

1-1 By: Watson S.B. