularly demands or accepts prepayments for maintenance;

(3) The seller engages in a type of business that generally requests or demands prepayment for maintenance; or

(4) The lien was filed as permitted in s. 289.89.

289.91 Discharge of lien. (1) A prepaid maintenance lien is discharged by:

(a) Returning the amount of the prepayment to the customer who made the prepayment;

(b) The expiration of the time period for the performance of all contract or other obligations secured by the prepayment; or

(c) Lapse of the right to maintain an action.

(2) Upon discharge of a prepaid maintenance lien, any customer who filed the lien as permitted in s. 289.89 is subject to the requirements of s. 409.404.

289.92 Enforceability of lien. A prepaid maintenance lien is enforceable from the time it attaches until it is discharged. Any enforcement and foreclosure of a prepaid maintenance lien shall be in one civil action and shall be against the proceeds of the escrow account.

289.93 Duties of the department of justice. (1) The department of justice shall investigate violations of this subchapter and attempts to circumvent this subchapter. The department of justice may subpoena persons and records to facilitate its investigations, and may enforce compliance with such subpoenas as provided in s. 885.12.

(2) The department of justice may in behalf of the state or in behalf of any person who holds a prepaid maintenance lien:

(a) Bring an action in any court of competent jurisdiction to enforce and foreclose a prepaid maintenance lien under s. 289.92.

(b) Bring an action for temporary or permanent injunctive or other relief in any court of competent jurisdiction for any violation of this chapter or attempt to circumvent this chapter. The court may in its discretion, prior to the entry of final judgment, award restitution to any customer suffering loss because of violations of this subchapter if proof of that loss is submitted to the satisfaction of the court.

(c) Bring an action in any court of competent jurisdiction for recovery of civil forfeitures against any seller who violates this subchapter.

289.94 Penalties. (1) **GENERALLY.** A person who violates this subchapter shall forfeit not less than \$100 nor more than \$10,000 for each violation.

(2) **MISUSE OF ESCROW FUNDS.** The use of the proceeds in an escrow account by a seller for any purpose prior to the discharge of the prepaid maintenance lien is theft by the seller and is punishable under s. 943.20. If the seller is a corporation, such misuse is also deemed theft by any officer, director or agent of the corporation responsible for the misappropriation. Any of the misappropriated proceeds which have been received as salary, dividend, loan repayment, capital distribution or otherwise by any shareholder of the corporation not responsible for the misappropriation is a civil liability of the shareholder and may be recovered and restored to the escrow account by action brought by any interested party.

SECTION 3. Program responsibilities. In the list of program responsibilities specified for the department of justice under section 15.251 (intro.) of the statutes, insert reference to "subch. X of ch. 289".

SECTION 4. Applicability. This act applies to all transactions entered into after the effective date of this act.
