

S274625

**IN THE
SUPREME COURT OF CALIFORNIA**

EVERARDO RODRIGUEZ et al.,
Plaintiffs and Appellants,

v.

FCA US, LLC,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE NO. E073766

EXHIBITS TO MOTION FOR JUDICIAL NOTICE
Volume 7 of 16 • Pages 1 – 256 of 1937

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CALIFORNIA LEGISLATURE
AT SACRAMENTO
1979-80 REGULAR SESSION

SENATE FINAL HISTORY

SHOWING ACTION TAKEN IN THIS SESSION ON ALL SENATE BILLS,
CONSTITUTIONAL AMENDMENTS, CONCURRENT, JOINT RESOLUTIONS
AND SENATE RESOLUTIONS

CONVENED DECEMBER 4, 1978
ADJOURNED SINE DIE NOVEMBER 30, 1980

DAYS IN SESSION..... 262
CALENDAR DAYS 728

LT. GOVERNOR MIKE CURB
President of the Senate

SENATOR JAMES R. MILLS
President pro Tempore

Compiled Under the Direction of
DARRYL R. WHITE
Secretary of the Senate

By
DAVID H. KNEALE
History Clerk

S.B. No. 1190—Sieroty.

An act to amend Sections 1791, 1791.1, 1792.2, and 1793 of, to add Sections 1793.02 and 1794.2 to, and to repeal Section 1794.2 of, the Civil Code, relating to consumer warranties.

1979

April 19—Introduced Read first time. To print.

April 20—From print. May be acted upon on or after May 20, 1979

April 25—To Com. on JUD.

April 30—Set for hearing May 22, 1979.

May 21—From committee with author's amendments Read second time. Amended. Re-referred to committee

May 30—From committee: Do pass as amended. (Ayes 7. Noes 1 Page 3849.)

May 31—Read second time Amended. To third reading

June 1—Read third time. Passed. To Assembly. (Ayes 26 Noes 0. Page 4024.)

June 4—In Assembly Read first time. Held at desk.

June 5—To Com. on L., E., & C.A.

June 21—From committee with author's amendments. Read second time. Amended. Re-referred to committee

July 9—From committee. Do pass as amended. (Ayes 7. Noes 0.)

July 10—Read second time Amended. To second reading

July 11—Read second time. To third reading.

Aug 27—Read third time. Amended. To third reading

Sept 5—Read third time. Amended. To third reading.

Sept. 10—Read third time. Passed. To Senate (Ayes 72. Noes 0. Page 9455.)

Sept. 10—In Senate. To unfinished business.

Sept. 13—Senate concurs in Assembly amendment. To enrollment. (Ayes 28. Noes 0. Page 7619.)

Sept. 18—Enrolled. To Governor at 11.30 a.m.

Sept 26—Approved by Governor.

Sept. 26—Chaptered by Secretary of State. Chapter 1023, Statutes of 1979

S.B. No. 1191—Sieroty.

An act to add Section 987 to the Civil Code, relating to fine art.

1979

April 19—Introduced Read first time To print.

April 20—From print May be acted upon on or after May 20, 1979

April 25—To Com. on JUD.

1980

Jan. 31—Returned to Secretary of Senate pursuant to Joint Rule 56.

S.B. No. 1192—Sieroty.

An act to amend Section 1506 of the Penal Code, relating to appeals.

1979

April 19—Introduced. Read first time To print

April 20—From print. May be acted upon on or after May 20, 1979

April 25—To Com. on JUD

April 30—Set for hearing May 22, 1979.

May 23—Set, first hearing Failed passage in committee (Ayes 2 Noes 5. Page 3850.)

1980

Jan. 7—Returned to Secretary of Senate pursuant to Joint Rule 62(a)

Introduced by Senator Sieroty

April 19, 1979

An act to amend Sections 1791 and 1793 of, and to add Sections 1792.21 and 1793.02 to, the Civil Code, relating to consumer warranties.

LEGISLATIVE COUNSEL'S DIGEST

SB 1190, as introduced, Sieroty. Consumer warranties.

Existing law imposes various warranty obligations on retail sellers of consumer goods, as defined, for the benefit and protection of the buyers of such goods.

This bill would include within the definition of consumer goods, and thus make subject to the warranty benefits and protections provided by law, new and used assistive devices, as defined, which are sold at retail.

This bill would, in addition, require that every sale of such a device be accompanied by both an implied and express warranty that the device is specifically fit for the particular needs of the buyer. Such express warranty would provide that the device may be returned within 30 days of the receipt of the device by the buyer if it is not specifically fit for the particular needs of the buyer. The seller would have the right to cure, as specified, in this situation, but if the seller fails to, he or she would be required to restore any consideration received from or on behalf of the buyer.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1791 of the Civil Code is
2 amended to read:
3 1791. As used in this chapter:

1 (a) "Consumer goods" means any new product or part
2 thereof that is used or bought for use primarily for
3 personal, family, or household purposes, except for
4 clothing and consumables. *"Consumer goods" shall*
5 *include new and used assistive devices sold at retail.*

6 (b) "Buyer" or "retail buyer" means any individual
7 who buys consumer goods from a person engaged in the
8 business of manufacturing, distributing, or selling such
9 goods at retail. As used in this subdivision, "person"
10 means any individual; partnership, corporation,
11 association, or other legal entity which engages in any
12 such business.

13 (c) "Clothing" means any wearing apparel, worn for
14 any purpose, including under and outer garments, shoes,
15 and accessories composed primarily of woven material,
16 natural or synthetic yarn, fiber, or leather or similar
17 fabric.

18 (d) "Consumables" means any product which is
19 intended for consumption by individuals, or use by
20 individuals for purposes of personal care or in the
21 performance of services ordinarily rendered within the
22 household, and which usually is consumed or expended in
23 the course of such consumption or use.

24 (e) "Distributor" means any individual, partnership,
25 corporation, association, or other legal relationship which
26 stands between the manufacturer and the retail seller in
27 purchases, consignments, or contracts for sale of
28 consumer goods.

29 (f) "Independent repair or service facility" or
30 "independent service dealer" means any individual,
31 partnership, corporation, association, or other legal
32 entity, not an employee or subsidiary of a manufacturer
33 or distributor, which engages in the business of servicing
34 and repairing consumer goods.

35 (g) "Manufacturer" means any individual,
36 partnership, corporation, association, or other legal
37 relationship which manufactures, assembles, or produces
38 consumer goods.

39 (h) "Place of business" means, for the purposes of any
40 retail seller that sells consumer goods by catalog or mail

1 order, the distribution point for such goods.

2 (i) "Retail seller," "seller," or "retailer" means any
3 individual, partnership, corporation, association, or other
4 legal relationship which engages in the business of selling
5 consumer goods to retail buyers.

6 (j) "Return to the retail seller" means, for the
7 purposes of any retail seller that sells consumer goods by
8 catalog or mail order, the retail seller's place of business,
9 as defined in subdivision (h).

10 (k) "Sale" means (1) the passing of title from the seller
11 to the buyer for a price, or (2) a consignment for sale.

12 (l) "Service contract" means a contract in writing to
13 perform, over a fixed period of time or for a specified
14 duration, services relating to the maintenance or repair
15 of a consumer product.

16 (m) *"Assistive device" means any instrument,*
17 *apparatus, or contrivance, including any component or*
18 *part thereof or accessory thereto, which is used or*
19 *intended to be used, to assist a physically disabled person*
20 *in the mitigation or treatment of an injury or disease or*
21 *to assist or affect the structure or any function of the body*
22 *of a physically disabled person.*

23 SEC. 2. Section 1792.21 is added to the Civil Code, to
24 read:

25 1792.21. Every sale of an assistive device sold at retail
26 in this state shall be accompanied by the retail seller's
27 implied warranty that the device is specifically fit for the
28 particular needs of the buyer.

29 SEC. 3. Section 1793 of the Civil Code is amended to
30 read:

31 1793. ~~Nothing~~ *Except as provided in Section 1793.02,*
32 *nothing* in this chapter shall affect the right of the
33 manufacturer, distributor, or retailer to make express
34 warranties with respect to consumer goods. However, a
35 manufacturer, distributor, or retailer, in transacting a sale
36 in which express warranties are given, may not limit,
37 modify, or disclaim the implied warranties guaranteed by
38 this chapter to the sale of consumer goods.

39 SEC. 4. Section 1793.02 is added to the Civil Code, to
40 read:

1 1793.02. All assistive devices sold at retail shall include
2 the retail seller's express warranty that the device is
3 specifically fit for the particular needs of the buyer, and
4 that the device may be returned to the seller within 30
5 days of the date of actual receipt by the buyer if the
6 device is not specifically fit for the particular needs of the
7 buyer. After receipt of notice of the buyer's intention to
8 return, the seller shall have the right to cure by
9 seasonably notifying the buyer of the seller's intention to
10 cure and by furnishing a conforming device within a
11 reasonable time. If the seller does not cure, the seller shall
12 restore any downpayment or other consideration
13 received from or on behalf of the buyer.

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SENATE BILL

No. 1190

Introduced by Senator Sieroty

April 19, 1979

An act to amend Sections 1791 , 1792.2, and 1793 of, and to add ~~Sections 1792.21 and~~ Section 1793.02 to, the Civil Code, relating to consumer warranties.

LEGISLATIVE COUNSEL'S DIGEST

SB 1190, as amended, Sieroty. Consumer warranties.

Existing law imposes various warranty obligations on retail sellers of consumer goods, as defined, for the benefit and protection of the buyers of such goods.

This bill would include within the definition of consumer goods, and thus make subject to the warranty benefits and protections provided by law, new and used assistive devices, as defined, which are sold at retail.

This bill would, in addition, require that every sale of such a device be accompanied by both an implied and express warranty that the device is specifically fit for the particular needs of the buyer. Such express warranty ~~would~~ *shall be in writing, as specified, shall* provide that the device may be returned within 30 days of the receipt of the device by the buyer if it is not specifically fit for the particular needs of the buyer , *and shall be delivered to the buyer at the time of sale.* The seller ~~would~~ *shall* have the right to cure, as specified, ~~in this situation after receipt of notice of the buyer's intention to return an assistive device,~~ but if the seller fails to, he or she ~~would~~ *shall* be required to restore any consideration received from or on behalf of the buyer.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1791 of the Civil Code is
2 amended to read:

3 1791. As used in this chapter:

4 (a) "Consumer goods" means any new product or part
5 thereof that is used or bought for use primarily for
6 personal, family, or household purposes, except for
7 clothing and consumables. "Consumer goods" shall
8 include new and used assistive devices sold at retail.

9 (b) "Buyer" or "retail buyer" means any individual
10 who buys consumer goods from a person engaged in the
11 business of manufacturing, distributing, or selling such
12 goods at retail. As used in this subdivision, "person"
13 means any individual, partnership, corporation,
14 association, or other legal entity which engages in any
15 such business.

16 (c) "Clothing" means any wearing apparel, worn for
17 any purpose, including under and outer garments, shoes,
18 and accessories composed primarily of woven material,
19 natural or synthetic yarn, fiber, or leather or similar
20 fabric.

21 (d) "Consumables" means any product which is
22 intended for consumption by individuals, or use by
23 individuals for purposes of personal care or in the
24 performance of services ordinarily rendered within the
25 household, and which usually is consumed or expended in
26 the course of such consumption or use.

27 (e) "Distributor" means any individual, partnership,
28 corporation, association, or other legal relationship which
29 stands between the manufacturer and the retail seller in
30 purchases, consignments, or contracts for sale of
31 consumer goods.

32 (f) "Independent repair or service facility" or
33 "independent service dealer" means any individual,
34 partnership, corporation, association, or other legal
35 entity, not an employee or subsidiary of a manufacturer
36 or distributor, which engages in the business of servicing
37 and repairing consumer goods.

38 (g) "Manufacturer" means any individual,

1 partnership, corporation, association, or other legal
2 relationship which manufactures, assembles, or produces
3 consumer goods.

4 (h) "Place of business" means, for the purposes of any
5 retail seller that sells consumer goods by catalog or mail
6 order, the distribution point for such goods.

7 (i) "Retail seller," "seller," or "retailer" means any
8 individual, partnership, corporation, association, or other
9 legal relationship which engages in the business of selling
10 consumer goods to retail buyers.

11 (j) "Return to the retail seller" means, for the
12 purposes of any retail seller that sells consumer goods by
13 catalog or mail order, the retail seller's place of business,
14 as defined in subdivision (h).

15 (k) "Sale" means (1) the passing of title from the seller
16 to the buyer for a price, or (2) a consignment for sale.

17 (l) "Service contract" means a contract in writing to
18 perform, over a fixed period of time or for a specified
19 duration, services relating to the maintenance or repair
20 of a consumer product.

21 (m) "Assistive device" means any instrument,
22 apparatus, or contrivance, including any component or
23 part thereof or accessory thereto, which is used or
24 intended to be used, to assist a physically disabled person
25 in the mitigation or treatment of an injury or disease or
26 to assist or affect the structure or any function of the body
27 of a physically disabled person. *"Assistive device" shall*
28 *include any device which is used or intended to be used*
29 *to replace any part of the human body.*

30 ~~SEC. 2. Section 1792.21 is added to the Civil Code, to~~
31 ~~read:~~

32 ~~1792.21. Every sale of an assistive device sold at retail~~
33 ~~in this state shall be accompanied by the retail seller's~~
34 ~~implied warranty that the device is specifically fit for the~~
35 ~~particular needs of the buyer.~~

36 *SEC. 2. Section 1792.2 of the Civil Code is amended*
37 *to read:*

38 *1792.2. (a) Every sale of consumer goods that are*
39 *sold at retail in this state by a retailer or distributor who*
40 *has reason to know at the time of the retail sale that the*

1 goods are required for a particular purpose, and that the
2 buyer is relying on the retailer's or distributor's skill or
3 judgment to select or furnish suitable goods shall be
4 accompanied by such retailer's or distributor's implied
5 warranty that the goods are fit for that purpose.

6 *(b) Every sale of an assistive device sold at retail in this*
7 *state shall be accompanied by the retail seller's implied*
8 *warranty that the device is specifically fit for the*
9 *particular needs of the buyer.*

10 SEC. 3. Section 1793 of the Civil Code is amended to
11 read:

12 1793. Except as provided in Section 1793.02, nothing
13 in this chapter shall affect the right of the manufacturer,
14 distributor, or retailer to make express warranties with
15 respect to consumer goods. However, a manufacturer,
16 distributor, or retailer, in transacting a sale in which
17 express warranties are given, may not limit, modify, or
18 disclaim the implied warranties guaranteed by this
19 chapter to the sale of consumer goods.

20 SEC. 4. Section 1793.02 is added to the Civil Code, to
21 read:

22 1793.02. (a) All assistive devices sold at retail shall
23 include the retail seller's express warranty that the device
24 is specifically fit for the particular needs of the buyer, and
25 that the device may be returned to the seller within 30
26 days of the date of actual receipt by the buyer if the
27 device is not specifically fit for the particular needs of the
28 ~~buyer. After receipt of notice of the buyer's intention to~~
29 ~~buyer.~~

30 (b) *The warranty shall be in a writing which shall*
31 *contain, but need not be limited to, the following*
32 *language: "This device is warranted to be specifically fit*
33 *for the particular needs of the buyer and may be returned*
34 *to the seller within 30 days of the date of actual receipt*
35 *by the buyer if the device is not specifically fit for the*
36 *particular needs of the buyer."*

37 (c) *The warranty shall be delivered to the buyer by*
38 *the retail seller at the time of the sale of the device.*

39 (d) *After receipt of notice of the buyer's intention to*
40 *return, the seller shall have the right to cure by*

- 1 seasonably notifying the buyer of the seller's intention to
- 2 cure and by furnishing a conforming device within a
- 3 reasonable time. If the seller does not cure, the seller shall
- 4 restore any downpayment or other consideration
- 5 received from or on behalf of the buyer.

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AMENDED IN SENATE MAY 31, 1979

AMENDED IN SENATE MAY 21, 1979

SENATE BILL

No. 1190

Introduced by Senator Sieroty

April 19, 1979

An act to amend Sections 1791, 1792.2, and 1793 of, and to add Section 1793.02 to, the Civil Code, relating to consumer warranties.

LEGISLATIVE COUNSEL'S DIGEST

SB 1190, as amended, Sieroty. Consumer warranties.

Existing law imposes various warranty obligations on retail sellers of consumer goods, as defined, for the benefit and protection of the buyers of such goods.

This bill would include within the definition of consumer goods, and thus make subject to the warranty benefits and protections provided by law, new and used assistive devices, as defined, which are sold at retail.

This bill would, in addition, require that every sale of such a device ~~be accompanied by both an implied and~~ include an express warranty that the device is specifically fit for the particular needs of the buyer. Such express warranty ~~shall be in writing, as specified, shall~~ would also provide that the device may be returned within 30 days of the actual receipt of the device by the buyer if it is not specifically fit for the particular needs of the buyer; and ~~shall be delivered to the buyer at the time of sale. The seller shall have the right to cure, as specified, after receipt of notice of the buyer's intention to return an assistive device, but if the seller fails to, he or she shall be required to restore any consideration received from or on behalf of the buyer.~~

The bill would also require the seller, if the buyer returns

the device within 30 days, to adjust the device or replace it with a device that is specifically fit for the particular needs of the buyer, or, if the seller does neither, to promptly refund to the buyer the total amount paid.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1791 of the Civil Code is
2 amended to read:

3 1791. As used in this chapter:

4 (a) "Consumer goods" means any new product or part
5 thereof that is used or bought for use primarily for
6 personal, family, or household purposes, except for
7 clothing and consumables. "Consumer goods" shall
8 include new and used assistive devices sold at retail.

9 (b) "Buyer" or "retail buyer" means any individual
10 who buys consumer goods from a person engaged in the
11 business of manufacturing, distributing, or selling such
12 goods at retail. As used in this subdivision, "person"
13 means any individual, partnership, corporation,
14 association, or other legal entity which engages in any
15 such business.

16 (c) "Clothing" means any wearing apparel, worn for
17 any purpose, including under and outer garments, shoes,
18 and accessories composed primarily of woven material,
19 natural or synthetic yarn, fiber, or leather or similar
20 fabric.

21 (d) "Consumables" means any product which is
22 intended for consumption by individuals, or use by
23 individuals for purposes of personal care or in the
24 performance of services ordinarily rendered within the
25 household, and which usually is consumed or expended in
26 the course of such consumption or use.

27 (e) "Distributor" means any individual, partnership,
28 corporation, association, or other legal relationship which
29 stands between the manufacturer and the retail seller in
30 purchases, consignments, or contracts for sale of
31 consumer goods.

1 (f) "Independent repair or service facility" or
2 "independent service dealer" means any individual,
3 partnership, corporation, association, or other legal
4 entity, not an employee or subsidiary of a manufacturer
5 or distributor, which engages in the business of servicing
6 and repairing consumer goods.

7 (g) "Manufacturer" means any individual,
8 partnership, corporation, association, or other legal
9 relationship which manufactures, assembles, or produces
10 consumer goods.

11 (h) "Place of business" means, for the purposes of any
12 retail seller that sells consumer goods by catalog or mail
13 order, the distribution point for such goods.

14 (i) "Retail seller," "seller," or "retailer" means any
15 individual, partnership, corporation, association, or other
16 legal relationship which engages in the business of selling
17 consumer goods to retail buyers.

18 (j) "Return to the retail seller" means, for the
19 purposes of any retail seller that sells consumer goods by
20 catalog or mail order, the retail seller's place of business,
21 as defined in subdivision (h).

22 (k) "Sale" means (1) the passing of title from the seller
23 to the buyer for a price, or (2) a consignment for sale.

24 (l) "Service contract" means a contract in writing to
25 perform, over a fixed period of time or for a specified
26 duration, services relating to the maintenance or repair
27 of a consumer product.

28 (m) "Assistive device" means any instrument,
29 apparatus, or contrivance, including any component or
30 part thereof or accessory thereto, which is used or
31 intended to be used, to assist a physically disabled person
32 in the mitigation or treatment of an injury or disease or
33 to assist or affect the structure or any function of the body
34 of a physically disabled person. "Assistive device" shall
35 include any device which is used or intended to be used
36 to replace any part of the human body.

37 SEC. 2. Section 1792.2 of the Civil Code is amended
38 to read:

39 1792.2. (a) Every sale of consumer goods that are
40 sold at retail in this state by a retailer or distributor who

1 has reason to know at the time of the retail sale that the
2 goods are required for a particular purpose, and that the
3 buyer is relying on the retailer's or distributor's skill or
4 judgment to select or furnish suitable goods shall be
5 accompanied by such retailer's or distributor's implied
6 warranty that the goods are fit for that purpose.

7 (b) Every sale of an assistive device sold at retail in this
8 state shall be accompanied by the retail seller's implied
9 warranty that the device is specifically fit for the
10 particular needs of the buyer.

11 SEC. 3. Section 1793 of the Civil Code is amended to
12 read:

13 1793. Except as provided in Section 1793.02, nothing
14 in this chapter shall affect the right of the manufacturer,
15 distributor, or retailer to make express warranties with
16 respect to consumer goods. However, a manufacturer,
17 distributor, or retailer, in transacting a sale in which
18 express warranties are given, may not limit, modify, or
19 disclaim the implied warranties guaranteed by this
20 chapter to the sale of consumer goods.

21 SEC. 4. Section 1793.02 is added to the Civil Code, to
22 read:

23 1793.02. (a) All assistive devices sold at retail shall
24 include the retail seller's express warranty that the device
25 is specifically fit for the particular needs of the buyer, and
26 that the device may be returned to the seller within 30
27 days of the date of actual receipt by the buyer if the
28 device is not specifically fit for the particular needs of the
29 buyer.

30 (b) The warranty shall be in a writing which shall
31 contain, but need not be limited to, the following
32 language: "This device is warranted to be specifically fit
33 for the particular needs of the buyer and may be returned
34 to the seller within 30 days of the date of actual receipt
35 by the buyer if the device is not specifically fit for the
36 particular needs of the buyer."

37 (c) The warranty shall be delivered to the buyer by
38 the retail seller at the time of the sale of the device.

39 (d) After receipt of notice of the buyer's intention to
40 return, the seller shall have the right to cure by

1 seasonably notifying the buyer of the seller's intention to
2 cure and by furnishing a conforming device within a
3 reasonable time. If the seller does not cure, the seller shall
4 restore any downpayment or other consideration
5 received from or on behalf of the buyer.

6 1793.02. (a) All new and used assistive devices sold at
7 retail shall include the retail seller's express warranty
8 which shall contain the following language: "This
9 assistive device is warranted to be specifically fit for the
10 particular needs of you, the buyer, and may be returned
11 to the seller within 30 days of the date of actual receipt
12 by you if the device is not specifically fit for your
13 particular needs. If you return the device, the seller will
14 either adjust or replace the device or promptly refund
15 the total amount paid."

16 (b) The language prescribed in subdivision (a) shall
17 appear on the first page of the warranty in at least
18 10-point bold type.

19 (c) If the buyer returns the device within 30 days, the
20 seller shall, within a reasonable time, adjust the device or,
21 if appropriate, replace it with a device that is specifically
22 fit for the particular needs of the buyer. If the seller does
23 not adjust or replace the device so that it is specifically fit
24 for the particular needs of the buyer, the seller shall
25 promptly refund to the buyer the total amount paid.

26 (d) The rights and remedies conferred on the buyer
27 under Section 1792.2 and this section are cumulative, and
28 shall not be construed to affect the obligations of the
29 retail seller or any other party or to supplant the rights
30 or remedies of the buyer under any other section of this
31 chapter or under any other law or instrument.

AMENDED IN ASSEMBLY JUNE 21, 1979

AMENDED IN SENATE MAY 31, 1979

AMENDED IN SENATE MAY 21, 1979

SENATE BILL

No. 1190

Introduced by Senator Sieroty

April 19, 1979

An act to amend Sections 1791, 1792.2, and 1793 of, and to add Section 1793.02 to, the Civil Code, relating to consumer warranties.

LEGISLATIVE COUNSEL'S DIGEST

SB 1190, as amended, Sieroty. Consumer warranties.

Existing law imposes various warranty obligations on retail sellers of consumer goods, as defined, for the benefit and protection of the buyers of such goods.

This bill would include within the definition of consumer goods, and thus make subject to the warranty benefits and protections provided by law, new and used assistive devices, as defined, which are sold at retail.

This bill would, in addition, require that every sale of such a device include ~~an express~~ *a written* warranty, *to be delivered to the buyer at the time of the sale of the device*, that the device is specifically fit for the particular needs of the buyer *or ultimate user*. Such ~~express~~ warranty would also provide that the device may be returned within 30 days of actual receipt of the device by the buyer, *or a longer period if the retail seller so specifies*, if it is not specifically fit for the particular needs of the buyer.

The bill would also require the seller, if the buyer returns the device within ~~30 days~~ *the time period specified in the warranty*, to adjust the device or replace it with a device that is specifically fit for the particular needs of the buyer, *or, if the*

seller does neither, to promptly refund to the buyer the total amount paid.

The bill would further provide that a buyer of a used assistive device shall have the same rights and remedies under the Song-Beverly Consumer Warranty Act as a buyer of a new assistive device.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1791 of the Civil Code is
2 amended to read:

3 1791. As used in this chapter:

4 (a) "Consumer goods" means any new product or part
5 thereof that is used or bought for use primarily for
6 personal, family, or household purposes, except for
7 clothing and consumables. "Consumer goods" shall
8 include new and used assistive devices sold at retail.

9 (b) "Buyer" or "retail buyer" means any individual
10 who buys consumer goods from a person engaged in the
11 business of manufacturing, distributing, or selling such
12 goods at retail. As used in this subdivision, "person"
13 means any individual, partnership, corporation,
14 association, or other legal entity which engages in any
15 such business.

16 (c) "Clothing" means any wearing apparel, worn for
17 any purpose, including under and outer garments, shoes,
18 and accessories composed primarily of woven material,
19 natural or synthetic yarn, fiber, or leather or similar
20 fabric.

21 (d) "Consumables" means any product which is
22 intended for consumption by individuals, or use by
23 individuals for purposes of personal care or in the
24 performance of services ordinarily rendered within the
25 household, and which usually is consumed or expended in
26 the course of such consumption or use.

27 (e) "Distributor" means any individual, partnership,
28 corporation, association, or other legal relationship which
29 stands between the manufacturer and the retail seller in

1 purchases, consignments, or contracts for sale of
2 consumer goods.

3 (f) "Independent repair or service facility" or
4 "independent service dealer" means any individual,
5 partnership, corporation, association, or other legal
6 entity, not an employee or subsidiary of a manufacturer
7 or distributor, which engages in the business of servicing
8 and repairing consumer goods.

9 (g) "Manufacturer" means any individual,
10 partnership, corporation, association, or other legal
11 relationship which manufactures, assembles, or produces
12 consumer goods.

13 (h) "Place of business" means, for the purposes of any
14 retail seller that sells consumer goods by catalog or mail
15 order, the distribution point for such goods.

16 (i) "Retail seller," "seller," or "retailer" means any
17 individual, partnership, corporation, association, or other
18 legal relationship which engages in the business of selling
19 consumer goods to retail buyers.

20 (j) "Return to the retail seller" means, for the
21 purposes of any retail seller that sells consumer goods by
22 catalog or mail order, the retail seller's place of business,
23 as defined in subdivision (h).

24 (k) "Sale" means (1) the passing of title from the seller
25 to the buyer for a price, or (2) a consignment for sale.

26 (l) "Service contract" means a contract in writing to
27 perform, over a fixed period of time or for a specified
28 duration, services relating to the maintenance or repair
29 of a consumer product.

30 (m) "Assistive device" means any instrument,
31 apparatus, or contrivance, including any component or
32 part thereof or accessory thereto, which is used or
33 intended to be used, to assist a physically disabled person
34 in the mitigation or treatment of an injury or disease or
35 to assist or affect the structure or any function of the body
36 of a physically disabled person. "Assistive device" shall
37 include any device which is used or intended to be used
38 to replace any part of the human body.

39 SEC. 2. Section 1792.2 of the Civil Code is amended
40 to read:

1 1792.2. (a) Every sale of consumer goods that are
2 sold at retail in this state by a retailer or distributor who
3 has reason to know at the time of the retail sale that the
4 goods are required for a particular purpose, and that the
5 buyer is relying on the retailer's or distributor's skill or
6 judgment to select or furnish suitable goods shall be
7 accompanied by such retailer's or distributor's implied
8 warranty that the goods are fit for that purpose.

9 (b) Every sale of an assistive device sold at retail in this
10 state shall be accompanied by the retail seller's implied
11 warranty that the device is specifically fit for the
12 particular needs of the buyer.

13 SEC. 3. Section 1793 of the Civil Code is amended to
14 read:

15 1793. Except as provided in Section 1793.02, nothing
16 in this chapter shall affect the right of the manufacturer,
17 distributor, or retailer to make express warranties with
18 respect to consumer goods. However, a manufacturer,
19 distributor, or retailer, in transacting a sale in which
20 express warranties are given, may not limit, modify, or
21 disclaim the implied warranties guaranteed by this
22 chapter to the sale of consumer goods.

23 SEC. 4. Section 1793.02 is added to the Civil Code, to
24 read:

25 1793.02. (a) All new and used assistive devices sold at
26 ~~retail shall include the retail seller's express warranty~~
27 *retail in this state shall be accompanied by the retail*
28 *seller's written warranty* which shall contain the
29 following language: "This assistive device is warranted to
30 be specifically fit for the particular needs of you, the
31 buyer, and may be returned to the seller within 30 days
32 of the date of actual receipt by you if the device is not
33 specifically fit for your particular needs. If you return the
34 device, the seller will either adjust or replace the device
35 or promptly refund ~~the total amount paid.~~ *the total*
36 *amount paid.*

37 *This warranty does not affect the protections and*
38 *remedies you have under other laws."*

39 *In lieu of the words "30 days" the retail seller may*
40 *specify any longer period.*

1 (b) The language prescribed in subdivision (a) shall
2 appear on the first page of the warranty in at least
3 10-point bold type. *The warranty shall be delivered to*
4 *the buyer at the time of the sale of the device.*

5 (c) If the buyer returns the device within 30 days, the
6 seller shall, within a reasonable time, adjust the device or,
7 if appropriate, replace it with a device that is specifically
8 fit for the particular needs of the buyer. If the seller does
9 not adjust or replace the device so that it is specifically fit
10 for the particular needs of the buyer, the seller shall
11 promptly refund to the buyer the total amount paid.

12 ~~(d) The rights and remedies conferred on the buyer~~
13 ~~under Section 1792.2 and this section are cumulative, and~~

14 (d) *With respect to the retail sale of an assistive device*
15 *to an individual, organization, or agency known by the*
16 *seller to be purchasing for the ultimate user of the device,*
17 *this section and subdivision (b) of Section 1792.2 shall be*
18 *construed to require that the device be specifically fit for*
19 *the particular needs of the ultimate user.*

20 (e) *The rights and remedies of the buyer under this*
21 *section and subdivision (b) of Section 1792.2 are not*
22 *subject to waiver under Section 1792.3. The rights and*
23 *remedies of the buyer under this section and subdivision*
24 *(b) of Section 1792.2 are cumulative, and shall not be*
25 *construed to affect the obligations of the retail seller or*
26 *any other party or to supplant the rights or remedies of*
27 *the buyer under any other section of this chapter or*
28 *under any other law or instrument.*

29 (f) *Section 1795.5 shall not apply to a sale of used*
30 *assistive devices, and for the purposes of the*
31 *Song-Beverly Consumer Warranty Act the buyer of a*
32 *used assistive device shall have the same rights and*
33 *remedies as the buyer of a new assistive device.*

34 (g) *The language in subdivision (a) shall not*
35 *constitute an express warranty for purposes of Sections*
36 *1793.2 and 1793.3.*

AMENDED IN ASSEMBLY JULY 10, 1979
AMENDED IN ASSEMBLY JUNE 21, 1979
AMENDED IN SENATE MAY 31, 1979
AMENDED IN SENATE MAY 21, 1979

SENATE BILL

No. 1190

Introduced by Senator Sieroty

April 19, 1979

An act to amend Sections 1791, 1792.2, and 1793 of, ~~and to add Section 1793.02 to,~~ *to add Sections 1793.02 and 1794.2 to,* and to repeal Section 1794.2 of, the Civil Code, relating to consumer warranties.

LEGISLATIVE COUNSEL'S DIGEST

SB 1190, as amended, Sieroty. Consumer warranties.

Existing law imposes various warranty obligations on retail sellers of consumer goods, as defined, for the benefit and protection of the buyers of such goods.

This bill would include within the definition of consumer goods, and thus make subject to the warranty benefits and protections provided by law, new and used assistive devices, as defined, which are sold at retail.

This bill would, in addition, require that every sale of such a device include a written warranty, to be delivered to the buyer at the time of the sale of the device, that the device is specifically fit for the particular needs of the buyer or ultimate user. Such warranty would also provide that the device may be returned within 30 days of actual receipt of the device by the buyer, or a longer period if the retail seller so specifies, if it is not specifically fit for the particular needs of the buyer.

The bill would also require the seller, if the buyer returns the device within the time period specified in the warranty,

to adjust the device or replace it with a device that is specifically fit for the particular needs of the buyer, or, if the seller does neither, to promptly refund to the buyer the total amount paid.

The bill would further provide that a buyer of a used assistive device shall have the same rights and remedies under the Song-Beverly Consumer Warranty Act as a buyer of a new assistive device.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1791 of the Civil Code is amended to read:

1791. As used in this chapter:

(a) "Consumer goods" means any new product or part thereof that is used or bought for use primarily for personal, family, or household purposes, except for clothing and consumables. "Consumer goods" shall include new and used assistive devices sold at retail.

(b) "Buyer" or "retail buyer" means any individual who buys consumer goods from a person engaged in the business of manufacturing, distributing, or selling such goods at retail. As used in this subdivision, "person" means any individual, partnership, corporation, association, or other legal entity which engages in any such business.

(c) "Clothing" means any wearing apparel, worn for any purpose, including under and outer garments, shoes, and accessories composed primarily of woven material, natural or synthetic yarn, fiber, or leather or similar fabric.

(d) "Consumables" means any product which is intended for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of such consumption or use.

(e) "Distributor" means any individual, partnership,

1 corporation, association, or other legal relationship which
2 stands between the manufacturer and the retail seller in
3 purchases, consignments, or contracts for sale of
4 consumer goods.

5 (f) "Independent repair or service facility" or
6 "independent service dealer" means any individual,
7 partnership, corporation, association, or other legal
8 entity, not an employee or subsidiary of a manufacturer
9 or distributor, which engages in the business of servicing
10 and repairing consumer goods.

11 (g) "Manufacturer" means any individual,
12 partnership, corporation, association, or other legal
13 relationship which manufactures, assembles, or produces
14 consumer goods.

15 (h) "Place of business" means, for the purposes of any
16 retail seller that sells consumer goods by catalog or mail
17 order, the distribution point for such goods.

18 (i) "Retail seller," "seller," or "retailer" means any
19 individual, partnership, corporation, association, or other
20 legal relationship which engages in the business of selling
21 consumer goods to retail buyers.

22 (j) "Return to the retail seller" means, for the
23 purposes of any retail seller that sells consumer goods by
24 catalog or mail order, the retail seller's place of business,
25 as defined in subdivision (h).

26 (k) "Sale" means (1) the passing of title from the seller
27 to the buyer for a price, or (2) a consignment for sale.

28 (l) "Service contract" means a contract in writing to
29 perform, over a fixed period of time or for a specified
30 duration, services relating to the maintenance or repair
31 of a consumer product.

32 (m) "Assistive device" means any instrument,
33 apparatus, or contrivance, including any component or
34 part thereof or accessory thereto, which is used or
35 intended to be used, to assist a physically disabled person
36 in the mitigation or treatment of an injury or disease or
37 to assist or affect the structure or any function of the body
38 of a physically disabled person. "Assistive device" shall
39 include any device which is used or intended to be used
40 to replace any part of the human body.

1 SEC. 2. Section 1792.2 of the Civil Code is amended
2 to read:

3 1792.2. (a) Every sale of consumer goods that are
4 sold at retail in this state by a retailer or distributor who
5 has reason to know at the time of the retail sale that the
6 goods are required for a particular purpose, and that the
7 buyer is relying on the retailer's or distributor's skill or
8 judgment to select or furnish suitable goods shall be
9 accompanied by such retailer's or distributor's implied
10 warranty that the goods are fit for that purpose.

11 (b) Every sale of an assistive device sold at retail in this
12 state shall be accompanied by the retail seller's implied
13 warranty that the device is specifically fit for the
14 particular needs of the buyer.

15 SEC. 3. Section 1793 of the Civil Code is amended to
16 read:

17 1793. Except as provided in Section 1793.02, nothing
18 in this chapter shall affect the right of the manufacturer,
19 distributor, or retailer to make express warranties with
20 respect to consumer goods. However, a manufacturer,
21 distributor, or retailer, in transacting a sale in which
22 express warranties are given, may not limit, modify, or
23 disclaim the implied warranties guaranteed by this
24 chapter to the sale of consumer goods.

25 SEC. 4. Section 1793.02 is added to the Civil Code, to
26 read:

27 1793.02. (a) All new and used assistive devices sold at
28 retail in this state shall be accompanied by the retail
29 seller's written warranty which shall contain the
30 following language:

31 "This assistive device is warranted to be specifically fit
32 for the particular needs of you, the buyer, and may be
33 returned to the seller within 30 days of the date of actual
34 receipt by you if the device is not specifically fit for your
35 particular needs. If you return the device, the seller will
36 either adjust or replace the device or promptly refund
37 the total amount paid.

38 ~~This warranty does not affect the protections and~~
39 ~~remedies you have under other laws."~~

40 In lieu of the words "30 days" the retail seller may

1 ~~specify any longer period.~~ *amount paid. This warranty*
 2 *does not affect the protections and remedies you have*
 3 *under other laws." In lieu of the words "30 days" the*
 4 *retail seller may specify any longer period.*

5 (b) The language prescribed in subdivision (a) shall
 6 appear on the first page of the warranty in at least
 7 10-point bold type. The warranty shall be delivered to the
 8 buyer at the time of the sale of the device.

9 (c) If the buyer returns the device within 30 days, the
 10 seller shall, within a reasonable time, adjust the device or,
 11 if appropriate, replace it with a device that is specifically
 12 fit for the particular needs of the buyer. If the seller does
 13 not adjust or replace the device so that it is specifically fit
 14 for the particular needs of the buyer, the seller shall
 15 promptly refund to the buyer the total amount paid.

16 (d) With respect to the retail sale of an assistive device
 17 to an individual, organization, or agency known by the
 18 seller to be purchasing for the ultimate user of the device,
 19 this section and subdivision (b) of Section 1792.2 shall be
 20 construed to require that the device be specifically fit for
 21 the particular needs of the ultimate user.

22 (e) The rights and remedies of the buyer under this
 23 section and subdivision (b) of Section 1792.2 are not
 24 subject to waiver under Section 1792.3. The rights and
 25 remedies of the buyer under this section and subdivision
 26 (b) of Section 1792.2 are cumulative, and shall not be
 27 construed to affect the obligations of the retail seller or
 28 any other party or to supplant the rights or remedies of
 29 the buyer under any other section of this chapter or
 30 under any other law or instrument.

31 (f) Section 1795.5 shall not apply to a sale of used
 32 assistive devices, and for the purposes of the
 33 Song-Beverly Consumer Warranty Act the buyer of a
 34 used assistive device shall have the same rights and
 35 remedies as the buyer of a new assistive device.

36 (g) The language in subdivision (a) shall not
 37 constitute an express warranty for purposes of Sections
 38 1793.2 and 1793.3.

39 *SEC. 5. Section 1794.2 of the Civil Code is repealed.*

40 ~~1794.2. (a) Subdivision (a) of Section 1794 shall not~~

1 apply to a cause of action commenced or maintained
2 pursuant to Section 382 of the Code of Civil Procedure or
3 pursuant to Section 1781 of this code.

4 ~~(b) Subdivision (a) of Section 1794 shall not apply to~~
5 ~~a judgment based solely on a breach of implied warranty~~
6 ~~of merchantability or, where present, the implied~~
7 ~~warranty of fitness.~~

8 *SEC. 6. Section 1794.2 is added to the Civil Code, to*
9 *read:*

10 *1794.2. The provision of Section 1794 authorizing the*
11 *recovery of three times the amount of the buyer's actual*
12 *damages shall not apply to either of the following:*

13 *(a) A cause of action commenced or maintained*
14 *pursuant to Section 382 of the Code of Civil Procedure or*
15 *pursuant to Section 1781 of this code.*

16 *(b) A judgment based solely on a breach of the*
17 *implied warranty of merchantability, or, where present,*
18 *the implied warranty of fitness.*

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AMENDED IN ASSEMBLY AUGUST 27, 1979

AMENDED IN ASSEMBLY JULY 10, 1979

AMENDED IN ASSEMBLY JUNE 21, 1979

AMENDED IN SENATE MAY 31, 1979

AMENDED IN SENATE MAY 21, 1979

SENATE BILL

No. 1190

Introduced by Senator Sieroty

April 19, 1979

An act to amend Sections 1791, *1791.1*, 1792.2, and 1793 of, to add Sections 1793.02 and 1794.2 to, and to repeal Section 1794.2 of, the Civil Code, relating to consumer warranties.

LEGISLATIVE COUNSEL'S DIGEST

SB 1190, as amended, Sieroty. Consumer warranties.

Existing law imposes various warranty obligations on retail sellers of consumer goods, as defined, for the benefit and protection of the buyers of such goods.

This bill would include within the definition of consumer goods, and thus make subject to the warranty benefits and protections provided by law, new and used assistive devices, as defined, which are sold at retail.

This bill would, in addition, require that every sale of such a device include *an implied warranty of fitness, as specified, and a written warranty*, to be delivered to the buyer at the time of the sale of the device, that the device is specifically fit for the particular needs of the buyer or ultimate user. Such *written warranty* would also provide that the device may be returned within 30 days, *or a longer period if the retail seller so specifies*, of actual receipt of the device by the buyer; ~~or a longer period if the retail seller so specifies~~, *or completion of fitting by the seller, whichever occurs later*, if it is not

specifically fit for the particular needs of the buyer. *Any sale of an assistive device which is a catalogue or similar sale, as defined, or which involves a retail sale price of less than \$15 would not, however, be subject to such warranty requirements.*

The bill would also require the seller, if the buyer returns the device within the time period specified in the written warranty, to adjust the device or replace it with a device that is specifically fit for the particular needs of the buyer, or, if the seller does neither, to promptly refund to the buyer the total amount paid.

The bill would further provide that a buyer of a used assistive device shall have the same rights and remedies under the Song-Beverly Consumer Warranty Act as a buyer of a new assistive device.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1791 of the Civil Code is
2 amended to read:

3 1791. As used in this chapter:

4 (a) "Consumer goods" means any new product or part
5 thereof that is used or bought for use primarily for
6 personal, family, or household purposes, except for
7 clothing and consumables. "Consumer goods" shall
8 include new and used assistive devices sold at retail.

9 (b) "Buyer" or "retail buyer" means any individual
10 who buys consumer goods from a person engaged in the
11 business of manufacturing, distributing, or selling such
12 goods at retail. As used in this subdivision, "person"
13 means any individual, partnership, corporation,
14 association, or other legal entity which engages in any
15 such business.

16 (c) "Clothing" means any wearing apparel, worn for
17 any purpose, including under and outer garments, shoes,
18 and accessories composed primarily of woven material,
19 natural or synthetic yarn, fiber, or leather or similar
20 fabric.

1 (d) "Consumables" means any product which is
2 intended for consumption by individuals, or use by
3 individuals for purposes of personal care or in the
4 performance of services ordinarily rendered within the
5 household, and which usually is consumed or expended in
6 the course of such consumption or use.

7 (e) "Distributor" means any individual, partnership,
8 corporation, association, or other legal relationship which
9 stands between the manufacturer and the retail seller in
10 purchases, consignments, or contracts for sale of
11 consumer goods.

12 (f) "Independent repair or service facility" or
13 "independent service dealer" means any individual,
14 partnership, corporation, association, or other legal
15 entity, not an employee or subsidiary of a manufacturer
16 or distributor, which engages in the business of servicing
17 and repairing consumer goods.

18 (g) "Manufacturer" means any individual,
19 partnership, corporation, association, or other legal
20 relationship which manufactures, assembles, or produces
21 consumer goods.

22 (h) "Place of business" means, for the purposes of any
23 retail seller that sells consumer goods by catalog or mail
24 order, the distribution point for such goods.

25 (i) "Retail seller," "seller," or "retailer" means any
26 individual, partnership, corporation, association, or other
27 legal relationship which engages in the business of selling
28 consumer goods to retail buyers.

29 (j) "Return to the retail seller" means, for the
30 purposes of any retail seller that sells consumer goods by
31 catalog or mail order, the retail seller's place of business,
32 as defined in subdivision (h).

33 (k) "Sale" means (1) the passing of title from the seller
34 to the buyer for a price, or (2) a consignment for sale.

35 (l) "Service contract" means a contract in writing to
36 perform, over a fixed period of time or for a specified
37 duration, services relating to the maintenance or repair
38 of a consumer product.

39 (m) "Assistive device" means any instrument,
40 apparatus, or contrivance, including any component or

1 part thereof or accessory thereto, which is used or
2 intended to be used, to assist a physically disabled person
3 in the mitigation or treatment of an injury or disease or
4 to assist or affect *or replace* the structure or any function
5 of the body of a physically disabled person. "~~Assistive~~
6 ~~device~~" shall include any device which is used or
7 intended to be used to replace any part of the human
8 body.

9 (n) "*Catalogue or similar sale*" means a sale in which
10 neither the seller nor any employee or agent of the seller
11 nor any person related to the seller nor any person with
12 a financial interest in the sale participates in the diagnosis
13 of the buyer's condition or in the selection or fitting of the
14 device.

15 SEC. 1.5. . Section 1791.1 of the Civil Code is amended
16 to read:

17 1791.1. As used in this chapter:

18 (a) "Implied warranty of merchantability" or
19 "implied warranty that goods are merchantable" means
20 that the consumer goods meet each of the following:

21 (1) Pass without objection in the trade under the
22 contract description.

23 (2) Are fit for the ordinary purposes for which such
24 goods are used.

25 (3) Are adequately contained, packaged, and labeled.

26 (4) Conform to the promises or affirmations of fact
27 made on the container or label.

28 (b) "Implied warranty of fitness" means (1) that when
29 the retailer, distributor, or manufacturer has reason to
30 know any particular purpose for which the consumer
31 goods are required, and further, that the buyer is relying
32 on the skill and judgment of the seller to select and
33 furnish suitable goods, then there is an implied warranty
34 that the goods shall be fit for such purpose and (2) that
35 when there is a sale of an assistive device sold at retail in
36 this state, then there is an implied warranty by the
37 retailer that the device is specifically fit for the needs of
38 the buyer.

39 (c) The duration of the implied warranty of
40 merchantability and where present the implied warranty

1 of fitness shall be coextensive in duration with an express
2 warranty which accompanies the consumer goods,
3 provided the duration of the express warranty is
4 reasonable; but in no event shall such implied warranty
5 have a duration of less than 60 days nor more than one
6 year following the sale of new consumer goods to a retail
7 buyer. Where no duration for an express warranty is
8 stated with respect to consumer goods, or parts thereof,
9 the duration of the implied warranty shall be the
10 maximum period prescribed above.

11 (d) Any buyer of consumer goods injured by a breach
12 of the implied warranty of merchantability and where
13 applicable by a breach of the implied warranty of fitness
14 has the remedies provided in Chapter 6 (commencing
15 with Section 2601) and Chapter 7 (commencing with
16 Section 2701) of Division 2 of the Commercial Code, and,
17 in any action brought under such provisions, Section 1794
18 of this chapter shall apply.

19 SEC. 2. Section 1792.2 of the Civil Code is amended
20 to read:

21 1792.2. (a) Every sale of consumer goods that are
22 sold at retail in this state by a retailer or distributor who
23 has reason to know at the time of the retail sale that the
24 goods are required for a particular purpose, and that the
25 buyer is relying on the retailer's or distributor's skill or
26 judgment to select or furnish suitable goods, shall be
27 accompanied by such retailer's or distributor's implied
28 warranty that the goods are fit for that purpose.

29 (b) Every sale of an assistive device sold at retail in this
30 state shall be accompanied by the retail seller's implied
31 warranty that the device is specifically fit for the
32 particular needs of the buyer.

33 SEC. 3. Section 1793 of the Civil Code is amended to
34 read:

35 1793. Except as provided in Section 1793.02, nothing
36 in this chapter shall affect the right of the manufacturer,
37 distributor, or retailer to make express warranties with
38 respect to consumer goods. However, a manufacturer,
39 distributor, or retailer, in transacting a sale in which
40 express warranties are given, may not limit, modify, or

1 disclaim the implied warranties guaranteed by this
2 chapter to the sale of consumer goods.

3 SEC. 4. Section 1793.02 is added to the Civil Code, to
4 read:

5 1793.02. (a) All new and used assistive devices sold at
6 retail in this state shall be accompanied by the retail
7 seller's written warranty which shall contain the
8 following language:

9 ~~"This assistive device is warranted to be specifically fit~~
10 ~~following language: "This assistive device is warranted to~~
11 ~~be specifically fit for the particular needs of you, the~~
12 ~~buyer; and . If the device is not specifically fit for your~~
13 ~~particular needs, it may be returned to the seller within~~
14 ~~30 days of the date of actual receipt by you if the device~~
15 ~~is not specifically fit for your particular needs receipt by~~
16 ~~you or completion of fitting by the seller, whichever~~
17 ~~occurs later.~~ If you return the device, the seller will either
18 adjust or replace the device or promptly refund the total
19 amount paid. This warranty does not affect the
20 protections and remedies you have under other laws." In
21 lieu of the words "30 days" the retail seller may specify
22 any longer period.

23 (b) The language prescribed in subdivision (a) shall
24 appear on the first page of the warranty in at least
25 10-point bold type. The warranty shall be delivered to the
26 buyer at the time of the sale of the device.

27 (c) If the buyer returns the device within 30 days, or
28 *within any longer period specified in the warranty, of the*
29 *date of actual receipt or completion of fitting by the*
30 *seller, whichever occurs later,* the seller shall, within a
31 reasonable time, adjust the device or, if appropriate,
32 replace it with a device that is specifically fit for the
33 particular needs of the buyer. If the seller does not adjust
34 or replace the device so that it is specifically fit for the
35 particular needs of the buyer, the seller shall promptly
36 refund to the buyer the total amount paid.

37 (d) With respect to the retail sale of an assistive device
38 to an individual, organization, or agency known by the
39 seller to be purchasing for the ultimate user of the device,
40 this section and subdivision (b) of Section 1792.2 shall be

1 construed to require that the device be specifically fit for
2 the particular needs of the ultimate user.

3 ~~(e) The rights and remedies of the buyer under this~~

4 *(e) This section and subdivision (b) of Section 1792.2*
5 *shall not apply to any sale of an assistive device which is*
6 *a catalogue or similar sale or which involves a retail sale*
7 *price of less than fifteen dollars (\$15).*

8 *(f) The rights and remedies of the buyer under this*
9 *section and subdivision (b) of Section 1792.2 are not*
10 *subject to waiver under Section 1792.3. The rights and*
11 *remedies of the buyer under this section and subdivision*
12 *(b) of Section 1792.2 are cumulative, and shall not be*
13 *construed to affect the obligations of the retail seller or*
14 *any other party or to supplant the rights or remedies of*
15 *the buyer under any other section of this chapter or*
16 *under any other law or instrument.*

17 ~~(f)~~

18 *(g) Section 1795.5 shall not apply to a sale of used*
19 *assistive devices, and for the purposes of the*
20 *Song-Beverly Consumer Warranty Act the buyer of a*
21 *used assistive device shall have the same rights and*
22 *remedies as the buyer of a new assistive device.*

23 ~~(g)~~

24 *(h) The language in subdivision (a) shall not*
25 *constitute an express warranty for purposes of Sections*
26 *1793.2 and 1793.3.*

27 SEC. 5. Section 1794.2 of the Civil Code is repealed.

28 SEC. 6. Section 1794.2 is added to the Civil Code, to
29 read:

30 1794.2. The provision of Section 1794 authorizing the
31 recovery of three times the amount of the buyer's actual
32 damages shall not apply to either of the following:

33 (a) A cause of action commenced or maintained
34 pursuant to Section 382 of the Code of Civil Procedure or
35 pursuant to Section 1781 of this code.

36 (b) A judgment based solely on a breach of the
37 implied warranty of merchantability, or, where present,
38 the implied warranty of fitness.

AMENDED IN ASSEMBLY SEPTEMBER 5, 1979

AMENDED IN ASSEMBLY AUGUST 27, 1979

AMENDED IN ASSEMBLY JULY 10, 1979

AMENDED IN ASSEMBLY JUNE 21, 1979

AMENDED IN SENATE MAY 31, 1979

AMENDED IN SENATE MAY 21, 1979

SENATE BILL

No. 1190

Introduced by Senator Sieroty

April 19, 1979

An act to amend Sections 1791, 1791.1, 1792.2, and 1793 of, to add Sections 1793.02 and 1794.2 to, and to repeal Section 1794.2 of, the Civil Code, relating to consumer warranties.

LEGISLATIVE COUNSEL'S DIGEST

SB 1190, as amended, Sieroty. Consumer warranties.

Existing law imposes various warranty obligations on retail sellers of consumer goods, as defined, for the benefit and protection of the buyers of such goods.

This bill would include within the definition of consumer goods, and thus make subject to the warranty benefits and protections provided by law, new and used assistive devices, as defined, which are sold at retail.

This bill would, in addition, require that every sale of such a device include an implied warranty of fitness, as specified, and a written warranty, to be delivered to the buyer at the time of the sale of the device, that the device is specifically fit for the particular needs of the buyer or ultimate user. Such written warranty would also provide that the device may be returned within 30 days, or a longer period if the retail seller so specifies, of actual receipt of the device by the buyer or

completion of fitting by the seller, whichever occurs later, if it is not specifically fit for the particular needs of the buyer. Any sale of an assistive device which is a catalogue or similar sale, as defined, or which involves a retail sale price of less than \$15 would not, however, be subject to such warranty requirements.

The bill would also require the seller, if the buyer returns the device within the time period specified in the written warranty, to adjust the device or replace it with a device that is specifically fit for the particular needs of the buyer, or, if the seller does neither, to promptly refund to the buyer the total amount paid, *as specified*.

The bill would further provide that a buyer of a used assistive device shall have the same rights and remedies under the Song-Beverly Consumer Warranty Act as a buyer of a new assistive device.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1791 of the Civil Code is
2 amended to read:

3 1791. As used in this chapter:

4 (a) "Consumer goods" means any new product or part
5 thereof that is used or bought for use primarily for
6 personal, family, or household purposes, except for
7 clothing and consumables. "Consumer goods" shall
8 include new and used assistive devices sold at retail.

9 (b) "Buyer" or "retail buyer" means any individual
10 who buys consumer goods from a person engaged in the
11 business of manufacturing, distributing, or selling such
12 goods at retail. As used in this subdivision, "person"
13 means any individual, partnership, corporation,
14 association, or other legal entity which engages in any
15 such business.

16 (c) "Clothing" means any wearing apparel, worn for
17 any purpose, including under and outer garments, shoes,
18 and accessories composed primarily of woven material,
19 natural or synthetic yarn, fiber, or leather or similar

1 fabric.

2 (d) "Consumables" means any product which is
3 intended for consumption by individuals, or use by
4 individuals for purposes of personal care or in the
5 performance of services ordinarily rendered within the
6 household, and which usually is consumed or expended in
7 the course of such consumption or use.

8 (e) "Distributor" means any individual, partnership,
9 corporation, association, or other legal relationship which
10 stands between the manufacturer and the retail seller in
11 purchases, consignments, or contracts for sale of
12 consumer goods.

13 (f) "Independent repair or service facility" or
14 "independent service dealer" means any individual,
15 partnership, corporation, association, or other legal
16 entity, not an employee or subsidiary of a manufacturer
17 or distributor, which engages in the business of servicing
18 and repairing consumer goods.

19 (g) "Manufacturer" means any individual,
20 partnership, corporation, association, or other legal
21 relationship which manufactures, assembles, or produces
22 consumer goods.

23 (h) "Place of business" means, for the purposes of any
24 retail seller that sells consumer goods by catalog or mail
25 order, the distribution point for such goods.

26 (i) "Retail seller," "seller," or "retailer" means any
27 individual, partnership, corporation, association, or other
28 legal relationship which engages in the business of selling
29 consumer goods to retail buyers.

30 (j) "Return to the retail seller" means, for the
31 purposes of any retail seller that sells consumer goods by
32 catalog or mail order, the retail seller's place of business,
33 as defined in subdivision (h).

34 (k) "Sale" means (1) the passing of title from the seller
35 to the buyer for a price, or (2) a consignment for sale.

36 (l) "Service contract" means a contract in writing to
37 perform, over a fixed period of time or for a specified
38 duration, services relating to the maintenance or repair
39 of a consumer product.

40 (m) "Assistive device" means any instrument,

1 apparatus, or contrivance, including any component or
2 part thereof or accessory thereto, which is used or
3 intended to be used, to assist a physically disabled person
4 in the mitigation or treatment of an injury or disease or
5 to assist or affect or replace the structure or any function
6 of the body of a physically disabled person.

7 (n) "Catalogue or similar sale" means a sale in which
8 neither the seller nor any employee or agent of the seller
9 nor any person related to the seller nor any person with
10 a financial interest in the sale participates in the diagnosis
11 of the buyer's condition or in the selection or fitting of the
12 device.

13 SEC. 1.5. Section 1791.1 of the Civil Code is amended
14 to read:

15 1791.1. As used in this chapter:

16 (a) "Implied warranty of merchantability" or
17 "implied warranty that goods are merchantable" means
18 that the consumer goods meet each of the following:

19 (1) Pass without objection in the trade under the
20 contract description.

21 (2) Are fit for the ordinary purposes for which such
22 goods are used.

23 (3) Are adequately contained, packaged, and labeled.

24 (4) Conform to the promises or affirmations of fact
25 made on the container or label.

26 (b) "Implied warranty of fitness" means (1) that when
27 the retailer, distributor, or manufacturer has reason to
28 know any particular purpose for which the consumer
29 goods are required, and further, that the buyer is relying
30 on the skill and judgment of the seller to select and
31 furnish suitable goods, then there is an implied warranty
32 that the goods shall be fit for such purpose and (2) that
33 when there is a sale of an assistive device sold at retail in
34 this state, then there is an implied warranty by the
35 retailer that the device is specifically fit for the *particular*
36 needs of the buyer.

37 (c) The duration of the implied warranty of
38 merchantability and where present the implied warranty
39 of fitness shall be coextensive in duration with an express
40 warranty which accompanies the consumer goods,

1 provided the duration of the express warranty is
2 reasonable; but in no event shall such implied warranty
3 have a duration of less than 60 days nor more than one
4 year following the sale of new consumer goods to a retail
5 buyer. Where no duration for an express warranty is
6 stated with respect to consumer goods, or parts thereof,
7 the duration of the implied warranty shall be the
8 maximum period prescribed above.

9 (d) Any buyer of consumer goods injured by a breach
10 of the implied warranty of merchantability and where
11 applicable by a breach of the implied warranty of fitness
12 has the remedies provided in Chapter 6 (commencing
13 with Section 2601) and Chapter 7 (commencing with
14 Section 2701) of Division 2 of the Commercial Code, and,
15 in any action brought under such provisions, Section 1794
16 of this chapter shall apply.

17 SEC. 2. Section 1792.2 of the Civil Code is amended
18 to read:

19 1792.2. (a) Every sale of consumer goods that are
20 sold at retail in this state by a retailer or distributor who
21 has reason to know at the time of the retail sale that the
22 goods are required for a particular purpose, and that the
23 buyer is relying on the retailer's or distributor's skill or
24 judgment to select or furnish suitable goods shall be
25 accompanied by such retailer's or distributor's implied
26 warranty that the goods are fit for that purpose.

27 (b) Every sale of an assistive device sold at retail in this
28 state shall be accompanied by the retail seller's implied
29 warranty that the device is specifically fit for the
30 particular needs of the buyer.

31 SEC. 3. Section 1793 of the Civil Code is amended to
32 read:

33 1793. Except as provided in Section 1793.02, nothing
34 in this chapter shall affect the right of the manufacturer,
35 distributor, or retailer to make express warranties with
36 respect to consumer goods. However, a manufacturer,
37 distributor, or retailer, in transacting a sale in which
38 express warranties are given, may not limit, modify, or
39 disclaim the implied warranties guaranteed by this
40 chapter to the sale of consumer goods.

1 SEC. 4. Section 1793.02 is added to the Civil Code, to
2 read:

3 1793.02. (a) All new and used assistive devices sold at
4 retail in this state shall be accompanied by the retail
5 seller's written warranty which shall contain the
6 following language: "This assistive device is warranted to
7 be specifically fit for the particular needs of you, the
8 buyer. If the device is not specifically fit for your
9 particular needs, it may be returned to the seller within
10 30 days of the date of actual receipt by you or completion
11 of fitting by the seller, whichever occurs later. If you
12 return the device, the seller will either adjust or replace
13 the device or promptly refund the total amount paid.
14 This warranty does not affect the protections and
15 remedies you have under other laws." In lieu of the words
16 "30 days" the retail seller may specify any longer period.

17 (b) The language prescribed in subdivision (a) shall
18 appear on the first page of the warranty in at least
19 10-point bold type. The warranty shall be delivered to the
20 buyer at the time of the sale of the device.

21 (c) If the buyer returns the device within 30 days, or
22 ~~within any longer period specified in the warranty, of the~~
23 ~~date of actual receipt or completion of fitting by the~~
24 ~~seller, whichever occurs later, the seller shall, within a the~~
25 ~~period specified in the written warranty, the seller shall,~~
26 ~~without charge and within a reasonable time, adjust the~~
27 ~~device or, if appropriate, replace it with a device that is~~
28 ~~specifically fit for the particular needs of the buyer. If the~~
29 ~~seller does not adjust or replace the device so that it is~~
30 ~~specifically fit for the particular needs of the buyer, the~~
31 ~~seller shall promptly refund to the buyer the total amount~~
32 ~~paid, the transaction shall be deemed rescinded, and the~~
33 ~~seller shall promptly return to the buyer all payments and~~
34 ~~any assistive device or other consideration exchanged as~~
35 ~~part of the transaction and shall promptly cancel or cause~~
36 ~~to be cancelled all contracts, instruments, and security~~
37 ~~agreements executed by the buyer in connection with~~
38 ~~the sale. When a sale is rescinded under this section, no~~
39 ~~charge, penalty, or other fee may be imposed in~~
40 ~~connection with the purchase, fitting, financing, or~~

1 *return of the device.*

2 (d) With respect to the retail sale of an assistive device
3 to an individual, organization, or agency known by the
4 seller to be purchasing for the ultimate user of the device,
5 this section and subdivision (b) of Section 1792.2 shall be
6 construed to require that the device be specifically fit for
7 the particular needs of the ultimate user.

8 (e) This section and subdivision (b) of Section 1792.2
9 shall not apply to any sale of an assistive device which is
10 a catalogue or similar sale or which involves a retail sale
11 price of less than fifteen dollars (\$15).

12 (f) The rights and remedies of the buyer under this
13 section and subdivision (b) of Section 1792.2 are not
14 subject to waiver under Section 1792.3. The rights and
15 remedies of the buyer under this section and subdivision
16 (b) of Section 1792.2 are cumulative, and shall not be
17 construed to affect the obligations of the retail seller or
18 any other party or to supplant the rights or remedies of
19 the buyer under any other section of this chapter or
20 under any other law or instrument.

21 (g) Section 1795.5 shall not apply to a sale of used
22 assistive devices, and for the purposes of the
23 Song-Beverly Consumer Warranty Act the buyer of a
24 used assistive device shall have the same rights and
25 remedies as the buyer of a new assistive device.

26 (h) The language in subdivision (a) shall not
27 constitute an express warranty for purposes of Sections
28 1793.2 and 1793.3.

29 SEC. 5. Section 1794.2 of the Civil Code is repealed.

30 SEC. 6. Section 1794.2 is added to the Civil Code, to
31 read:

32 1794.2. The provision of Section 1794 authorizing the
33 recovery of three times the amount of the buyer's actual
34 damages shall not apply to either of the following:

35 (a) A cause of action commenced or maintained
36 pursuant to Section 382 of the Code of Civil Procedure or
37 pursuant to Section 1781 of this code.

38 (b) A judgment based solely on a breach of the
39 implied warranty of merchantability, or, where present,
40 the implied warranty of fitness.

Volume 3

STATUTES OF CALIFORNIA

AND DIGESTS OF MEASURES

1979

Constitution of 1879 as Amended

Measures Submitted to Vote of Electors,
Special Election, November 6, 1979

General Laws, Amendments to the Codes, Resolutions,
and Constitutional Amendments passed by the
California Legislature

1979–80 Regular Session



Compiled by
BION M. GREGORY
Legislative Counsel

manufacturer, the license plate number, and the mileage;

(3) The authority and purpose for the removal of the vehicle.

Such notification shall also specify that, in order to receive their post-storage hearing, such owners, or their agents, must request the hearing in person, writing, or by telephone within 10 days of the date appearing on the notice. Any such hearing shall be conducted within 48 hours of the request, excluding weekends and holidays. The public agency may authorize its own officer or employee to conduct the hearing, so long as such hearing officer is not the same person who directed the storage of the vehicle.

(b) Failure of either the registered or legal owner, or their agent, to request or to attend a scheduled hearing shall satisfy the post-storage validity hearing requirement of this section.

The agency employing the person who directed the storage shall be responsible for the costs incurred for towing and storage if it is determined in the hearing that probable cause for the storage cannot be established

(c) The provisions of this section shall not apply to the removal of vehicles abated under the Abandoned Vehicle Abatement Program pursuant to Sections 22660 to 22668, inclusive, and Section 22710, or to vehicles impounded for investigation pursuant to Section 22655, or to vehicles removed from private property pursuant to Section 22658

SEC 5. Notwithstanding Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act pursuant to these sections because the performance of any service required to be performed by this act is mandated by judicial decision. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

CHAPTER 1023

An act to amend Sections 1791, 1791.1, 1792 2, and 1793 of, to add Sections 1793.02 and 1794 2 to, and to repeal Section 1794.2 of, the Civil Code, relating to consumer warranties.

[Approved by Governor September 26, 1979 Filed with
Secretary of State September 26, 1979]

The people of the State of California do enact as follows.

SECTION 1 Section 1791 of the Civil Code is amended to read: 1791. As used in this chapter:

(a) "Consumer goods" means any new product or part thereof that is used or bought for use primarily for personal, family, or household purposes, except for clothing and consumables. "Consumer goods" shall include new and used assistive devices sold at retail

(b) "Buyer" or "retail buyer" means any individual who buys consumer goods from a person engaged in the business of

manufacturing, distributing, or selling such goods at retail. As used in this subdivision, "person" means any individual, partnership, corporation, association, or other legal entity which engages in any such business

(c) "Clothing" means any wearing apparel, worn for any purpose, including under and outer garments, shoes, and accessories composed primarily of woven material, natural or synthetic yarn, fiber, or leather or similar fabric.

(d) "Consumables" means any product which is intended for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of such consumption or use

(e) "Distributor" means any individual, partnership, corporation, association, or other legal relationship which stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale of consumer goods

(f) "Independent repair or service facility" or "independent service dealer" means any individual, partnership, corporation, association, or other legal entity, not an employee or subsidiary of a manufacturer or distributor, which engages in the business of servicing and repairing consumer goods

(g) "Manufacturer" means any individual, partnership, corporation, association, or other legal relationship which manufactures, assembles, or produces consumer goods.

(h) "Place of business" means, for the purposes of any retail seller that sells consumer goods by catalog or mail order, the distribution point for such goods

(i) "Retail seller," "seller," or "retailer" means any individual, partnership, corporation, association, or other legal relationship which engages in the business of selling consumer goods to retail buyers

(j) "Return to the retail seller" means, for the purposes of any retail seller that sells consumer goods by catalog or mail order, the retail seller's place of business, as defined in subdivision (h)

(k) "Sale" means (1) the passing of title from the seller to the buyer for a price, or (2) a consignment for sale.

(l) "Service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair of a consumer product

(m) "Assistive device" means any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of a physically disabled person

(n) "Catalogue or similar sale" means a sale in which neither the seller nor any employee or agent of the seller nor any person related to the seller nor any person with a financial interest in the sale participates in the diagnosis of the buyer's condition or in the selection or fitting of the device

SEC. 15. Section 1791.1 of the Civil Code is amended to read:

1791.1. As used in this chapter:

(a) "Implied warranty of merchantability" or "implied warranty that goods are merchantable" means that the consumer goods meet each of the following:

(1) Pass without objection in the trade under the contract description.

(2) Are fit for the ordinary purposes for which such goods are used

(3) Are adequately contained, packaged, and labeled.

(4) Conform to the promises or affirmations of fact made on the container or label

(b) "Implied warranty of fitness" means (1) that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose and (2) that when there is a sale of an assistive device sold at retail in this state, then there is an implied warranty by the retailer that the device is specifically fit for the particular needs of the buyer.

(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable, but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above.

(d) Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply.

SEC. 2. Section 1792.2 of the Civil Code is amended to read.

1792.2. (a) Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who 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 retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose.

(b) Every sale of an assistive device sold at retail in this state shall be accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer.

SEC. 3. Section 1793 of the Civil Code is amended to read.

1793 Except as provided in Section 1793.02, nothing in this

chapter shall affect the right of the manufacturer, distributor, or retailer to make express warranties with respect to consumer goods. However, a manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods

SEC. 4 Section 1793.02 is added to the Civil Code, to read:

1793.02 (a) All new and used assistive devices sold at retail in this state shall be accompanied by the retail seller's written warranty which shall contain the following language: "This assistive device is warranted to be specifically fit for the particular needs of you, the buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws." In lieu of the words "30 days" the retail seller may specify any longer period

(b) The language prescribed in subdivision (a) shall appear on the first page of the warranty in at least 10-point bold type. The warranty shall be delivered to the buyer at the time of the sale of the device.

(c) If the buyer returns the device within the period specified in the written warranty, the seller shall, without charge and within a reasonable time, adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer. If the seller does not adjust or replace the device so that it is specifically fit for the particular needs of the buyer, the seller shall promptly refund to the buyer the total amount paid, the transaction shall be deemed rescinded, and the seller shall promptly return to the buyer all payments and any assistive device or other consideration exchanged as part of the transaction and shall promptly cancel or cause to be cancelled all contracts, instruments, and security agreements executed by the buyer in connection with the sale. When a sale is rescinded under this section, no charge, penalty, or other fee may be imposed in connection with the purchase, fitting, financing, or return of the device

(d) With respect to the retail sale of an assistive device to an individual, organization, or agency known by the seller to be purchasing for the ultimate user of the device, this section and subdivision (b) of Section 1792.2 shall be construed to require that the device be specifically fit for the particular needs of the ultimate user

(e) This section and subdivision (b) of Section 1792.2 shall not apply to any sale of an assistive device which is a catalogue or similar sale or which involves a retail sale price of less than fifteen dollars (\$15)

(f) The rights and remedies of the buyer under this section and subdivision (b) of Section 1792.2 are not subject to waiver under

Section 1792.3. The rights and remedies of the buyer under this section and subdivision (b) of Section 1792.2 are cumulative, and shall not be construed to affect the obligations of the retail seller or any other party or to supplant the rights or remedies of the buyer under any other section of this chapter or under any other law or instrument.

(g) Section 1795.5 shall not apply to a sale of used assistive devices, and for the purposes of the Song-Beverly Consumer Warranty Act the buyer of a used assistive device shall have the same rights and remedies as the buyer of a new assistive device.

(h) The language in subdivision (a) shall not constitute an express warranty for purposes of Sections 1793.2 and 1793.3.

SEC. 5 Section 1794.2 of the Civil Code is repealed.

SEC. 6 Section 1794.2 is added to the Civil Code, to read:

1794.2 The provision of Section 1794 authorizing the recovery of three times the amount of the buyer's actual damages shall not apply to either of the following.

(a) A cause of action commenced or maintained pursuant to Section 382 of the Code of Civil Procedure or pursuant to Section 1781 of this code.

(b) A judgment based solely on a breach of the implied warranty of merchantability, or, where present, the implied warranty of fitness.

CHAPTER 1024

An act to add and repeal Section 4432 of the Welfare and Institutions Code, relating to state hospitals.

[Approved by Governor September 26, 1979. Filed with
Secretary of State September 26, 1979.]

The people of the State of California do enact as follows:

SECTION 1 Section 4432 is added to the Welfare and Institutions Code, to read:

4432. The department shall conduct a study or pilot project, or both, in one or more state hospitals to determine the cost-effectiveness and feasibility of providing, at the same level of quality, all or some portion of food services, janitorial services, medical/surgical services, laundry services, or pharmacy services, or the management of one or more services, by contract with private providers.

The department shall submit a report to the Legislature on the results of the study or pilot project, or both, on or before January 1, 1982.

This section shall remain in effect only until January 1, 1982, and as of such date is repealed, unless a later enacted statute, which is



1020 N STREET, SACRAMENTO, CALIFORNIA 95814
(916) 322-4292



April 5, 1979

Mr. Larry Briskin
Senator Alan Sieroty's Office
State Capitol, Room 5072
Sacramento, CA 95814

Dear Larry:

Please find enclosed a draft and information regarding the assistive device warranty proposal we discussed. In view of your record in this area, many of the proponents would like Alan to author.

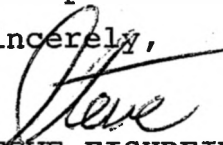
This proposal has been approved by the Administration and is sponsored by the Departments of Consumer Affairs and Rehabilitation. Other organizations which have responded positively to this legislation are the California Association for the Physically Handicapped, Fresno Association of the Physically Handicapped Service Center, Long Beach Disabled Resources, Mt. Diablo Rehabilitation Center, the Adult Independence Development Center, Berkeley Center for Independent Living, and the San Francisco Independent Living Project. This response arose out of inquiries conducted during the fall recess. We are also developing other proponents.

Judicial remedies are not always appropriate for a disabled consumer who purchases an assistive device not individually suited. The essential time element necessary for physical mobility and assistance would be best served through the initial retail purchase level and not by subsequent lengthy civil remedies. Further, the disabled are not always in a position to effectively assert their rights under existing law.

One amendment to this legislation might be to include an additional provision requiring contract language to specify the warranty remedies, right of return and retailer cure options. This language would insure the necessary knowledge and communication between the consumer and retailer.

Please let me know your thoughts. We will be glad to discuss additional justification and need for this specific warranty.

Sincerely,


STEVE FISHBEIN
Legislative Coordinator

cc: Richard B. Spohn
Bob Williams
Allen Sumner
Joan Jennings
Jan Dell



NOTE: The original proposal was submitted on November 3, 1975. This is a redraft.

Amendments to the California Song-Beverly Consumer Warranty Act

Add to Civil Code Section 1791(a):

"Consumer goods' shall include new and used assistive devices sold at retail."

Add to Civil Code Section 1791(m):

"(m) 'Assistive device' means any instrument, apparatus, or contrivance, including any component or part of an assistive device, or accessory thereto, which is used, or intended for use, to assist a physically disabled person in any of the following ways:

"(a) In the mitigation or treatment of an injury or disease; or

"(b) To assist or affect the structure or any function of the body."

Add to Civil Code Section 1792.21:

"Every sale of an assistive device sold at retail in this state shall be accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer."

Add to Civil Code Section 1793.06:

"All assistive devices sold at retail shall include the retail seller's express warranty that the device is specifically fit for the particular needs of the buyer, and that the device may be returned to the seller within thirty (30) days of the date of actual receipt by the buyer if the device is not specifically fit for the particular needs of the buyer. After receipt of notice of the buyer's intention to return, the seller shall have the right to cure by seasonably notifying the buyer of the seller's intention to cure and by furnishing a conforming product within a reasonable time. If the seller does not cure, the seller shall restore any downpayment or other consideration received from or on behalf of the buyer."

NOTE: Our original proposal stated the period of time for the buyer's right of return as 15 days. The suggested language, outlined above, states a 30 day period. The Department of Rehabilitation desires a 45 day return period.

Should your office prefer the Department of Rehabilitation's modification, we would concur.

§ 1790. [Title.] This chapter may be cited as the "Song-Beverly Consumer Warranty Act." [1970 ch 1333 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 190; *Witkin Summary* (8th ed) pp 1128, 1277.

§ 1790.1. [Enforceability of waiver.] Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void. [1970 ch 1333 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 195; *Witkin Summary* (8th ed) pp 1150, 1220, 1278.

§ 1790.2. [Severability.] If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. [1970 ch 1333 § 1.]

§ 1790.3. [Construction in case of conflict with Commercial Code.] The provisions of this chapter shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail. [1970 ch 1333 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 190; *Witkin Summary* (8th ed) p 1128.

§ 1790.4. [Cumulative remedies.] The remedies provided by this chapter are cumulative and shall not be construed as restricting any remedy that is otherwise available and, in particular, shall not be construed to supplant the provisions of the Unfair Practices Act. [1971 ch 1523 § 1, operative January 1, 1972; 1976 ch 416 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 190; *Witkin Summary* (8th ed) p 1219.

ARTICLE 2

Definitions

§ 1791. Definitions.

§ 1791.1. "Implied warranty of merchantability": "Implied warranty of fitness."

§ 1791.2. "Express warranty".

§ 1791.3. "As is": "With all faults".

§ 1791. [Definitions.] As used in this chapter:

(a) "Consumer goods" means any new product or part thereof that is used or bought for use primarily for personal, family, or household purposes, except for clothing and consumables.

(b) "Buyer" or "retail buyer" means any individual who buys consumer goods from a person engaged in the business of manufacturing, distributing, or selling such goods at retail. As used in this subdivision, "person" means any individual, partnership, corporation, association, or other legal entity which engages in any such business.

(c) "Clothing" means any wearing apparel, worn for any purpose, including under and outer garments, shoes, and accessories composed primarily of woven material, natural or synthetic yarn, fiber, or leather or similar fabric.

(d) "Consumables" means any product which is intended for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of such consumption or use.

(e) "Distributor" means any individual, partnership, corporation, association, or other legal relationship which stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale of consumer goods.

(f) "Independent repair or service facility" or "independent service dealer" means any individual, partnership, corporation, association, or other legal entity, not an employee or subsidiary of a manufacturer or distributor, which engages in the business of servicing and repairing consumer goods.

CALIFORNIA SONG-BEVERLY CONSUMER WARRANTY ACT

(California Civil Code Sections 1790-1795.7)

TITLE 1.7

Consumer Warranties

Chapter

1. Consumer Warranty Protection. §§ 1790-1795.7.
2. Standards For Warranty Work. §§ 1796, 1796.5
3. Mobilehome Warranties. §§ 1797-1797.5.

CHAPTER 1

Consumer Warranty Protection

Article

1. General Provisions. §§ 1790-1790.4.
2. Definitions. §§ 1791-1791.3.
3. Sale Warranties. §§ 1792-1795.7.

ARTICLE 1

General Provisions

- § 1790. Title.
- § 1790.1. Enforceability of waiver.
- § 1790.2. Severability.
- § 1790.3. Construction in case of conflict with Commercial Code.
- § 1790.4. Cumulative remedies.

§ 1791.3. ["As is": "With all faults".] As used in this chapter, a sale "as is" or "with all faults" means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to

the sale of consumer goods under the provisions of this chapter. [1970 ch 1333 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws § 195; Cal Jur 2d Sales §§ 97, 101.*

ARTICLE 3

Sale Warranties

- § 1792. Implied warranties: Manufacturer's warranty of merchantability.
- § 1792.1. Manufacturer's warranty of fitness for particular purpose.
- § 1792.2. Retailer's or distributor's warranty of fitness for particular purpose.
- § 1792.3. When waiver allowed.
- § 1792.4. Disclaimer: Contents of written notice: Catalog sales.
- § 1792.5. Effective waiver.
- § 1793. Express warranties.
- § 1793.05. Vehicle manufacturers altering new vehicles into housecars: Warranty responsibility.
- § 1793.1. Contents of written notice.
- § 1793.2. Duty of manufacturer making express warranty: Service and repair facilities, and servicing and repairing nonconforming goods: Buyer's delivery or notice, and transportation of goods to facility: Replacement of goods or reimbursement therefor.
- § 1793.3. Same: Buyer's remedies in absence of service and repair facilities: Option of retail seller to provide service or repair: Manufacturer to provide notice of buyer's courses of action.
- § 1793.35. Same: Replacement of or reimbursement for soft goods or consumables.
- § 1793.4. Time for buyer to exercise option for service and repair.
- § 1793.5. Same: Manufacturer's liability to retailer on failing to maintain service facilities.
- § 1793.6. Same: Manufacturer's liability to independent service man performing services or incurring obligations.
- § 1794. Buyer's right to damages: Treble damages: Attorneys' fees.
- § 1794.1. Damages recoverable by retail seller and independent serviceman.
- § 1794.2. When treble damages provisions inapplicable.
- § 1794.3. Effect of unauthorized or unreasonable use of goods.
- § 1794.4. Service contract.
- § 1794.5. Alternative suggestions for repair.
- § 1795. Liability of one, other than manufacturer, making express warranty.
- § 1795.1. Components of air conditioning system.
- § 1795.5. Obligation of distributor or retail seller of used consumer goods on making express warranties: Duration of implied warranties.
- § 1795.6. Tolling the warranty period.
- § 1795.7. Effect of tolling on manufacturer's liability.

§ 1792. [Implied warranties: Manufacturer's warranty of merchantability.] Unless disclaimed in the manner prescribed by this chapter, 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. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section. [1970 ch 1333 § 1; 1971 ch 1523 § 4, operative January 1, 1972; 1978 ch 991 § 3.]

Cal Jur 3d Consumer and Borrower Protection Laws § 192; Witkin Summary (8th ed) pp 1138, 1154.

§ 1792.1. [Manufacturer's warranty of fitness for particular purpose.] Every sale of consumer goods that are sold at retail in this state by a manufacturer who 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's skill or judgment to select or furnish suitable goods shall be accompanied

(g) "Manufacturer" means any individual, partnership, corporation, association, or other legal relationship which manufactures, assembles, or produces consumer goods.

(h) "Place of business" means, for the purposes of any retail seller that sells consumer goods by catalog or mail order, the distribution point for such goods.

(i) "Retail seller," "seller," or "retailer" means any individual, partnership, corporation, association, or other legal relationship which engages in the business of selling consumer goods to retail buyers.

(j) "Return to the retail seller" means, for the purposes of any retail seller that sells consumer goods by catalog or mail order, the retail seller's place of business, as defined in subdivision (h).

(k) "Sale" means (1) the passing of title from the seller to the buyer for a price, or (2) a consignment for sale.

(l) "Service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair of a consumer product. [1970 ch 1333 § 1; 1971 ch 1523 § 2, operative January 1, 1972; 1976 ch 416 § 1.5; 1977 ch 598 § 1; 1978 ch 991 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws* §§ 191, 201; *Cal Jur 2d Sales* §§ 97, 101; *Witkin Summary (8th ed)* pp 1129, 1154.

§ 1791.1. ["Implied warranty of merchantability": "Implied warranty of fitness."] As used in this chapter:

(a) "Implied warranty of merchantability" or "implied warranty that goods are merchantable" means that the consumer goods meet each of the following:

(1) Pass without objection in the trade under the contract description.

(2) Are fit for the ordinary purposes for which such goods are used.

(3) Are adequately contained, packaged, and labeled.

(4) Conform to the promises or affirmations of fact made on the container or label.

(b) "Implied warranty of fitness" means that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose.

(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coexten-

sive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above.

(d) Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply. [1970 ch 1333 § 1; 1971 ch 1523 § 3, operative January 1, 1972; 1978 ch 991 § 2.] *Cal Jur 3d Consumer and Borrower Protection Laws* §§ 192, 193, 194, 203; *Cal Jur 2d Sales* §§ 97 et seq.; *Witkin Summary (8th ed)* pp 1138, 1139, 1140, 1154.

§ 1791.2. ["Express warranty".] (a) "Express warranty" means:

(1) 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

(2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

(b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

(c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty. [1970 ch 1333 § 1; 1978 ch 991 § 2.5.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 196; *Cal Jur 2d Sales* §§ 97, 101; *Witkin Summary (8th ed)* pp 1131, 1132, 1133, 1136.

(1) At the time of sale, provide the buyer with the name and address of each such service and repair facility within this state; or

(2) At the time of sale, provide the buyer with the name and address and telephone number of a service and repair facility central directory within this state, or the toll-free telephone number of a service and repair facility central directory outside this state. It shall be the duty of the central directory to provide, upon inquiry, the name and address of the authorized service and repair facility nearest the buyer; or

(3) Maintain at the premises of retail sellers of the warrantor's consumer goods a current listing of such warrantor's authorized service and repair facilities, or retail sellers to whom the consumer goods are to be returned for service and repair, whichever is applicable, within this state. It shall be the duty of every retail seller provided with such a listing to provide, on inquiry, the name, address, and telephone number of the nearest authorized service and repair facility, or the retail seller to whom the consumer goods are to be returned for service and repair, whichever is applicable. [1970 ch 1333 § 1; 1971 ch 1523 § 8, operative January 1, 1972; 1972 ch 1293 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws* §§ 196, 197; *Witkin Summary* (8th ed) p 1277.

§ 1793.2. [Duty of manufacturer making express warranty: Service and repair facilities, and servicing and repairing nonconforming goods: Buyer's delivery or notice, and transportation of goods to facility: Replacement of goods or reimbursement therefor.] (a) Every manufacturer of consumer goods sold in this state and for which the manufacturer has made an express warranty shall:

(1) Maintain in this state sufficient service and repair facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties or designate and authorize in this state as service and repair facilities independent repair or service facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties.

As a means of complying with paragraph (1) of this subdivision, a manufacturer shall be permitted to enter into warranty service contracts with independent service and repair facilities. The warranty service contracts may provide for a fixed schedule of rates to

be charged for warranty service or warranty repair work, however, the rates fixed by such contracts shall be in conformity with the requirements of subdivision (c) of Section 1793.3. The rates established pursuant to subdivision (c) Section 1793.3, between the manufacturer and the independent service and repair facility, shall not preclude a good-faith discount which is reasonably related to reduced credit and general overhead cost factors arising from the manufacturer's payment of warranty charges direct to the independent service and repair facility. The warranty service contracts authorized by this paragraph shall not be executed to cover a period of time in excess of one year.

(2) In the event of a failure to comply with paragraph (1) of this subdivision, be subject to the provisions of Section 1793.5.

(b) Where such service and repair facilities are maintained in this state and service or repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative in this state. Unless the buyer agrees in writing to the contrary, the goods must be serviced or repaired so as to conform to the applicable warranties within 30 days. Delay caused by conditions beyond the control of the manufacturer or his representatives shall serve to extend this 30-day requirement. Where such delay arises, conforming goods shall be tendered as soon as possible following termination of the condition giving rise to the delay.

(c) It shall be the duty of the buyer to deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, such delivery cannot reasonably be accomplished. Should the buyer be unable to effect return of nonconforming goods for any of the above reasons, he shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section. Upon receipt of such notice of nonconformity the manufacturer shall, at its option, service or repair the goods at the buyer's residence, or pick up the goods for service and repair, or arrange for transporting the goods to its service and repair facility. All reasonable costs of transporting the goods when, pursuant to the above, a buyer

by such manufacturer's implied warranty of fitness. [1970 ch 1333 § 1; 1971 ch 1523 § 5, operative January 1, 1972; 1978 ch 991 § 4.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 193; *Witkin Summary* (8th ed) pp 1140, 1154.

§ 1792.2. [Retailer's or distributor's warranty of fitness for particular purpose.] Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who 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 retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose. [1970 ch 1333 § 1; 1971 ch 1523 § 6, operative January 1, 1972; 1978 ch 991 § 5.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 193; *Witkin Summary* (8th ed) p 1140.

§ 1792.3. [When waiver allowed.] No implied warranty of merchantability and, where applicable, no implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an "as is" or "with all faults" basis where the provisions of this chapter affecting "as is" or "with all faults" sales are strictly complied with. [1970 ch 1333 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 195; *Cal Jur 2d Sales* § 98; *Witkin Summary* (8th ed) pp 1148, 1150.

§ 1792.4. [Disclaimer: Contents of written notice: Catalog sales.] (a) No sale of goods, governed by the provisions of this chapter, on an "as is" or "with all faults" basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:

(1) The goods are being sold on an "as is" or "with all faults" basis.

(2) The entire risk as to the quality and performance of the goods is with the buyer.

(3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.

(b) In the event of sale of consumer goods by means of a mail order catalog, the catalog offering such goods shall contain the

required writing as to each item so offered in lieu of the requirement of notification prior to the sale. [1970 ch 1333 § 1; 1971 ch 1523 § 6.5, operative January 1, 1972.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 195; *Cal Jur 2d Sales* § 98; *Witkin Summary* (8th ed) p 1148.

§ 1792.5. [Effective waiver.] Every sale of goods that are governed by the provisions of this chapter, on an "as is" or "with all faults" basis, made in compliance with the provisions of this chapter, shall constitute a waiver by the buyer of the implied warranty of merchantability and, where applicable, of the implied warranty of fitness. [1970 ch 1333 § 1; 1971 ch 1523 § 6.5, operative January 1, 1972.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 195; *Cal Jur 2d Sales* § 98; *Witkin Summary* (8th ed) p 1148.

§ 1793. [Express warranties.] Nothing in this chapter shall affect the right of the manufacturer, distributor, or retailer to make express warranties with respect to consumer goods. However, a manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods. [1970 ch 1333 § 1; 1971 ch 1523 § 7, operative January 1, 1972; 1978 ch 991 § 6.] *Cal Jur 3d Consumer and Borrower Protection Laws* §§ 195, 196; *Witkin Summary* (8th ed) p 1148.

§ 1793.05. [Vehicle manufacturers altering new vehicles into housecars: Warranty responsibility.] Vehicle manufacturers who alter new vehicles into housecars shall, in addition to any new product warranty, assume any warranty responsibility of the original vehicle manufacturer for any and all components of the finished product which are, by virtue of any act of the alterer, no longer covered by the warranty issued by the original vehicle manufacturer. [1977 ch 873 § 1, operative July 1, 1978.]

§ 1793.1. [Contents of written notice.] (a) Every manufacturer, distributor, or retailer making express warranties with respect to consumer goods shall fully set forth such warranties in readily understood language and clearly identify the party making such express warranties.

(b) Every manufacturer, distributor, or retailer making express warranties and who elects to maintain service and repair facilities within this state pursuant to the provisions of this chapter shall:

buyer to an independent repair or service facility, the manufacturer shall be liable for the reasonable cost of repair services in the manner provided in subdivision (c).

(e) In the event a buyer is unable to return nonconforming goods to the retailer due to reasons of size and weight, or method of attachment, or method installation, or nature of the nonconformity, the buyer shall give notice of the nonconformity to the retailer. Upon receipt of such notice of nonconformity the retailer shall, at its option, service or repair the goods at the buyer's residence, or pick up the goods for service or repair, or arrange for transporting the goods to its place of business. The reasonable costs of transporting the goods shall be at the retailer's expense. The retailer shall be entitled to recover all such reasonable costs of transportation from the manufacturer pursuant to Section 1793.5. The reasonable costs of transporting nonconforming goods after delivery to the retailer until return of the goods to the buyer, when incurred by a retailer, shall be recoverable from the manufacturer pursuant to Section 1793.5. Written notice of nonconformity to the retailer shall constitute return of the goods for the purposes of subdivisions (a) and (b).

(f) The manufacturer of consumer goods with a wholesale price to the retailer of fifty dollars (\$50) or more for which the manufacturer has made express warranties shall provide written notice to the buyer of the courses of action available to him under subdivision (a), (b), or (c). [1970 ch 1333 § 1; 1971 ch 1523 § 10, operative January 1, 1972; 1976 ch 416 § 3; 1978 ch 991 § 8.] *Cal Jur 3d Consumer and Borrower Protection Laws* §§ 190, 199, 200; *Witkin Summary* (8th ed) pp 1224, 1278.

§ 1793.35. [Same: Replacement of or reimbursement for soft goods or consumables.]

(a) Where the retail sale of clothing or consumables is accompanied by an express warranty and such items do not conform with the terms of the express warranty, the buyer thereof may return the goods within 30 days of purchase or the period specified in the warranty, whichever is greater. The manufacturer may, in the express warranty, direct the purchaser to return nonconforming goods to a retail seller of like goods of the same manufacturer for replacement.

(b) When clothing or consumables are returned to a retail seller for the reason that they do not conform to an express warranty, the retailer shall replace the nonconforming

goods where the manufacturer has directed replacement in the express warranty. In the event the manufacturer has not directed replacement in the express warranty, the retailer may replace the nonconforming goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer for the goods, at the option of the retailer. Costs of reimbursement or replacement are recoverable by a retailer from the manufacturer in the manner provided in Section 1793.5.

(c) Where the retail sale of draperies is not accompanied by an express warranty and the sale of such draperies is accompanied by a conspicuous writing disclaiming the retailer's implied warranty of merchantability on the fabric, the retailer's implied warranty of merchantability shall not apply to the fabric. [1971 ch 1523 § 10.5, operative January 1, 1972; 1978 ch 991 § 8.5.] *Cal Jur 3d Consumer and Borrower Protection Laws* §§ 201, 202; *Witkin Summary* (8th ed) pp 1129, 1278.

§ 1793.4. [Time for buyer to exercise option for service and repair.] Where an option is exercised in favor of service and repair under Section 1793.3, such service and repair must be commenced within a reasonable time, and, unless the buyer agrees in writing to the contrary, goods conforming to the applicable express warranties shall be tendered within 30 days. Delay caused by conditions beyond the control of the retail seller or his representative shall serve to extend this 30-day requirement. Where such a delay arises, conforming goods shall be tendered as soon as possible following termination of the condition giving rise to the delay. [1970 ch 1333 § 1; 1971 ch 1523 § 11; 1978 ch 991 § 9.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 200; *Witkin Summary* (8th ed) p 1278.

§ 1793.5. [Same: Manufacturer's liability to retailer on failing to maintain service facilities.] Every manufacturer making express warranties who does not provide service and repair facilities within this state pursuant to subdivision (a) of Section 1793.2 shall be liable as prescribed in this section to every retail seller of such manufacturer's goods who incurs obligations in giving effect to the express warranties that accompany such manufacturer's consumer goods. The amount of such liability shall be determined as follows:

(a) In the event of replacement, in an amount equal to the actual cost to the retail

is unable to effect return shall be at the manufacturer's expense. The reasonable costs of transporting nonconforming goods after delivery to the service and repair facility until return of the goods to the buyer shall be at the manufacturer's expense.

(d) Should the manufacturer or its representative in this state be unable to service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity. [1970 ch 1333 § 1; 1971 ch 1523 § 9, operative January 1, 1972; 1976 ch 416 § 2; 1978 ch 991 § 7.] *Cal Jur 3d Consumer and Borrower Protection Laws* §§ 197, 198, 199; *Cal Jur 2d Sales* § 28; *Witkin Summary* (8th ed) p 1277.

§ 1793.3. [Same: Buyer's remedies in absence of service and repair facilities: Option of retail seller to provide service or repair: Manufacturer to provide notice of buyer's courses of action.] If the manufacturer of consumer goods sold in this state for which the manufacturer has made an express warranty does not provide service and repair facilities within this state pursuant to subdivision (a) of Section 1793.2, the buyer of such manufacturer's nonconforming goods may follow the course of action prescribed in either subdivision (a), (b), or (c), below, as follows:

(a) Return the nonconforming consumer goods to the retail seller thereof. The retail seller shall do one of the following:

(1) Service or repair the nonconforming goods to conform to the applicable warranty.

(2) Direct the buyer to a reasonably close independent repair or service facility willing to accept service or repair under this section.

(3) Replace the nonconforming goods with goods that are identical or reasonably equivalent to the warranted goods.

(4) Refund to the buyer the original purchase price less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.

(b) Return the nonconforming consumer goods to any retail seller of like goods of the same manufacturer within this state who may do one of the following:

(1) Service or repair the nonconforming goods to conform to the applicable warranty.

(2) Direct the buyer to a reasonably close independent repair or service facility willing to accept service or repair under this section.

(3) Replace the nonconforming goods with goods that are identical or reasonably equivalent to the warranted goods.

(4) Refund to the buyer the original purchase price less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.

(c) Secure the services of an independent repair or service facility for the service or repair of the nonconforming consumer goods, when service or repair of the goods can be economically accomplished. In that event the manufacturer shall be liable to the buyer, or to the independent repair or service facility upon an assignment of the buyer's rights, for the actual and reasonable cost of service and repair, including any cost for parts and any reasonable cost of transporting the goods or parts, plus a reasonable profit. It shall be a rebuttable presumption affecting the burden of producing evidence that the reasonable cost of service or repair is an amount equal to that which is charged by the independent service dealer for like services or repairs rendered to service or repair customers who are not entitled to warranty protection. Any waiver of the liability of a manufacturer shall be void and unenforceable.

The course of action prescribed in this subdivision shall be available to the buyer only after the buyer has followed the course of action prescribed in either subdivision (a) or (b) and such course of action has not furnished the buyer with appropriate relief. In no event, shall the provisions of this subdivision be available to the buyer with regard to consumer goods with a wholesale price to the retailer of less than fifty dollars (\$50). In no event shall the buyer be responsible or liable for service or repair costs charged by the independent repair or service facility which accepts service or repair of nonconforming consumer goods under this section. Such independent repair or service facility shall only be authorized to hold the manufacturer liable for such costs.

(d) A retail seller to which any nonconforming consumer good is returned pursuant to subdivision (a) or (b) shall have the option of providing service or repair itself or directing the buyer to a reasonably close independent repair or service facility willing to accept service or repair under this section. In the event the retail seller directs the

§ 1794.3. [Effect of unauthorized or unreasonable use of goods.] The provisions of this chapter shall not apply to any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale. [1970 ch 1333 § 1; 1971 ch 1523 § 15, operative January 1, 1972.] *Witkin Summary (8th ed) p 1278.*

§ 1794.4. [Service contract.] Nothing in this chapter shall be construed to prevent the sale of a service contract to the buyer in addition to or in lieu of an express warranty if such contract fully and conspicuously discloses in simple and readily understood language the terms and conditions of such contract. [1970 ch 1333 § 1; 1971 ch 1523 § 16, operative January 1, 1972.]

§ 1794.5. [Alternative suggestions for repair.] The provisions of this chapter shall not preclude a manufacturer making express warranties from suggesting methods of effecting service and repair, in accordance with the terms and conditions of the express warranties, other than those required by this chapter. [1970 ch 1333 § 1.]

§ 1795. [Liability of one, other than manufacturer, making express warranty.] If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer under this chapter. [1970 ch 1333 § 1.] *Cal Jur 3d Consumer and Borrower Protection Laws § 197; Witkin Summary (8th ed) p 1148.*

§ 1795.1. [Components of air conditioning system.] This chapter shall apply to any equipment or mechanical, electrical, or thermal component of a system designed to heat, cool, or otherwise condition air, but shall not apply to the system as a whole where such a system becomes a fixed part of a structure. [1971 ch 1523 § 16.5, operative January 1, 1972; 1978 ch 991 § 11.] *Cal Jur 3d Consumer and Borrower Protection Laws § 190; Witkin Summary (8th ed) p 1129.*

§ 1795.5. [Obligation of distributor or retail seller of used consumer goods on making express warranties: Duration of implied warranties.] Notwithstanding the provisions of subdivision (a) of Section 1791 defining consumer goods to mean "new" goods, the obligation of a distributor or retail seller of used consumer goods shall be the same as that imposed on manufacturers under this chapter in a sale in which an express warranty is given, except:

(a) It shall be the obligation of the distributor or retail seller making express warranties with respect to used consumer goods (and not the original manufacturer, distributor, or retail seller making express warranties with respect to such goods when new) to maintain sufficient service and repair facilities within this state to carry out the terms of such express warranties.

(b) The provisions of Section 1793.5 shall not apply to the sale of used consumer goods sold in this state.

(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness with respect to used consumer goods sold in this state, where the sale is accompanied by an express warranty, shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable, but in no event shall such implied warranties have a duration of less than 30 days nor more than three months following the sale of used consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to such goods, or parts thereof, the duration of the implied warranties shall be the maximum period prescribed above.

(d) The obligation of the distributor or retail seller who makes express warranties with respect to used goods that are sold in this state, shall extend to the sale of all such used goods, regardless of when such goods may have been manufactured. [1971 ch 1523 § 17, operative January 1, 1972; 1974 ch 169 § 1; 1978 ch 991 § 12.] *Cal Jur 3d Consumer and Borrower Protection Laws § 205; Witkin Summary (8th ed) pp 1277, 1278.*

§ 1795.6. [Tolling the warranty period.]

(a) Every warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars (\$50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to subdivision (c) of Section 1793.2 or subdivision (c) of Section 1793.3, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the

seller of the replaced goods, and cost of transporting the goods, if such costs are incurred plus a reasonable handling charge.

(b) In the event of service and repair, in an amount equal to that which would be received by the retail seller for like service rendered to retail consumers who are not entitled to warranty protection, including actual and reasonable costs of the service and repair and the cost of transporting the goods, if such costs are incurred, plus a reasonable profit.

(c) In the event of reimbursement under subdivision (a) of Section 1793.3, in an amount equal to that reimbursed to the buyer, plus a reasonable handling charge. [1970 ch 1333 § 1; 1971 ch 1523 § 2, operative January 1, 1972.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 200; *Witkin Summary* (8th ed) p 1278.

§ 1793.6. [Same: Manufacturer's liability to independent service man performing service or incurring obligations.] Except as otherwise provided in the terms of a warranty service contract, as specified in subdivision (a) of Section 1793.2, entered into between a manufacturer and an independent service and repair facility, every manufacturer making express warranties whose consumer goods are sold in this state shall be liable as prescribed in this section to every independent serviceman who performs services or incurs obligations in giving effect to the express warranties that accompany such manufacturer's consumer goods whether the independent serviceman is acting as an authorized service and repair facility designated by the manufacturer pursuant to paragraph (1) of subdivision (a) of Section 1793.2 or is acting as an independent serviceman pursuant to subdivisions (c) and (d) of Section 1793.3. The amount of such liability shall be an amount equal to the actual and reasonable costs of the service and repair, including any cost for parts and any reasonable cost of transporting the goods or parts, plus a reasonable profit. It shall be a rebuttable presumption affecting the burden of producing evidence that the reasonable cost of service or repair is an amount equal to that which is charged by the independent serviceman for like services or repairs rendered to service or repair customers who are not entitled to warranty protection. Any waiver of the liability of a manufacturer shall be void and unenforceable. [1976 ch 416 § 4.]

§ 1794. [Buyer's right to damages: Tre-

ble damages: Attorneys' fees.] Any buyer of consumer goods injured by a willful violation of the provisions of this chapter or a willful violation of the implied or express warranty or service contract may bring an action for the recovery of three times the amount of actual damages and other legal and equitable relief, and, if the buyer prevails in any action brought under this section, he or she may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorney's fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action. [1970 ch 1333 § 1; 1971 ch 1523 § 13, operative January 1, 1972; 1978 ch 991 § 10.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 203; *Witkin Summary* (8th ed) pp 1224, 1278.

§ 1794.1. [Damages recoverable by retail seller and independent serviceman.] (a) Any retail seller of consumer goods injured by the willful or repeated violation of the provisions of this chapter may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney fees.

(b) Any independent serviceman of consumer goods injured by the willful or repeated violation of the provisions of this chapter may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney fees. [1970 ch 1333 § 1; 1976 ch 416 § 5.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 204; *Witkin Summary* (8th ed) pp 1224, 1278.

§ 1794.2. [When treble damages provisions inapplicable.] (a) Subdivision (a) of Section 1794 shall not apply to a cause of action commenced or maintained pursuant to Section 382 of the Code of Civil Procedure or pursuant to Section 1781 of this code.

(b) Subdivision (a) of Section 1794 shall not apply to a judgment based solely on a breach of implied warranty of merchantability or, where present, the implied warranty of fitness. [1970 ch 1333 § 3; 1971 ch 1523 § 14, operative January 1, 1972.] *Cal Jur 3d Consumer and Borrower Protection Laws* § 203; *Witkin Summary* (8th ed) pp 1224, 1278.

only under a permit issued pursuant to Section 35790 of the Vehicle Code and shall include in addition to the structure thereof the plumbing, heating and electrical systems and all appliances and other equipment installed or included therein by the manufacturer or dealer. [1971 ch 1492 § 1.]

§ 1797.2. [Application of warranty to manufacturer and dealer.] The warranty provided for in this chapter shall apply to the manufacturer of the mobilehome as well as to the dealer who sells the mobilehome to the buyer. [1971 ch 1492 § 1.]

§ 1797.3. [Required written warranty: Contents.] The mobilehome warranty from the manufacturer or dealer to the buyer shall be set forth in a separate written document entitled "Mobilehome Warranty," shall be delivered to the buyer by the dealer at the time the contract of sale is signed, and shall contain, but is not limited to, the following terms:

(a) That the mobilehome is free from any substantial defects in materials or workmanship.

(b) That the manufacturer or dealer or both shall take appropriate corrective action at the site of the mobilehome in instances of substantial defects in materials or workmanship which become evident within one year from the date of delivery of the mobilehome to the buyer, provided the buyer or his transferee gives written notice of such defects to the manufacturer or dealer at their business address not later than 1 year and 10 days after date of delivery.

(c) That the manufacturer and dealer shall be jointly and severally liable to the buyer for the fulfillment of the terms of warranty, and that the buyer may notify either one or

both of the need for appropriate corrective action in instances of substantial defects in materials or workmanship.

(d) That the address and the phone number of where to mail or deliver written notices of defects shall be set forth in the document.

(e) That the one-year warranty period applies to the structures, plumbing, heating, electrical systems and all appliances and other equipment installed and included therein by the manufacturer or dealer.

(f) That while the manufacturers of any or all appliances may also issue their own warranties, the primary responsibility for appropriate corrective action under the warranty rests with the dealer and manufacturer, and the buyer should report all complaints to the dealer and manufacturer initially. [1971 ch 1492 § 1; 1973 ch 807 § 1.]

§ 1797.4. [Additional rights and privileges: Prohibited waiver.] The warranty under this chapter shall be in addition to and not in derogation of all other rights and privileges which such buyer may have under any other law or instrument. The manufacturer or dealer shall not require the buyer to waive his rights under this chapter and any such waiver shall be deemed contrary to public policy and shall be unenforceable and void. [1971 ch 1492 § 1.]

§ 1797.5. [Display of notice of warranty.] Every dealer shall display a notice of reasonable size stating the existence of a one-year warranty and a sample copy of such warranty. The notice shall be posted in each area where purchase orders and conditional sales contracts are written. [1974 ch 1286 § 1, operative July 1, 1975.]

buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

(b) For purposes of this section only, "manufacturer" includes the manufacturer's service or repair facility.

(c) Every manufacturer or seller of consumer goods selling for fifty dollars (\$50) or more shall provide a receipt to the buyer showing the date of purchase. Every manufacturer or seller performing warranty repairs or service on the goods shall provide to the buyer a work order or receipt with the date of return and either the date the buyer was notified that the goods were repaired or serviced or, where applicable, the date the goods were shipped or delivered to the buyer. [1974 ch 844 § 1, operative July 1, 1975.]

§ 1795.7. [Effect of tolling on manufacturer's liability.] Whenever a warranty, express or implied, is tolled pursuant to Sec-

tion 1795.6 as a result of repairs or service performed by any retail seller, the warranty shall be extended with regard to the liability of the manufacturer to a retail seller pursuant to law. In such event, the manufacturer shall be liable in accordance with the provisions of Section 1793.5 for the period that an express warranty has been extended by virtue of Section 1795.6 to every retail seller who incurs obligations in giving effect to such express warranty. The manufacturer shall also be liable to every retail seller for the period that an implied warranty has been extended by virtue of Section 1795.6, in the same manner as he would be liable under Section 1793.5 for an express warranty. If a manufacturer provides for warranty repairs and service through its own service and repair facilities and through independent repair facilities in the state, its exclusive liability pursuant to this section shall be to such facilities. [1974 ch 844 § 2, operative July 1, 1975.]

CHAPTER 2

Standards For Warranty Work

[Added by Stats 1978 ch 991 § 13.]

§ 1796. Duty to install new or used goods.

§ 1796.5. Duty to service or repair new or used goods.

§ 1796. [Duty to install new or used goods] Any individual, partnership, corporation, association, or other legal relationship which engages in the business of installing new or used consumer goods, has a duty to the buyer to install them in a good and workmanlike manner. [1978 ch 991 § 13.]

§ 1796.5. [Duty to service or repair new

or used goods.] Any individual, partnership, corporation, association, or other legal relationship which engages in the business of providing service or repair to new or used consumer goods has a duty to the purchaser to perform those services in a good and workmanlike manner. [1978 ch 991 § 13.]

CHAPTER 3

Mobilehome Warranties

§ 1797. Mobilehomes covered by warranty.

§ 1797.1. "Mobilehome."

§ 1797.2. Application of warranty to manufacturer and dealer.

§ 1797.3. Required written warranty: Contents.

§ 1797.4. Additional rights and privileges: Prohibited waiver.

§ 1797.5. Display of notice of warranty.

§ 1797. [Mobilehomes covered by warranty.] After the effective date of this chapter all new mobilehomes sold by a dealer licensed by the Department of Motor Vehicles to a buyer shall be covered by the warranty set forth in this chapter. [1971 ch

1492 § 1.]

§ 1797.1. ["Mobilehome."] As used in this chapter, "mobilehome" means a vehicle designed and equipped for human habitation and which may be drawn by a motor vehicle



1020 N STREET, SACRAMENTO, CALIFORNIA 95814
(916) 322-4292



Dear Consumer:

I am enclosing a copy of SB 1190 by Senator Alan Sieroty. This measure is co-sponsored by the Departments of Consumer Affairs and Rehabilitation. This bill would require that new and used assistive devices sold at retail be covered by warranties that insure that the devices are specifically fit for the individual needs of the buyer.

If the device is found not specifically suited for the purchaser, it could be returned within 30 days to the seller. The seller would then be required to make necessary adjustments or replacements. If the seller does not cure the problem, reimbursement would be available.

The definition of "assistive device" is intended to cover all devices which would assist a person with a physical disability. This would include, but not be limited to, hearing aids, braces, crutches, wheelchairs, and prosthetic devices.

By including "assistive devices" in the legal definition of "consumer goods," more specific protection is available to consumers of these devices. This will be a vital marketplace reform for those who use such devices to assist a physical disability.

SB 1190 is scheduled to be heard in the Senate Judiciary Committee on Tuesday, May 22, at 1:30 p.m. We need your help. Opposition to this bill by retailers and manufacturers will be strong. Please write to your legislators in support of SB 1190. Written communication to the members of the Senate Judiciary Committee, particularly those from your district, is necessary. A list of the committee members is enclosed for your information.

Finally, we need supportive testimony in committee from those with disabilities, especially those who have suffered personally from the lack of consumer protection in this area.

For further information, and to coordinate your support with us, please contact me at (916) 322-4292. I look forward to hearing from you. Only with your active involvement will we insure passage of this important consumer legislation.

Sincerely,

A handwritten signature in cursive script that reads "Steve Fishbein".

STEVE FISHBEIN
Legislative Coordinator

PROPOSED AMENDMENTS TO SB 1190

Amendment 1

On page 3, line 23, amend to read:

SEC. 2. Section 1792.2 of the Civil Code is amended to read:

(a) Every sale or consignment for sale of consumer goods that are sold at retail in this state by a retailer or distributor who 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 retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose.

(b) Every sale of an assistive device sold at retail in this state shall be accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer.

Amendment 2

On page 3, line 22, after "person," strike "." add "," and:

including any device to replace any part of the body.

Amendment 3

On page 4, line 1, change to:

(a) All assistive devices sold at retail shall include the retail seller's express warranty that the device is particularly fit for the particular needs of the buyer, and that the device may be returned to the seller within 30 days of the date of actual receipt by the buyer if the device is not specifically fit for the particular needs of the buyer.

On page 4, line 7, add:

(b) The warranty shall be in a writing which shall contain, but need not be limited to, the following language: "This device is warranted to be specifically fit for the particular needs of the buyer, and may be returned to the seller within 30 days of the date of actual receipt by the buyer if the device is not specifically fit for the particular needs of the buyer."

(c) The warranty shall be delivered to the buyer by the retail seller at the time of the sale of the device.

(d) After receipt of notice of the buyer's intention to return, the seller shall have the right to cure by seasonably notifying the buyer of the seller's intention to cure and by furnishing a conforming device within a reasonable time. If the seller does not cure, the seller shall restore any downpayment or other consideration received from or on behalf of the buyer.

Dear Mr. Miller:

Thank you for your letter indicating the support of the California Association ~~for~~ of the Physically Handicapped for SB 1190, which ~~would~~ would establish by statute an express and implied warranty ~~of~~ that assistive devices for the ~~the~~ disabled are specifically fit for the particular needs of the ~~the~~ purchaser.

(I appreciate your association's support for this legislation.) If you or other members of CAPH know of persons who have had problems in this area, I would appreciate your notifying Steve Fishbein of the Department of Consumer Affairs at 322-4292 so that he can ^{try to} arrange for them to testify when the bill is heard by the Senate Judiciary Committee on Wednesday, May 25 23.

CALIFORNIA ASSOCIATION of the PHYSICALLY HANDICAPPED, Inc.

a non-profit corporation



P.O. BOX 22552 ■ SACRAMENTO, CALIFORNIA 95822

May 15, 1979

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Rene Shneider
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Ray Uzeta
San Francisco

Gale Williams
Santa Monica

Honorable Senator Alan Sieroty
State Capitol
Sacramento, Ca 95814

Dear Senator Sieroty,

The California Association of the Physically Handicapped supports
SB 1190.

This bill will offer great benefits to the estimated 3,500,000 handicapped persons in the State of California. Presently the only remedy that handicapped persons have in this state is to repair to Small Claims Court. The handicapped have great difficulty in obtaining transportation, and also in finding public buildings which are accessible. For these reasons, court action is almost impossible for most handicapped people.

We think that this is landmark legislation and would set a national standard of which we can all be proud.

Thank you,

Jim Miller by TST
Jim Miller

Legislative Chairperson
California Association of the Physically Handicapped

**National
Multiple
Sclerosis
Society**

**Southern California Chapter
229 North Central Avenue,
Third Floor
Glendale, California 91203**

**Los Angeles County
Headquarters**

(213) 247-1175

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May 15, 1979

Senator Bob Wilson
State Capitol
Room 2065
Sacramento, CA 95814

Dear Senator Wilson:

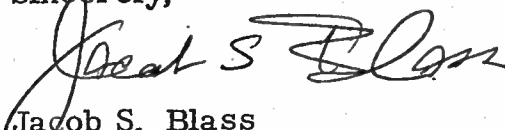
I am writing in support of SB1190, introduced by Senator Alan Sieroty.

As a representative for the approximately 15,000 multiple sclerosis patients and family members, I can attest to the great rigors handicapped people undergo in trying to find and purchase proper assistive devices. Because the patient needs the assistive devices, often an outrageous price is charged for its procurement; the patient is left helpless because of the need for the equipment. There is no alternative resort for all equipment is extremely expensive, regardless of the manufacturer.

It is not an infrequent complaint emanating from the handicapped community that the wrong equipment is frequently ordered, and that they are left holding the bag because there is no means of exchanging it.

I hope you recognize the dire need for consumer protection in this area. The handicapped community is asking your assistance in helping them live full lives.

Sincerely,


Jacob S. Blass
Director of Patient Services

JSB/sh

RECORD # 20 BF:

MAY 17 1979

79137 9:19

RN 009593 PAGE NO. 1
Substantive

AMENDMENTS TO SENATE BILL NO. 1190

Amendment 1

In line 1 of the title of the printed bill,
after "1791" insert:

, 1792.2,

Amendment 2

In line 2 of the title, strike out "Sections
1792.21 and" and insert:

Section

Amendment 3

On page 3, line 22, after "person." insert:

"Assistive device" shall include any device which is used
or intended to be used to replace any part of the human
body.

Amendment 4

On page 3, strike out lines 23 to 28, inclusive,
and insert:

RECORD # 20 BF:

RN 009593 PAGE NO. 2
Substantive

SEC. 2. Section 1792.2 of the Civil Code is amended to read:

1792.2. (a) Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who 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 retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose.

(b) Every sale of an assistive device sold at retail in this state shall be accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer.

Amendment 5

On page 4, line 1, after "1793.02." insert:

(a)

Amendment 6

On page 4, strike out line 7, and insert:

RECORD # 30 BF:

RN 009593 PAGE NO. 3
Substantive

buyer.

(b) The warranty shall be in a writing which shall contain, but need not be limited to, the following language: "This device is warranted to be specifically fit for the particular needs of the buyer and may be returned to the seller within 30 days of the date of actual receipt by the buyer if the device is not specifically fit for the particular needs of the buyer."

(c) The warranty shall be delivered to the buyer by the retail seller at the time of the sale of the device.

(d) After receipt of notice of the buyer's intention to

- 0 -

COMMUNITY SERVICE CENTER FOR THE DISABLED, INC.

4601 PARK BOULEVARD
SAN DIEGO, CALIFORNIA 92116
(714) 293-3500

May 18, 1979

Senator Bob Wilson
2165 San Diego Avenue, Suite 202
San Diego, California 92110

FILE

Dear Senator Wilson:

As representative spokesperson for the Community Service Center for the Disabled Inc., I urge you and the Senate Judiciary Committee's support of SB 1190. The measure, if passed, will require a 30-day warranty on purchases of all assistive devices used by disabled people.

The bill would require that new and used assistive devices sold at retail be covered by warranties that insure maximal serviceability by the buyer. This includes the requirement that both manufacturers and retailers make the devices specifically fit for the individual needs of the buyer.

The definition of "assistive devices" is intended to cover all devices which would include, but not be limited to, hearing aids, braces, crutches, wheelchairs, and prosthetic devices.

The Community Service Center for the Disabled, Inc., appreciates your sponsorship of other legislation that remove excess sales tax on motor vehicles having undergone design modifications for disabled drivers and suggests that SB-1190 is similar in scope with insuring equitable treatment be vouchsafed to disabled consumers.

Thank you,

Linda Gunther
Community Affairs Director

cc: Senator Jerry Smith, Chairman
Senate Judiciary Committee
State Capitol, Room 3056
Sacramento, California 95814

Senator Bob Wilson
State Capitol, Room 2065
Sacramento, California 95814



**Western Regional Center for the
Developmentally Disabled**

11300 South La Cienega Blvd. • Suite 400
Inglewood, CA 90304 • (213) 670-7715

May 22, 1979

Senator Alan Sieroty
State Capitol
Sacramento, California 95814

Dear Senator Sieroty:

We are writing in support of Senate Bill 1190 regarding warranty for assistive devices.

Western Regional Center is a state funded agency that serves developmentally disabled clients, many of whom are physically handicapped. Our clients frequently use assistive devices, and often have difficulty in receiving proper fitting and adjustment. We feel the opportunity for correction and return will be of great benefit to handicapped individuals.

Thank you for sponsoring this important legislation.

Sincerely,

Eileen Walsh

Eileen Walsh
Chief, Community Services

LB
Dear Ms. Walsh:
Thank you for your recent letter in support of SB 1190, regarding warranty for assistive devices.
7/16

SB 1190 (Sieroty)
As amended May 21
Civil Code

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WARRANTIES
-ASSISTIVE DEVICES-

HISTORY

Source: Department of Consumer Affairs

Prior Legislation: None

Support: Department of Rehabilitation, Easter Seal Society, Calif. Ass'n. for the Physically Handicapped, San Francisco Independent Living Project, United Cerebral Palsy of San Francisco, Center for the Disabled (Garden Grove), Center for Independent Living (Berkeley), Bay Area Gray Panthers, Disabled Resources (Long Beach)

Opposition: No Known

PURPOSE

Existing law provides for the enforcement by the consumer of implied warranties of merchantability, implied warranties of fitness, and express warranties. However, there is no requirement that the retailer of an "assistive device" supply either an implied warranty or an express warranty with the device.

This bill would provide as a matter of law that the retailer makes an implied warranty of fitness with every sale of an "assistive device." It also would require the retailer to give an express warranty that the device was specifically fit for the particular needs of the buyer and, if not, that it could be returned to be "cured" or for reimbursement.

The purpose of the bill is to place greater responsibility on the retailer of "assistive devices" to make sure that the devices they sell properly fit the needs of their customers.

(More)

COMMENT

1. Definition of "assistive device"

The bill defines "assistive device" as an instrument, apparatus, or contrivance designed to assist a physically disabled person in coping with his disability.

2. Need for the bill

Proponents claim that buyers of assistive devices, many of which are quite expensive, frequently find that the particular device they bought is not suited for their particular disability. In such circumstances retailers have disclaimed any responsibility.

3. Existing warranty obligations

Under the U.C.C. and the Song-Beverly Consumer Warranty Act, a retailer makes an implied warranty of fitness if he has reason to know at the time of sale that the goods are required for a particular purpose and that the buyer is relying on his judgment to select the proper product.

This bill would statutorily assume that the retailer of an assistive device would always have reason to know that the device was required for a particular purpose and that the buyer was relying on his judgment to select the proper device, and so it would impose the implied warranty of fitness obligation on every retail sale of such a device.

Under existing law neither a manufacturer nor a retailer is required to make an express warranty. If he does, however, he is obligated to live up to the terms of that warranty. Most assistive devices are sold with an express warranty from the manufacturer, but that warranty only covers

(More)

defects in the manufacturing process, not errors of judgment by the retailer in supplying a particular device to a particular customer.

4. Mandatory express warranty

This bill would require the retailer of an assistive device to provide an express warranty to every buyer. The only other product which must, under California law, be accompanied by an express warranty with specified content is a mobilehome.

The warranty required under this bill would have to contain the following language: "This device is warranted to be specifically fit for the particular needs of the buyer and may be returned to the seller within 30 days of the date of actual receipt by the buyer if the device is not specifically fit for the particular needs of the buyer."

Aside from being repetitious, this language does not indicate to the buyer what his remedies would be if he did return the device.

SHOULD NOT THE TEXT OF THE WARRANTY INCLUDE THE OBLIGATIONS OF THE RETAILER PRESCRIBED BY LAW?

5. Obligations of the retailer--suggested amendment

The language of the bill requires the retailer to "cure" either the product or the transaction (presumably not the buyer) by furnishing a "conforming device" within a reasonable time or by reimbursing to the buyer the money he paid. The language is unclear and would be subject to misinterpretation.

(More)

Suggested amendment: On pages 4 and 5, strike out subdivision (d) presently in the bill and insert:

(d) If the buyer returns the device within 30 days, the seller shall, within a reasonable time, repair it or replace it with a similar device so that it is specifically fit for the particular needs of the buyer. If the seller does not repair or replace the device, he shall refund to the buyer the total amount paid to him for the purchase of the device.

6. Application to new goods only

As drafted SB 1190 would only apply only to the sale of new assistive devices, and would not affect the sale of used devices. However, a letter from Steve Fishbein, Legislative Coordinator for the Department of Consumer Affairs, indicates the Department's intent to cover the sale of used devices as well. If so, additional language would be necessary.

PROPOSED AMENDMENTS TO SB 1190 (SIEROTY)

AS AMENDED IN THE SENATE MAY 21, 1979

Amendment 1
(CC 1793.02(a))

On page 4, strike lines 22-36, and insert:

(a) All new and used assistive devices sold at retail shall include the retail seller's express warranty which shall contain the following language: "This assistive device is warranted to be specifically fit for the particular needs of you, the buyer, and may be returned to the seller within 30 days of the date of actual receipt by you if the device is not specifically fit for your particular needs. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid."

(b) The language prescribed in subdivision (a) shall appear on the first page of the warranty in at least 10-point bold type.

Amendment 2
(CC 1793.02(c))

On page 4, strike lines 39-40 and on page 5 strike lines 1-5 and insert:

(c) If the buyer returns the device within 30 days, the seller shall, within a reasonable time, adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer. If the seller does not adjust or replace the device so that it is specifically fit for the particular needs of the buyer, the seller shall promptly refund to the buyer the total amount paid.

Amendment 3
(CC 1793.02(d))

On page 5, following above Amendment 2, insert the following:

(d) The rights and remedies conferred on the buyer under Section 1792.2 and this Section 1793.02 are cumulative, and shall not be construed to affect the obligations of the retail seller or any other party or to supplant the rights or remedies of the buyer under any other section of this chapter or under any other law or instrument.

619 San Juan Ave.
Venice, Ca. 90291

Senator Jerry Smith
Chairman - Senate Judiciary Committee

Dear Senator Smith.

to Larry
Briston -

for SB 1190
(Sieroty) file

As a consumer and parent of an 8 year old son, severely involved with cerebral palsy, I strongly urge your support of Alan Sieroty's bill, SB 1190. My child has used many assistive devices in his young life, such as an electric wheelchair, walker, and various braces and adaptive equipment. With the use of this equipment he has become an integrated member of his neighborhood, social and school groups.

Most retailers and manufacturers are ethical and helpful, however we have had minor problems, and I can see where the opportunity exists for major ones to arise. Since it is a highly time consuming, expensive and already often frustrating task securing the proper equipment, a warranty assurance would be of great benefit to the consumer.

The State of California is often the purchaser of equipment through California Children's Services and the Regional Center System. A bill such as SB 1190 would safeguard the taxpayers money.

Sincerely
Donna McGuire

Mar 16, 1979

679 San Juan Ave.

Venice, Ca. 90291

Dear Steve,

I appreciate being on your mailing list for information concerning SB 1190. I've been in touch with Leroy and his office often concerning school bills and those affecting our disabled population. I've written to the members of the Judiciary Committee and passed your letter on to other people who would be interested in helping.

I am the parent of an eight year old with cerebral Palsy and am deeply involved in special Ed., both through the Santa Monica School District and the state Department. I am also a member of the Board of Directors of Western Regional Center.

Any further information on this or future bills or policies concerning these populations will be gladly received by me and presented to appropriate groups for support.

Sincerely

Mary Ann Suzanne

* Please note my present mailing address



1020 N STREET, SACRAMENTO, CALIFORNIA 95814
(916) 445-4465



May 21, 1979

Honorable Jerry Smith, Chairman
Senate Judiciary Committee
State Capitol, Room 3056
Sacramento, CA 95814

Dear Senator Smith:

The Department of Consumer Affairs strongly supports SB 1190 (Sieroty), which would provide specific warranty protection for new and used assistive devices sold at retail. This bill will be heard in your committee on Wednesday, May 23rd. The amendments to existing warranty coverage would provide that the device, if found not to be specifically fit for the physically disabled buyer, may be returned within 30 days to the seller. The seller would be able to make necessary adjustments or replacements, or reimburse the device's purchase costs incurred by the buyer.

The concept of "fit" is a particularly important one in the sale and purchase of an assistive device. Buyers of such devices are not always able to tell immediately if a device is particularly fitted to their needs. This discovery is contingent upon at least a brief period of adjustment. The 30 days for right of adjustment or return provided by this bill will give the disabled consumer an opportunity to determine the fitness of his/her purchase.

The attached information sheet provides further information on SB 1190, which proposes a vital marketplace reform for California's disabled consumers who use assistive devices.

Should you wish to discuss this further prior to the hearing, please contact our Legislative Coordinator, Steve Fishbein, at 322-4292.

Sincerely,

Richard B. Spohn
RICHARD B. SPOHN
Director

cc: Members, Senate Judiciary Committee

*Dear Mr. Spohn
Thank you for
sending me a copy of
your letter to Sen
Smith. I appreciate
this legislation.
SB 1190
5-25-79
L*

File



The CALIFORNIA ASSOCIATION OF THE DEAF, Inc.

Affiliated with the National Association of the Deaf - Founded 1906, Incorporated 1914
1507 TWENTY-FIRST STREET, SUITE 102, SACRAMENTO, CALIFORNIA 95814
Telephone TTY (916) 443-2833 Voice (916) 443-3604

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Executive Director

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C.H.A.D. Administrator
KYLE WORKMAN
Perris

May 21, 1979

The Honorable Jerry Smith
Chairman, Senate Judiciary Committee
2046 State Capitol
Sacramento, California 95814

Dear Senator Smith:

On Wednesday, May 23, your committee will consider Senate Bill 1190 (Sieroty). This bill would require that new and used assistive devices sold at retail be covered by warranties that insure that the devices are specifically fit for the individual needs of the buyer.

The California Association of the Deaf would like to go on record in support of this bill. For many years, hearing impaired people have all too often been fitted with hearing aids that were inappropriate to the type and severity of their hearing loss. SB 1109 would help to insure that retailers of hearing aids become more responsible to the needs of their clients.

Your favorable consideration of SB 1109 would be greatly appreciated.

Sincerely,

F. A. CALIGIURI
Executive Director

FAC:rr

cc: Committee Members
Committee Consultant
Senator Alan Sieroty

FACT SHEET

SB 1190 (Sieroty)

SUBJECT: Assistive device warranties

SB 1190 would require that assistive devices sold at retail be specifically covered by express and implied warranties that insure that the devices are specifically fit for the individual needs of the buyer. If the device is found not specifically suited for the purchaser, it could be returned within 30 days to the seller. The seller would then be required to make necessary adjustments or replacements. If the seller does not cure the problem, reimbursement would be available.

The definition of "assistive device" is intended to cover devices which would assist a person with a physical disability. This would include, but not be limited to, hearing aids, braces, crutches, wheelchairs, and prosthetic devices.

The importance of proper fit and utilization of an assistive device is vital to a disabled person's normal functioning. A high marketplace standard of quality assurance would be encouraged and required by the establishment of this specific warranty.

By including "assistive devices" in the legal definition of "consumer goods," more specific protection is available to consumers of these devices. This will be a vital marketplace protection for those who use such devices to assist a physical disability. The essential time element necessary for physical mobility and assistance would be best served through the initial retail purchase level and not by subsequent lengthy and costly civil remedies. Further, persons with disabilities are not always in a position to effectively assert their rights under existing law.

According to statistics from the California Department of Rehabilitation:

- Approximately 1.8 million Californians have physical disabilities
- Over 700,000 Californians use assistive devices, excluding eyeglasses (1977)
- The average prescription manual wheelchair costs \$300-\$2,000
- An average electric wheelchair costs approximately \$1500-\$3,500 (dependent upon the extent of disability)

SUPPORTERS

Easter Seal Society
California Association for the Physically Handicapped (CAPH)
San Francisco Independent Living Project
United Cerebral Palsy of San Francisco
Center for the Disabled (Garden Grove)
Center for Independent Living (Berkeley)
Bay Area Gray Panthers
Disabled Resources (Long Beach)
Adult Independence Development Center (Campbell)
Mt. Diablo Rehabilitation Center
Fresno Association of the Physically Handicapped Service Center
Department of Rehabilitation
State Department of Rehabilitation
State Department of Consumer Affairs

LAW OFFICES OF
CALIFORNIA RURAL LEGAL ASSISTANCE

ROBERT E. LEIDIGH
DIRECTING ATTORNEY
RALPH LIGHTSTONE
ATTORNEY
EMMA E. GUNTERMAN
SENIOR CITIZENS ADVOCATE
446-7904

1900 "K" STREET — SUITE 203
SACRAMENTO, CALIFORNIA 95814
TELEPHONE 446-7901
(AREA CODE 916)

CENTRAL OFFICE
115 SANSOME STREET
SUITE 900
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 421-3408
ALBERTO SALDAMANDO
DIRECTOR

May 23, 1979

TO: Members, Senate Judiciary Committee

Re: Support - SB 1190 (Sieroty)

Dear Senator:

In behalf of our clients we ask you to vote for SB 1190 (Sieroty). SB 1190 will provide protection for persons who are in need of devices to be able to function.

These essential devices are useless unless they function well for the particular person to whom they are sold. Unfortunately, we have seen examples where this was not the case - and yet our clients had no redress.

SB 1190 gives our clients redress if, within the first 30 days, the device turns out to not provide the service which the buyer needed. We would prefer to see the 30 day period lengthened because some devices do not get used daily - for instance, a device intended for once a week exercise. In that case 30 days is a very short period. SB 1190 addresses a real need.

We urge an "aye" vote.

Sincerely,

Emma E. Gunterman

Emma E. Gunterman
Senior Citizens Advocate

EEG/rh

cc: Senator Alan Sieroty

MAY 29 1979

79149 18:24

RECORD # 30 BF:

RN 010404 PAGE NO. 1

AMENDMENTS TO SENATE BILL NO. 1190 Substantive
AS AMENDED IN SENATE MAY 21, 1979

Amendment 1

On page 4 of the printed bill, as amended in Senate May 21, 1979, strike out lines 22 to 40, inclusive, and strike out page 5, and insert:

1793.02. (a) All new and used assistive devices sold at retail shall include the retail seller's express warranty which shall contain the following language:

"This assistive device is warranted to be specifically fit for the particular needs of you, the buyer, and may be returned to the seller within 30 days of the date of actual receipt by you if the device is not specifically fit for your particular needs. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid."

(b) The language prescribed in subdivision (a) shall appear on the first page of the warranty in at least 10-point bold type.

(c) If the buyer returns the device within 30 days, the seller shall, within a reasonable time, adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer. If the seller does not adjust or replace the device so that it is specifically fit for the particular needs of the buyer, the seller shall promptly refund to the buyer the total amount paid.

(d) The rights and remedies conferred on the buyer under Section 1792.2 and this section are cumulative, and shall not be construed to affect the obligations of the retail seller or any other party or to supplant the rights or remedies of the buyer under any other section of this chapter or under any other law or instrument.

- 0 -



1020 N STREET, SACRAMENTO, CALIFORNIA 95814
(916) 322-4292



Larry -

Dick Elbrecht wrote this
synopsis of SB 1190's intent.

He asked that I
give you two copies.

Candis Cohen

This bill amends the Song-Beverly Consumer Warranty Act (Civil Code Sections 1790 et.seq.) to create a new "warranty of fitness for a particular purpose" that applies only to retail sales of "assistive devices" made in this state.

The term "assistive device" includes, but is not limited to, hearing aids, wheelchairs, braces, crutches and prosthetic devices. The bill (see new Civil Code Section 1791(m)) defines "assistive device" to mean "any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of a physically disabled person." The term includes both new and used assistive devices (see new Civil Code Sections 1791(a) and 1793.02(g)).

The new warranty takes the form of an implied warranty which becomes a part of every covered sale by operation of law, plus a written warranty which is required to be furnished to the buyer at the time of sale. The written warranty assures actual notification to the consumer of the rights that are conferred. The implied warranty assures that the consumer will have these rights whether or not the seller complies with the written warranty requirement.

The implied warranty (see new Civil Code Section 1792.2(b) states simply that --

"Every sale of an assistive device sold at retail in this state shall be accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer."

The written warranty received by the buyer (see new Civil Code Section 1793.02(a)) states simply that --

"This assistive device is warranted to be specifically fit for the particular needs of you, the buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws."

The written warranty adds to the rights conferred by the implied warranty by making the language of the written warranty part of the contract of sale between the parties and therefore enforceable as a private contract.

The new warranty is patterned after the present warranty of fitness for a particular purpose (see present Commercial Code Section 2315 and present Civil Code Section 1792.2), but differs in that it applies to all sales that are covered by the Act and does not depend upon proof of the buyer's reliance on the seller's skill or judgment. Unless the seller is totally uninvolved in the diagnosis, selection and fitting of the device, the assistive device warranty applies. Sales of inexpensive devices (under \$15,000) are specifically excluded (see Civil Code Section 1793.02(e)).

The bill also provides (see Civil Code Section 1793.02(c)) that if the buyer returns the device within the period specified in the

warranty, the seller shall, within a reasonable time, adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer.

If the buyer is an agency (e.g., Department of Health Services) purchasing for the ultimate user, the device must be specifically fit for the particular needs of the ultimate user (see Civil Code Section 1793.02(d)).

Violations of the new provisions (including failure to either give the written warranty or to honor the written or implied warranty) are subject to the existing provisions of the Song-Beverly Act on violations. These include Civil Code Section 1794, which confers a right to recover treble damages, attorney's fees and other relief for violations that are "wilful", and Articles 6 and 7 of the Commercial Code for violations of the implied warranty (see Civil Code Section 1791.1(d)).

The bill makes it clear that the rights of the buyer may not be waived, and that the bill is not intended to supplant other rights the buyer may have (see Civil Code Section 1793.02(f)).

SB 1190 imposes an ~~implied~~ warranty of fitness with respect to the sale of devices which assist the physically disabled ~~to live as normal as possible lives.~~

The bill ~~also~~ requires the seller of these assistive devices to provide an express warranty that the device ~~is~~ specifically fit for the needs of the purchaser and allows the buyer 30 days to return the device in order to cure alleged defects.

Under the bill, if a device is returned as defective, the seller must either "cure" the defect or refund the buyer's money.

Problems arise with assistive devices when, for example, disabled persons feel that the discomfort of a particular device is due to the person's disability rather than the fit of the device. ~~I have here several witnesses who have experienced specific problems and can point out the need for this legislation.~~

Both buyer and seller are better served by a process of curing defects in these devices initially rather than pursuing lengthy and costly court actions. The need to file court actions also often puts the physically disabled person at a relative disadvantage.

SB 1190 is supported by many organizations representing disabled persons in this state as well as the State Department of Rehabilitation and Consumer Affairs. I know of no opposition to the bill.

731-A West Henderson (209) 784-4396
Porterville, Ca. 93257



REGIONAL COALITION FOR HANDICAPPED CITIZENS, INC.

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Honorable Bill Lockyer
Chrm. Assembly Labor, Emp.
& Consumer Affairs Comm.
State Capitol, Room 2091
Sacramento, CA 95814

Dear Assemblyman Lockyer,

On July 3rd at 1:30, your Committee on Labor, Employment and Consumer Affairs will be hearing SB 1190, Senator Sieroty, relating to consumer warranty on assistive devices used by handicapped members of our society.

Because I will be recovering from additional corrective surgery at that time I will not be able to appear before your committee to present my testimony in favor of this bill. As I have been obliged to do on other occasions I am presenting my testimony in writing and would appreciate your having it read into the records of the hearing on this bill.

Mr. Chairman and members of the Committee my experience as a purchaser and user of adaptive devices during the last seven years, as a result of a near fatal automobile accident, and in addition my experiences during the last 16 years with various types of adaptive devices which I purchased for my daughter as she grew and progressed from a non-ambulatory condition to her present ambulation with the aid of a wheel chair and walker, I feel that I am qualified to express my concern with not only the manufactured product, but also the fact that quite frequently the product becomes defective or it is not properly fitted according to the prescription. In these cases I have on numerous occasions had to do my own fixing and fitting even though I am not a licensed technician. When reporting to the retailer that the device was not performing properly the retailer would say that it was not his problem but the manufacturers problem. When I wrote to the manufacturer they either ignored my letters or provided me with some excuse why they could not be held responsible for the damage etc. of their product.

The 30 day return period as indicated in this bill is not ample time for some devices as I discovered three months ago when a garage mechanic wrecked my car doing over \$3,000;

worth of damage. The fault according to the mechanic who was driving the car into the garage, was that the hand control which is attached to the excelerator became stuck and he was unable to stop the car before it collided with another vehicle. This control was installed almost 1 year prior to the incident I just described. That is why I am concerned about the 30 day return period.

I would not want you Mr. Chairman and members of the committee to arend this bill at this time, but to approve it as it is written.. There are many other kinds of assitive devices such as wheel chair lifts etc. which can be covered using the generic definition of assistive devices. The bill does enumerate such items as corrective glasses, hearing aids which are defined as assistive devices. I assume that dentures would also be included under the generic name assistive devices?

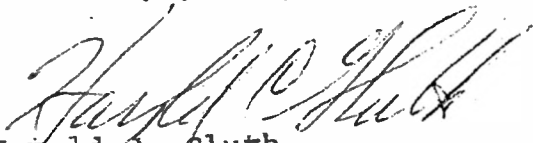
A look into the garages and store rooms of persons using assistive devices will show you immediately how poorly some of the devices are constructed as verified by the pile of broken and unuseable devices which can be seen. I have in my present collection the remains of three walkers which my daughter broke while falling. Unfortunately the walker breaks in the same location each time and all I can do is save the good parts hoping that the next time some other part will break and I will not be forced to purchase an entirely new device.

I have written the manufacturer on several occasions suggesting how they might strengthen the device, but I have never received a reply from them.

I urge you Mr. Chairman and members of the committee to vote favorably on this bill and reccomend a "do Pass" to the full Assembly.

I thank you for this opportunity to present my testimony in support of AB 1190.

Sincerely yours,


Harold C. Gluth

AMENDMENTS TO SENATE BILL NO. 1190
AS AMENDED IN SENATE MAY 31, 1979

Amendment 1

On page 5 of the printed bill, as amended in Senate May 31, 1979, strike out line 7 and insert:

retail in this state shall be accompanied by the retail seller's written warranty

Amendment 2

On page 5, strike out line 15 and insert:

the total amount paid.

This warranty does not affect the protections and remedies you have under other laws."

In lieu of the words "30 days" the retail seller may specify any longer period.

Amendment 3

On page 5, line 18, after "type." insert:

The warranty shall be delivered to the buyer at the time of the sale of the device.

Amendment 4

On page 5, strike out lines 26 and 27 and insert:

(d) With respect to the retail sale of an assistive device to an individual, organization, or agency known by the seller to be purchasing for the ultimate user of the device, this section and subdivision (b) of Section 1792.2 shall be construed to require that the device be specifically fit for the particular needs of the ultimate user.

(e) The rights and remedies of the buyer under this section and subdivision (b) of Section 1792.2 are not subject to waiver under Section 1792.3. The rights and remedies of the buyer under this section and subdivision (b) of Section 1792.2 are cumulative, and

Amendment 5

On page 5, after line 31, insert:

(f) Section 1795.5 shall not apply to a sale of used assistive devices, and for the purposes of the

Song-Beverly Consumer Warranty Act the buyer of a used assistive device shall have the same rights and remedies as the buyer of a new assistive device.

(g) The language in subdivision (a) shall not constitute an express warranty for purposes of Sections 1793.2 and 1793.3.

- 0 -

MEMBERS

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EXECUTIVE SECRETARY
VALERIE VESCI

California Legislature

Assembly Rules Committee

ROOM 3016, STATE CAPITOL
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 445-8173

LOUIS J. PAPAN
CHAIRMAN

June 21, 1979

MEMORANDUM

TO: ALL MEMBERS OF THE ASSEMBLY COMMITTEE ON LABOR, EMPLOYMENT AND
CONSUMER AFFAIRS.

FROM: JULIE GARCIA, ASSEMBLY RULES COMMITTEE SECRETARY

SUBJECT: SENATE BILL 1190

As you probably are aware, a teletype machine has been installed in the Assembly Rules Committee office for the purpose of communicating with the deaf community.

The attached message from Mr. Willis J. Mann, Executive Director, Norcal Center on Deafness, was received on Thursday, June 21. It pertains to Senate Bill 1190, authored by Senator Sieroty, relating to consumer warranties, that is currently held in the Assembly Committee on Labor, Employment and Consumer Affairs. Mr. Mann asked that his message be referred to all members of the Assembly Committee on Labor, Employment and Consumer Affairs.

JG

cc: Senator Alan Sieroty
Mr. Willis J. Mann

HONORABLE MEMBERS OF THE ASSEMBLY LABOR⁷ EMPLOYMENT AND
CONSUMER AFFAIRS COMMITTEE!

I AM CALLING TO REQUEST YOUR SUPPORT FOR SENATOR SIEROTYS BILL
SB 1190 WHICH IS SCHEDULED FOR HEARING BEFORE THIS COMMITTEE
ON JULY 3. THE BILL PROVIDES THAT NEW AND USED ASSISTIVE
DEVICES FOR THE HANDICAPPED WHICH ARE SOLD AT RETAIL BE COVERED
BY WARRANTIES THAT INSURE THE DEVICES ARE SPECIFICALLY FIT FOR
THE INDIVIDUAL NEEDS OF THE BUYER.

ASSISTIVE DEVICES ARE BOTH A BOON AND A BANE TO THE HANDICAPPED
AND ALL TOO OFTEN PEOPLE WHO PURCHASE THESE DEVICES AND LATER
DISCOVER THEY ARE NOT WHAT THEY REALLY NEED HAVE NO RECOURSE
BUT TO LOOK FOR AND PURCHASE OTHER DEVICES. THIS IS AN EXPENSE
THEY CAN ILL AFFORD AND SENATOR SIEROTYS BILL IS A STEP IN THE
RIGHT DIRECTION.

YOUR SUPPORT FOR SB 1190 WILL BE VERY MUCH APPRECIATED.

WILLIS J. MANN
EXECUTIVE DIRECTOR
NORCAL CENTER ON DEAFNESS
2755 COTTAGE WAY⁷ SUITE 6
SACRAMENTO⁸ CALIF 95825

WITNESSES FOR SB 1190

Assembly Labor, Employment, and Consumer Affairs Committee

July 3, 1:30 p.m.

① Steve Fishbein, Legislative Coordinator,
Department of Consumer Affairs

Resource
TO Answer Questions Clarence Nicodemus, Rehabilitation Engineering
Consultant, Department of Rehabilitation

③ Henry Henscheid, Easter Seal Society

⑤ Terry Terry, California Association for
Physically Handicapped (CAPH)

② Barbara Nevins, Occupational Therapist,
San Francisco Independent Living Project

Resource
TO Answer Questions Dick Elbrecht, Supervising Attorney, Division of
Consumer Services, Department of Consumer Affairs

④ F.A. Caligiuri, Executive Director, California
Association of the Deaf

Caligiuri

Technical Amendments to SB 1190 (Sieroty)

(As Amended in the Assembly June 21, 1979)

Amendment 1

On page 4, line 36, insert the sentence presently commencing on line 37 immediately after the words "amount paid." and not as a separate paragraph; and on page 4, line 38, insert the sentence presently commencing on line 39 immediately after the words "other laws." and not as a separate paragraph.

Amendment 2

On page 5, after line 36, add a new SECTION 5 as follows:

SEC. 5. Section 1794.2 of Civil Code is amended to read as follows:

"The provision of Section 1794 authorizing the recovery of three times the amount of the buyer's actual damages shall not apply to (a) a cause of action commenced or maintained pursuant to section 382 of the Code of Civil Procedure or pursuant to section 1781 of this code; or (b) to a judgment based solely on a breach of the implied warranty of merchantability, or where present, the implied warranty of fitness."

ASSEMBLY COMMITTEE ON LABOR, EMPLOYMENT, & CONSUMER AFFAIRS
Bill Lockyer, Chairman

HEARING DATE: July 3, 1979

BILL: SB 1190 (As Amended June 21, 1979)

AUTHOR: Sieroty

SUBJECT: Consumer Warranties

BACKGROUND

The Song-Beverly Consumer Warranty Act, enacted in 1970, provides certain protections to the purchasers of consumer goods. "Consumer goods" are defined as "any new product or part thereof that is used or bought for use primarily for personal, family, or household purposes, except for clothing and consumables." (B & P Code Sec. 1791).

In general, every sale of consumer goods in this state is covered by what is known as an "implied warranty" of fitness and merchantability. A warranty of merchantability means that the goods pass in the business as they are described in the contract, that they are fit for the ordinary purpose for which they are used, are adequately packaged and labeled, and conform to representations made on the label. A warranty of fitness means that the seller has selected for the buyer goods that are appropriate for the purpose the buyer intended.

Although not mandatory, manufacturers, distributors, and retailers may make express warranties, written agreements to preserve or maintain the goods or provide some form of compensation if there is a failure in utility or performance.

There is no specific reference in the codes to warranties covering "assistive devices", apparatus used by a physically disabled individual to assist in bodily movement or replace a part of the body, though presumably they might be considered products "used... for personal...purposes".

BILL

SB 1190, as amended, declares that every sale of an assistive device, new or used, in this state is covered by an implied warranty, and shall be accompanied by a written warranty that the product will fit the particular needs of the buyer. For up to a minimum of 30 days after purchase, the seller is obligated to adjust or replace the device in order to achieve the proper fit, or shall promptly refund the full payment. The warranty must contain specific language spelling out these rights, printed in at least 10 point type.

These specific performance requirements do not in any way limit the right of the buyer to other legal protections or remedies that might exist.

ANALYSIS

1. The basic problem with assistive devices seems to be one of fit, rather than one of defects in the products. Because these devices are strapped on, worn, or used with the body, it's vitally important that they be comfortable, that they do not chafe, and that they are the proper size for the task. Sometimes these things cannot be discovered until the product has been in use awhile, e.g., a prosthetic device may be comfortably snug on a cold morning when purchased, but unreasonably tight after a hot afternoon of walking. This bill guarantees that the seller will make an effort to ensure the equipment fits properly.

2. The definition of "assistive device" found in the bill is quite broad: it would not only cover artificial limbs, but also walkers, wheelchairs, and perhaps glasses.

3. Under present practice, assistive devices are usually accompanied by an express warranty by the manufacturer that covers manufacturing defects in the product. While this provides some protection in those cases where the product is broken or simply does not work, it provides no protection in those great numbers of cases where the product is simply not appropriate for the job or is adjusted improperly: retailers' errors.

4. There are approximately 1.8 million Californians who have some form of physical disability. Approximately 700,000 of these use some form of assistive device, excluding eyeglasses.

SUPPORT:

Dept. of Consumer Affairs
Dept. of Rehabilitation
Regional Coalition of Handicapped
Citizens (Porterville)
California Paralyzed Veterans Assn.
Easter Seal Society
California Assn. for the Physically
Handicapped

San Francisco Independent
Living Project
United Cerebral Palsy
Center for the Disabled (Garden
Grove)
Center for Independent Living
(Berkeley)
Bay Area Gray Panthers
Disabled Resources (Long Beach)

OPPOSE: Unknown

FINAL SENATE VOTES:

Senate Judiciary Committee - May 30 (7-1)
Senate Third Reading - June 1 (26-0)

Consultant: Greg Schmidt
mh

VINCENT W. JONES
GENERAL COUNSEL

(213) 576-4766

Sears, Roebuck and Co.

PACIFIC COAST LAW OFFICES

900 SOUTH FREMONT AVENUE

ALHAMBRA, CALIFORNIA 91802

July 5, 1979

RMS	LDH	WC	APR	ALB
				READING
JW				

ATTORNEYS:

R. STANLEY HALL 576-4457
IRWIN G. ARBY 576-4454
PHILIPPE J. MONET 576-4454
CHARLES P. MCKENNEY 576-4058
NEIL A. GRANGER 576-4451
ANN KANE SMITH 576-4064
JULIA BELL 576-4451
FRED W. BRUNING 576-4616
R. WILLIAM SMITH 576-4725
PATRICIA A. FISHER 576-4426
JAMES A. MURPHY 576-4612

OUR FILE NO. _____

Mr. Robert M. Shillito
Executive Vice President
California Retailers Association
1127 Eleventh Street
Sacramento, California 95814

Re: SB 1190, as amended May 31, 1979

Dear Bob:

I still haven't seen the June 21 amendments to this bill, so I don't know if some of these problems have been resolved. This letter is to add to what is in my July 3rd letter to you.

1. The definition of assistive devices is so broad that any seller will have to guess what is covered for purposes of honoring the implied warranty or providing the express warranty. Sellers of these items ought not to have to be in this position.

2. Most of what can reasonably be thought to be assistive devices are sold by Sears through the catalog, an example of which I sent you July 3. Consequently, Sears may not know why a person is buying an item. However proposed Civil Code Sec. 1792.2(b), in SEC. 2 of the bill at page 4 states that every sale of an assistive device shall be accompanied by the seller's implied warranty that the device is specifically fit for the particular needs of the buyer. Logically, how can this be? Also, the express warranty required by proposed Civil Code Sec. 1793.02 (a), in SEC. 4 of the bill at page 5 requires a specific express warranty of fitness for particular purpose. If a seller doesn't know what the particular purpose is, how can it be required to make a specific warranty of fitness for particular purpose?

3. It is possible that the words of the proposed express warranty are illegal because they are at odds with the requirements of Magnuson-Moss.

We'd like to suggest some amendments to the bill:

1. Define assistive device tighter to reach exactly what is intended and no more.

2. Delete proposed Civil Code Sec. 1792.2 (b). This does not create an "implied warranty", but an express warranty, mandating by law a 30 day free trial period on every item that could be called an assistive device, whether or not it was prescribed by a doctor, the customer relied on the seller, or the seller knew why the buyer wanted the device.

3. Specifically exclude catalog sales from the bill.

4. Allow the express warranty to provide that the provisions of 1793.02 (a) don't apply if the seller has a general policy of satisfaction that is not subject to any specific limitation.

These comments are made in good faith to solve some real problems, not to keep people who need help from getting it.

Sincerely yours,



Charles McKenney

CPM:blp

cc: John Andrew
John Hunter

VINCENT W. JONES
GENERAL COUNSEL

(213) 576-4786

Sears, Roebuck and Co.

PACIFIC COAST LAW OFFICES

900 SOUTH FREMONT AVENUE

ALHAMBRA, CALIFORNIA 91802

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PATRICIA A. FISHER 576-4426
JAMES A. MURPHY 576-4612

July 3, 1979

Robert Shillito
Executive Vice President
California Retailers Association
1127 Eleventh Street
Sacramento, California 95814

RMS ✓	LDH	WC	ARR	FILE NO.
JUL 5 1979				✓
JW	JM	TK	HG	file

Re: SB 1190 as amended May 31, 1979

Dear Bob:

I see that this bill has been amended on June 21. I don't have the amendments, so I don't know if they have improved the bill.

As it is, it is bad beyond belief.

Several points come to mind, in addition to those John Hunter wrote you about on June 13. As I understand it the term "durable medical equipment" has a meaning in Medicare law. I'm enclosing a copy of an insert from the Sears Home Health Care which explains it and explains the Medicare provisions. It doesn't take much imagination to guess the confusion that would be caused trying to get money from Medicare with the return requirements of the warranty or dealing with Medicare at all in this kind of transaction with the additional warranty requirements.

Another problem is in the definition of assistive devices. Enclosed is the Sears Home Care Catalog containing several hundred items and parts which could be considered assistive devices. Add to this list orthopedic shoes, eyeglasses, hearing aids, and other items, and the bill takes on gargantuan proportions. Question: does the author intend to include hearing aids, eyeglasses, shoes and similar items in the definition of assistive device?

As you can see from the catalog, Sears gives a full warranty on many items in it. However, many items are without warranty, because they are "durable medical equipment" or because they are "personal" items.

There are a lot of problems in this bill.

Sincerely yours,

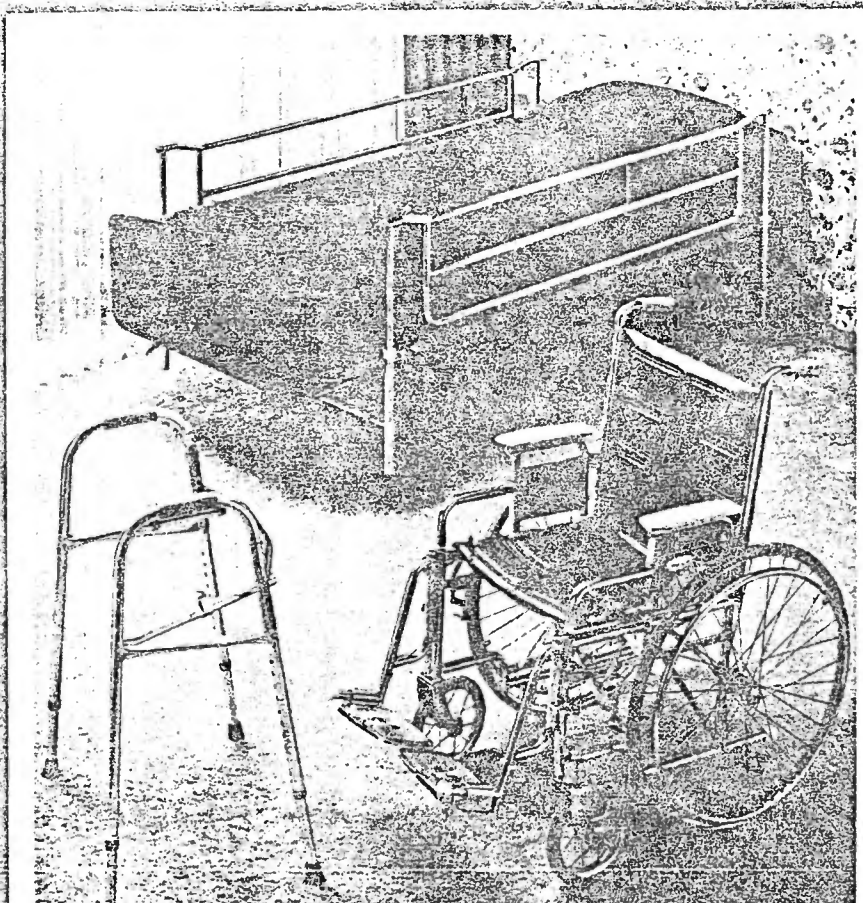
cc: John Andrew

Renting? You should
consider Buying Instead!

Medicare

can pay up to 80%
on the purchase of
certain durable
medical equipment
prescribed by a
doctor

(under those conditions as established by Medicare,
a federal program administered by
the Health Care Finance Administration,
part of the U.S. Dept. of Health, Education and Welfare)



A Certificate of Necessity is attached to assist you in filing Medicare claims.

For more specific definitions of terms referred to below and for official answers to Medicare-related questions, please contact your local Social Security Office.

here's what is meant by "durable medical equipment"

This is equipment which (1) can withstand repeated use, and (2) is primarily used to serve a medical purpose, and (3) generally is not useful to a person in the absence of an illness or injury. Shown here are just a few of the items that are classified as durable medical equipment. Not all of the items shown in this catalog meet the definition of durable medical equipment under Medicare.

here's how it works:

If your doctor prescribes durable medical equipment to be used in your home, Medical Insurance (part B of Medicare) can often help pay for the purchase. After you have met the \$60 annual deductible, Medicare will pay 80% of the reasonable purchase price for approved items when you submit your bill. Medicare payments over \$50 are made on a monthly basis, in an amount equal to 80% of the approved rental rate, until the reasonable purchase price has been met, or until your medical need for the equipment ends... whichever comes first. *However, if your doctor's prescription specifies a long term need for the equipment and if the monthly payments over that estimated period would exceed the purchase price, then Medicare can pay in a lump sum if the reasonable purchase price is less than \$600.* The reasonable purchase price may include delivery charges and finance charges. The cost of repairs and major maintenance of durable medical equipment may also be covered by Medicare.

buy or rent? consider these facts:

Your doctor can give you an estimate of how long you are likely to need durable medical equipment. You can compare the rental fee over an extended period as opposed to what it would cost you to purchase the equipment. If you will need the equipment permanently, purchase will probably cost less than rental. The proposed lump sum payment will simplify reimbursement of 80% of purchase price. If you are presently renting, you should consider potential advantages of owning your own equipment.



National
Headquarters

SEARS, ROEBUCK AND CO.
SEARS TOWER
CHICAGO, ILLINOIS 60684

Dear Sears Customer:

To expedite the handling of your Medicare Claim for durable medical equipment, it is suggested that you do the following:

1. You must complete Form SSA-1490, REQUEST FOR MEDICAL PAYMENT. This form can be obtained from your local Medicare Office or Social Security Office.

Complete all of Part I, Questions 1 through 6 of the Form SSA-1490. Be sure you sign the form.

2. CERTIFICATE OF MEDICAL NECESSITY. This form is on the back of this letter. The form should be completed and signed by your doctor.

If you use the CERTIFICATE OF MEDICAL NECESSITY, your doctor will not need to complete Part II of the Form SSA-1490.

3. Mail both completed forms, along with a copy of your bill to the Medicare Payment Office for your area. Remember, your bill can include delivery charges, taxes, as well as interest charges if you are purchasing on a Time Payment Plan.

If you have any questions, be sure to contact your nearest Social Security Office.

Sincerely,

SEARS, ROEBUCK AND CO.

durable medical equipment

CERTIFICATE OF NECESSITY

beneficiary's name (first name, middle initial, last name) _____

Health Insurance Claim No. _____
(include all letters)

diagnosis _____

prognosis _____

patient status: check all conditions applicable:

- | | | |
|--|--|--|
| <input type="checkbox"/> confined to room | <input type="checkbox"/> unable to ambulate | <input type="checkbox"/> substantial therapy required under MD's supervision |
| <input type="checkbox"/> confined to chair | <input type="checkbox"/> body positioning required that would not be feasible in an ordinary bed | <input type="checkbox"/> hypoxemic with exercise |
| <input type="checkbox"/> confined to bed | <input type="checkbox"/> periodic movement necessary to retard deterioration | <input type="checkbox"/> other _____ |
| <input type="checkbox"/> disoriented | | |
| <input type="checkbox"/> ambulation impaired | | |

durable medical equipment needed (list accessories) _____

Special feature, such as electrically operated bed or wheelchair, required because disability precludes the use of standard equipment (Explain) _____

date of medical need _____

equipment will be needed for ☐ number of months ☐ indefinitely ☐ permanently

place where equipment will be used

- | | | |
|--|--|--------------------------------------|
| <input type="checkbox"/> beneficiary's home | <input type="checkbox"/> relative's home | <input type="checkbox"/> other _____ |
| <input type="checkbox"/> beneficiary's apartment | <input type="checkbox"/> home for the aged | |
| <input type="checkbox"/> nursing home (not a skilled nursing facility) | | |

beneficiary's address (where equipment will be used)

name (if an institution) _____

street _____

city _____ state _____ zip _____

physician's signature _____ date _____

address _____

city _____ state _____ zip _____



Sieroty 5072

The CALIFORNIA ASSOCIATION OF THE DEAF, Inc.

Affiliated with the National Association of the Deaf — Founded 1906, Incorporated 1914
1507 TWENTY-FIRST STREET, SUITE 102, SACRAMENTO, CALIFORNIA 95814
Telephone TTY (916) 443-2833 Voice (916) 443-3604

F. A. Caligiuri
Executive Director

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Alhambra

July 10, 1979

Members of the Assembly
State Capitol
Sacramento, California 95814

Dear Assemblymember:

Senate Bill 1190 (Sieroty) will soon be considered by the full Assembly. This bill would require that new and used assistive devices sold at retail be covered by warranties that insure that the devices are specifically fit for the individual needs of the buyer.

The California Association of the Deaf would like to go on record in support of this bill. For many years, hearing impaired people have all too often been fitted with hearing aids that were inappropriate to the type and severity of their hearing loss. SB 1190 would help to insure that retailers of hearing aids become more responsible to the needs of their clients.

Your favorable consideration of SB 1190 would be greatly appreciated.

Sincerely,

F.A. Caligiuri
F.A. CALIGIURI
Executive Director

FAC:rr

✓cc: Senator Alan Sieroty

C.H.A.D. Administrator
KYLE WORKMAN
Perris

JUL 18 1979

79199 14:46

RECORD # 20 BF:

RN 014476 PAGE NO. 1

Substantive

AMENDMENTS TO SENATE BILL NO. 1190
AS AMENDED IN ASSEMBLY JULY 10, 1979

Amendment 1

In line 1 of the title of the printed bill, as amended in Assembly July 10, 1979, after "1791," insert:

1791.1,

Amendment 2

On page 3, line 37, after "affect" insert:

or replace

Amendment 3

On page 3, line 38, strike out " "Assistive device" shall" and strike out lines 39 and 40, and insert:

(n) "Catalogue or similar sale" means a sale in which neither the seller nor any employee or agent of the seller nor any person related to the seller nor any person with a financial interest in the sale participates in the diagnosis of the buyer's condition or in the selection or fitting of the device.

SEC. 1.5. Section 1791.1 of the Civil Code is amended to read:

1791.1. As used in this chapter:

(a) "Implied warranty of merchantability" or "implied warranty that goods are merchantable" means that the consumer goods meet each of the following:

(1) Pass without objection in the trade under the contract description.

(2) Are fit for the ordinary purposes for which such goods are used.

(3) Are adequately contained, packaged, and labeled.

(4) Conform to the promises or affirmations of fact made on the container or label.

(b) "Implied warranty of fitness" means (1) that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose and (2) that when there is a sale of an assistive device sold at retail in this state, then there is an implied warranty by the

retailer that the device is specifically fit for the needs of the buyer.

(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above.

(d) Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply.

Amendment 4

On page 4, strike out lines 30 and 31, and insert:

following language: "This assistive device is warranted to be specifically fit

Amendment 5

On page 4, line 32, strike out ", and" and insert:

. If the device is not specifically fit for your particular needs, it

Amendment 6

On page 4, strike out line 34, and in line 35, strike out "particular needs" and insert:

receipt by you or completion of fitting by the seller, whichever occurs later

Amendment 7

On page 5, line 9, after "days," insert:

or within any longer period specified in the warranty, of the date of actual receipt or completion of fitting by the seller, whichever occurs later,

Amendment 8

On page 5, strike out line 22, and insert:

(e) This section and subdivision (b) of Section 1792.2 shall not apply to any sale of an assistive device which is a catalogue or similar sale or which involves a retail sale price of less than fifteen dollars (\$15).

(f) The rights and remedies of the buyer under this

Amendment 9

On page 5, line 31, strike out "(f)" and insert:

(g)

Amendment 10

On page 5, line 36, strike out "(g)" and insert:

(h)

- 0 -



HEARING & SPEECH SERVICES

2323 BUCHANAN ROAD
ANTIOCH, CALIFORNIA 94509
(415) 432-3978

1479 YGNACIO VALLEY RD #104
WALNUT CREEK, CALIFORNIA 94598
(415) 938-8686

AUDIOLOGICAL EVALUATIONS
PEDIATRIC EVALUATIONS
INDUSTRIAL AUDIOLOGY
HEARING AID EVALUATIONS
HEARING AID ANALYSIS

Cisco
Michael
d. m. d.

August 13, 1979

Senator Sieroty
11340 West Olympic Boulevard
Los Angeles, California 90064

Re: Senate Bill #1190

Dear Senator Sieroty:

I have had the opportunity to review Senate Bill #1190 which was introduced by you. The bill is dated April 19, 1979.

As an audiologist and a hearing aid dispenser involved in the dispensing and selling of hearing instruments, I feel it is worthwhile that one specific aspect of the bill be given more consideration. In the introductory statements, a clause is included which paraphrases to say that if a seller neither sells nor replaces a device that he is to promptly refund to the buyer the total amount paid.

I am not familiar with other consumer items. However, I believe you should be aware that according to the FDA and the FDC if a hearing aid is fitted on a 30 day trial basis or if it is used by a patient, it is considered to be a used hearing aid. As a result, the hearing aid manufacturer requires a restocking fee of from \$15.00 to \$40.00 per aid.

Because of this legal requirement, this cost should be passed on to the consumer. If the cost is not passed directly to the consumer, it will, in essence, mean that all instruments sold will have to be increased in price to cover the cost of returned instruments.

If you have any questions regarding my comments, please let me know.

Sincerely,

Mike Hall
C. Mike Hall, M.A., C.C.C.
Clinical Audiologist

CMH/jar
cc: Hearing Aid Ass'n. of Cal.



1020 N STREET, SACRAMENTO, CALIFORNIA 95814



August 24, 1979

Mr. Larry Briskin
Administrative Assistant to
Senator Alan Sieroty
State Capitol, Room 5072

Re: SB 1190 (Sieroty)

Dear Larry:

We have reviewed the Legislative Counsel's draft of the latest set of amendments to SB 1190. I am enclosing some clarifying amendments.

We have dealt with the question raised by the hearing aid dispenser, Mr. Hall, through changes which prohibit the imposition of a fee for exercising the cure and return rights.

Let's discuss this further if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Steve".

STEVE FISHBEIN
Legislative Coordinator

SF:ddo

enc.

Amendments to SB 1190 (Sieroty)

Change I

In Legislative Counsel's draft of Civil Code Section 1791.1 (b) (2), insert "particular" before "needs of the buyer."

p. 4, l. 37

~~Change II~~

~~On page 4 of the July 10 version, line 36, insert a comma after the word "device."~~

Change III

Change Legislative Counsel's amendment #7 to read as follows:

p. 6, l. 27-30
On page 5 of the July 10 version, delete lines 9 and 10 and insert: "(c) If the buyer returns the device within the period specified in the written warranty, the seller shall, within a reasonable time, adjust the device or, ".

Change IV

*p. 6, l. 36
after "paid"*
On page 5 of the July 10 version, insert after the words "total amount paid" the words "and the transaction shall be deemed rescinded. No buyer shall be required to pay any charge for exercising any rights under this section."

AUG 29 1979

79241 15:59

RECORD # 10 BF:

RN 015849
Substantive

PAGE NO. 1

AMENDMENTS TO SENATE BILL NO. 1190
AS AMENDED IN ASSEMBLY AUGUST 27, 1979

Amendment 1

On page 4, line 37 of the printed bill, as amended in Assembly August 27, 1979, after the second "the" insert:

particular

Amendment 2

On page 6, line 27, strike out "30 days, or", strike out lines 28 to 30, inclusive, and insert:

the period specified in the written warranty, the seller shall, within a

Amendment 3

On page 6, line 36, after "paid" insert:

and the transaction shall be deemed rescinded. No buyer shall be required to pay any charge or fee for exercising any rights under this section

- 0 -



1020 N STREET, SACRAMENTO, CALIFORNIA 95814
322-4292



August 31, 1979

Larry Briskin
Office of Senator Sieroty
State Capitol, Room 5072
Sacramento, CA 95814

Dear Larry:

In response to your request regarding SB 1190, we have changed Amendments 4 and 5. This considerably improves and defines the rights of the buyer upon cancellation. We have also made it clear that the cancellation applies to the entire transaction including any trade-in or security interest given in connection with the transaction.

Please let me know if you have any other questions. Otherwise, this should be the last change. Thanks again for your patience and assistance in developing this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Steve".

STEVE FISHBEIN
Legislative Coordinator

Enclosure

4 PM Tuesday Rm 187

Hunger

Manges

Imbrest or other Road Trip Reunions

Society

Speran ~~or Wilson~~ or Campbell or
Russell

~~Hedden~~ Petis

Talk to Hunger's office
Call Al Tofel

Amendments to SB 1190 (Sieroty)

1

In Legislative Counsel's draft of Civil Code Section 1791.1 (b) (2), insert "particular" before "needs of the buyer."

2

On page 4 of the July 10 version, line 36, insert a comma after the word "device."

3

Change Legislative Counsel's amendment #7 to read as follows:

On page 5 of the July 10 version, delete lines 9 and 10 and insert: "(c) If the buyer returns the device within the period specified in the written warranty, the seller shall, within a reasonable time, adjust the device or,".

4

On page 5, line 10, after the words "seller shall," insert the words "without charge and".

5

On page 5 of the July 10 version, delete all of lines 14 and 15 and insert: "for the particular needs of the buyer, the transaction shall be deemed rescinded, and the seller shall promptly return to the buyer all payments and anything traded in and shall promptly cancel or cause to be cancelled all contracts, instruments and security agreements executed by the buyer in connection with the sale. When a sale is rescinded under this section, no charge or penalty may be imposed in connection with the purchase, fitting, financing or return of the device."

SEP 04 1979

79247 13:42

RECORD # 10 BF:

RN 016118 PAGE NO. 1

Substantive

AMENDMENTS TO SENATE BILL NO. 1190
AS AMENDED IN ASSEMBLY AUGUST 27, 1979

Amendment 1

On page 4, line 37 of the printed bill, as amended in Assembly August 27, 1979, after the second "the" insert:

particular

Amendment 2

On page 6, line 27, strike out "30 days, or", strike out lines 28 to 30, inclusive, and insert:

the period specified in the written warranty, the seller shall, without charge and within a

Amendment 3

On page 6, line 36, after "paid" insert:

, the transaction shall be deemed rescinded, and the seller shall promptly return to the buyer all payments and any assistive device or other consideration exchanged as part of the transaction and shall promptly cancel or cause to be cancelled all contracts, instruments, and security agreements executed by the buyer in connection with the sale. When a sale is rescinded under this section, no charge, penalty, or other fee may be imposed in connection with the purchase, fitting, financing, or return of the device

- 0 -

SB 1190 - Assembly Floor

SB 1190 amends the Song-Beverly Consumer Warranty Act to require that the sale of devices which assist the physically disabled be accompanied by an express warranty that the device will fit the particular needs of the buyer.

Under the bill, the buyer is given 30 days to return the device. The seller must either "cure" the defect or refund the buyer's money.

SB 1190 is supported by many organizations representing disabled persons in this state as well as by the State Departments of Rehabilitation and Consumer Affairs. I know of no opposition to the bill and urge your "aye" vote.

NOTES:

(1) The purchaser will receive a written warranty with the language on page 6 of the bill (as amended August 27) to notify the purchaser of his or her rights.

(2) The 30 days the buyer has to return begins to run from the date of purchase or the date of completion of the fitting of the device, whichever occurs later.

(3) The bill also creates an implied warranty of fitness with respect to these devices which aid the disabled. This will be helpful in the situation where the seller fails to provide the required written warranty. The remedies under the implied warranty will be similar to those under the express warranty, namely, the right to reject the item initially or to revoke acceptance, the right to sue for damages.

(4) Examples of the kind of complaints which prompted this legislation are: wheelchairs that are too large for the person, improperly fitted hearing aids and prosthetic devices, etc.

SB 1190 - Amendments on Assembly Floor

(The bill provides an express written warranty that an assistive device purchased by a physically disabled person be fit for the specific needs of that person and allows the buyer 30 days to return the device for refund or to make modifications at the choice of the seller.)

There is no opposition to the bill but the California Retailers Association and the California Orthotics and Prosthetics Association have expressed specific concerns about the bill. The amendments address those concerns.

1. Catalogue sales are exempted.
2. When the 30 days begins to run is clarified (from the date of receipt or completion of fitting, whichever is later).
3. Other technical and clarifying, i.e. nonsubstantive changes are made.

NOTE: Please do not take up the bill for final passage until after the recess even if the Assembly meets Friday.

ASSEMBLY THIRD READING

SB 1190 (Sieroty) As Amended: September 5, 1979

SENATE VOTE: 26-0

ASSEMBLY ACTIONS:

COMMITTEE L., E., & C. A. VOTE 7-0 COMMITTEE _____ VOTE _____

Ayes: Ayes:

Nays: Nays:

DIGEST

The Song-Beverly Consumer Warranty Act requires retailers and distributors selling consumer goods at retail to guarantee (by implied warranty) that those goods are suitable to the buyer if the retailer or distributor has reason to know that the goods are required for a specific purpose and that the buyer is relying on the retailer's or distributor's skill or judgment in furnishing suitable goods.

This bill requires retail sales of "assistive devices" for the physically handicapped to be guaranteed to fit the particular needs of the buyer.

Specifically, the bill:

- 1) Defines "assistive device" as any instrument used to assist a physically disabled person in mitigating or treating an injury or disease or in assisting any bodily function. An assistive device may be used to replace any part of the human body.
- 2) Defines the term "catalog or similar sale" and exempt catalog purchases of less than \$15 of assistive devices from having to be guaranteed to fit the particular needs of the buyer.
- 3) Requires retailers of assistive devices to guarantee, by implied warranty, that such devices are specifically fit for the particular needs of the buyer.
- 4) Requires all new and used assistive devices sold at retail to be accompanied by a written warranty which specifies that the product is to fit the particular needs of the buyer and can be returned within 30 days for adjustment, replacement, or refund of moneys paid, if found to be unsuitable. The period may be more than 30 days if the retailer so specifies.
- 5) Specifies that an assistive device may be returned to the retailer within the period of time specified in the warranty.

- continued -

FISCAL EFFECT

No fiscal effect expected on state or local government. Undetermined cost to retailers of assistive devices for supplying written warranties to the physically handicapped.

COMMENTS

The Assembly Labor, Employment, and Consumer Affairs Committee analysis states:

The basic problem with assistive devices seems to be one of fit, rather than one of defects in the products. Because these devices are strapped on, worn, or used with the body, it's important that they be comfortable, that they do not chafe, and that they be the proper size. Sometimes these things cannot be discovered until the product has been in use awhile (e.g., a prosthetic device may be comfortably snug on a cold morning when purchased, but unreasonably tight after a hot afternoon of walking). This bill guarantees that the seller will make an effort to ensure the equipment fits properly.

The definition of "assistive device" in the bill is quite broad. It would not only cover artificial limbs, but also walkers, wheelchairs, and perhaps glasses.

There are approximately 1.8 million Californians who have some form of physical disability. Approximately 700,000 of these use assistive devices, excluding eyeglasses.

Should language be added which clarifies that it is the judgment of the buyer, rather than that of the seller, which will prevail in a dispute concerning proper fit and a refund of money.

STATE CAPITOL
SACRAMENTO, CALIFORNIA 95814
(916) 445-7928

DISTRICT OFFICE
11340 W. OLYMPIC BLVD., SUITE 359
LOS ANGELES, CALIFORNIA 90064
(213) 479-4244

LARRY BRISKIN
ADMINISTRATIVE ASSISTANT

MICHAEL SIEGEL
LEGISLATIVE ASSISTANT

Senate California Legislature

ALAN SIEROTY
TWENTY-SECOND SENATORIAL DISTRICT

September 14, 1979

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STATUS OF WOMEN
CONSUMER ADVISORY COUNCIL

Hon. Edmund G. Brown, Jr.
Governor of California
State Capitol
Sacramento, CA 95814

Dear Governor Brown:

I respectfully request your signature on SB 1190, now before you for consideration.

This bill, introduced at the request of the Department of Consumer Affairs and the Department of Rehabilitation, amends the Song-Beverly Consumer Warranty Act to require that the sale of devices which assist the physically disabled be accompanied by an express warranty that the device is fit for the particular needs of the buyer.

Under the bill, the buyer will receive written notice of this warranty at the time of sale and is given a minimum of 30 days to return the device. The seller must either "cure" the defect or refund the purchaser's money and cancel the contract.

The two departments concerned with this legislation have received serious complaints from disabled persons regarding the sale of such devices as wheelchairs, hearing aids, and artificial limbs. SB 1190 will provide a remedy for the physically disabled and will help to resolve disputes without the need for litigation.

SB 1190 is supported by numerous organizations representing the physically-disabled community, including the California Association of the Physically Handicapped, the California Association of the Deaf, the Easter Seal Society, the Center for Independent Living, the National Multiple Sclerosis Society, and the United Cerebral Palsy. The bill

has been amended to resolve the concerns of the California Retailers Association and the California Orthotics and Prosthetics Association. I know of no opposition to SB 1190, as now amended, and urge your favorable consideration.

Yours sincerely,



ALAN SIEROTY



The CALIFORNIA ASSOCIATION OF THE DEAF, Inc.

Affiliated with the National Association of the Deaf -- Founded 1906, Incorporated 1914
1507 TWENTY-FIRST STREET, SUITE 102, SACRAMENTO, CALIFORNIA 95814
Telephone TTY (916) 443-2603 Voice (916) 443-3604

F. A. Caligiuri
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C.H.A.D. Administrator

KYLE WORKMAN
Perris

September 18, 1979

The Honorable Edmund G. Brown Jr.
Governor
State Capitol
Sacramento, California 95814

Re: Senate Bill 1190

Dear Governor Brown:

Senate Bill 1190 (Sieroty) will soon be before you for your signature. This bill would require that new and used assistive devices sold at retail be covered by warranties that insure that the devices are specifically fit to the individual needs of the buyer.

For many years, hearing impaired people have all too often been fitted with hearing aids that were inappropriate to the type and severity of their hearing loss. SB 1190 would help insure that retailers of hearing aids become more responsible to the needs of their clients.

The California Association of the Deaf supports SB 1190 and respectfully requests your favorable consideration in this matter.

Sincerely,

EDWARD D. SANTILLANES
Administrative Assistant

EDS:rr

cc: Senator Alan Sieroty



1020 N STREET, SACRAMENTO, CALIFORNIA 95814
(916) 445-4465



L

October 22, 1979

Dear Consumer:

I am glad to inform you that SB 1190 (Sieroty) has been signed by the Governor and will become effective on January 1, 1980. This important consumer bill will provide warranty protection for purchasers of assistive devices in California. I have enclosed a copy of SB 1190 for your review, and welcome your comments. Our Department is now in the process of informing affected retail sellers of the provisions of SB 1190.

I would also like to take this opportunity to assist Senator Milton Marks of San Francisco in his outreach effort to inform interested persons of the existence of his new Senate Health and Welfare Subcommittee on the Disabled. This committee is earnestly soliciting the active participation of the disabled in identifying and addressing related issues and problems.

Interim hearings, open to the public, will be held on October 29 in Sacramento, October 31 in San Francisco, and November 14 in Los Angeles. For further information, please contact Senator Marks' administrator, Dorothy Epstein. She can be reached at the Senator's San Francisco office at 350 McAlister Street, Room 2043, San Francisco, CA, 94102, (415) 557-1437, TTY: (415) 861-7586. We encourage your work with this committee, which is particularly interested in the continuity of services to the disabled in the aftermath of Proposition 13.

In addition, our Department is requesting input for our Consumer Health Catalogue to be published next year. This catalogue will have a section regarding consumer health concerns and resources available for the disabled in California. If you have any suggestions for content, please contact Candis Cohen, in our Legislative Unit, (916) 322-4292, by November 5th.

Again, our thanks and appreciation to the many individuals and organizations representing the disabled community who helped secure passage and enactment of SB 1190.

Sincerely,


RICHARD B. SPOHN
Director

cc: Senator Milton Marks
Dorothy Epstein
Steve Fishbein, Legislative Coordinator

STATE CAPITOL
SACRAMENTO, CALIFORNIA 95814
(916) 445-7928

DISTRICT OFFICE
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LOS ANGELES, CALIFORNIA 90064
(213) 479-4244

LARRY BRISKIN
ADMINISTRATIVE ASSISTANT

MICHAEL SIEGEL
LEGISLATIVE ASSISTANT

Senate California Legislature

ALAN SIEROTY
TWENTY-SECOND SENATORIAL DISTRICT

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December 18, 1979

Richard A. Elbrecht, Supervising Attorney
Legal Services Unit
Department of Consumer Affairs
1020 N Street, Room A-602
Sacramento, CA 95814

Dear Dick:

Thanks for the opportunity to comment on the draft pamphlet explaining the Assistive Device Warranty Law.

As you will note in the copy I have returned, I have circled several typos in the draft. In addition, there are several substantive points I want to relate.

First, the pamphlet does not explain the definition of an assistive device. I have had several phone calls from retailers and representatives of major organizations inquiring whether a hearing aid is an assistive device or eyeglasses or contact lens. As I read the definition, the answer may depend on whether the user of these devices is a physically disabled person, a term not defined in this law. Any way this question can be clarified by a detailed list of examples or otherwise would be most helpful and make the pamphlet much more useful.


Second, it should be pointed out to sellers that the act requires them to take an active role in supplying a written warranty at the time of sale. This and other requirements relating to the seller's role should be presented earlier in the text, or, if that is impractical, perhaps the requirements, obligations, and rights of the seller and buyer can be summarized point by point in the front of the pamphlet. In general I think the pamphlet, while an excellent draft, is a bit esoteric and should be as practical as possible.

Finally, it is important to explain the 30 day (or longer) period, particularly in terms of when it begins to run. Sellers and buyers should understand that it is

a flexible period and that they may not agree when a fitting is complete. I understand that you want the pamphlet more informative than combative, but it is important to clarify these difficult issues whenever possible.

I appreciate your considering my views and will be happy to talk with you further about this.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Larry Briskin", written in a cursive style.

LARRY BRISKIN
Administrative Assistant

STATE CAPITOL
SACRAMENTO, CALIFORNIA 95814
(916) 445-7928

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LARRY BRISKIN
ADMINISTRATIVE ASSISTANT

MICHAEL SIEGEL
LEGISLATIVE ASSISTANT

Senate
California Legislature

ALAN SIEROTY
TWENTY-SECOND SENATORIAL DISTRICT

January 14, 1980

5B 1190
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MEMBER
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STATUS OF WOMEN
CONSUMER ADVISORY COUNCIL

Professor Harvey Levin
Law and You
c/o You Magazine
Los Angeles Times
Times Mirror Square
Los Angeles, CA 90053

Dear Professor Levin:

I noted with interest your "The Law and You" column of January 8 regarding California consumer warranties.

I thought you might be interested in knowing about an addition to the Song-Beverly Consumer Warranty Act which I authored last year and which became effective January 1, 1980. The new law requires that sales of devices which assist the physically disabled be accompanied by an express warranty that the device is fit for the needs of the buyer. The purchaser receives written notice of the warranty at the time of sale and has a minimum of 30 days to return the device for repair or refund.

I am enclosing a copy of SB 1190 and a related press release for your information.

I enjoy reading your column.

Yours sincerely,


ALAN SIEROTY

AS/LB/po

Enclosures



california optometric association

921 - 11th STREET P. O. BOX 2591 SACRAMENTO, CALIFORNIA 95812 (916) 441-3990

J. S. LIEBLEIN, O. D.
PRESIDENT

April 23, 1980
File: 541

State of California
Department of Consumer Affairs
1020 N Street
Sacramento, California 95814

Re: SB 1190 (Sieroty) - Consumer
Warranties

Attn: Richard B. Spohn

Dear Mr. Spohn:

I have just read the pamphlet prepared by your Department concerning the above referenced law. I was shocked and surprised to note that your Department has included eyeglasses within the definition of "assistive device."

This unilateral action is not in keeping with the intent of SB 1190, and can do nothing but cause confusion to California consumers and vision care practitioners.

SB 1190 defines an "assistive device" as:

"...Any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure of any function of the body of a physically disabled person."

I do not believe that the approximate ten million Californians who presently wear eyeglasses or contact lenses are "disabled persons." You yourself wear eyeglasses and I doubt that you place yourself in the same position as an individual with an artificial arm.

I have reviewed the legislative history of this bill and it appears clearly to be intended to assist purchasers of "wheel chairs, hearing aids, and artificial limbs." I refer you to a copy

RECEIVED
APR 23 1980

Dept. of Consumer Affairs
EXECUTIVE (138)E
SACRAMENTO

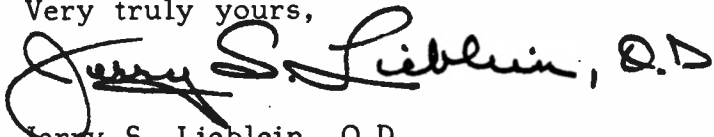
Mr. Richard B. Spohn
April 23, 1980
Page Two

of Senator Sieroty's letter to Governor Brown, dated September 14, 1979, which is attached hereto.

Considering the language of SB 1190 and its legislative history, your Department's pamphlet captioned "California Assistive Device Warranty Law" is irresponsible when it refers to eyeglasses as an assistive device.

On behalf of the members of the California Optometric Association, I request that you take immediate steps to cease the dissemination of misleading information concerning SB 1190 and make clear to the public, in conformity with SB 1190, that eyeglasses and contact lenses are not included in that legislation.

Very truly yours,


Jerry S. Lieblein, O.D.
President, California Optometric
Association

JSL:cr
attachment

cc: Edmund G. Brown, Jr., Governor
Alice A. Lytle, Secretary, State and Consumer Services Agency
Members, State Board of Optometry
Lawrence D. Price, Executive Officer, State Board of Optometry



BOARD OF OPTOMETRY
1020 N STREET, SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 445-2095



April 22, 1980

Mr. Richard B. Spohn, Director
Department of Consumer Affairs
1020 N Street
Sacramento, CA 95814

Dear Mr. Spohn:

The Board of Optometry at its April 19 Board Meeting discussed SB 1190 and the brochure published by the Department referred to as "California Assistive Device Warranty Law".

It is our understanding that the Department has been advertising through the communication medium of television and radio that eyeglasses and contact lenses are included under said warranty law. Written inquiries and telephone inquiries have started coming in to the Board office in Sacramento. However, after conferring with the Attorney General's Office regarding the authority the Board would have to enforce SB 1190 we find that an informal opinion has been given to Assemblyman Frank Vicencia regarding said legislation and that Mr. Vicencia is also seeking a formal opinion from the Attorney General's Office (please see Mr. Vicencia's April 17 letter, copy attached). Therefore, counsel for the Board that would represent the Board in litigative actions has indicated the Board does not have authority under said legislation.

Therefore, it is confusing to this Board why there was not some communication with the Board office in Sacramento or perhaps the Board President prior to initiating television and radio announcements that eyeglasses and contact lenses were included, which we are informed is not correct at this time and may eventually cause your Department some embarrassment.

In order to avoid future problems of this nature the Board is requesting that prior to any public statements or press releases affecting the practice of optometry in California that the Department so inform the Executive Officer of the Board or the Board President regarding same. This really is just a matter of common courtesy. We stand ready to help you and advise your staff in any manner practicable regarding the laws and regulations concerning optometrists in the State of California.

Sincerely,

Ernest K. Takahashi, O.D.

ERNEST K. TAKAHASHI, O.D., President
State Board of Optometry

EKT:nc

Attach.

cc: Board Members w/attach.

RECEIVED
APR 23 1980

Dept. of Consumer Affairs
EXECUTIVE OFFICE
SACRAMENTO

Assembly California Legislature

GOVERNMENTAL ORGANIZATION
CHAIRMAN

COMMITTEES
REVENUE AND TAXATION
ELECTIONS AND REAPPORTIONMENT

SUBCOMMITTEE ON
EMERGENCY PLANNING AND
DISASTER RELIEF

FRANK VICENCIA
ASSEMBLYMAN, FIFTY-FOURTH DISTRICT
(BELLFLOWER, COMPTON, LYNWOOD, PARAMOUNT
AND WILLOWBROOK)

CHAIRMAN
Governmental Organization

April 17, 1980

Ms. Kathryn C. Rees, Director
Legislative Division
California Optometric Association
P.O. Box 2591
Sacramento, CA 95812

Re: SB 1190 (Sieroty) Consumer Warranties

Dear Ms. Rees:

I thought it would be of interest to your organization that I have sought and received a verbal opinion from the Office of the Attorney General relative to the above referenced legislation.

Specifically, I requested a determination as to whether or not the term "assistive device", as outlined in this measure included eyeglasses, contact lenses or other ophthalmic goods.

It was the informal opinion of the Attorney General's Office that eyeglasses and contact lenses are not covered within the scope of the measure because:

1. The definition of assistive device is normally used in connection with an injury or disease and thus would not include eyeglasses and contact lenses; and
2. Assistive devices are intended for use by the physically disabled and the use of glasses and/or contact lenses is not normally considered to be a disabling handicap.

Further to this, I am seeking a formal opinion from the Attorney General's Office pursuant to this verbal opinion. Should you have any questions or concerns, don't hesitate in contacting me.

Sincerely,

John Huntington, Asst. AG
Alvin Korobkin, Deputy AG
Jack Winkler, Asst. AG
Don Price, Ex. Office (State Bd. of Optometry)

FRANK VICENCIA

LAW OFFICES OF

ATHEARN, CHANDLER & HOFFMAN

ONE ELEVEN SUTTER STREET

SAN FRANCISCO, CALIFORNIA 94104

FRED G. ATHEARN (1913-1956)
A. E. CHANDLER (1919-1954)
LEIGH ATHEARN (1933-1976)
WALTER HOFFMAN
EDWARD G. CHANDLER
CLARK W. MASER
ROBERT R. WOOD
RICHARD HARRINGTON
DONALD H. MAFFLY
STEPHEN E. CLARK

WENDELL H. GODDARD
JUDITH E. HARDING

TELEPHONE
AREA CODE 415
421-5484
CABLE ADDRESS
"HAVATH"

May 20, 1980

Lawrence Keethe, Esq.
Deputy Attorney General
555 Capitol Mall, Suite 250
Sacramento, CA 95814

Re: Opinion Request as to Whether Pre-
scription Eyewear is An "Assistive
Device" Under Amendments to Song-
Beverly Consumer Warranty Act

Dear Mr. Keethe:

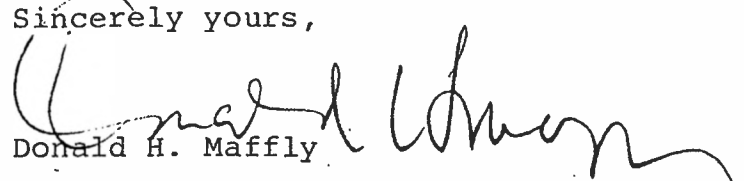
We are attorneys for the California Association of Dispensing Opticians. Members of this organization are licensed by the Division of Allied Health Professions to dispense prescription lenses to members of the consuming public in conformity with prescriptions written by physicians and optometrists.

Senate Bill 1190 amended the Song-Beverly Consumer Warranty Act to mandate an implied and express warranty of fitness for assistive devices used by physically disabled persons. I understand that you are in the process of preparing a formal opinion as to whether prescription eyewear constitutes an assistive device under the recent legislative amendments.

We enclose for your review our legal memorandum concluding that the 50 percent of the population using prescription eyewear are not physically disabled persons, with the result that their eyewear cannot be regarded as assistive devices under the Song-Beverly Consumer Warranty Act. In the legal memorandum we review the many California statutes and cases that define the term "physically disabled" or similar terms. The statutes and cases uniformly conclude that "physical disability" involves a serious condition that affects a person's ability to obtain or maintain employment or impairs a person's physical mobility. It is particularly telling that Vehicle Code §22511.5 defines physical disability in terms of visual acuity that is worse than 20/200 in the better eye with corrective lenses. Thus, a person whose vision can

be corrected to 20/200 with corrective lenses is not a physically disabled person. Accordingly, prescription eyewear does not constitute an assistive device within the 1979 amendments to the Song-Beverly Consumer Warranty Act.

Sincerely yours,


Donald H. Maffly

Enclosure

cc.: Honorable Edmund G. Brown, Jr.

Honorable Richard B. Spohn

Alvin Korobkin, Esq.,
Deputy Attorney General

Honorable Frank Vicencia

Honorable Alan Sieroty

Honorable Daniel E. Boatwright

Honorable Alister McAlister

Honorable William J. Filante

Mr. Simon Haynes,
California Medical Association

Robert R. Peabody, M.D.,
California Association of Ophthalmology

Byron Demorest, M.D.,
California Association of Ophthalmology

Ms. Kathryn C. Rees,
California Optometric Association

William A. Gould, Jr., Esq.

Jack C. Crose, Esq.

MEMORANDUM

May 19, 1980

Re: Prescription Eyewear is Not An
"Assistive Device" Under Amend-
ments to the Song-Beverly Con-
sumer Warranty Act that Became
Effective on January 1, 1980;
Thus Dispensers of Prescription
Eyewear are Not Required to Give
the Written Warranty Specified
in Civil Code §1793.02

INTRODUCTION

Senate Bill 1190, containing amendments to the Song-Beverly Consumer Warranty Act, was passed by the State Legislature in 1979 and became effective January 1, 1980. The amendments accomplish the following:

1. They create a new category of consumer goods, namely the "assistive device" which is limited by its definition to a device that is used to assist "a physically disabled person."
2. They require that every retail sale of an assistive device be accompanied by an implied warranty that the device is specifically fit for the particular needs of the buyer. This amendment eliminates the normal requirement that a buyer, in proving a breach of the implied warranty of fitness, must show the seller's knowledge of the buyer's particular use for the goods and reliance by the buyer on the seller's skill and judgment in furnishing the goods.
3. They require that every retailer of an assistive device give a written 30-day express warranty of fitness. The statutory language of the express warranty invites the dissatisfied buyer to return the assistive device to the seller within 30 days of receipt or completion of fitting of the device for adjustment, replacement or refund.
4. In the case of willful violations of the act, a buyer may recover treble damages plus reasonable attorneys' fees and any other appropriate legal or equitable relief. In the case of a class action, Civil Code §1794.2 authorizes all of the foregoing remedies except recovery of treble damages. It is important to note that when an assistive device is sold all of the foregoing remedies are available not only for a

breach of the warranty of fitness but also for the seller's failure to give the buyer an express written warranty at the time the sale is made.

QUESTION PRESENTED

The State of California's Department of Consumer Affairs has published a 9-page "business information pamphlet" regarding the sale of assistive devices. This pamphlet refers to the Song-Beverly Consumer Warranty Act amendments of 1979 as the "California Assistive Device Warranty Law." The pamphlet gives an overview of the new law and explains in detail the requirements of the new written warranty of fitness for a buyer's particular needs. In discussing the scope of the new law, the Department of Consumer Affairs states in this pamphlet that "the sale of corrective eyeglasses is clearly within [the scope of the new law]." This rather casual assertion in the lengthy pamphlet is not supported by any argument or citation of authority.

The question to be considered in this memorandum is whether or not prescription eyeglasses and contact lenses are assistive devices and whether wearers of prescription lenses are physically disabled persons within the meaning of the recent amendments. If the answer is in the negative, the pamphlet of the Department of Consumer Affairs is in error and should obviously be withdrawn before it further misleads consumers as to their rights and creates misunderstandings and friction between consumers and the dispensers of prescription eyewear.

RELEVANT STATUTES

The Song-Beverly Consumer Warranty Act defines an assistive device as one intended for use by "a physically disabled person". Civil Code §1791(m) provides:

"'Assistive device' means any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure of any function of the body of a physically disabled person."

As stated in the introduction of this memorandum, the retail sale of an assistive device is accompanied as a matter

of law by an implied warranty of fitness and the seller at the time of the sale must provide the buyer with a written warranty stating that the assistive device is specifically fit for that buyer's particular needs. The warranty must advise the buyer that he has 30 days within which to return an assistive device that he believes is not fit for his particular needs. The 30-day period runs from the date of receipt of the device or the date of completion of fitting, whichever is later. If this provision were to apply to contact lenses the 30-day period would not commence running until many weeks or months after the lenses were first delivered to the consumer. Civil Code §1793.02(a) states the exact language that comprises the express warranty. That section provides as follows:

"All new and used assistive devices sold at retail in this state shall be accompanied by the retail seller's written warranty which shall contain the following language: 'This assistive device is warranted to be specifically fit for the particular needs of you the Buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws.' In lieu of the words '30 days' the retail seller may specify any longer period."

SUMMARY OF CONCLUSIONS

Under the Song-Beverly Consumer Warranty Act - before the 1979 amendments - each retail sale of prescription eyewear and other consumer goods is accompanied by an implied warranty of merchantability and an implied warranty of fitness. A willful violation of these warranties or other provisions of the act by a seller gives rise to a cause of action for treble damages, court costs, reasonable attorneys' fees and other appropriate legal and equitable relief. Thus, the purchaser of prescription eyewear has substantial protection under the act even if the 1980 amendments pertaining to assistive devices do not cover prescription eyewear.

Neither reliance on common sense nor reliance on the slight legislative history that is available gives any support for the notion that the 1979 amendments intended to include prescription eyewear under the term "assistive devices." There is no indication that the Legislature regarded the 50 percent of the population that wears prescription lenses as physically disabled persons.

Apart from common sense and legislative history, the many California statutes and appellate cases that deal with the term "physically disabled" make it clear that the Legislature and the courts uniformly regard a physical disability to be a serious impairment of bodily functions that either interferes with the ability of a person to be employed, impairs physical mobility, or entitles the person to some form of rehabilitative or other benefits. In fact, the one statute that does define disability in terms of visual acuity (Vehicle Code §22511.5) requires that the person have visual acuity worse than 20/200 in the better eye with corrective lenses. Based on this statute, other statutes and California cases no suggestion can be found that a person wearing corrective lenses that provide normal or near normal visual acuity is in any sense "a physically disabled person."

For all of the foregoing reasons the wearer of prescription lenses is not a physically disabled person and does not wear an assistive device as that term is defined in the 1979 amendments to the Song-Beverly Consumer Warranty Act. Thus, the new provisions of that act that require an express warranty of fitness for assistive devices do not apply to dispensers of prescription eyewear.

In the discussion that follows we shall discuss in section 1 the implied warranties that do apply to the retail sale of prescription eyewear and the remedies available to the purchaser of prescription eyewear. In section 2 we shall state the common sense reasons and the legislative history that lead to the conclusion that persons who wear prescription eyewear are not physically disabled persons wearing assistive devices. In section 3 we shall discuss the many California statutes and appellate cases that define a physically disabled person as someone with a serious physical impairment which interferes with the ability to maintain productive employment, impairs physical mobility, or entitles the person to some type of special rehabilitative or other benefit made available by the state.

DISCUSSION

1. Each sale of prescription lenses or other consumer goods - irrespective of the 1979 amendments - is accompanied by an implied warranty of merchantability and in some cases an

implied warranty of fitness for a buyer's particular needs; substantial remedies are provided to the buyer of such goods.

(a) The implied warranty of merchantability.

Under Civil Code §1792 every retail sale of prescription eyewear is accompanied by an implied warranty that the goods are merchantable, absent a written disclaimer of this warranty. An implied warranty of merchantability binds the retailer to a promise that the goods are fit for their ordinary purposes and that they conform to any promises or affirmations made on the container or label. Civil Code §1791.1. Where no duration has been stated in an express warranty, the implied warranty of merchantability endures for one year. In no event is the duration of the warranty less than 60 days.

(b) The implied warranty of fitness.

There is an implied warranty that goods are fit for the buyer's particular purpose whenever the seller has reason to know at the time of the sale that the buyer requires the goods for a particular purpose and that the buyer is relying upon the seller's skill or judgment to select and furnish suitable goods. Civil Code §1791.1(b). There would seem to be little doubt that the implied warranty of fitness normally applies to the sale of prescription eyewear, since the buyer is known to be relying on the skill and judgment of the dispenser in furnishing the prescription eyewear. As in the case of the implied warranty of merchantability, the implied warranty of fitness has a duration of between 60 days and one year.

(c) Express warranties.

Civil Code §1793 expressly permits a retailer to make express warranties in connection with the sale of consumer goods, including prescription eyewear. Section 1793.1 provides protection to the consumer when express warranties are made. Express warranties must be made in readily understood language and identify those locations where the buyer may return the goods for service and repair.

In California many dispensers of prescription eyewear choose to make extensive warranties for prescription eyewear. Some dispensers of eyeglasses guarantee replacement for one year of frames or lenses that are broken through any cause, including carelessness of the customer.

(d) Remedies for Breach of Implied or Express Warranty.

A dissatisfied buyer who claims breach of an express warranty has three choices of action. First,

he may return the nonconforming goods to the seller and seek the remedies of repair, replacement or refund. Second, he may return the nonconforming goods to a seller of like goods of the same manufacturer and seek these remedies. Third, he may tender the nonconforming goods to an independent repair and service facility when service or repair is economically feasible. Civil Code §1793.3.

For willful violations of any express or implied warranty a buyer has the additional remedy of treble damages plus attorneys' fees and costs. However, treble damages are not available in a class action or if the judgment is based solely on a breach of an implied warranty. Civil Code §1794.2.

Based on the foregoing it is obvious that the purchaser of prescription eyewear is adequately protected by the substantive provisions of the Song-Beverly Consumer Warranty Act and by the many remedies made available under that act.

2. Neither common sense nor the legislative history of the 1979 amendments gives any indication that the Legislature regarded the wearer of prescription lenses as a physically disabled person using an assistive device.

It is of course commonplace for persons in the United States to use prescription eyeglasses and contact lenses. On June 2, 1978, the Federal Trade Commission issued a trade regulation rule pertaining to advertising prescription eyewear. The FTC noted that over 50 percent of the population in the United States uses ophthalmic goods and services. In 1975 over 112 million people used corrective lenses in the United States. The FTC referred to a 1974 Department of Health, Education and Welfare survey showing that 49.1 percent of persons between the ages of 24 and 45 use eyeglasses, that 88 percent of persons between the ages of 45 and 65 use eyeglasses, and that 93 percent of persons over the age of 65 use eyeglasses.

In view of these statistics it seems farfetched and in defiance of common sense to regard a person wearing prescription lenses as a physically disabled person. It is common knowledge that the use of prescription eyewear does not interfere in any way with gainful employment and does not impair physical mobility or participation in vigorous physical activities. Certainly, there should be a heavy burden on any person claiming that the Legislature intended the term "physical disability" to include the great percentage of the California population that wears prescription eyewear.

Certainly the burden of proof is not met when one refers to the language of the 1980 amendments or the sparse legislative history that is available to interpret the intent of the

Legislature. First of all, the Legislature made no effort to define the term "physical disability" in the 1979 amendments. In view of the silence of the Legislature, it should be presumed that it intended this term to be defined in its usual and ordinary sense and did not intend the term to be expanded to cover persons not normally falling within even the most expansive definition of the term "physical disability."

Turning to legislative history, the author of the 1979 amendments, Senator Sieroty, sent a letter to the Governor on September 14, 1979, explaining the contents of his bill. There is no reference in that letter to any intent to include prescription eyewear within the meaning of the term assistive device. In fact, every reasonable inference is that the author did not intend to include prescription eyeglasses. Senator Sieroty stated:

"The two departments concerned with this legislation have received serious complaints from disabled persons regarding the sale of such devices as wheelchairs, hearing aids, and artificial limbs. SB 1190 will provide a remedy for the physically disabled "

The Senator then went on to list the number of organizations representing the physically disabled that supported his bill. None of these organizations is directly concerned with persons with poor but correctable visual acuity.

3. Referring to California statutes and appellate cases defining the term "physically disabled" it is clear that prescription eyewear is not an assistive device used by physically disabled persons within the meaning of the Song-Beverly Consumer Warranty Act.

As stated previously the 1979 amendment to the Song-Beverly Consumer Warranty Act defines an "assistive device" as one used by "a physically disabled person." No provision of the act defines the term "physically disabled person."

One must turn to other California statutes and appellate cases for guidance as to the meaning of the term "physically disabled person." The statutes and cases uniformly define this term as involving a serious disability that makes a person unable to obtain or maintain employment or as impairing a person's physical mobility. Physical disability is usually a condition entitling the person so afflicted to various public benefits including workers' compensation, early retirement, temporary disability pay to compensate for lost wages and benefits, and other forms of public assistance which depend upon the nature of the disability. As far as we can determine in none of these cases is a person regarded as "physically disabled" if he requires

corrective lenses in order to enjoy 20/20 vision or a reasonable approximation thereof. In fact one statute defines physical disability in terms of visual acuity as not worse than 20/200 in the better eye with corrective lenses. This is an express legislative recognition of the fact that a person whose visual acuity can be corrected to 20/200 or better is not physically disabled.

With these preliminary thoughts in mind we now turn to specific California statutes and case law defining the term "physical disability" or similiar terms.

The starting point is Vehicle Code §22511.5 which defines a "disabled person" as one suffering a severe disability. One type of disability is one that prevents the person from moving "without the aid of an assistant device." We submit that the term "assistive device" in the Warranty Act should be interpreted in light of the definition in Vehicle Code §22511.5, i.e., an "assistive device" is one that permits a severely disabled person to move or transport himself. The second type of physical disability mentioned in Vehicle Code §22511.5 pertains to visual acuity: a person is not deemed blind and therefore disabled unless his visual acuity in the better eye with corrective lenses is 20/200 or worse. Thus, under this statute a wearer of prescription lenses is not regarded as physically disabled even if he has extremely poor vision so long as his visual acuity can be corrected to 20/200 or better with corrective lenses.

The relevant part of Vehicle Code §22511.5 reads as follows:

"(a) A disabled person is:

(1) Any person who has lost, or has lost the use of, one or more lower extremities or both hands, or who has significant limitation in the use of lower extremities, or who has a diagnosed disease or disorder which substantially impairs or interferes with mobility, or who is so severely disabled as to be unable to move without the aid of an assistant device.

(2) Any person who is blind to such an extent that the person's central visual acuity does not exceed 20/200 in the better eye, with corrective lenses, as measured by the Snellen test, or visual acuity that is greater than 20/200, but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle not greater than 20 degrees." (Emphasis added).

Another statute that defines disability in terms of blindness or inability to move one's body without the aid of an "assistant device" is Vehicle Code §9105. That section provides for a vehicle registration fee exemption for vehicles owned by disabled veterans. That section defines disability as follows:

"The fees specified in this code . . . need not be paid for any . . . vehicles . . . when owned by any veteran whose disability has been rated, by the United States Veterans Administration or the military service from which such veteran was discharged, at 100 percent due to a diagnosed disease or disorder which substantially impairs or interferes with mobility, or who is so severely disabled as to be unable to move without the aid of an assistant device, or who has lost, or has lost use of, two or more limbs, or one eye and any limb, or who has suffered permanent blindness as defined in Section 19153 of the Welfare and Institutions Code, as a result of injury or disease suffered while on active service with the armed forces of the United States." (Emphasis added.)

It is interesting that Government Code §14679 equates being "physically handicapped" with being "physically disabled." That section requires designation of special parking spaces for "physically handicapped persons conducting business with a state agency", and defines the term "physically handicapped person" by reference to the two Vehicle Code sections already discussed in this memorandum, i.e., §§9105 and 22511.5. The Vehicle Code sections as already noted define the terms "physical disability" and "disability." Thus, the Legislature regards a person suffering a physical disability as one who is "physically handicapped."

Another statute defining the term "physically disabled" is Health and Safety Code §34704.5, which describes those persons who are eligible to participate in government rehabilitation or social service programs. That section provides as follows:

"As used in this part, 'physically disabled' means affected by a physical disability rendering the affected persons eligible to participate in programs of rehabilitation or social services conducted by or on behalf of a public agency, and also means persons affected by such a physical disability." (Emphasis added.)

As far as we know there is no governmental program in California providing rehabilitation or social services for the 50 percent of the population which happens to wear prescription eyewear.

We turn now to a number of statutes in California that define the term "physical disability" in terms of whether the person is able to obtain or maintain employment. Health and Safety Code §50072 uses the term "physical disability" to identify those persons requiring special care or facilities in the home. It provides in part as follows:

"'Handicapped' means a family in which the head of the household is suffering from an orthopedic disability impairing personal mobility or a physical disability affecting his or her ability to obtain employment or a single person with such physical disability, where the family or person requires special care or facilities in the home" (Emphasis added.)

Government Code §18135(c) is another statute defining "disability" in terms of incapacitating an employee to perform his customary work. That section provides as follows:

"'Disability' or 'disabled' includes mental or physical illness and mental or physical injury, including any illness or injury resulting from pregnancy, childbirth, or related medical condition. An employee is deemed disabled on any day in which, because of his or her physical, mental, or medical condition, he or she is unable to perform his or her regular or customary work." (Emphasis added).

To the same effect is Government Code §19231 which defines "disabled person" as one unable to secure, retain or advance in employment because of the disability. That section provides:

"A disabled individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability." (Emphasis added.)

Along the same lines is Unemployment Insurance Code §2626 which equates physical disability with inability to perform work functions. That section provides in part as follows:

"An individual shall be deemed disabled on any day in which, because of his or her physical or mental condition, he or she is unable to perform his or her regular or customary work." (Emphasis added).

Another example of a statute equating physical disability with inability to maintain employment is Welfare and Institutions Code §19151 which provides in part as follows:

"The term 'handicapped individual' means any individual who is under a physical or mental disability which constitutes a substantial handicap to employment, but which is of such a nature that vocational rehabilitation services may reasonably be expected to render him fit to engage in a gainful occupation" (Emphasis added.)

Court interpretations of the term "physically disabled" are consistent with the legislative definition given to this term as discussed in preceding paragraphs. In De Celle v. City of Alameda, 186 Cal. App.2d 574 (1960), interpreting the term "physically disabled" in a city ordinance, the court recognized that the term was intended to identify those city employees whose physical condition had deteriorated to the point where they were "incapacitated with regard to prior occupation." Accordingly, the court held as follows:

"The board was required to interpret the words 'physically disabled' as they appear in the ordinance to mean incapacitated with regard to prior occupation, it was required to determine not only whether respondent had incurred the injury in the performance of duty, but also whether said injury had rendered him incapable of continuing his former employment."

Similarly, a permanent disability under the Workers' Compensation Law has been defined as one "which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market." State Compensation Ins. Fund v. Industrial Acc. Com., 59 Cal. 2d 45, 52 (1963). In that case the court noted that the loss of an eye impairs a bodily function and is compensable under the Workers' Compensation Law "as a possible handicap in the open labor market."

This decision by the Supreme Court is consistent with all of the other statutes and court decisions previously discussed: a physical disability is some severe impairment of a bodily function that affects physical mobility, interferes with a person's capacity to be employed, or otherwise entitles the disabled person to some special public benefit. This case and other California statutes do recognize blindness or vision not correctible to better than 20/200 as a physical disability. We have found no suggestion in any California statute or court decision that defective eyesight requiring corrective lenses constitutes a physical disability.

CONCLUSION

Based on the foregoing authorities a prescription lens is not an assistive device under Civil Code §1791(m) of the Song-Beverly Consumer Warranty Act because a prescription lens is not used to assist a "physically disabled" person. Accordingly, dispensers of prescription lenses are not required to give the type of express warranty specified in Civil Code §1793.02.



1020 N STREET, SACRAMENTO, CALIFORNIA 95814
(916) 445-4465



May 28, 1980

Ernest K. Takahashi, O.D.
President
State Board of Optometry
1020 N Street, Room 407
Sacramento, CA 95814

Dear Dr. Takahashi:

Thank you for your letter regarding the issue of eyeglass coverage under the provisions of California's Assistive Device Warranty Law, SB 1190 (Sieroty), Chapter 1023, Statutes of 1979. You noted that our Department notified the public that eyeglasses and contact lenses are covered by the new law.

In drafting discussions on SB 1190 between our Department and Senator Sieroty's Office, it was specifically decided that the definition of "assistive device" would be broad, and that no exemptions would be allowed. The issue of eyeglasses was raised in the Assembly Labor, Employment, and Consumer Affairs Committee hearing on June 21, 1979. The committee analysis stated that "perhaps" eyeglasses would be included.

At this open legislative hearing Chairman Lockyer specifically asked the Department's witness if eyeglasses were indeed covered. He received an affirmative response, coupled with an explanation on the policy of not granting exemptions in warranty law. After additional testimony, the committee passed the bill out with a unanimous vote.

This issue was clearly deliberated publicly and in accordance with all legislative protocol, our administration procedures, and other applicable rules. We have and will continue to meet in good faith with representatives of the California Optometry Association and Senator Sieroty on possible clarifying language to alleviate any demonstrated problems.

You and the Board are certainly welcome to join with us in this effort, although we cannot exempt eyeglasses from the mandate

Dr. Takahashi
Page 2

of the law. In this latter regard, our Department has no choice but to enforce the law.

Please feel free to contact me or Steve Fishbein, our Legislative Coordinator, should you want to pursue a discussion on this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Richard B. Spohn', written over a horizontal line.

RICHARD B. SPOHN
Director

cc: Senator Alan Sieroty
Larry Briskin, Consultant, Office of Senator Sieroty ✓
Steve Fishbein, Legislative Coordinator
Dick Elbrecht, Supervising Attorney
Board of Optometry Members



1020 N. STREET, SACRAMENTO, CALIFORNIA 95814
(916) 322-4292



WP

June 4, 1980

SB 190 file

Mr. Gene Jones, Chairman
Legislative Committee
California Orthotics & Prosthetics Association
1117 Market Street
San Francisco, CA 94103

Dear Mr. Jones:

It was good speaking with you regarding the recently enacted California assistive device warranty law.

As we discussed, our Department is certainly willing to discuss all reasonable marketplace concerns involving the new law. Please feel free to relay our comments to your members at the upcoming convention.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steve Fishbein".

STEVE FISHBEIN
Legislative Coordinator

cc: Senator Alan Sieroty ✓
Richard B. Spohn, Director
Dick Elbrecht, Supervising Attorney
Candis Cohen, Legislative Analyst
Nick Medeiros



california optometric association

921 - 11th STREET P. O. BOX 2591 SACRAMENTO, CALIFORNIA 95812 (916) 441-3990

June 9, 1980

Larry talk to me re: this

Honorable Alan Sieroty
Member of the Senate
State Capitol, Room 5072
Sacramento, CA 95814

Dear Senator Sieroty:

Thank you so much for meeting with Chuck Olsen and myself, not only for an enjoyable lunch, but also for the opportunity to discuss the issue of assistive devices.

As we discussed, it is our Association's feeling that there is sufficient language in the existing statutes to preclude the inclusion under SB 1190 of eyeglasses, contact lenses or ophthalmic devices provided by optometrists. These conclusions are hinged on statutes which deal in two areas. The first exempts optometrists, physicians, surgeons and registered dispensing opticians as being retailers (Revenue and Taxation Code, Section 6018). The second area is a series of statutes defining what constitutes the definition of the physically disabled.

→ The thrust of the second area would appear to define "physical disabilities" relative to vision in terms of 1) the disability being the result of a disease or injury; 2) the disability interfering with an individual's ability to work, advance or retain employment, or to obtain work; or 3) visual acuity being worse than 20/200 in the best eye with corrective lenses. It may therefore appear that no clarifying language is required relative to the provision of services by optometrists or opticians under SB 1190.

Should clarifying language be needed, however, the 20/200 in the best correctable eye definition would probably be the most appropriate clarification, as long as the physical fit is all that is warrantable. But again, the net effect of the Revenue and Taxation Code, Section 6018 is a valid question.

Larry please call
As I indicated, Sam Genensky, Ph.D, Director of the Center for the Partially Sighted, Santa Monica Hospital Medical Center, has expressed considerable concern relative to providing warranties for the fitting of devices to their patients. In instances where the partially sighted (particularly the 20/200 category, which comprises about 80 percent of his center's work) are fitted with corrective lenses, these devices may take the form of very expensive telescopic lenses ranging in price from \$130-\$600. If in fact, SB 1190 does apply to this category, it becomes crucial that this applicability be narrowed to the physical fit.

In addition to his experience directing the center, Dr. Genensky is partially sighted himself, and is therefore inherently familiar with all of the physiological and psychological problems accompanying disabilities resulting from partial sight.

Senator Sieroty
June 9, 1980
Page 2

His major concern centers around the fact that there are very few practitioners in the low vision field. Should they be required to warranty this expensive instrumentation, only to have a patient disappointed and return the device because his/her expectations were greater than what the device is able to accomplish, practitioners will be discouraged from engaging in this already understaffed practice.

Moreover, since optometrists are licensed as health care professionals for the health and safety of the public, they seriously question the necessity of requiring warranties for any facet of the services they provide. This is especially true in the absence on any demonstrated problems which have arisen necessitating the issuance of written warranties.

It is my understanding that your assistant, Larry Briskin, will be contacting Dr. Genensky prior to the pursuit of any other further clarifying language. As I indicated to you, I will be giving Dr. Genensky's address and phone number to Larry.

In addition, it is my understanding that the necessity for any clarifying language will be explored in the light of existing statutes defining the physically disabled. I have attached a list of those statutes of which I am aware to date.

Once again, Chuck and I sincerely appreciate the opportunity of meeting with you. Thank you for your help and patience in this matter.

Kind regards,

Kathy

Kathryn C. Rees, Director
Legislative Division

KCR/ap

Attachment

cc: Larry Briskin
Chuck Olsen

Samuel M. Genensky, Ph.D., Director
Center for the Partially Sighted
Santa Monica Hospital Medical Center
1250 Sixteenth Street
Santa Monica, CA 90404

(213) 451-1511, Ext. 2393

APPLICABLE STATUTES

1. Revenue and Taxation Code
Section 6018

A licensed optometrist, physician and surgeon or registered dispensing optician is a consumer of, and shall not be considered a retailer within the provisions of this part in the case of a licensed optometrist or physician and surgeon with respect to the ophthalmic materials used or furnished by him, in the performance of his professional services in the diagnosis, treatment or correction of conditions of the human eye, including the adaptation of lenses or frames for the aid thereof, or in the case of a registered dispensing optician with respect to the dispensing of ophthalmic materials.

2. Vehicle Code
Section 22511.5

Defines a disabled person, among other things, as one who is so severely disabled as to be unable to move without the aid of an assistive device or who is any person who is blind to such an extent that the person's central visual acuity does not exceed 20/200 in the better eye with corrective lenses...or whose visual acuity that is greater than 20/200 but with a limitation in the field of vision such that the widest diameter of the visual field extends an angle of not greater than 20 degrees.

3. Vehicle Code
Section 9105

Defines disability as a diagnosed disease or disorder which substantially impairs or interferes with mobility of an individual who is so severely disabled as to be unable to move without the aid of an assistive device...or who has suffered permanent blindness, as defined in Section 19153 of the Welfare and Institutions Code.

4. Health and Safety Code
Section 34704.5

This section describes persons who are eligible to participate in government rehabilitation or social service programs and provides that physical disabled means affected by a physical disability rendering the affected persons eligible to participate in programs of rehabilitation or social services conducted on or on behalf of a public agency...

5. Health and Safety Code
Section 50072

Defines physical disability in terms of affecting the individual's ability to obtain employment.

6. Government Code
Section 18135 (c)

Indicates that an employee is deemed disabled on any day which because of his/her physical, mental, or medical condition, he/she is unable to perform his/her regular or customary work.

7. Government Code
Section 19231

Defines a disabled person as one who is substantially limited if he/she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability.

8. Unemployment Insurance Code
Section 2626

Indicates that an individual shall be deemed disabled on any day in which, because of his/her physical or mental condition, he/she is unable to perform his/her regular or customary work.

9. Education Code
Sections 56700-56729

Section 1850, Title 5
of the California
Administrative Code

Physically disabled, among other things is defined as an individual's acuity in the better eye as 20/200 after the best correction.

Alternative A

PROPOSED AMENDMENT TO
CIVIL CODE SECTION 1791(m)

(m) "Assistive device" means any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of a physically disabled person.

The term physically disabled person for the purposes of this section shall not include persons whose vision is correctable to better than 20/200.

Alternative B

PROPOSED AMENDMENT TO
CIVIL CODE SECTION 1791(i)

(i) "Retail seller", "seller", or "retailer" means any individual, partnership, corporation, association, or other legal relationship which engages in the business of selling consumer goods to retail buyers, except "retail seller", "seller", or "retailer", shall

not include those classes of persons set forth
in Revenue and Taxation Code Section 6018.

Alternative C

1. Amend Civil Code Section 1791(a) to read:

"(a) 'Consumer goods' means any new product or part thereof that is used or bought for use primarily for personal, family or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail." Except for
ophthalmic devices such as eyeglasses, eyeglass
lenses, eyeglass frames, contact lenses, or
the combination thereof.

2. Amend Civil Code Section 1791 (m) to read:

"(m) 'Assistive device' means any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of a physically disabled person." The term does not include
Ophthalmic devices such as eyeglasses, eyeglass
lenses, eyeglass frames, contact lenses, or
any combination thereof.



1020 N STREET, SACRAMENTO, CALIFORNIA 95814



June 17, 1980

Honorable Alan Sieroty
State Senator
State Capitol, Room 5072
Sacramento, CA 95814

Dear Senator Sieroty 

Re: Assistive Device Warranty Law
SB 1190 (Sieroty), Chapter 1023, Statutes of 1979

For your information I am enclosing a copy of a letter we have recieved from Donald H. Maffly, from the firm of Athearn, Chandler, and Hoffman in San Francisco, which is directed to Mr. Lawrence Keethe of the Office of the Attorney General in support of a request for a formal opinion on the application of SB 1190 (Chapter 1023, Statutes of 1979) to prescription eyeglasses. I am also enclosing a copy of our Department's response to the issues presented.

Evidently, the optometric trade associations have retained this law firm to argue for a formal Attorney General opinion to exempt corrective lenses from the scope of the law.

Sincerely,



RICHARD B. SPOHN
Director

Enclosures

cc: Steve Fishbein, Legislative Coordinator
Richard A. Elbrecht, Supervising Attorney,
Division of Consumer Services
Candis Cohen, Legislative Analyst

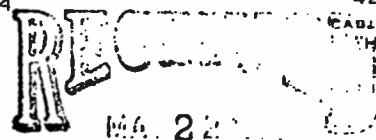
ATHEARN, CHANDLER & HOFFMAN

ONE ELEVEN SUTTER STREET

SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE
AREA CODE 415
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May 20, 1980



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Lawrence Keethe, Esq.
Deputy Attorney General
555 Capitol Mall, Suite 250
Sacramento, CA 95814

Re: Opinion Request as to Whether Pre-
scription Eyewear is An "Assistive
Device" Under Amendments to Song-
Beverly Consumer Warranty Act

Dear Mr. Keethe:

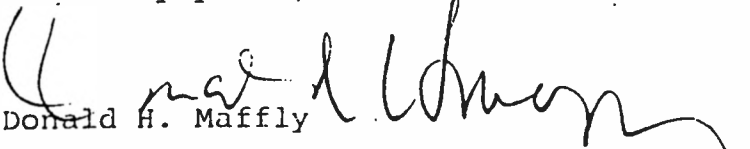
We are attorneys for the California Association of Dispensing Opticians. Members of this organization are licensed by the Division of Allied Health Professions to dispense prescription lenses to members of the consuming public in conformity with prescriptions written by physicians and optometrists.

Senate Bill 1190 amended the Song-Beverly Consumer Warranty Act to mandate an implied and express warranty of fitness for assistive devices used by physically disabled persons. I understand that you are in the process of preparing a formal opinion as to whether prescription eyewear constitutes an assistive device under the recent legislative amendments.

We enclose for your review our legal memorandum concluding that the 50 percent of the population using prescription eyewear are not physically disabled persons, with the result that their eyewear cannot be regarded as assistive devices under the Song-Beverly Consumer Warranty Act. In the legal memorandum we review the many California statutes and cases that define the term "physically disabled" or similar terms. The statutes and cases uniformly conclude that "physical disability" involves a serious condition that affects a person's ability to obtain or maintain employment or impairs a person's physical mobility. It is particularly telling that Vehicle Code §22511.5 defines physical disability in terms of visual acuity that is worse than 20/200 in the better eye with corrective lenses. Thus, a person whose vision can

be corrected to 20/200 with corrective lenses is not a physically disabled person. Accordingly, prescription eyewear does not constitute an assistive device within the 1979 amendments to the Song-Beverly Consumer Warranty Act.

Sincerely yours,


Donald H. Maffly

Enclosure

cc: Honorable Edmund G. Brown, Jr.

Honorable Richard B. Spohn

Alvin Korobkin, Esq.,
Deputy Attorney General

Honorable Frank Vicencia

Honorable Alan Sieroty

Honorable Daniel E. Boatwright

Honorable Alister McAlister

Honorable William J. Filante

Mr. Simon Haynes,
California Medical Association

Robert R. Peabody, M.D.,
California Association of Ophthalmology

Byron Demorest, M.D.,
California Association of Ophthalmology

Ms. Kathryn C. Rees,
California Optometric Association

William A. Gould, Jr., Esq.

Jack C. Crose, Esq.

MEMORANDUM

May 19, 1980

Re: Prescription Eyewear is Not An
"Assistive Device" Under Amend-
ments to the Song-Beverly Con-
sumer Warranty Act that Became
Effective on January 1, 1980;
Thus Dispensers of Prescription
Eyewear are Not Required to Give
the Written Warranty Specified
in Civil Code §1793.02

INTRODUCTION

Senate Bill 1190, containing amendments to the Song-Beverly Consumer Warranty Act, was passed by the State Legislature in 1979 and became effective January 1, 1980. The amendments accomplish the following:

1. They create a new category of consumer goods, namely the "assistive device" which is limited by its definition to a device that is used to assist "a physically disabled person."

2. They require that every retail sale of an assistive device be accompanied by an implied warranty that the device is specifically fit for the particular needs of the buyer. This amendment eliminates the normal requirement that a buyer, in proving a breach of the implied warranty of fitness, must show the seller's knowledge of the buyer's particular use for the goods and reliance by the buyer on the seller's skill and judgment in furnishing the goods.

3. They require that every retailer of an assistive device give a written 30-day express warranty of fitness. The statutory language of the express warranty invites the dissatisfied buyer to return the assistive device to the seller within 30 days of receipt or completion of fitting of the device for adjustment, replacement or refund.

4. In the case of willful violations of the act, a buyer may recover treble damages plus reasonable attorneys' fees and any other appropriate legal or equitable relief. In the case of a class action, Civil Code §1794.2 authorizes all of the foregoing remedies except recovery of treble damages. It is important to note that when an assistive device is sold all of the foregoing remedies are available not only for a

breach of the warranty of fitness but also for the seller's failure to give the buyer an express written warranty at the time the sale is made.

QUESTION PRESENTED

The State of California's Department of Consumer Affairs has published a 9-page "business information pamphlet" regarding the sale of assistive devices. This pamphlet refers to the Song-Beverly Consumer Warranty Act amendments of 1979 as the "California Assistive Device Warranty Law." The pamphlet gives an overview of the new law and explains in detail the requirements of the new written warranty of fitness for a buyer's particular needs. In discussing the scope of the new law, the Department of Consumer Affairs states in this pamphlet that "the sale of corrective eyeglasses is clearly within [the scope of the new law]." This rather casual assertion in the lengthy pamphlet is not supported by any argument or citation of authority.

The question to be considered in this memorandum is whether or not prescription eyeglasses and contact lenses are assistive devices and whether wearers of prescription lenses are physically disabled persons within the meaning of the recent amendments. If the answer is in the negative, the pamphlet of the Department of Consumer Affairs is in error and should obviously be withdrawn before it further misleads consumers as to their rights and creates misunderstandings and friction between consumers and the dispensers of prescription eyewear.

RELEVANT STATUTES

The Song-Beverly Consumer Warranty Act defines an assistive device as one intended for use by "a physically disabled person". Civil Code §1791(m) provides:

"'Assistive device' means any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure of any function of the body of a physically disabled person."

As stated in the introduction of this memorandum, the retail sale of an assistive device is accompanied as a matter

of law by an implied warranty of fitness and the seller at the time of the sale must provide the buyer with a written warranty stating that the assistive device is specifically fit for that buyer's particular needs. The warranty must advise the buyer that he has 30 days within which to return an assistive device that he believes is not fit for his particular needs. The 30-day period runs from the date of receipt of the device or the date of completion of fitting, whichever is later. If this provision were to apply to contact lenses the 30-day period would not commence running until many weeks or months after the lenses were first delivered to the consumer. Civil Code §1793.02(a) states the exact language that comprises the express warranty. That section provides as follows:

"All new and used assistive devices sold at retail in this state shall be accompanied by the retail seller's written warranty which shall contain the following language: 'This assistive device is warranted to be specifically fit for the particular needs of you the Buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws.' In lieu of the words '30 days' the retail seller may specify any longer period."

SUMMARY OF CONCLUSIONS

Under the Song-Beverly Consumer Warranty Act - before the 1979 amendments - each retail sale of prescription eyewear and other consumer goods is accompanied by an implied warranty of merchantability and an implied warranty of fitness. A willful violation of these warranties or other provisions of the act by a seller gives rise to a cause of action for treble damages, court costs, reasonable attorneys' fees and other appropriate legal and equitable relief. Thus, the purchaser of prescription eyewear has substantial protection under the act even if the 1980 amendments pertaining to assistive devices do not cover prescription eyewear.

Neither reliance on common sense nor reliance on the slight legislative history that is available gives any support for the notion that the 1979 amendments intended to include prescription eyewear under the term "assistive devices." There is no indication that the Legislature regarded the 50 percent of the population that wears prescription lenses as physically disabled persons.

Apart from common sense and legislative history, the many California statutes and appellate cases that deal with the term "physically disabled" make it clear that the Legislature and the courts uniformly regard a physical disability to be a serious impairment of bodily functions that either interferes with the ability of a person to be employed, impairs physical mobility, or entitles the person to some form of rehabilitative or other benefits. In fact, the one statute that does define disability in terms of visual acuity (Vehicle Code §22511.5) requires that the person have visual acuity worse than 20/200 in the better eye with corrective lenses. Based on this statute, other statutes and California cases no suggestion can be found that a person wearing corrective lenses that provide normal or near normal visual acuity is in any sense "a physically disabled person."

For all of the foregoing reasons the wearer of prescription lenses is not a physically disabled person and does not wear an assistive device as that term is defined in the 1979 amendments to the Song-Beverly Consumer Warranty Act. Thus, the new provisions of that act that require an express warranty of fitness for assistive devices do not apply to dispensers of prescription eyewear.

In the discussion that follows we shall discuss in section 1 the implied warranties that do apply to the retail sale of prescription eyewear and the remedies available to the purchaser of prescription eyewear. In section 2 we shall state the common sense reasons and the legislative history that lead to the conclusion that persons who wear prescription eyewear are not physically disabled persons wearing assistive devices. In section 3 we shall discuss the many California statutes and appellate cases that define a physically disabled person as someone with a serious physical impairment which interferes with the ability to maintain productive employment, impairs physical mobility, or entitles the person to some type of special rehabilitative or other benefit made available by the state.

DISCUSSION

1. Each sale of prescription lenses or other consumer goods - irrespective of the 1979 amendments - is accompanied by an implied warranty of merchantability and in some cases an

implied warranty of fitness for a buyer's particular needs; substantial remedies are provided to the buyer of such goods.

(a) The implied warranty of merchantability.

Under Civil Code §1792 every retail sale of prescription eyewear is accompanied by an implied warranty that the goods are merchantable, absent a written disclaimer of this warranty. An implied warranty of merchantability binds the retailer to a promise that the goods are fit for their ordinary purposes and that they conform to any promises or affirmations made on the container or label. Civil Code §1791.1. Where no duration has been stated in an express warranty, the implied warranty of merchantability endures for one year. In no event is the duration of the warranty less than 60 days.

(b) The implied warranty of fitness.

There is an implied warranty that goods are fit for the buyer's particular purpose whenever the seller has reason to know at the time of the sale that the buyer requires the goods for a particular purpose and that the buyer is relying upon the seller's skill or judgment to select and furnish suitable goods. Civil Code §1791.1(b). There would seem to be little doubt that the implied warranty of fitness normally applies to the sale of prescription eyewear, since the buyer is known to be relying on the skill and judgment of the dispenser in furnishing the prescription eyewear. As in the case of the implied warranty of merchantability, the implied warranty of fitness has a duration of between 60 days and one year.

(c) Express warranties.

Civil Code §1793 expressly permits a retailer to make express warranties in connection with the sale of consumer goods, including prescription eyewear. Section 1793.1 provides protection to the consumer when express warranties are made. Express warranties must be made in readily understood language and identify those locations where the buyer may return the goods for service and repair.

In California many dispensers of prescription eyewear choose to make extensive warranties for prescription eyewear. Some dispensers of eyeglasses guarantee replacement for one year of frames or lenses that are broken through any cause, including carelessness of the customer.

(d) Remedies for Breach of Implied or Express Warranty.

A dissatisfied buyer who claims breach of an express warranty has three choices of action. First,

he may return the nonconforming goods to the seller and seek the remedies of repair, replacement or refund. Second, he may return the nonconforming goods to a seller of like goods of the same manufacturer and seek these remedies. Third, he may tender the nonconforming goods to an independent repair and service facility when service or repair is economically feasible. Civil Code §1793.3.

For willful violations of any express or implied warranty a buyer has the additional remedy of treble damages plus attorneys' fees and costs. However, treble damages are not available in a class action or if the judgment is based solely on a breach of an implied warranty. Civil Code §1794.2.

Based on the foregoing it is obvious that the purchaser of prescription eyewear is adequately protected by the substantive provisions of the Song-Beverly Consumer Warranty Act and by the many remedies made available under that act.

2. Neither common sense nor the legislative history of the 1979 amendments gives any indication that the Legislature regarded the wearer of prescription lenses as a physically disabled person using an assistive device.

It is of course commonplace for persons in the United States to use prescription eyeglasses and contact lenses. On June 2, 1978, the Federal Trade Commission issued a trade regulation rule pertaining to advertising prescription eyewear. The FTC noted that over 50 percent of the population in the United States uses ophthalmic goods and services. In 1975 over 112 million people used corrective lenses in the United States. The FTC referred to a 1974 Department of Health, Education and Welfare survey showing that 49.1 percent of persons between the ages of 24 and 45 use eyeglasses, that 88 percent of persons between the ages of 45 and 65 use eyeglasses, and that 93 percent of persons over the age of 65 use eyeglasses.

In view of these statistics it seems farfetched and in defiance of common sense to regard a person wearing prescription lenses as a physically disabled person. It is common knowledge that the use of prescription eyewear does not interfere in any way with gainful employment and does not impair physical mobility or participation in vigorous physical activities. Certainly, there should be a heavy burden on any person claiming that the Legislature intended the term "physical disability" to include the great percentage of the California population that wears prescription eyewear.

Certainly the burden of proof is not met when one refers to the language of the 1980 amendments or the sparse legislative history that is available to interpret the intent of the

Legislature. First of all, the Legislature made no effort to define the term "physical disability" in the 1979 amendments. In view of the silence of the Legislature, it should be presumed that it intended this term to be defined in its usual and ordinary sense and did not intend the term to be expanded to cover persons not normally falling within even the most expansive definition of the term "physical disability."

Turning to legislative history, the author of the 1979 amendments, Senator Sieroty, sent a letter to the Governor on September 14, 1979, explaining the contents of his bill. There is no reference in that letter to any intent to include prescription eyewear within the meaning of the term assistive device. In fact, every reasonable inference is that the author did not intend to include prescription eyeglasses. Senator Sieroty stated:

"The two departments concerned with this legislation have received serious complaints from disabled persons regarding the sale of such devices as wheelchairs, hearing aids, and artificial limbs. SB 1190 will provide a remedy for the physically disabled "

The Senator then went on to list the number of organizations representing the physically disabled that supported his bill. None of these organizations is directly concerned with persons with poor but correctable visual acuity.

3. Referring to California statutes and appellate cases defining the term "physically disabled" it is clear that prescription eyewear is not an assistive device used by physically disabled persons within the meaning of the Song-Beverly Consumer Warranty Act.

As stated previously the 1979 amendment to the Song-Beverly Consumer Warranty Act defines an "assistive device" as one used by "a physically disabled person." No provision of the act defines the term "physically disabled person."

One must turn to other California statutes and appellate cases for guidance as to the meaning of the term "physically disabled person." The statutes and cases uniformly define this term as involving a serious disability that makes a person unable to obtain or maintain employment or as impairing a person's physical mobility. Physical disability is usually a condition entitling the person so afflicted to various public benefits including workers' compensation, early retirement, temporary disability pay to compensate for lost wages and benefits, and other forms of public assistance which depend upon the nature of the disability. As far as we can determine in none of these cases is a person regarded as "physically disabled" if he requires

corrective lenses in order to enjoy 20/20 vision or a reasonable approximation thereof. In fact one statute defines physical disability in terms of visual acuity as not worse than 20/200 in the better eye with corrective lenses. This is an express legislative recognition of the fact that a person whose visual acuity can be corrected to 20/200 or better is not physically disabled.

With these preliminary thoughts in mind we now turn to specific California statutes and case law defining the term "physical disability" or similar terms.

The starting point is Vehicle Code §22511.5 which defines a "disabled person" as one suffering a severe disability. One type of disability is one that prevents the person from moving "without the aid of an assistive device." We submit that the term "assistive device" in the Warranty Act should be interpreted in light of the definition in Vehicle Code §22511.5, i.e., an "assistive device" is one that permits a severely disabled person to move or transport himself. The second type of physical disability mentioned in Vehicle Code §22511.5 pertains to visual acuity: a person is not deemed blind and therefore disabled unless his visual acuity in the better eye with corrective lenses is 20/200 or worse. Thus, under this statute a wearer of prescription lenses is not regarded as physically disabled even if he has extremely poor vision so long as his visual acuity can be corrected to 20/200 or better with corrective lenses.

The relevant part of Vehicle Code §22511.5 reads as follows:

- "(a) A disabled person is:
- (1) Any person who has lost, or has lost the use of, one or more lower extremities or both hands, or who has significant limitation in the use of lower extremities, or who has a diagnosed disease or disorder which substantially impairs or interferes with mobility, or who is so severely disabled as to be unable to move without the aid of an assistive device.
 - (2) Any person who is blind to such an extent that the person's central visual acuity does not exceed 20/200 in the better eye, with corrective lenses, as measured by the Snellen test, or visual acuity that is greater than 20/200, but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle not greater than 20 degrees." (Emphasis added).

Another statute that defines disability in terms of blindness or inability to move one's body without the aid of an "assistant device" is Vehicle Code §9105. That section provides for a vehicle registration fee exemption for vehicles owned by disabled veterans. That section defines disability as follows:

"The fees specified in this code . . . need not be paid for any . . . vehicles . . . when owned by any veteran whose disability has been rated, by the United States Veterans Administration or the military service from which such veteran was discharged, at 100 percent due to a diagnosed disease or disorder which substantially impairs or interferes with mobility, or who is so severely disabled as to be unable to move without the aid of an assistant device, or who has lost, or has lost use of, two or more limbs, or one eye and any limb, or who has suffered permanent blindness as defined in Section 19153 of the Welfare and Institutions Code, as a result of injury or disease suffered while on active service with the armed forces of the United States." (Emphasis added.)

It is interesting that Government Code §14679 equates being "physically handicapped" with being "physically disabled." That section requires designation of special parking spaces for "physically handicapped persons conducting business with a state agency", and defines the term "physically handicapped person" by reference to the two Vehicle Code sections already discussed in this memorandum, i.e., §§9105 and 22511.5. The Vehicle Code sections as already noted define the terms "physical disability" and "disability." Thus, the Legislature regards a person suffering a physical disability as one who is "physically handicapped."

Another statute defining the term "physically disabled" is Health and Safety Code §34704.5, which describes those persons who are eligible to participate in government rehabilitation or social service programs. That section provides as follows:

"As used in this part, 'physically disabled' means affected by a physical disability rendering the affected persons eligible to participate in programs of rehabilitation or social services conducted by or on behalf of a public agency, and also means persons affected by such a physical disability." (Emphasis added.)

As far as we know there is no governmental program in California providing rehabilitation or social services for the 50 percent of the population which happens to wear prescription eyewear.

We turn now to a number of statutes in California that define the term "physical disability" in terms of whether the person is able to obtain or maintain employment. Health and Safety Code §50072 uses the term "physical disability" to identify those persons requiring special care or facilities in the home. It provides in part as follows:

"'Handicapped' means a family in which the head of the household is suffering from an orthopedic disability impairing personal mobility or a physical disability affecting his or her ability to obtain employment or a single person with such physical disability, where the family or person requires special care or facilities in the home" (Emphasis added.)

Government Code §18135(c) is another statute defining "disability" in terms of incapacitating an employee to perform his customary work. That section provides as follows:

"'Disability' or 'disabled' includes mental or physical illness and mental or physical injury, including any illness or injury resulting from pregnancy, childbirth, or related medical condition. An employee is deemed disabled on any day in which, because of his or her physical, mental, or medical condition, he or she is unable to perform his or her regular or customary work." (Emphasis added).

To the same effect is Government Code §19231 which defines "disabled person" as one unable to secure, retain or advance in employment because of the disability. That section provides:

"A disabled individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability." (Emphasis added.)

Along the same lines is Unemployment Insurance Code §2626 which equates physical disability with inability to perform work functions. That section provides in part as follows:

"An individual shall be deemed disabled on any day in which, because of his or her physical or mental condition, he or she is unable to perform his or her regular or customary work." (Emphasis added).

Another example of a statute equating physical disability with inability to maintain employment is Welfare and Institutions Code §19151 which provides in part as follows:

"The term 'handicapped individual' means any individual who is under a physical or mental disability which constitutes a substantial handicap to employment, but which is of such a nature that vocational rehabilitation services may reasonably be expected to render him fit to engage in a gainful occupation . . . " (Emphasis added.)

Court interpretations of the term "physically disabled" are consistent with the legislative definition given to this term as discussed in preceding paragraphs. In De Celle v. City of Alameda, 186 Cal. App.2d 574 (1960), interpreting the term "physically disabled" in a city ordinance, the court recognized that the term was intended to identify those city employees whose physical condition had deteriorated to the point where they were "incapacitated with regard to prior occupation." Accordingly, the court held as follows:

"The board was required to interpret the words 'physically disabled' as they appear in the ordinance to mean incapacitated with regard to prior occupation, it was required to determine not only whether respondent had incurred the injury in the performance of duty, but also whether said injury had rendered him incapable of continuing his former employment."

Similarly, a permanent disability under the Workers' Compensation Law has been defined as one "which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market." State Compensation Ins. Fund v. Industrial Acc. Com., 59 Cal. 2d 45, 52 (1963). In that case the court noted that the loss of an eye impairs a bodily function and is compensable under the Workers' Compensation Law "as a possible handicap in the open labor market."

This decision by the Supreme Court is consistent with all of the other statutes and court decisions previously discussed: a physical disability is some severe impairment of a bodily function that affects physical mobility, interferes with a person's capacity to be employed, or otherwise entitles the disabled person to some special public benefit. This case and other California statutes do recognize blindness or vision not correctible to better than 20/200 as a physical disability. We have found no suggestion in any California statute or court decision that defective eyesight requiring corrective lenses constitutes a physical disability.

CONCLUSION

Based on the foregoing authorities a prescription lens is not an assistive device under Civil Code §1791(m) of the Song-Beverly Consumer Warranty Act because a prescription lens is not used to assist a "physically disabled" person. Accordingly, dispensers of prescription lenses are not required to give the type of express warranty specified in Civil Code §1793.02.



1020 N STREET, SACRAMENTO, CALIFORNIA 95814



June 17, 1980

Lawrence Keethe, Esq.
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, CA 95814

Dear Mr. Keethe:

Re: Assistive Device Warranty Law
SB 1190 (Sieroty), Chapter 1023, Statutes of 1979

I am informed that the Attorney General has been asked by Assemblyman Frank Vicencia to render a formal opinion on the application of SB 1190 (Sieroty), Chapter 1023, Statutes of 1979, to prescription eyeglasses.

The Departments of Consumer Affairs and Rehabilitation were co-sponsors of this legislation, which was authored by Senator Alan Sieroty. My Department provided direct assistance to Senator Sieroty and his Administrative Assistant, Mr. Larry Briskin, in the drafting of both the original bill and its amendments, in responding to inquiries, and in testifying at the legislative hearings that preceded its adoption.

The members of the staff of the Department of Consumer Affairs who were personally involved in drafting the bill and its amendments, in responding to inquiries and in preparing and presenting testimony at the Assembly and Senate hearings were Steve Fishbein, the Department's Legislative Coordinator, Candis Cohen, Legislative Analyst, Legislative Unit, Division of Consumer Services, and Richard A. Elbrecht, who is Supervising Attorney of the Legal Services Unit, Division of Consumer Services. Their declarations are attached hereto.

Following the passage of this legislation, the Department of Consumer Affairs, Division of Consumer Services, published a business information pamphlet which describes the new law, offers businesses practical help on how to comply with its requirements, and reflects the legislative representations made regarding the law's content. A copy of our pamphlet is also attached.

Evidently, when the optometric trade associations first saw the pamphlet after the law's effective date, they realized that eyeglasses and contact lenses were within its scope. They had not adequately raised their opposition to eyeglass/contact lens inclusion during the proper time--legislative deliberations--thus their attempt to now seek some interpretive exclusion via the California Attorney General's Formal Opinion.

I will not dwell at length on the analysis of the meaning that the Legislature and courts have given to the term "physical disability" in other contexts unrelated to the one present here. The discussion of Vehicle Code Section 22511.5 in the letter from Athearn, Chandler, and Hoffman dated May 20, 1980, illustrates the relative unproductivity of an exercise of that kind. The discussion of Athearn, Chandler, and Hoffman concerns the definition of disability for the purpose of the exemption from certain restrictions on the parking of motor vehicles and makes no reference to vision. It would be equally appropriate, or inappropriate, if you wish, to focus on the requirements of Vehicle Code Section 12804 and 12805 on the degree of correctable vision needed to qualify for a driver's license. Neither exercise provides much help in determining whether eyeglasses are subject to this particular law.

In construing this statute, a point of departure should be the plain meaning of the language used. In this connection, it is useful to look to our dictionaries for help. In the Random House Dictionary of the English Language, College Edition, 1968, the term "physical" is defined to mean "of or pertaining to the body" and the term "disability" is defined as "1. lack of competent power, strength, or physical or mental ability; incapacity. 2. a physical handicap, esp. one that prevents a person from living a normal life or from performing a specific job...."

As you will see from the discussion that follows, the concept of "physically disabled person" as used in this law means a person whose normal bodily functions are somehow impaired. The legislative language does not state, nor does it imply, that a person's bodily functions must be impaired to any particular degree.

Although the issue is not analyzed in the text of the statute, it is permissible to conclude that a person's bodily functions must be impaired to the extent that would merely justify the purchase of an assistive device. The legislation itself does not purport to require anything more than an impairment, and we think that none should be inferred.

Briefly, even if the alternative were argued, as the optometric trade associations do, that prescription eyeglasses and corrective lenses are not assistive devices used by physically disabled persons, this can be readily refuted by accepted medical knowledge regarding known visual disorders and related treatments. Attached for your information is a copy of the National Federation of the Blind publication entitled, "Blindness and Disorders of the Eye." The data in this publication clearly demonstrates that persons having serious physical disabilities involving visual impairments can have those impairments assisted or improved by the use of eyeglasses and corrective lenses in some cases.

In construing the language of this statute, we also urge you to consider its purpose. The purpose of this law was and is to provide a reasonable degree of protection to purchasers of certain products that are of value only if the product is specifically fit for the buyer's personal needs. As we explained in our business information pamphlet, the traditional implied warranty of fitness for a particular purpose was and is very difficult to enforce, since it requires proof that the seller exercised skill or judgment in selecting or fitting the device, that the buyer relied upon the seller's skill or judgment in purchasing the device, and that the seller had reason to know that fact.

Since laws of this kind must be self-executing in order to be effective, we cannot expect individual consumers to understand and apply complex elements of causes of action of this kind. The new law short-circuits the need for such complex proof where the subject of the purchase is a device that is used or intended to be used to replace, support or assist a part of the human body that is not functioning as it should.

The premise of this new law is that departures from bodily normality create a need for assistance that is of an essentially different nature than the needs that derive from the culture at large, such as those that are generated by television advertising or those having to do with the acquisition or maintenance of one's social status or property.

The new law presumes that a person who lacks normal hearing, normal eyesight, or any other bodily function, is deserving of a greater degree of consumer protection than a person who simply lacks the latest fashion or is spending discretionary income for a truly discretionary purpose.

This law takes the position that sales of devices that restore bodily normality should not be final unless and until it is determined that the device has fulfilled its purpose. This law represents a legislative declaration that crutches, wheelchairs, false limbs, hearing aids -- and eyeglasses -- should not be discarded unused because they are unfit simply because they are the subject of a contract or a bill of sale.

In short, this law adds to the terms of sale a requirement that the device must be specifically fit for the buyer's particular needs.

As you can see, it was and is our Department's intent, as a sponsor of this law, to include, without exception, all instruments, apparatuses and contrivances, including any components and parts thereof and accessories thereto, which are used or intended to be used to assist physically disabled persons in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure of any function of their bodies. It is and always has been our Department's view that eyeglasses

are within the scope of this definition, and that eyeglasses are therefore subject to the law.

The reason that eyeglasses were made subject to the law is simply that they represent the very kind of product to which the law ought to apply. In order to be of any value to a consumer, eyeglasses must be specifically fit for the individual's particular needs. Eyeglasses that are not specifically fit for the buyer's particular needs have no value.

Like most devices designed to restore bodily normality, eyeglasses are tailored for use by the particular buyer. Unlike paint, plumbing, auto accessories and most other products, one does not usually purchase eyeglasses at a supermarket, department store, or other mass-distribution outlet. Eyeglasses are manufactured and merchandised by specialists whose principal functions are to determine the needs of the particular buyer and to then fabricate or select and fit a product that will satisfy those particular needs.

Almost without exception, the eyeglass purchaser is relying on the seller's special expertise and the seller is in fact applying a special expertise upon which the buyer is relying.

As with the purchasers of most assistive devices, the eyeglass purchaser is in a poor position to know, understand, and enjoy the traditional implied warranty of fitness for a particular purpose.

While the industry agrees that sales of eyeglasses are usually covered by the traditional implied warranty of fitness for a particular purpose, it is apparently the industry's position that eyeglass buyers should be denied an explicit right of roughly the same content.

It is clear that there is nothing in the purposes of the law that would justify excluding eyeglasses from its scope. All of the purposes of the law are served by including eyeglasses within its provisions. The mere fact that many more people need eyeglasses than false limbs is irrelevant.

In interpreting a statute, it is proper to consider the purposes sought to be achieved. Wotton v. Bush (1953) 41C.2d 460, 261 P.2d 256. In view of the purposes this law seeks to achieve, it is clear that eyeglasses ought to be within its scope. Any uncertainty should therefore be resolved by a construction of this law that will include eyeglasses within its scope.

In determining whether eyeglasses are subject to this law, the intent of the Legislature is relevant if not all-important. In adopting this law, did the Legislature intend that eyeglasses be covered?

The evidence of legislative intent on this law is as persuasive as evidence of intent can be in California.

The question of the inclusion of eyeglasses within the purview of the new law was specifically raised by Assemblyman Bill Lockyer, Chairman of the Assembly Committee on Labor, Employment, and Consumer Affairs at the hearing on this bill on July 3, 1979.

According to the members of my staff who were present at the hearing, Assemblyman Lockyer specifically asked the representatives of my Department whether eyeglasses were covered. The Department's Legislative Coordinator, Steve Fishbein, who was testifying, responded by stating that eyeglasses were indeed to be included and no exemptions were being accepted. All of the members of my staff who were present at this hearing recall Assemblyman Lockyer's question and Mr. Fishbein's response. Their declarations are attached. After additional testimony, the bill was passed out of committee with a unanimous vote.

There can be no doubt that it was the specific intent of the author, members of the Assembly Committee on Labor, Employment, and Consumer Affairs, as well as the sponsors and the full California Legislature, Senate and Assembly, by passage of this bill, that the scope of the bill included eyeglasses. There was no dispute or debate on that point. If any member of the committee were of the view that eyeglasses should not be included, we can feel certain that an amendment excluding eyeglasses would have been offered. None was offered. As it was, the bill passed unanimously, and, in light of the question and Mr. Fishbein's response, it must be assumed that the committee members both individually, and as a group, intended that the bill include eyeglasses within its scope.

The legislative history of this law reflects the following:

- California State Senate Judiciary Committee (Ayes 7. Noes 1), May 30, 1979
- California State Senate (Ayes 26. Noes 0), June 1, 1979
- California State Assembly Committee on Labor, Employment, and Consumer Affairs (Ayes 7. Noes 0), July 3, 1979
- California State Assembly (Ayes 72. Noes 0), September 10, 1979
- Senate Concurrence in Assembly Amendment (Ayes 28. Noes 0), September 13, 1979
- Enrolled. To Governor, September 18, 1979
- Approved by Governor, September 26, 1979
- Chaptered by Secretary of State. Chapter 1023, Statutes of 1979, September 26, 1979
- Effective Date of Law, January 1, 1980

In determining legislative intent, it is well to keep in mind the admonition of the court in Lewis v. Ryan (1976) 64 C.A.3d 330,333,134 C.R. 355:

"In determining that issue, we apply the recognized approach of seeking the intent of the Legislature in enacting the statutory scheme so that the intent may be carried out by judicial construction....More precisely, we search for the manner in which the Legislature would have treated the problem in the case at bench had the Legislature foreseen it. In that search, we are cognizant of at least three judicial approaches applied singly or in some combination. One approach utilizes maxims of statutory construction which, by a process of selection, can support any result a court thinks appropriate....Another resolves the unforeseen problem in the way the court would have done had it been the Legislature and blessed with foresight equal to hindsight...The third approach seeks clues of legislative intent from legislative history and within the statutory scheme of which the legislation to be interpreted is a part....As seductive and uninhibited as the first and second approaches may be, we deem the third controlling upon us where clues to the legislative intent exist."

Among the "clues to the legislative intent," what better evidence could there be than a direct question and answer on the very point in issue, as we have here? Can there be any doubt about whether eyeglasses are covered? A declaration that they are not would fly directly in the face of what is probably the only direct evidence of legislative intent that exists on this issue.

If there is any remaining doubt, I invite your attention to a contemporaneous letter from the lawyer on my staff who was the most closely involved in the actual technical drafting of the bill -- Richard A. Elbrecht, Supervising Attorney of the Legal Services Unit, Division of Consumer Services. In a letter to one of our Department's advisors, Mr. Elbrecht wrote that the bill would "give buyers of supports, wheelchairs, hearing aids, eyeglasses, false limbs, and other assistive devices a measure of protection they haven't had before."

While a sponsor's intent is not exactly the same as a legislative committee's intent, it is clear that our courts will give due weight to a drafter's contemporaneous statement of the intended meaning of a statute. In both Miro v. Superior Court (1970) 5C.A.3d 87,84 C.R. 874, and Osgood v. County of Shasta (1975) 50C.A.2d 586,123 C.R. 442, the court considered the drafter's statement of intent in construing legislative language.

Our own Department's view, as expressed in the accompanying pamphlet, is also relevant. See Worthington v. Unemp Ins. App. Bd. (1976) 64 C.A.3d 384, 134 C.R. 507. While we are not specifically charged with the enforcement of the Song-Beverly Consumer Warranty Act, our Department is deeply involved in refining and implementing this legislation on a relatively continuous basis, and our staff has a special expertise in its subject matter.

In our judgment, the only possible construction of the law in question is one in which eyeglasses are subject to its provisions. There is no legal basis for concluding otherwise. There is no evidence of legislative intent pointing to an exclusion of eyeglasses from its scope. Such an exclusion would be inconsistent with the purposes of the law and would be contrary to its language.

Thank you for your attention.

Sincerely,



RICHARD B. SPOHN
Director

Enclosures

- 1) Declaration of Steve Fishbein
- 2) Declaration of Richard A. Elbrecht
- 3) Declaration of Candis Cohen
- 4) California Assistive Device Warranty pamphlet
- 5) Publication--"Blindness and Disorders of the Eye",
National Federation of the Blind

cc: Senator Alan Sieroty
Assemblyman Frank Vicencia
Donald Maffly, Esq.

DECLARATION OF STEVE FISHBEIN

I, Steve Fishbein, say:

I am employed as the Legislative Coordinator for the California Department of Consumer Affairs.

I was personally present at the hearing on SB 1190 before the Assembly Committee on Labor, Employment, and Consumer Affairs, held on July 3, 1979, in Room 2133, State Capitol, Sacramento, California.

During the course of the hearing on SB 1190, Richard A. Elbrecht and I appeared before the committee on behalf of the Department of Consumer Affairs. Candis Cohen of my staff was also present. Assemblyman Bill Lockyer, Chairman of the Committee, asked me whether eyeglasses were included in the bill. I responded by stating to the Committee that eyeglasses were included in the bill and it was not our intent to have exemptions. While I do not recall my exact words, it is clear that my answer was that sales of eyeglasses would be subject to the new law. There were no further questions and there was no further discussion on the subject of the scope of SB 1190. At no time was any statement or reference made by anyone at the hearing that eyeglasses were not covered. The Committee then passed the bill out on a unanimous vote.

Executed at Sacramento, California, on June 16, 1980.

I declare under penalty of perjury that the foregoing is true and correct.


STEVE FISHBEIN

DECLARATION OF CANDIS COHEN

I, Candis Cohen, say:

I am a Legislative Analyst for the California Department of Consumer Affairs and am employed as a member of the Legislative Unit of the Division of Consumer Services.

I was personally present at the hearing on SB 1190 before the Assembly Committee on Labor, Employment, and Consumer Affairs, held on or about July 3, 1979, in Room 2133, State Capitol, Sacramento, California.

During the course of the hearing on SB 1190, Steve Fishbein and Richard A. Elbrecht appeared before the Committee on behalf of the Department of Consumer Affairs. I was also present during the entire hearing on SB 1190. Assemblyman Bill Lockyer, Chairman of the Committee, asked Mr. Fishbein whether eyeglasses were included in the bill. Mr. Fishbein responded by stating to the Committee that eyeglasses were included in the bill. While I do not recall Mr. Fishbein's exact words, it is clear that his answer was that sales of eyeglasses would be subject to the new law. At no time was any statement or implication made by anyone at the hearing that eyeglasses were not covered.

Executed at Sacramento, California, on June 16, 1980.

I declare under penalty of perjury that the foregoing is true and correct.



CANDIS COHEN

DECLARATION OF RICHARD A. ELBRECHT

I, Richard A. Elbrecht, say:

I am Supervising Attorney of the Legal Services Unit, Division of Consumer Services, California Department of Consumer Affairs.

As a part of my duties, I regularly provide legislative drafting assistance to the Legislative Unit of the Division of Consumer Services, California Department of Consumer Affairs, and as part of my duties I actively assisted the staff of the Legislative Unit in drafting the original text of SB 1190 and all of the amendments thereto.

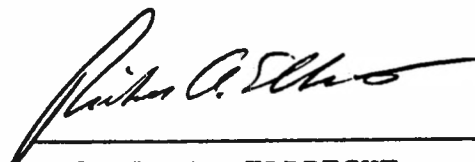
I was personally present at the hearing on SB 1190 before the Assembly Committee on Labor, Employment, and Consumer Affairs, held on or about July 3, 1979, in Room 2133, State Capitol, Sacramento, California.

During the course of the hearing on SB 1190, Steve Fishbein and I appeared before the Committee on behalf of the Department of Consumer Affairs. Assemblyman Bill Lockyer, Chairman of the Committee, asked Mr. Fishbein whether eyeglasses were included in the bill. Mr. Fishbein responded by stating to the Committee that eyeglasses were included in the bill. While I do not recall Mr. Fishbein's exact words, it is clear that his answer was the sales of eyeglasses would be subject to the new law. There were no further questions and there was no further discussion on the subject of the scope of SB 1190. At no time was any statement or inference made by anyone at the hearing that eyeglasses were not covered.

On or about July 5, 1979, I wrote a letter to Mr. Don Gartner, Assistant District Attorney, County of Santa Cruz, who is an expert on the sale of hearing aids and the laws applicable thereto. In that letter, I asked Mr. Gartner to evaluate the text of the bill for the purpose of making any necessary technical adjustments. In that letter, I stated that the bill would "give buyers of supports, wheelchairs, hearing aids, eyeglasses, false limbs, and other assistive devices a measure of protection they haven't had before." A true copy of my letter is attached hereto and by this reference incorporated herein.

Executed at Sacramento, California, on June 16, 1980.

I declare under penalty of perjury that the foregoing is true and correct.



RICHARD A. ELBRECHT



DIVISION OF CONSUMER SERVICES
LEGAL SERVICES UNIT
1020 N STREET, ROOM A-602
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 445-5126



July 5, 1979

Don Gartner
Assistant District Attorney
County of Santa Cruz
Government Center
Santa Cruz, CA 95060

Dear Don:

It looks as if our assistive device warranty bill is going to pass. It's not quite revolutionary, but it will give buyers of supports, wheelchairs, hearing aids, eyeglasses, false limbs, and other assistive devices a measure of protection they haven't had before. It will make it crystal clear that the device must be specifically fit for the particular needs of the buyer.

In the hearing aid context, for instance, the aid that is supplied must respond to the buyer's actual needs. If the buyer needs an aid with particular characteristics and the dealer supplies another, or if the buyer has no need for an aid at all, the buyer can return the aid for a full refund of the price, subject only to the dealer's right to cure by furnishing an aid, if one exists and/or is actually needed, that does meet the buyer's particular needs.

Would you carefully read this bill and let me know if you see any problems? While it's rather late to consider any major revisions, technical adjustments in the bill can probably still be incorporated.

Thanks.

Yours very truly,


RICHARD A. ELBRECHT
Supervising Attorney

RAE:vf
Enclosure



California Assistive Device Warranty Law

**Senate Bill No. 1190 By Senator Alan Sieroty
Chapter 1023, Statutes of 1979**

**BUSINESS INFORMATION PAMPHLET
SALES OF
ASSISTIVE DEVICES**

STATE OF CALIFORNIA
DEPARTMENT OF
**Consumer
Affairs**

DIVISION OF CONSUMER SERVICES

STATE OF CALIFORNIA

EDMUND G. BROWN JR.
Governor

ALICE A. LYTLE
Secretary, State & Consumer Services Agency

RICHARD B. SPOHN
Director, Department of Consumer Affairs

RON GORDON
Chief, Division of Consumer Services

STEVE FISHBEIN
Legislative Coordinator

RICHARD A. ELBRECHT
Supervisor, Legal Services Unit

CANDIS COHEN
Legislative Analyst

JANICE LOWEN AGEE
Education Editor

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I -- Overview of the New Law

The California Song-Beverly Consumer Warranty Act was amended in 1979 to provide greater protection for persons who use assistive devices -- devices that assist them in mitigating or treating injuries or a disease or that assist or replace parts of their bodies.

The amendments state that most California retail sales of assistive devices must warrant that the device will be specifically fit for the buyer's particular needs. The new provisions are reproduced in Appendix A.

The consumer protection involved is modest indeed and the vast majority of California's retail sellers will have no difficulty complying, as their existing business practices generally exceed the provisions of the new law. This law was drafted so as to equitably balance the legitimate interests of both California sellers and buyers.

The new law, effective January 1, 1980, states that all new and used assistive devices sold at retail in California must be accompanied by a written warranty by the retail seller that the device is specifically fit for the buyer's particular needs. If the device is not specifically fit for the buyer's particular needs, the device may be returned to the seller within 30 days of the date of actual receipt by the buyer or completion of fitting by the seller, whichever occurs later. If the buyer returns the device, the seller must either adjust or replace the device or promptly refund the total amount paid.

The 30-day warranty period is a minimum. The new law permits the retail seller to specify any longer period. The new law also specifies the language that must be used, and it provides that the required language must appear in at least 10-point bold type. The warranty must be delivered to the buyer at the time of the sale of the device.

There is, in addition to the written warranty, a new implied warranty by the retail seller that the device is specifically fit for the particular needs of the buyer.

II -- Basis and Purpose of the New Law

It has been a long-standing rule of law in California that a seller who exercises skill or judgment in selecting a device impliedly warrants to the buyer that the device will satisfy the buyer's particular needs. The traditional warranty, however, has only applied in those instances in which the buyer was able to show that the seller exercised skill or judgment in selecting or fitting the device, that the buyer relied upon the seller's skill or judgment in purchasing the device, and that the seller had reason to know

that the buyer was relying upon the seller's skill or judgment. (See Commercial Code §2315; and Handbook of the Law Under the Uniform Commercial Code [West Pub. Co., 1972], §9-9.)

Since relatively few consumers were sophisticated enough to understand the old Commercial Code warranty or assert their rights in the event of its breach by a retail seller, the warranty was of little practical benefit to individual consumers. The major beneficiaries were commercial buyers of expensive equipment who had access to sophisticated legal counsel.

The 1979 amendments to the Song-Beverly Act in effect reactivate the traditional implied warranty of fitness by presuming that the buyer of an "assistive device" is purchasing for the purpose of satisfying the buyer's particular needs, that the seller has exercised skill and the buyer has relied upon the seller's skill in selecting and fitting the device, and that the seller was aware of that fact. The new law provides that except in sales under \$15, and in those in which neither the seller nor anyone who is related to the seller or has a financial interest in the sale participates in the diagnosis, selection or fitting, the buyer of an assistive device will have substantially the same protections that would exist if the traditional implied warranty of fitness applied, but without the need to specifically show the presence of the factors outlined above.

Since the buyer of an assistive device almost always relies on the seller's skill and judgment in making a purchase, and since the seller is almost always aware of that fact, the new warranty is roughly in accord with previous law, at least theoretically. When the seller is uninvolved directly or indirectly in selecting or fitting, and the person who selects the device has no financial interest in the sale, the new warranty is also in accord with previous law, since it will not apply in that event.

The importance of proper fit and use of an assistive device is vital to a disabled person's normal functioning. A high marketplace standard of quality assurance will be encouraged and required by this specific warranty. By including "assistive devices" in the legal definition of "consumer goods," more specific protection is available to consumers of these devices. This protection is vital for those who use such devices to assist physical disability, particularly because persons with disabilities are not always in a position to effectively assert their rights under existing law.

III -- Scope of the New Law

The new law only applies to retail sales of assistive devices. The term "assistive device" is defined by the law to include any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used to assist a physically disabled person in the mitigation

or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of a physically disabled person.

For an instrument, apparatus, contrivance, component, part or accessory to be an assistive device, it must:

- a) be designed to assist a physically disabled person,
and
- b) either mitigate or treat an injury or disease or
assist, affect or replace the structure or a
function of the disabled person's body.

The new law, for instance, does not apply to the sale of a device which is intended for use primarily by persons who are not physically disabled. For example, the sale of binoculars is not subject to the new law, while the sale of corrective eyeglasses is clearly within its scope. The new law also applies to the sale of wheelchairs, hearing aids, braces, crutches, and prosthetic devices, as well as other devices.

IV -- Effect of the New Law

The practical effect of the new warranty has been to reverse the present allocation of risk between sellers and buyers of assistive devices.

In the past, because the old implied warranty of fitness did not function as intended, the risk that a device would not prove to be specifically fit for the buyer's particular needs was generally borne by the buyer. As a result, once a purchase was made, the buyer might have to "live with it" without regard to how well the device actually satisfied the buyer's particular needs.

Many hearing aids, wheelchairs, and similar devices went unused -- stored in a cabinet or closet or discarded -- because in practice, the buyer, rather than the seller, bore the risk that the device might prove to be unsuitable. Of course, most ethical retailers voluntarily assumed that risk themselves and, in conformance with the old implied warranty, made adjustments, fittings and exchanges for as long as necessary to achieve a proper fitting. Those retailers should have no difficulty living with the new law, because their existing business practices generally exceed the protections afforded by this new law.

The practical effect of the new law will be to foster more care in diagnosing the buyer's actual needs and in determining in advance of the sale of a device whether the buyer can really be helped. Hopefully, consumers' use of this law will help ferret out the unethical sellers of assistive devices. Since the buyer will have no obligation to keep a device that does not prove to be specifically fit for his or her particular needs, any incentive

for the seller to sell a device that the buyer does not really need or will not prove genuinely beneficial will be significantly reduced.

If the diagnosis, selection and fitting is made by a person who is unrelated to the seller and has no financial interest in the sale, and if the sale is made by a supplier who does not participate in (or charge for) diagnosis, selection and fitting, one of the exclusions will apply and the sale will not be covered. This is explained in greater detail below.

While the new law confers additional rights on the buyer, the buyer does not have an unqualified option to return the device. The buyer has a right to cancel only if:

- a) the device is not specifically fit for the particular needs of the buyer, and
- b) the buyer has returned the device for adjustment or replacement, and
- c) the seller has failed to adjust the device or, if appropriate, replace it with a device that is specifically fit for the buyer's particular needs.

Whether the device is or is not specifically fit for the buyer's particular needs will always be a question of fact. The fact that the buyer sincerely believes that the device is unfit is relevant, but will never be conclusive, just as the fact that the seller believes that the device is fit will never be conclusive. In a dispute, the opinion of an unrelated third person will be helpful -- but again, never conclusive. As usually exists, the seller and buyer will work to resolve any differences to one another's satisfaction.

V -- New Written Warranty of Fitness

The new law requires retail sellers to inform buyers of their rights at the time of the sale. The new law also requires that the terms of the warranty be expressed in writing, and that the essential provisions follow the language prescribed by the new law.

The seller's warranty must contain the following language in at least 10-point bold type:

This assistive device is warranted to be specifically fit for the particular needs of you, the buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either

adjust or replace or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws.

The warranty also must conform to the existing federal warranty information disclosure regulations (See Appendix B.). These regulations require that warranties on consumer products must contain:

- * The warrantor's name and mailing address.
- * Who is protected by the warranty, including any limitations (for example, a warranty protecting only the first owner).
- * Precisely what parts, components, or characteristics or properties the warranty covers and what it excludes.
- * What items or services the warrantor will pay for, and those, if any, for which the buyer must pay.
- * When the warranty term begins (if other than the date of purchase).
- * The warranty's duration (measured, for example, by time).
- * Whom to contact to obtain warranty service (including names, addresses, and telephone numbers).
- * Step-by-step instructions to follow to obtain service.
- * Any expenses the buyer may be required to pay.

The following sample warranty was drafted to comply with the new California law, as well as the existing federal warranty disclosure regulations:

LIMITED WARRANTY

This new assistive device is warranted to be specifically fit for the particular needs of you, the buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws.

If you, the buyer, should return the device, we will, without charge and within a reasonable time, adjust

the device or, if appropriate, replace it with a device that is specifically fit for your particular needs.

If we are unable to adjust or replace the device so that it is specifically fit for your particular needs, we will promptly cancel the sale and refund everything you have paid.

This warranty only protects the original buyer, or the person known by us to be the first user for whom the device was purchased, and not any subsequent owner or other user of the device.

We will do our best to provide you with a device that is specifically fit for your particular needs. If you have any problems or questions, phone or visit us without delay.

NAME OF RETAIL SELLER
Street Address of Retail Seller
City, State and Zip Code
Telephone Number

The new law allows the retail seller to specify a warranty duration of 30 days or any longer period. If 30 days is not enough to determine whether the device the seller provides is or is not specifically fit for the buyer's particular needs, the seller may insert a longer period and most retail sellers would do so as normal business practice.

If a particular fitting requires more than 30 days to complete (or any longer period specified in the warranty), the buyer will have the rights conferred by the warranty until the actual completion of fitting. Inserting a more appropriate warranty duration in those kinds of transactions in which 30 days is insufficient will help achieve a clearer understanding between the seller and the buyer.

Physicians who prescribe assistive devices may also insist on a longer period of time within which the buyer may return the device if it proves to be unfit. As already explained, however, no provision of law obligates a seller to fill such a prescription.

Federal warranty regulations (See Appendix C.) also require the seller to make the warranty available for the buyer's inspection prior to sale by use of one or more of the following means:

- * Clearly and conspicuously displaying the text of the warranty near the product, and/or
- * Maintaining a binder or series of binders which contain copies of the warranties for the products sold in the particular department, and/or

- * Displaying the package of the product on which the text of the warranty is disclosed so that the warranty is clearly visible to the buyer at the point of sale, and/or
- * Placing a notice near the product which discloses the text of the warranty and clearly identifies to the buyer the product to which the notice applies.

VI -- New Implied Warranty of Fitness

In addition to the written warranty, there is a new implied warranty that an assistive device is specifically fit for the particular needs of the buyer. Therefore, if the seller forgets to deliver the written warranty, the implied warranty will still apply. However, if a court should find that the failure to furnish a written warranty was wilful, the buyer would be entitled to recover a penalty in the amount of three times the buyer's loss, plus a reasonable attorney's fee.

VII -- Procedure Following the Sale

If the buyer returns the device within the period specified in the warranty, the seller is required, without charge and within a reasonable time, to adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer.

The device may be returned at any time within 30 days after the later of the following events:

- a) the date of the actual delivery of the device,
or
- b) the date of completion of fitting by the seller.

For example, if a device is sold on July 1, and actually delivered to the buyer on July 15, it may be returned for adjustment or replacement through August 15. If, however, the process of fitting only begins on July 15 and fitting is not completed until August 20, the buyer will be entitled to return the device for adjustment or replacement through September 20.

Upon such return, the seller has the right to attempt to achieve a proper fitting, and may do so either by adjusting the device or by furnishing a replacement. The adjustment or replacement must take place within a reasonable time after the buyer has returned the device. What a "reasonable time" is depends on the particular circumstances.

The seller must act in good faith in honoring the buyer's rights, and the buyer too must act in good faith in enforcing such rights.

If the seller does not adjust or replace the device so that it is specifically fit for the particular needs of the buyer, the seller is required to promptly refund to the buyer the total amount paid. In that event, the transaction is considered to be cancelled. The seller must promptly return to the buyer all payments and any trade-in or other consideration exchanged as part of the transaction, and promptly cancel or cause to be cancelled all contracts, instruments and security agreements executed by the buyer in connection with the sale.

If a sale is cancelled, no fee or other charge may be imposed in connection with the purchase, fitting, financing or return of the device.

In the case of a sale of a device to an individual, organization or agency known by the seller to be purchasing for the ultimate user of the device, the device must be specifically fit for the particular needs of the ultimate user.

The new law also provides that the rights and remedies of the buyer cannot be waived and do not affect the seller's obligations or those of any other party under any other law.

While the Song-Beverly Act generally requires product warrantors to maintain repair facilities, those provisions do not apply to assistive device warranties.

VII -- Not Applicable to Certain Forms of Sale

The new written and implied warranties do not apply to:

- a) sales which involve a retail sales price of less than \$15; or
- b) catalogue and similar sales in which neither the seller nor any employee or agent nor any person related to the seller nor any person with a financial interest in the sale participates in the diagnosis of the buyer's condition or in the selection or fitting of the device.

The exemption of catalogue and similar sales will permit sellers who wish to do so to avoid the obligations of the new assistive device warranty (but not the standard implied warranty of merchantability which applies to virtually all products sold at retail) by:

- a) avoiding any participation in the diagnosis of the buyer's condition, or in the selection or fitting of the device, either on its own part

or on the part of any employee, agent, or other person with a business or other relationship with the seller, and

- b) avoiding any business relationship under which a person who has participated in the diagnosis of the buyer's condition or in the selection or fitting of the device has a financial interest in the sale.

APPENDICES

A — SONG-BEVERLY CONSUMER WARRANTY ACT (abridged)

§ 1790. This chapter may be cited as the "Song-Beverly Consumer Warranty Act."

§ 1790.1. Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void.

§ 1790.2. If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable.

§ 1790.3. The provisions of this chapter shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail.

§ 1790.4 The remedies provided by this chapter are cumulative and shall not be construed as restricting any remedy that is otherwise available, and, in particular, shall not be construed to supplant the provisions of the Unfair Practices Act.

* * *

§ 1791. As used in this chapter:

(a) "Consumer goods" means any new product or part thereof that is used or bought for use primarily for personal, family, or household purposes, except for clothing and consumables. "Consumer goods" shall include new and used assistive devices sold at retail.

(b) "Buyer" or "retail buyer" means any individual who buys consumer goods from a person engaged in the business of manufacturing, distributing, or selling such goods at retail. As used in the subdivision, "person" means any individual, partnership, corporation, association, or other legal entity which engages in any such business.

* * *

(i) "Retail seller," "seller," or "retailer" means any individual, partnership, corporation, association, or other legal relationship which engages in the business of selling consumer goods to retail buyers.

* * *

(m) "Assistive device" means any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of a physically disabled person.

(n) "Catalogue or similar sale" means a sale in which neither the seller nor any employee or agent of the seller nor any person related to the seller nor any person with a financial interest in the sale participates in the diagnosis of the buyer's condition or in the selection or fitting of the device.

§ 1791.1. As used in this chapter:

(a) "Implied warranty of merchantability" or "implied warranty that goods are merchantable" means that the consumer goods meet each of the following:

(1) Pass without objection in the trade under the contract description.

(2) Are fit for the ordinary purposes for which such goods are used.

(3) Are adequately contained, packaged, and labeled.

(4) Conform to the promises or affirmations of fact made on the container or label.

(b) "Implied warranty of fitness" means (1) that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose and (2) that when there is a sale of an assistive device sold at retail in this state, then there is an implied warranty by the retailer that the device is specifically fit for the particular needs of the buyer.

(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above.

(d) Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply.

* * *

§ 1792. Unless disclaimed in the manner prescribed by this chapter, 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. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section.

* * *

§ 1792.2 (a) Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who 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 retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose.

(b) Every sale of an assistive device sold at retail in this state shall be accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer.

* * *

§ 1793. Except as provided in Section 1793.02, nothing in this chapter shall affect the right of the manufacturer, distributor, or retailer to make express warranties with respect to consumer goods. However, a manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods.

* * *

§ 1793.02. (a) All new and used assistive devices sold at retail in this state shall be accompanied by the retail seller's written warranty which shall contain the following language: "This assistive device is warranted to be specifically fit for the particular needs of you, the buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws." In lieu of the words "30 days" the retail seller may specify any longer period.

(b) The language prescribed in subdivision (a) shall appear on the first page of the warranty in at least 10-point bold type. The warranty shall be delivered to the buyer at the time of the sale of the device.

(c) If the buyer returns the device within the period specified in the written warranty, the seller shall, without charge and within a reasonable time, adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer. If the seller does not adjust or replace the device so that it is specifically fit for the particular needs of the buyer, the seller shall promptly refund to the buyer the total amount paid, the transaction shall be deemed rescinded, and the seller shall promptly return to the buyer all payments and any assistive device or other consideration exchanged as part of the transaction and shall promptly cancel or cause to be cancelled all contracts, instruments, and security agreements executed by the buyer in connection with the sale. When a sale is rescinded under this section, no charge, penalty, or other fee may be imposed in connection with the purchase, fitting, financing, or return of the device.

(d) With respect to the retail sale of an assistive device to an individual, organization, or agency known by the seller to be purchasing for the ultimate user of the device, this section and subdivision (b) of Section 1792.2 shall be construed to require that the device be specifically fit for the particular needs of the ultimate user.

(e) This section and subdivision (b) of Section 1792.2 shall not apply to any sale of an assistive device which is a catalogue or similar sale or which involves a retail sale price of less than fifteen dollars (\$15).

(f) The rights of remedies of the buyer under this section and subdivision (b) of Section 1792.2 are not subject to waiver under Section 1792.3. The rights and remedies of the buyer under this section and subdivision (b) of Section 1792.2 are cumulative, and shall not be construed to affect the obligations of the retail seller or any other party or to supplant the rights or remedies of the buyer under any other section of this chapter or under any other law or instrument.

(g) Section 1795.5 shall not apply to a sale of used assistive devices, and for the purposes of the Song-Beverly Consumer Warranty Act the buyer of a used assistive device shall have the same rights and remedies as the buyer of a new assistive device.

(h) The language in subdivision (a) shall not constitute an express warranty for purposes of Sections 1793.2 and 1793.3.

* * *

§ 1793.1. (a) Every manufacturer, distributor, or retailer making express warranties with respect to consumer goods shall fully set forth such warranties in readily understood language and clearly identify the party making such express warranties.

* * *

§ 1794. Any buyer of consumer goods injured by a willful violation of the provisions of this chapter or a willful violation of the implied or express warranty or service contract may bring an action for the recovery of three times the amount of actual damages and other legal and equitable relief, and, if the buyer prevails in any action brought under this section, he or she may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorney's fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action.

* * *

§ 1794.2. The provision of Section 1794 authorizing the recovery of three times the amount of the buyer's actual damages shall not apply to either of the following:

(a) A cause of action commenced or maintained pursuant to Section 382 of the Code of Civil Procedure or pursuant to Section 1781 of this code.

(b) A judgment based solely on a breach of the implied warranty of merchantability, or, where present, the implied warranty of fitness.

§ 1794.3. The provisions of this chapter shall not apply to any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale.

* * *

§ 1795.6. (a) Every warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars (\$50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service.

* * *

§ 1796.5. Any individual, partnership, corporation, association, or other legal relationship which engages in the business of providing service or repair to new or used consumer goods has a duty to the purchaser to perform those services in a good and workmanlike manner.

* * *

B — FEDERAL TRADE COMMISSION DISCLOSURE REGULATIONS (Abridged)

§ 701.2. Scope. The regulations in this part establish requirements for warrantors for disclosing the terms and conditions of written warranties on consumer products actually costing the consumer more than \$15.00.

§ 701.3. Written warranty terms. (a) 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 in a single document in simple and readily understood language, the following items of information: (1) The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;

(2) A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty;

(3) A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;

(4) 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;

(5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantor(s), together with: the mailing address(es) of the warrantor(s), and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance;

(6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with Part 703 of this subchapter;

(7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in Section 108 of the Act, accompanied by the following statement:

Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

(8) Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the statement required in sub-paragraph (7) above:

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

(9) A statement in the following language:

The warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

(b) Paragraph (a)(1) — (9) of this Section shall not be applicable with respect to statements of general policy on emblems, seals or insignias issued by third parties promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that (1) the disclosures required by paragraph (a)(1) — (9) are published by such third parties in each issue of a publication with a general circulation, and (2) such disclosures are provided free of charge to any consumer upon written request.

* * *

C — REGULATIONS ON PRE-SALE AVAILABILITY (Abridged)

§ 702.2. Scope. The regulations in this part establish requirements for sellers and warrantors for making the terms of any written warranty on a consumer product available to the consumer prior to sale.

§ 702.3. Pre-sale availability of written warranty terms. The following requirements apply to consumer products actually costing the consumer more than \$15.00: (a) Duties of the seller. Except as provided in paragraphs (c) — (d) of this section, the seller of a consumer product with a written warranty shall:

(1) Make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:

(i) clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

(ii) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such department, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product or warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced into the store or department by substituting superseding warranties and by adding new warranties as appropriate. The seller shall either:

(a) display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or

(b) make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of the binders, including instructions for obtaining access; and/or

(iii) displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

(iv) placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies;

(2) Not remove or obscure any warranty disclosure materials provided by a warrantor, except:

(i) where such removal is necessary for store window displays, fashion shows, or picture taking; or

(ii) where the seller otherwise, through means provided for in sub-paragraph (1) above, makes the terms of the warranty information available to the consumer.

(b) Duties of the warrantor. (1) A warrantor who gives a written warranty warranting to a consumer a consumer product actually costing the consumer more than \$15.00 shall:

(i) Provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in paragraph (a) of this section, by the use of one or more by the following means:

(A) Providing a copy of the written warranty with every warranted consumer product; and/or

(B) Providing a tag, sign, sticker, label, decal or other attachment to the product, which contains the full text of the written warranty; and/or

(C) Printing on or otherwise attaching the text of the written warranty to the package, carton, or other container if that package, carton or other container is normally used for display purposes. If the warrantor elects this option a copy of the written warranty must also accompany the warranted product; and/or

(D) Providing a notice, sign, or poster disclosing the text of a consumer product warranty.

If the warrantor elects this option, a copy of the

written warranty must also accompany each warranted product.

(ii) Provide catalog, mail order, and door-to-door sellers with copies of written warranties necessary for such sellers to comply with the requirements set forth in paragraphs (c) and (d) of this section.

(2) Sub-paragraph (1) of this paragraph (b) shall not be applicable with respect to statements of general policy on emblems, seals or insignias issued by third parties promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that (i) the disclosures required by 701.3(a)(1) — (9) are published by such third parties in each issue of a publication with a general circulation, and (ii) such disclosures are provided free of charge to any consumer upon written request.

(c) Catalog and Mail Order Sales. (1) For purposes of this paragraph:

(i) "Catalog or mail order sales," means any offer for sale, or any solicitation for an order for a consumer product with a written warranty, which includes instructions for ordering the product which do not require a personal visit to the seller's establishment.

(ii) "Close conjunction" means on the page containing the description of the warranted product, or on the page facing that page.

(2) Any seller who offers for sale to consumers consumer products with written warranties by means of a catalog or mail order solicitation shall:

(i) clearly and conspicuously disclose in such catalog or solicitation in close conjunction to the description of warranted product, or in an information section of the catalog or solicitation clearly referenced, including a page number, in close conjunction to the description of

warranted product, or in an information section of the catalog or solicitation clearly referenced, including a page number, in close conjunction to the description of the warranted product, either:

(A) the full text of the written warranty; or

(B) that the written warranty can be obtained free upon specific written request, and the address where such warranty can be obtained. If this option is elected, such seller shall promptly provide a copy of any written warranty requested by the consumer.

(d) Door-to-door sales. (1) For purposes of this paragraph:

(i) "Door-to-door sale" means a sale of consumer products in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by a buyer, and the buyer's agreement to offer to purchase is made at a place other than the place of business of the seller.

(ii) "Prospective buyer" means an individual solicited by a door-to-door seller to buy a consumer product who indicates sufficient interest in that consumer product or maintains sufficient contact with the seller for the seller reasonably to conclude that the person solicited is considering purchasing the product.

(2) Any seller who offers for sale to consumers consumer products with written warranties by means of door-to-door sales shall, prior to the consummation of the sale, disclose the fact that the sales representative has copies of the warranties for the warranted products being offered for sale, which may be inspected by the prospective buyer at any time during the sales presentation. Such disclosure shall be made orally and shall be included in any written materials shown to prospective buyers.

* * *



Room 509

1020 N STREET, SACRAMENTO, CALIFORNIA 95814
(916) 322-4292

July 7, 1980

Mr. Gene C. Jones
Executive Vice-President
Hittenbergers
1117 Market Street
San Francisco, CA 94103

Dear Mr. Jones:

Thank you for your letter regarding your experiences with California's Assistive Device Warranty Law, SB 1190 (Sieroty), Statutes of 1979, Chapter 1023.

As we have indicated before our Department will be glad to discuss demonstrated problems encountered by businesses affected by SB 1190, and to consider proposed amendments to the new law. The Legislature will be recessed from July 11 to August 18 and will adjourn after completion of business on August 31. We will be glad to meet with you during those times.

Please feel free to contact me to schedule a meeting at your convenience. We look forward to working with you.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steve Fishbein".

STEVE FISHBEIN
Legislative Coordinator

cc: Senator Alan Sieroty
Richard B. Spohn, Director
Department of Consumer Affairs



June 10, 1980

Mr. Steve Fishbein
Legislative Coordinator
Department of Consumer Affairs
1020 N Street
Sacramento, California 95814

Dear Mr. Fishbein:

As of this date, I have no reported problems in dealing with the new warranty law where it has been implemented. I am informed that most physicians' offices are not complying with the law. Also, I have not researched whether the long-term care facilities are aware of the ramifications.

One major area of conflict that we are having is in the area of spinal cervical bracing where the devices we fit are extremely uncomfortable to a patient. I would appreciate an opportunity to demonstrate and review these problems with the appropriate staff member.

Please contact me at your earliest convenience.

Yours truly,

Gene C. Jones
Executive Vice-President

GCJ:ck

cc: Senator Alan Sieroty
Richard B. Spohn, Director
Dick Elbrecht, Supervising Attorney
Candis Cohen, Legislative Analyst
Nick Medeiros

SUPPORT

Ca. Assoc. of Physically Handicapped

Dept of Consumer Affairs

Calif. Association of the Deaf Inc.

Norcal Center on Deafness - Sacramento

Calif. Rural Legal Assistance

Dept of Rehabilitation

Easter Seal Society

Center for Independent Living

United Cerebral Palsy -

Western Regional Center for Developmentally Disabled

National M.S. Society

Community Service Center for Disabled

ASSEMBLY THIRD READING

SB 1190 (Sieroty) As Amended: September 5, 1979SENATE VOTE: 26-0

ASSEMBLY ACTIONS:

COMMITTEE L., E., & C. A. VOTE 7-0 COMMITTEE _____ VOTE _____

Ayes: Ayes:

Nays: Nays:

DIGEST

The Song-Beverly Consumer Warranty Act requires retailers and distributors selling consumer goods at retail to guarantee (by implied warranty) that those goods are suitable to the buyer if the retailer or distributor has reason to know that the goods are required for a specific purpose and that the buyer is relying on the retailer's or distributor's skill or judgment in furnishing suitable goods.

This bill requires retail sales of "assistive devices" for the physically handicapped to be guaranteed to fit the particular needs of the buyer.

Specifically, the bill:

- 1) Defines "assistive device" as any instrument used to assist a physically disabled person in mitigating or treating an injury or disease or assisting any bodily function. An assistive device may be used to replace any part of the human body.
- 2) Defines the term "catalog or similar sale" and exempt catalog purchases of less than \$15 of assistive devices from having to be guaranteed to fit the particular needs of the buyer.
- 3) Requires retailers of assistive devices to guarantee, by implied warranty, that such devices are specifically fit for the particular needs of the buyer.
- 4) Requires all new and used assistive devices sold at retail to be accompanied by a written warranty which specifies that the product is to fit the particular needs of the buyer and can be returned within 30 days for adjustment, replacement, or refund of moneys paid, if found to be unsuitable. The period may be more than 30 days if the retailer so specifies.
- 5) Specifies that an assistive device may be returned to the retailer within the period of time specified in the warranty.

- continued -

FISCAL EFFECT

No fiscal effect expected on state or local government. Undetermined cost to retailers of assistive devices for supplying written warranties to the physically handicapped.

COMMENTS

The Assembly Labor, Employment, and Consumer Affairs Committee analysis states:

The basic problem with assistive devices seems to be one of fit, rather than one of defects in the products. Because these devices are strapped on, worn, or used with the body, it's important that they be comfortable, that they do not chafe, and that they be the proper size. Sometimes these things cannot be discovered until the product has been in use awhile (e.g., a prosthetic device may be comfortably snug on a cold morning when purchased, but unreasonably tight after a hot afternoon of walking). This bill guarantees that the seller will make an effort to ensure the equipment fits properly.

The definition of "assistive device" in the bill is quite broad. It would not only cover artificial limbs, but also walkers, wheelchairs, and perhaps glasses.

There are approximately 1.8 million Californians who have some form of physical disability. Approximately 700,000 of these use assistive devices, excluding eyeglasses.

Should language be added which clarifies that it is the judgment of the buyer, rather than that of the seller, which will prevail in a dispute concerning proper fit and a refund of money.

SB 1190 (Sieroty)
As amended May 21
Civil Code

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WARRANTIES
-ASSISTIVE DEVICES-

HISTORY

Source: Department of Consumer Affairs

Prior Legislation: None

Support: Department of Rehabilitation, Easter Seal Society, Calif. Ass'n. for the Physically Handicapped, San Francisco Independent Living Project, United Cerebral Palsy of San Francisco, Center for the Disabled (Garden Grove), Center for Independent Living (Berkeley), Bay Area Gray Panthers, Disabled Resources (Long Beach)

Opposition: No Known

PURPOSE

Existing law provides for the enforcement by the consumer of implied warranties of merchantability, implied warranties of fitness, and express warranties. However, there is no requirement that the retailer of an "assistive device" supply either an implied warranty or an express warranty with the device.

This bill would provide as a matter of law that the retailer makes an implied warranty of fitness with every sale of an "assistive device." It also would require the retailer to give an express warranty that the device was specifically fit for the particular needs of the buyer and, if not, that it could be returned to be "cured" or for reimbursement.

The purpose of the bill is to place greater responsibility on the retailer of "assistive devices" to make sure that the devices they sell properly fit the needs of their customers.

(More)

COMMENT

1. Definition of "assistive device"

The bill defines "assistive device" as an instrument, apparatus, or contrivance designed to assist a physically disabled person in coping with his disability.

2. Need for the bill

Proponents claim that buyers of assistive devices, many of which are quite expensive, frequently find that the particular device they bought is not suited for their particular disability. In such circumstances retailers have disclaimed any responsibility.

3. Existing warranty obligations

Under the U.C.C. and the Song-Beverly Consumer Warranty Act, a retailer makes an implied warranty of fitness if he has reason to know at the time of sale that the goods are required for a particular purpose and that the buyer is relying on his judgment to select the proper product.

This bill would statutorily assume that the retailer of an assistive device would always have reason to know that the device was required for a particular purpose and that the buyer was relying on his judgment to select the proper device, and so it would impose the implied warranty of fitness obligation on every retail sale of such a device.

Under existing law neither a manufacturer nor a retailer is required to make an express warranty. If he does, however, he is obligated to live up to the terms of that warranty. Most assistive devices are sold with an express warranty from the manufacturer, but that warranty only covers

defects in the manufacturing process, not errors of judgment by the retailer in supplying a particular device to a particular customer.

4. Mandatory express warranty

This bill would require the retailer of an assistive device to provide an express warranty to every buyer. The only other product which must, under California law, be accompanied by an express warranty with specified content is a mobilehome.

The warranty required under this bill would have to contain the following language: "This device is warranted to be specifically fit for the particular needs of the buyer and may be returned to the seller within 30 days of the date of actual receipt by the buyer if the device is not specifically fit for the particular needs of the buyer."

Aside from being repetitious, this language does not indicate to the buyer what his remedies would be if he did return the device.

SHOULD NOT THE TEXT OF THE WARRANTY INCLUDE THE OBLIGATIONS OF THE RETAILER PRESCRIBED BY LAW?

5. Obligations of the retailer--suggested amendment

The language of the bill requires the retailer to "cure" either the product or the transaction by furnishing a "conforming device" within a reasonable time or by reimbursing to the buyer the money he paid. The language is unclear and would be subject to misinterpretation.

Suggested amendment: On pages 4 and 5, strike out
subdivision (d) presently in the bill and insert:

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- (d) If the buyer returns the device within 30 days, the seller shall, within a reasonable time, repair it or replace it with a similar device so that it is specifically fit for the particular needs of the buyer. If the seller does not repair or replace the device, he shall refund to the buyer the total amount paid to him for the purchase of the device.

6. Application to new goods only

As drafted SB 1190 would only apply only to the sale of new assistive devices, and would not affect the sale of used devices. However, a letter from Steve Fishbein, Legislative Coordinator for the Department of Consumer Affairs, indicates the Department's intent to cover the sale of used devices as well. If so, additional language would be necessary.

FACT SHEET

SB 1190 (Sieroty)

SUBJECT: Assistive device warranties

SB 1190 would require that assistive devices sold at retail be specifically covered by express and implied warranties that insure that the devices are specifically fit for the individual needs of the buyer. If the device is found not specifically suited for the purchaser, it could be returned within 30 days to the seller. The seller would then be required to make necessary adjustments or replacements. If the seller does not cure the problem, reimbursement would be available.

The definition of "assistive device" is intended to cover devices which would assist a person with a physical disability. This would include, but not be limited to, hearing aids, braces, crutches, wheelchairs, and prosthetic devices.

The importance of proper fit and utilization of an assistive device is vital to a disabled person's normal functioning. A high marketplace standard of quality assurance would be encouraged and required by the establishment of this specific warranty.

By including "assistive devices" in the legal definition of "consumer goods," more specific protection is available to consumers of these devices. This will be a vital marketplace protection for those who use such devices to assist a physical disability. The essential time element necessary for physical mobility and assistance would be best served through the initial retail purchase level and not by subsequent lengthy and costly civil remedies. Further, persons with disabilities are not always in a position to effectively assert their rights under existing law.

According to statistics from the California Department of Rehabilitation:

- Approximately 1.8 million Californians have physical disabilities
- Over 700,000 Californians use assistive devices, excluding eyeglasses (1977)
- The average prescription manual wheelchair costs \$300-\$2,000
- An average electric wheelchair costs approximately \$1500-\$3,500 (dependent upon the extent of disability)

SUPPORTERS

Easter Seal Society,
California Association for the Physically Handicapped, (CAPH)
San Francisco Independent Living Project,
United Cerebral Palsy of San Francisco,
Center for the Disabled (Garden Grove),
Center for Independent Living (Berkeley),
Bay Area Gray Panthers,
Disabled Resources (Long Beach),
Adult Independence Development Center (Campbell),
Mt. Diablo Rehabilitation Center,
Fresno Association of the Physically Handicapped Service Center
~~Department of Rehabilitation~~
~~State Department of Rehabilitation~~
~~State Department of Consumer Affairs~~

AMENDMENTS TO SENATE BILL NO. 1190
AS AMENDED IN THE SENATE MAY 21, 1979

AMENDMENT 1

On page 4 of the printed bill, as amended in the Senate May 21, 1979, strike out lines 22 to 40, inclusive, and strike out page 5, and insert:

1793.02. (a) All new and used assistive devices sold at retail shall include the retail seller's express warranty which shall contain the following language: "This assistive device is warranted to be specifically fit for the particular needs of you, the buyer, and may be returned to the seller within 30 days of the date of actual receipt by you if the device is not specifically fit for your particular needs. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid."

(b) The language prescribed in subdivision (a) shall appear on the first page of the warranty in at least 10-point bold type.

(c) If the buyer returns the device within 30 days, the seller shall, within a reasonable time, adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer. If the seller does not adjust or replace the device so that it is specifically

fit for the particular needs of the buyer, the seller shall promptly refund to the buyer the total amount paid.

(d) The rights and remedies conferred on the buyer under Section 1792.2 and this Section 1793.02 are cumulative, and shall not be construed to affect the obligations of the retail seller or any other party or to supplant the rights or remedies of the buyer under any other section of this chapter or under any other law or instrument.

-0-

S3 1199 (Sieroty)
As amended May 21
Civil Code

WARRANTIES
-ASSISTIVE DEVICES-

HISTORY

Source: Department of Consumer Affairs

Prior Legislation: None

Support: Department of Rehabilitation, Easter Seal Society, Calif. Ass'n. for the Physically Handicapped, San Francisco Independent Living Project, United Cerebral Palsy of San Francisco, Center for the Disabled (Garden Grove), Center for Independent Living (Berkeley), Bay Area Gray Panthers, Disabled Resources (Long Beach)

Opposition: No Known

PURPOSE

Existing law provides for the enforcement by the consumer of implied warranties of merchantability, implied warranties of fitness, and express warranties. However, there is no requirement that the retailer of an "assistive device" supply either an implied warranty or an express warranty with the device.

This bill would provide as a matter of law that the retailer makes an implied warranty of fitness with every sale of an "assistive device." It also would require the retailer to give an express warranty that the device was specifically fit for the particular needs of the buyer and, if not, that it could be returned to be "cured" or for reimbursement.

The purpose of the bill is to place greater responsibility on the retailer of "assistive devices" to make sure that the devices they sell properly fit the needs of their customers.

(More)

COMMENT

1. Definition of "assistive device"

The bill defines "assistive device" as an instrument, apparatus, or contrivance designed to assist a physically disabled person in coping with his disability.

2. Need for the bill

Proponents claim that buyers of assistive devices, many of which are quite expensive, frequently find that the particular device they bought is not suited for their particular disability. In such circumstances retailers have disclaimed any responsibility.

3. Existing warranty obligations

Under the U.C.C. and the Song-Beverly Consumer Warranty Act, a retailer makes an implied warranty of fitness if he has reason to know at the time of sale that the goods are required for a particular purpose and that the buyer is relying on his judgment to select the proper product.

This bill would statutorily assume that the retailer of an assistive device would always have reason to know that the device was required for a particular purpose and that the buyer was relying on his judgment to select the proper device, and so it would impose the implied warranty of fitness obligation on every retail sale of such a device.

Under existing law neither a manufacturer nor a retailer is required to make an express warranty. If he does, however, he is obligated to live up to the terms of that warranty. Most assistive devices are sold with an express warranty from the manufacturer, but that warranty only covers

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defects in the manufacturing process, not errors of judgment by the retailer in supplying a particular device to a particular customer.

4. Mandatory express warranty

This bill would require the retailer of an assistive device to provide an express warranty to every buyer. The only other product which must, under California law, be accompanied by an express warranty with specified content is a mobilehome.

The warranty required under this bill would have to contain the following language: "This device is warranted to be specifically fit for the particular needs of the buyer and may be returned to the seller within 30 days of the date of actual receipt by the buyer if the device is not specifically fit for the particular needs of the buyer."

Aside from being repetitious, this language does not indicate to the buyer what his remedies would be if he did return the device.

SHOULD NOT THE TEXT OF THE WARRANTY INCLUDE THE OBLIGATIONS OF THE RETAILER PRESCRIBED BY LAW?

5. Obligations of the retailer--suggested amendment

The language of the bill requires the retailer to "cure" either the product or the transaction by furnishing a "conforming device" within a reasonable time or by reimbursing to the buyer the money he paid. The language is unclear and would be subject to misinterpretation.

Suggested amendment: On pages 4 and 5, strike out subdivision (d) presently in the bill and insert:

- (d) If the buyer returns the device within 30 days, the seller shall, within a reasonable time, repair it or replace it with a similar device so that it is specifically fit for the particular needs of the buyer. If the seller does not repair or replace the device, he shall refund to the buyer the total amount paid to him for the purchase of the device.

6. Application to new goods only

As drafted SB 1190 would only apply only to the sale of new assistive devices, and would not affect the sale of used devices. However, a letter from Steve Fishbein, Legislative Coordinator for the Department of Consumer Affairs, indicates the Department's intent to cover the sale of used devices as well. If so, additional language would be necessary.

AMENDMENTS TO SENATE BILL NO. 1190
AS AMENDED IN SENATE MAY 31, 1979

Amendment 1

On page 5 of the printed bill, as amended in Senate May 31, 1979, strike out line 7 and insert:

retail in this state shall be accompanied by the retail seller's written warranty

Amendment 2

On page 5, strike out line 15 and insert:

the total amount paid.

This warranty does not affect the protections and remedies you have under other laws."

In lieu of the words "30 days" the retail seller may specify any longer period.

Amendment 3

On page 5, line 18, after "type." insert:

The warranty shall be delivered to the buyer at the time of the sale of the device.

Amendment 4

On page 5, strike out lines 26 and 27 and insert:

(d) With respect to the retail sale of an assistive device to an individual, organization, or agency known by the seller to be purchasing for the ultimate user of the device, this section and subdivision (b) of Section 1792.2 shall be construed to require that the device be specifically fit for the particular needs of the ultimate user.

(e) The rights and remedies of the buyer under this section and subdivision (b) of Section 1792.2 are not subject to waiver under Section 1792.3. The rights and remedies of the buyer under this section and subdivision (b) of Section 1792.2 are cumulative, and

Amendment 5

On page 5, after line 31, insert:

(1) Section 1795.5 shall not apply to a sale of used assistive devices, and for the purposes of the

Song-Beverly Consumer Warranty Act the buyer of a used assistive device shall have the same rights and remedies as the buyer of a new assistive device.

(4) The language in subdivision (a) shall not constitute an express warranty for purposes of Sections 1793.2 and 1793.3.

- 0 -

CALIFORNIA PARALYZED VETERANS ASSOCIATION

Member of the Paralyzed Veterans of America, Inc./Chartered by U. S. Congress

Main Office:
V.A. HOSPITAL
LONG BEACH, CALIFORNIA
Phone: (213) 498-2311



Mailing Address:
5901 EAST 7th STREET
LONG BEACH, CALIFORNIA 90822

21 June 79

Honorable Bill Lockyer
Member of the Assembly
State Capitol, Room 2091
Sacramento, California 95814

Dear Assemblyman Lockyer:

We are taking this opportunity to register our strong support for SB 1190 sponsored by Senator Alan Sieroty.

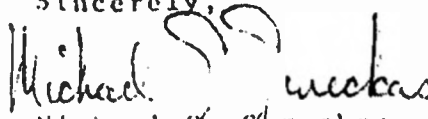
Veterans and non-veterans alike who have received spinal cord injuries resulting in the continuing trauma of paraplegia and quadriplegia face enormous financial problems.

They not only budget monies to support their families on their meager incomes but also budget monies to support their catastrophic disabilities.

Any legislation that would ease this financial burden would be welcomed.

We respectfully urge you to support SB 1190 when it comes before the Assembly Labor, Employment and Consumer Affairs Committee on Tuesday 3 July 79.

Sincerely,


Michael G. Greckas
CPVA President

MGG:klh

a paraplegic is an individual

The Paralyzed Veterans of America is a non-profit organization dedicated to furthering the needs of the veteran, his dependent and all catastrophically disabled through service, education, medical research and the elimination of architectural barriers

20 - E West Henderson (209) 784-4396
Foster, Ca. 95257



REGIONAL COALITION FOR HANDICAPPED CITIZENS, INC.

Honorable Bill Lockyer
Chrm. Assembly Labor, Emp.
& Consumer Affairs Comm.
State Capitol, Room 2091
Sacramento, CA 95814

June 20, 1979

Dear Assemblyman Lockyer,

On July 3rd at 1:30, your Committee on Labor, Employment and Consumer Affairs will be hearing SB 1190, Senator Sieroty, relating to consumer warranty on assistive devices used by handicapped members of our society.

Because I will be recovering from additional corrective surgery at that time I will not be able to appear before your committee to present my testimony in favor of this bill. As I have been obliged to do on other occasions I am presenting my testimony in writing and would appreciate your having it read into the records of the hearing on this bill.

Mr. Chairman and members of the Committee my experience as a purchaser and user of adaptive devices during the last seven years, as a result of a near fatal automobile accident, and in addition my experiences during the last 16 years with various types of adaptive devices which I purchased for my daughter as she grew and progressed from a non-ambulatory condition to her present ambulation with the aid of a wheel chair and walker, I feel that I am qualified to express my concern with not only the manufactured product, but also the fact that quite frequently the product becomes defective or it is not properly fitted according to the prescription. In these cases I have on numerous occasions had to do my own fixing and fitting even though I am not a licensed technician. When reporting to the retailer that the device was not performing properly the retailer would say that it was not his problem but the manufacturers problem. When I wrote to the manufacturer they either ignored my letters or provided me with some excuse why they could not be held responsible for the damage etc. of their product.

The 30 day return period as indicated in this bill is not ample time for some devices as I discovered three months ago when a garage mechanic wrecked my car doing over \$3,000;

worth of damage. The fault according to the mechanic who was driving the car into the garage, was that the hand control which is attached to the accelerator became stuck and he was unable to stop the car before it collided with another vehicle. This control was installed almost 1 year prior to the incident I just described. That is why I am concerned about the 30 day return period.

I would not want you Mr. Chairman and members of the committee to amend this bill at this time, but to approve it as it is written.. There are many other kinds of assistive devices such as wheel chair lifts etc. which can be covered using the generic definition of assistive devices. The bill does enumerate such items as corrective glasses, hearing aids which are defined as assistive devices. I assume that dentures would also be included under the generic name assistive devices?

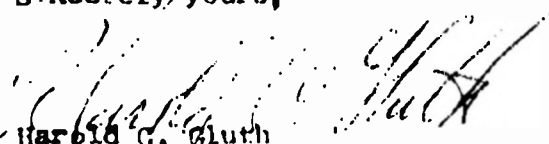
A look into the garages and store rooms of persons using assistive devices will show you immediately how poorly some of the devices are constructed as verified by the pile of broken and unuseable devices which can be seen. I have in my present collection the remains of three walkers which my daughter broke while falling. Unfortunately the walker breaks in the same location each time and all I can do is save the good parts hoping that the next time some other part will break and I will not be forced to purchase an entirely new device.

I have written the manufacturer on several occasions suggesting how they might strengthen the device, but I have never received a reply from them.

I urge you Mr. Chairman and members of the committee to vote favorably on this bill and recommend a "do Pass" to the full Assembly.

I thank you for this opportunity to present my testimony in support of AB 1190.

Sincerely, yours,


Harold C. Gluth



for crippled children and adults of California



742 Market Street, Suite 202, San Francisco, CA 94102

(415) 391-2006

June 21, 1979

Assemblyman Bill Lockyer
State Capitol
Sacramento, CA 95814

Dear Assemblyman Lockyer,

The Easter Seal Society of California would like to urge your support of Senator Sieroty's Bill S.B. 1190, providing for explicit warranties for assistive devices for persons with disabilities.

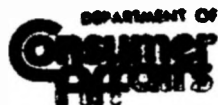
We are convinced that devices which are essential to the freedom, independence and self-determination for millions of disabled Californians ought to enhance, rather than frustrate their lives. As we indicated in our testimony in the Senate Judiciary Committee, persons who rely on the equipment often are unaware that they are protected in the event of a breakdown. This bill would ensure that they are aware of that protection.

If you have any questions, please do not hesitate to contact me. Thank you for your support of S.B. 1190.

Sincerely,

Henry N. Henscheid
Director of Advocacy

HNH:fd



1030 N STREET, SACRAMENTO, CALIFORNIA 95814
(916) 445-4465

June 25, 1979

Honorable Bill Lockyer, Chairman
Assembly Labor, Employment, and
Consumer Affairs Committee
State Capitol, Room 2091
Sacramento, CA 95814

Dear Assemblyman Lockyer:

The Department of Consumer Affairs and the Administration strongly support SB 1190 (Sieroty), which would provide specific warranty protection for new and used assistive devices sold at retail. This bill will be heard in your committee on Tuesday, July 3. The amendments to existing warranty coverage would provide that the device, if found not to be specifically fit for the physically disabled buyer, may be returned within 30 days to the seller. The seller would be able to make necessary adjustments or replacements, or reimburse the device's purchase costs incurred by the buyer.

The concept of "fit" is a particularly important one in the sale and purchase of an assistive device. Buyers of such devices are not always able to tell immediately if a device is particularly fitted to their needs. This discovery is contingent upon at least a brief period of adjustment. The 30 days for right of adjustment or return provided by this bill will give the disabled consumer an opportunity to determine the fitness of his/her purchase.

The attached information sheet provides further information on SB 1190, which proposes a vital marketplace reform for California's disabled consumers who use assistive devices.

Should you wish to discuss this further prior to the hearing, please contact our Legislative Coordinator, Steve Fishbein, at 322-4292.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard B. Brown", is written over the typed name and title.

RICHARD B. BROWN
Director

cc: Members, Assembly Labor, Employment, and
Consumer Affairs Committee



THE CALIFORNIA ASSOCIATION OF THE DEAF, Inc.

2001 STATE CAPITOL BUILDING, SUITE 102, SACRAMENTO, CALIFORNIA 95814
Telephone: (916) 443-2633 Voice: (916) 443-3804

F. A. Caligiuri
Executive Director

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WILLIAM K. K. K.
Lombard

June 29, 1979

The Honorable Bill Lockyer
Chairman, Assembly Labor, Employment
and Consumer Affairs Committee
2091 State Capitol
Sacramento, California 95814

Dear Mr. Lockyer:

On Tuesday, July 3, your committee will consider Senate Bill 1190 (Sieroty). This bill would require that new and used assistive devices sold at retail be covered by warranties that insure that the devices are specifically fit for the individual needs of the buyer.

The California Association of the Deaf would like to go on record in support of this bill. For many years, hearing impaired people have all too often been fitted with hearing aids that were inappropriate to the type and severity of their hearing loss. SB 1190 would help to insure that retailers of hearing aids become more responsible to the needs of their clients.

Your favorable consideration of SB 1190 would be greatly appreciated.

Sincerely,

F. A. CALIGIURI
Executive Director

FAC:rr

cc: Committee Members
✓ Committee Consultant
Senator Alan Sieroty

10423 Louisiana Avenue
Los Angeles, CA. 90025
June 25, 1979

Re: SB 1190 (Sincerely)

Honorable Bill Lockyer
Chairman, Assembly Labor, Employment, and Consumer
Affairs Committee
State Capitol, Room 2091
Sacramento, CA. 95814

Dear Mr. Lockyer:

This is written in support of SB 1190 (Sincerely),
which will come before your committee shortly.
I am shocked to learn that there is no such law
on the books. Of all the consumers who should be
protected against dishonest or irresponsible vendors,
surely those who need assistive devices must be
at the top of the list. How can anyone sell them
such devices without warranties?

Please use your influence to help this bill
along the way.

Sincerely,

Thomas Schmitt

ADULT INDEPENDENCE DEVELOPMENT CENTER

2275 SOUTH BASCOM AVENUE, CAMPBELL, CALIFORNIA 95008 (408) 371-7010

June 29, 1979

Assemblyman Lockyer
State Capitol
Sacramento, CA 95814

Dear Assemblyman Lockyer:

Enclosed for your review is a copy of a letter sent to the Department of Rehabilitation in regard to SB-1190 enforcing a warranty disclosing the exact use of assistive devices for the physically handicapped and a fifteen (15) day allowance to return the item if unsatisfactory.

Such a bill would greatly help purchasers make a more appropriate selection and curtail wasteful spending.

Your support of this bill in the Labor, Employment, and Consumer Affairs Committee would be appreciated.

Sincerely,



Robert Zier
Resource Development Supervisor

RZ:dap

DEPARTMENT OF REHABILITATION

1000 "K" STREET MALL
SACRAMENTO, CALIFORNIA 95814
(916) 445-3971



June 29, 1979

Honorable Bill Lockyer, Chairman
Assembly Labor, Employment and
Consumer Affairs Committee
State Capitol, Room 2091
Sacramento, CA 95814

Dear Mr. Lockyer:

The Assembly Labor, Employment and Consumer Affairs Committee is scheduled to hear Senate Bill 1190, Sieroty, on Tuesday, July 3, 1979.

SB 1190 would require that devices sold to assist physically disabled persons be accompanied by the vendor's implied warranty, stating that the device is specifically fit to the particular needs of the buyer. This bill would also require an express warranty that the device may be returned within 30 days if it is not suited to the consumer's personal needs. This 30 day warranty would allow time for the consumer to either check back with the prescribing physicians and/or try out the device for comfort and fit.

Assistive devices are expensive and necessary equipment for persons with disabilities and, therefore, should be given warranties just as home appliances (which are conveniences not necessities) are given.

The Department of Rehabilitation supports this bill and urges you to vote in favor of SB 1190.

Sincerely,

A handwritten signature in cursive script that reads "Edward V. Roberts".

EDWARD V. ROBERTS
Director



The CALIFORNIA ASSOCIATION OF THE DEAF, Inc.

Affiliated with the National Association of the Deaf - Founded 1906, Incorporated 1914
1507 TWENTY-FIRST STREET, SUITE 102, SACRAMENTO, CALIFORNIA 95814
Telephone TTY (916) 443-2833 Voice (916) 443-3804

F. A. Caligiuri
Executive Director

June 29, 1979

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KYLE WORKMAN
Perris

The Honorable Bill Lockyer
Chairman, Assembly Labor, Employment
and Consumer Affairs Committee
2091 State Capitol
Sacramento, California 95814

Dear Mr. Lockyer:

On Tuesday, July 3, your committee will consider Senate Bill 1190 (Sieroty). This bill would require that new and used assistive devices sold at retail be covered by warranties that insure that the devices are specifically fit for the individual needs of the buyer.

The California Association of the Deaf would like to go on record in support of this bill. For many years, hearing impaired people have all too often been fitted with hearing aids that were inappropriate to the type and severity of their hearing loss. SB 1190 would help to insure that retailers of hearing aids become more responsible to the needs of their clients.

Your favorable consideration of SB 1190 would be greatly appreciated.

Sincerely,

F.A. CALIGIURI
Executive Director

FAC:rr

cc: Committee Members
Committee Consultant
Senator Alan Sieroty

DEPARTMENT OF REHABILITATION

830 "K" STREET MALL

SACRAMENTO, CALIFORNIA 95814

(916) 445-3971



June 29, 1979

Honorable Bill Lockyer, Chairman
Assembly Labor, Employment and
Consumer Affairs Committee
State Capitol, Room 2091
Sacramento, CA 95814

Dear Mr. Lockyer:

The Assembly Labor, Employment and Consumer Affairs Committee is scheduled to hear Senate Bill 1190, Sieroty, on Tuesday, July 3, 1979.

SB 1190 would require that devices sold to assist physically disabled persons be accompanied by the vendor's implied warranty, stating that the device is specifically fit to the particular needs of the buyer. This bill would also require an express warranty that the device may be returned within 30 days if it is not suited to the consumer's personal needs. This 30 day warranty would allow time for the consumer to either check back with the prescribing physicians and/or try out the device for comfort and fit.

Assistive devices are expensive and necessary equipment for persons with disabilities and, therefore, should be given warranties just as home appliances (which are conveniences not necessities) are given.

The Department of Rehabilitation supports this bill and urges you to vote in favor of SB 1190.

Sincerely,

A handwritten signature in cursive script, reading 'Edward V. Roberts'.

EDWARD V. ROBERTS
Director

FACT SHEET

SB 1190 (Sieroty)

Assembly Labor, Employment,
and Consumer Affairs
Committee

Tuesday, July 3, 1979
1:30 p.m.

SUBJECT: Assistive device warranties

SB 1190 would require that assistive devices sold at retail be specifically covered by express and implied warranties that insure that the devices are specifically fit for the individual needs of the buyer. If the device is found not specifically suited for the purchaser, it could be returned within 30 days to the seller. The seller would then be required to make necessary adjustments or replacements. If the seller does not cure the problem, reimbursement would be available.

The definition of "assistive device" is intended to cover devices which would assist a person with a physical disability. This would include, but not be limited to, hearing aids, braces, crutches, wheelchairs, and prosthetic devices.

The importance of proper fit and utilization of an assistive device is vital to a disabled person's normal functioning. A high marketplace standard of quality assurance would be encouraged and required by the establishment of this specific warranty.

By including "assistive devices" in the legal definition of "consumer goods," more specific protection is available to consumers of these devices. This will be a vital marketplace protection for those who use such devices to assist a physical disability. The essential time element necessary for physical mobility and assistance would be best served through the initial retail purchase level and not by subsequent lengthy and costly civil remedies. Further, persons with disabilities are not always in a position to effectively assert their rights under existing law.

According to statistics from the California Department of Rehabilitation:

- Approximately 1.8 million Californians have physical disabilities
- Over 700,000 Californians use assistive devices, excluding eyeglasses (1977)
- The average prescription manual wheelchair costs \$300-\$2,000
- An average electric wheelchair costs approximately \$1500-\$3,500 (dependent upon the extent of disability)

SUPPORTERS

Easter Seal Society
California Association for the Physically Handicapped (CAPH)
Arthritis Foundation
San Francisco Independent Living Project
United Cerebral Palsy of San Francisco
Center for the Disabled (Garden Grove)
Center for Independent Living (Berkeley)
Bay Area Gray Panthers
Disabled Resources (Long Beach)
Adult Independence Development Center (Campbell)
Mt. Diablo Rehabilitation Center
Fresno Association of the Physically Handicapped Service Center
Department of Rehabilitation
State Department of Rehabilitation
State Department of Consumer Affairs

ASSEMBLY COMMITTEE ON LABOR, EMPLOYMENT, & CONSUMER AFFAIRS
Bill Lockyer, Chairman

HEARING DATE: July 3, 1979

BILL: SB 1190 (As Amended June 21, 1979)

AUTHOR: Sieroty

SUBJECT: Consumer Warranties

BACKGROUND

The Song-Beverly Consumer Warranty Act, enacted in 1970, provides certain protections to the purchasers of consumer goods. "Consumer goods" are defined as "any new product or part thereof that is used or bought for use primarily for personal, family, or household purposes, except for clothing and consumables." (B & P Code Sec. 1791).

In general, every sale of consumer goods in this state is covered by what is known as an "implied warranty" of fitness and merchantability. A warranty of merchantability means that the goods pass in the business as they are described in the contract, that they are fit for the ordinary purpose for which they are used, are adequately packaged and labeled, and conform to representations made on the label. A warranty of fitness means that the seller has selected for the buyer goods that are appropriate for the purpose the buyer intended.

Although not mandatory, manufacturers, distributors, and retailers may make express warranties, written agreements to preserve or maintain the goods or provide some form of compensation if there is a failure in utility or performance.

There is no specific reference in the codes to warranties covering "assistive devices", apparatus used by a physically disabled individual to assist in bodily movement or replace a part of the body, though presumably they might be considered products "used... for personal... purposes".

BILL

SB 1190, as amended, declares that every sale of an assistive device, new or used, in this state is covered by an implied warranty, and shall be accompanied by a written warranty that the product will fit the particular needs of the buyer. For up to a minimum of 30 days after purchase, the seller is obligated to adjust or replace the device in order to achieve the proper fit, or shall promptly refund the full payment. The warranty must contain specific language spelling out these rights, printed in at least 10 point type.

These specific performance requirements do not in any way limit the right of the buyer to other legal protections or remedies that might exist.

ANALYSIS

1. The basic problem with assistive devices seems to be one of fit, rather than one of defects in the products. Because these devices are strapped on, worn, or used with the body, it's vitally important that they be comfortable, that they do not chafe, and that they are the proper size for the task. Sometimes these things cannot be discovered until the product has been in use awhile, e.g., a prosthetic device may be comfortably snug on a cold morning when purchased, but unreasonably tight after a hot afternoon of walking. This bill guarantees that the seller will make an effort to ensure the equipment fits properly.

2. The definition of "assistive device" found in the bill is quite broad: it would not only cover artificial limbs, but also walkers, wheelchairs, and perhaps glasses.

3. Under present practice, assistive devices are usually accompanied by an express warranty by the manufacturer that covers manufacturing defects in the product. While this provides some protection in those cases where the product is broken or simply does not work, it provides no protection in those great numbers of cases where the product is simply not appropriate for the job or is adjusted improperly: retailers' errors.

4. There are approximately 1.8 million Californians who have some form of physical disability. Approximately 700,000 of these use some form of assistive device, excluding eyeglasses.

SUPPORT:

Dept. of Consumer Affairs
Dept. of Rehabilitation
Regional Coalition of Handicapped
Citizens (Porterville)
California Paralyzed Veterans Assn.
Easter Seal Society
California Assn. for the Physically
Handicapped

San Francisco Independent
Living Project
United Cerebral Palsy
Center for the Disabled (Garden
Grove)
Center for Independent Living
(Berkeley)
Bay Area Gray Panthers
Disabled Resources (Long Beach)

OPPOSE: Unknown

FINAL SENATE VOTES:

Senate Judiciary Committee - May 30 (7-1)
Senate Third Reading - June 1 (26-0)

Consultant: Grog Schmidt
mh

AMENDMENTS TO SENATE BILL NO. 1190
AS AMENDED IN ASSEMBLY JUNE 21, 1979

Amendment 1

In lines 1 and 2 of the title of the printed bill, as amended in Assembly June 21, 1979, strike out "and to add Section 1793.02 to," and insert:

to add Sections 1793.02 and 1794.2 to, and to repeal Section 1794.2 of,

Amendment 2

On page 4, strike out lines 36 to 40, inclusive, and insert:

amount paid. This warranty does not affect the protections and remedies you have under other laws." In lieu of the words "30 days" the retail seller may specify any longer period.

Amendment 3

On page 5, after line 36, insert:

SEC. 5. Section 1794.2 of the Civil Code is repealed.

~~1794.2. (a) Subdivision (a) of Section 1794 shall not apply to a cause of action commenced or maintained pursuant to Section 382 of the Code of Civil Procedure or pursuant to Section 1781 of this code.~~

~~(b) Subdivision (a) of Section 1794 shall not apply to a judgment based solely on a breach of implied warranty of merchantability or, where present, the implied warranty of fitness.~~

SEC. 6. Section 1794.2 is added to the Civil Code, to read:

1794.2. The provision of Section 1794 authorizing the recovery of three times the amount of the buyer's actual damages shall not apply to either of the following:

(a) A cause of action commenced or maintained pursuant to Section 382 of the Code of Civil Procedure or pursuant to Section 1781 of this code.

(b) A judgment based solely on a breach of the implied warranty of merchantability, or, where present, the implied warranty of fitness.

ASSEMBLY THIRD READING

SB 1190 (Sieroty) As Amended: July 10, 1979SENATE VOTE: 26-0

ASSEMBLY ACTIONS:

COMMITTEE L., E., & C. A. VOTE 7-0 COMMITTEE _____ VOTE _____

Ayes:

Ayes:

Nays:

Nays:

DIGEST

The Song-Beverly Consumer Warranty Act requires retailers and distributors selling consumer goods at retail to guarantee (by implied warranty) that those goods are suitable to the buyer if the retailer or distributor has reason to know that the goods are required for a specific purpose and that the buyer is relying on the retailer's or distributor's skill or judgment in furnishing suitable goods.

This bill requires retail sales of "assistive devices" for the physically handicapped to be guaranteed to fit the particular needs of the buyer.

Specifically, the bill:

- 1) Defines "assistive device" as any instrument used to assist a physically disabled person in mitigating or treating an injury or disease or in assisting any bodily function. An assistive device may be used to replace any part of the human body.
- 2) Requires retailers of assistive devices to guarantee, by implied warranty, that such devices are specifically fit for the particular needs of the buyer.
- 3) Requires all new and used assistive devices sold at retail to be accompanied by a written warranty which specifies that the product is to fit the particular needs of the buyer and can be returned within 30 days for adjustment, replacement, or refund of moneys paid, if found to be unsuitable. The period may be more than 30 days if the retailer so specifies.

FISCAL EFFECT

No fiscal effect expected on state or local government. Undetermined cost to retailers of assistive devices for supplying written warranties to the physically handicapped.

- continued -

COMMENTS

The Assembly Labor, Employment, and Consumer Affairs Committee analysis states:

The basic problem with assistive devices seems to be one of fit, rather than one of defects in the products. Because these devices are strapped on, worn, or used with the body, it's important that they be comfortable, that they do not chafe, and that they be the proper size. Sometimes these things cannot be discovered until the product has been in use awhile (e.g., a prosthetic device may be comfortably snug on a cold morning when purchased, but unreasonably tight after a hot afternoon of walking). This bill guarantees that the seller will make an effort to ensure the equipment fits properly.

The definition of "assistive device" in the bill is quite broad. It would not only cover artificial limbs, but also walkers, wheelchairs, and perhaps glasses.

There are approximately 1.8 million Californians who have some form of physical disability. Approximately 700,000 of these use assistive devices, excluding eyeglasses.

Should language be added which clarifies that it is the judgment of the buyer, rather than that of the seller, which will prevail in a dispute concerning proper fit and a refund of money.

ENROLLED BILL MEMORANDUM TO GOVERNOR	DATE 9/25/79
BILL NO. SB 1190	AUTHOR Sieroty

Vote—Senate _____ Unanimous

Ayes— 26
Noes— 0

Vote—Assembly _____ Unanimous

Ayes— 72
Noes— 0

SB 1190 -Sieroty Existing law imposes various warranty obligations on retail sellers of consumer goods, as defined, for the benefit and protection of the buyers of such goods.

This bill would include within the definition of consumer goods new and used assistive devices which are sold at retail.

SPONSOR

Department of Consumer Affairs and Rehabilitation

OPPOSITION

No expressed opposition (but see Consumer Affairs analysis)

FISCAL IMPACT

None

Recommendation APPROVE	Legislative Secretary
----------------------------------	-----------------------

OWEN K. KUNZ
RAY H. WHITAKER
CHIEF DEPUTIES

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8011 STATE BUILDING
107 SOUTH BROADWAY
LOS ANGELES 90012
(213) 620-2550

Legislative Counsel of California

BION M. GREGORY

Sacramento, California
September 24, 1979

Honorable Edmund G. Brown Jr.
Governor of California
Sacramento, CA


Senate Bill No. 1190

Dear Governor Brown:

Pursuant to your request we have reviewed the
above-numbered bill authored by Senator Sieroty
and, in our opinion, the title and form are sufficient and
the bill, if chaptered, will be constitutional. The digest
on the printed bill as adopted correctly reflects the views
of this office.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By 
John T. Studebaker
Principal Deputy

JTS:AB

Two copies to Honorable Alan Sieroty,
pursuant to Joint Rule 34.

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ENROLLED BILL REPORT

AGENCY Health and Welfare	BILL NUMBER SB 1190 (9/5/79)
DEPARTMENT, BOARD OR COMMISSION Rehabilitation	AUTHOR Sieroty

SUBJECT: An act relating to consumer warranties on assistive devices.

HISTORY: Under existing law, there is no warranty on the sale of assistive devices (prosthetic/orthotic devices, wheelchairs, hearing aids, braces, etc.) to persons with physical disabilities.

The Department of Rehabilitation requires clients to return to the prescribing physician after being fitted with a device. The physician then determines whether or not the device purchased is the same as the device prescribed and if it is properly fitted. The Department has had informal agreements with vendors which allow the Department to return the device if it does not fit properly. This informal agreement is not enforceable, and at times, has not been kept. Consumers other than Department of Rehabilitation clients have no recourse for improperly fitted devices.

The Department of Rehabilitation has worked with the Department of Consumer Affairs on this proposal and has received input from California Association for the Physically Handicapped (CAPH), Fresno CAPH Service Center, Long Beach Disabled Resources, Mt. Diablo Rehabilitation Center, the Adult Independence Development Center, and Humboldt Access Project, Incorporated, all of which have responded very positively to the proposal.

A long list of organizations representing persons with disabilities supports SB 1190 and there is no known opposition.

SPONSORSHIP: Departments of Consumer Affairs and Rehabilitation.

<u>DEPARTMENT POSITIONS:</u>	<u>Proposed</u>	<u>Approved</u>
Original	Support	Support
5/21/79	Support	Support
5/31/79	Support	Support
6/21/79	Support	Support
7/10/79	Support	Support
8/27/79	Support	Not received
9/5/79	Support	Not received

VOTE: Senate: 26-0 Assembly: 72-0
 Senate concurs in Assembly amendments: 28-0

SPECIFIC FINDINGS: SB 1190 would:

1. Include new and used assistive devices sold at retail within the definition of "consumer goods".
2. Define assistive devices to include any instrument, apparatus, or contrivance, including any component, part, or accessory which is used or intended to be used,

(Continued)

RECOMMENDATION:

Sign the bill.

DEPARTMENT DIRECTOR <i>Edward H. Bertz</i>	DATE <i>9/24/79</i>	AGENCY SECRETARY <i>Opal Hulley</i>	DATE <i>9/24/79</i> <div style="text-align: right; font-weight: bold;">245</div>
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SPECIFIC FINDINGS: (Continued)

to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist, affect, or replace the structure or any function of the body of a physically disabled person.

3. Require that every assistive device sold, costing \$15 or more, be accompanied by the vendor's implied warranty that the device is specifically fit for the particular needs of the buyer. Catalogue or similar sales would be exempt.
4. Requires that all assistive devices sold include the vendor's express warranty that the device may be returned within 30 days of the date of receipt of the device (minimum warranty) if it is not specifically fit for the particular needs of the buyer.

The Department of Rehabilitation supports SB 1190 for the following reasons:

1. The fit of an assistive device is critical to the health and safety of persons with disabilities. An improperly fitted artificial limb, for instance, can cause a skin irritation, etc.; an improperly fitted wheelchair can cause a person to sit in a slumped position, contract bed sores, etc.
2. Assistive devices are expensive and necessary equipment for persons with disabilities and, therefore, should be given warranties just as home appliances (which are conveniences not necessities) are given.
3. The 30-day warranty will allow time for the consumer to either check back with the prescribing physician and/or try out the device for comfort and fit.

FISCAL IMPACT: The fiscal impact of SB 1190 to the State General Fund and to the Department of Rehabilitation is uncertain. It is possible that as more custom-made devices are returned, the increased cost to the vendor will be passed on to the consumer. On the other hand, the Department could incur case service savings by not having to purchase ill fitting assistive devices.

RECOMMENDATION: Sign the bill. Assistive devices are expensive and necessary for persons with disabilities. These persons should not have to bear the burden of replacing improperly fitted devices, as they can least afford this added expense.

DIRECTOR: Edward Roberts Work Phone: 445-3971 Home Phone: 451-0393

CONTACT: James Donald Work Phone: 445-0186 Home Phone: 451-0978
Jan Dell *JDell* Work Phone: 445-7976 Home Phone: 726-7859



1020 N STREET, SACRAMENTO, CALIFORNIA 95814

ENROLLED BILL REPORT



AGENCY State and Consumer Services	BILL NUMBER SB 1190
DEPARTMENT, BOARD OR COMMISSION Department of Consumer Affairs	AUTHOR Sieroty

SUBJECT: Warranties -- Assistive Devices, Disabled Consumers

HISTORY, SPONSORSHIP, and RELATED LEGISLATION:

SB 1190 was developed and sponsored by the Department of Consumer Affairs. The Department of Rehabilitation also supported this measure. It is the first bill of its kind. This is considered a major Department consumer bill for 1979. Although not reflected by the final votes, this legislation met opposition from such entities as Sears, Montgomery Ward, California Retailers Association, hearing aid manufacturers and retailers, and prosthetic device retailers.

The Department met with these groups and eliminated any organized opposition prior to legislative committee and floor votes. This can be evidenced by the bill's amendment history (amended four times in the Assembly and twice in the Senate). The amendments were constructive and effectively strengthened consumer protections while at the same time providing some security to legitimate business.

Among the "active" supporters of this legislation, who assisted the Department's lobbying efforts, were: the Easter Seal Society, National Multiple Sclerosis Society, the California Association of the Physically Handicapped, San Francisco Independent Living Project, Berkeley Center for Independent Living, California Association for the Deaf, and the San Diego Community Service Center for the Disabled.

ANALYSIS

A. SPECIFIC FINDINGS

Existing law, under the Song-Beverly Consumer Warranty Act (Civil Code Sections 1790 et seq.) protects buyers of consumer goods by imposing warranty obligations on the sellers. This law provides implied warranties of merchantability, implied warranties of fitness, and express warranties. However, existing law does not require the retailer to grant either an implied or express warranty for an "assistive device".

In view of the complexity and uncertainty of existing warranty law, effective remedies are not available for consumers who purchase defective or unfit assistive devices.

This legislation would provide that, (1) an implied warranty of fitness be made with every sale of an "assistive device", and (2) an express warranty be provided that states the device is specifically fit for

RECOMMENDATION:

 DEPARTMENT DIRECTOR
Sign

DATE

9-19-79

 AGENCY SECRETARY
Deputy
Assistive

DATE

9/24/79

the particular needs of the buyer, and, if not, it could be returned for retailer "cure" or if not possible, reimbursement.

One purpose of the bill is to place greater responsibility on the retailer of "assistive devices". The importance of proper fit and utilization of an assistive device is vital to a disabled person's functioning. A high marketplace standard of quality assurance would be encouraged and required by this specific warranty.

The concept of "fit" is a particularly important one in the sale and purchase of an assistive device. Buyers of such devices are not always able to tell immediately if a device is particularly fitted to their needs. This discovery is contingent upon at least a brief period of adjustment. Further, the essential time element necessary for physical mobility and assistance would be best served through the initial retail purchase level and not by subsequent lengthy and costly civil remedies. The 30-day right of return and cure period in this bill is a more appropriate marketplace protection.

Legal Analysis

This bill amends the Song-Beverly Consumer Warranty Act to create a new "warranty of fitness for a particular purpose" that applies only to retail sales of "assistive devices" made in this state.

The term "assistive device" includes, but is not limited to, hearing aids, wheelchairs, braces, crutches and prosthetic devices. The bill (See new Civil Code Section 1791(m).) defines "assistive device" to mean, "any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of a physically disabled person." The term includes both new and used assistive devices (See new Civil Code Sections 1791(a) and 1793.02(g).).

The new warranty takes the form of an implied warranty which becomes a part of every covered sale by operation of law, plus a written warranty which is required to be furnished to the buyer at the time of sale. The written warranty assures actual notification to the consumer of the rights that are conferred. The implied warranty assures that the consumer will have these rights whether or not the seller complies with the written warranty requirement.

The implied warranty (See new Civil Code Section 1792.2(b).) states simply that --

"Every sale of an assistive device sold at retail in this state shall be accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer."

The written warranty received by the buyer (See new Civil Code Section 1793.02(a).) states simply that --

"This assistive device is warranted to specifically fit for the particular needs of you, the buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws."

The written warranty adds to the rights conferred by the implied warranty by making the language of the written warranty part of the contract of sale between the parties and therefore enforceable as a private contract.

The new warranty is patterned after the present warranty of fitness for a particular purpose (See present Commercial Code Section 2315 and present Civil Code Section 1792.2.), but differs in that it applies to all sales that are covered by the Act and does not depend upon proof of the buyer's reliance on the seller's skill or judgment. Unless the seller is totally uninvolved in the diagnosis, selection and fitting of the device, the assistive device warranty applies. Sales of inexpensive devices (under \$15,00) are specifically excluded (See Civil Code Section 1793.02(e).).

The bill also provides (See Civil Code Section 1793.02(c).) that if the buyer returns the device within the period specified in the warranty, the seller shall, within a reasonable time, adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer.

If the buyer is an agency (e.g., Department of Health Services) purchasing for the ultimate user, the device must be specifically fit for the particular needs of the ultimate user (See Civil Code Section 1793.02(d).).

Violations of the new provisions (including failure to either give the written warranty or to honor the written or implied warranty) are subject to the existing provisions of the Song-Beverly Act on violations. These include Civil Code Section 1794, which confers a right to recover treble damages, attorney's fees and other relief for violations that are "wilful", and Articles 6 and 7 of the Commercial Code for violations of the implied warranty (See Civil Code Section 1791.1(d).).

The bill makes it clear that the rights of the buyer may not be waived, and that the bill is not intended to supplant other rights the buyer may have (See Civil Code Section 1793.02(f).).

B. FISCAL IMPACT

None on this Department

C. VOTE

Assembly 72-0
Senate 26-0

D. RECOMMENDATION: Sign

According to available statistical information, there are approximately 1.8 million Californians with physical disabilities, with approximately 700,000 utilizing assistive devices, excluding eye glasses (1977 California Department of Rehabilitation data). By including "assistive devices" in the legal definition of consumer goods, more specific protection will be made available to consumers of these products. This legislation is a vital marketplace reform and should establish a constructive precedent.



california optometric association

921 - 11th STREET P.O. BOX 2591 SACRAMENTO, CALIFORNIA 95812 (916) 441-3990

April 23, 1980
File: 541

State of California
Department of Consumer Affairs
1020 N Street
Sacramento, California 95814

Re: SB 1190 (Sieroty) - Consumer
Warranties

Attn: Richard B. Spohn

Dear Mr. Spohn:

I have just read the pamphlet prepared by your Department concerning the above referenced law. I was shocked and surprised to note that your Department has included eyeglasses within the definition of "assistive device."

This unilateral action is not in keeping with the intent of SB 1190, and can do nothing but cause confusion to California consumers and vision care practitioners.

SB 1190 defines an "assistive device" as:

"...Any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used, to assist a physically disabled person in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure of any function of the body of a physically disabled person."

I do not believe that the approximate ten million Californians who presently wear eyeglasses or contact lenses are "disabled persons." You yourself wear eyeglasses and I doubt that you place yourself in the same position as an individual with an artificial arm.

I have reviewed the legislative history of this bill and it appears clearly to be intended to assist purchasers of "wheel-chairs, hearing aids, and artificial limbs." I refer you to a copy

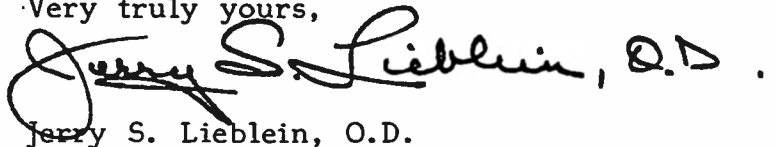
Mr. Richard B. Spohn
April 23, 1980
Page Two

of Senator Sieroty's letter to Governor Brown, dated September 14, 1979, which is attached hereto.

Considering the language of SB 1190 and its legislative history, your Department's pamphlet captioned "California Assistive Device Warranty Law" is irresponsible when it refers to eyeglasses as an assistive device.

On behalf of the members of the California Optometric Association, I request that you take immediate steps to cease the dissemination of misleading information concerning SB 1190 and make clear to the public, in conformity with SB 1190, that eyeglasses and contact lenses are not included in that legislation.

Very truly yours,



Jerry S. Lieblein, O.D.
President, California Optometric
Association

JSL:cr
attachment

cc: ✓ Edmund G. Brown, Jr., Governor
Alice A. Lytle, Secretary, State and Consumer Services Agency
Members, State Board of Optometry
Lawrence D. Price, Executive Officer, State Board of Optometry

STATE CAPITOL
SACRAMENTO, CALIFORNIA 95814
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DISTRICT OFFICE
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LARRY BRISKIN
ADMINISTRATIVE ASSISTANT

MICHAEL SIEGEL
LEGISLATIVE ASSISTANT

Senate California Legislature

ALAN SIEROTY
TWENTY-SECOND SENATORIAL DISTRICT

September 14, 1979

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ARTS TASK FORCE, NATIONAL
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MEMBER
CALIFORNIA COMMISSION ON THE
STATUS OF WOMEN
CONSUMER ADVISORY COUNCIL

Hon. Edmund G. Brown, Jr.
Governor of California
State Capitol
Sacramento, CA 95814

Dear Governor Brown:

I respectfully request your signature on SB 1190, now before you for consideration.

This bill, introduced at the request of the Department of Consumer Affairs and the Department of Rehabilitation, amends the Song-Beverly Consumer Warranty Act to require that the sale of devices which assist the physically disabled be accompanied by an express warranty that the device is fit for the particular needs of the buyer.

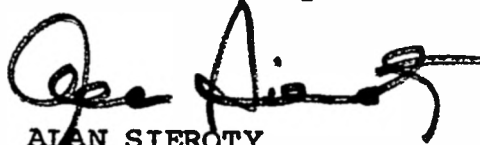
Under the bill, the buyer will receive written notice of this warranty at the time of sale and is given a minimum of 30 days to return the device. The seller must either "cure" the defect or refund the purchaser's money and cancel the contract.

The two departments concerned with this legislation have received serious complaints from disabled persons regarding the sale of such devices as wheelchairs, hearing aids, and artificial limbs. SB 1190 will provide a remedy for the physically disabled and will help to resolve disputes without the need for litigation.

SB 1190 is supported by numerous organizations representing the physically-disabled community, including the California Association of the Physically Handicapped, the California Association of the Deaf, the Easter Seal Society, the Center for Independent Living, the National Multiple Sclerosis Society, and the United Cerebral Palsy. The bill

has been amended to resolve the concerns of the California Retailers Association and the California Orthotics and Prosthetics Association. I know of no opposition to SB 1190, as now amended, and urge your favorable consideration.

Yours sincerely,



ALAN SIEROTY



Dayle McIntosh Center

8100 Garden Grove Blvd, Garden Grove, Ca 92644

714-898-9571 TTY-892-7070

SB1190
p.w.

September 18, 1979


Governor Jerry Brown
State Capitol
Sacramento, CA 95814

Dear Governor Brown:

I am writing this letter to draw your attention to Senate Bill 1190 (Consumer Warranties).

I feel that the passage of this bill is imperative, because just as you depend on an automobile for dependable transportation, a refrigerator for preserving perishables, and a television for entertainment, a disabled person depends on a proper fitting and functioning assistive device; an iron lung to breathe, a prosthesis or electric wheelchair to motivate. The passage of Senate Bill 1190 will insure the proper protection of these assistive devices.

Sincerely,



James J. Stratton
Administrative Analyst

JJS/bjb



The CALIFORNIA ASSOCIATION OF THE DEAF, Inc.

Affiliated with the National Association of the Deaf — Founded 1906. Incorporated 1914
1507 TWENTY-FIRST STREET, SUITE 102, SACRAMENTO, CALIFORNIA 95814
Telephone TTY (916) 443-2833 Voice (916) 443-3604

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KYLE WORKMAN
Perris

September 18, 1979

The Honorable Edmund G. Brown Jr.
Governor
State Capitol
Sacramento, California 95814

Re: Senate Bill 1190

Dear Governor Brown:

Senate Bill 1190 (Sieroty) will soon be before you for your signature. This bill would require that new and used assistive devices sold at retail be covered by warranties that insure that the devices are specifically fit to the individual needs of the buyer.

For many years, hearing impaired people have all too often been fitted with hearing aids that were inappropriate to the type and severity of their hearing loss. SB 1190 would help insure that retailers of hearing aids become more responsible to the needs of their clients.

The California Association of the Deaf supports SB 1190 and respectfully requests your favorable consideration in this matter.

Sincerely,

EDWARD D. SANTILLANES
Administrative Assistant

EDS:rr

cc: Senator Alan Sieroty

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RODRIGUEZ v. FCA
US**

Case Number: **S274625**

Lower Court Case Number: **E073766**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **smckenzie@horvitzlevy.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
MOTION	S274625_MJN_FCA.PDF
ADDITIONAL DOCUMENTS	Vol. 07 MJN Exhs. 1-256.PDF
ADDITIONAL DOCUMENTS	Vol. 08 MJN Exhs. 257-367.PDF
ADDITIONAL DOCUMENTS	Vol. 09 MJN Exhs. 368-553.PDF
ADDITIONAL DOCUMENTS	Vol. 10 MJN Exhs. 554-736.PDF
ADDITIONAL DOCUMENTS	Vol. 11 MJN Exhs. 737-954.PDF
ADDITIONAL DOCUMENTS	Vol. 12 MJN Exhs. 955-1149.PDF
ADDITIONAL DOCUMENTS	Vol. 13 MJN Exhs. 1150-1387.PDF
ADDITIONAL DOCUMENTS	Vol. 14 MJN Exhs. 1388-1577.PDF
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ADDITIONAL DOCUMENTS	Vol. 16 MJN Exhs. 1841-1937.PDF

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

2/8/2023

Date

/s/Shane McKenzie

Signature

McKenzie, Shane (228978)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm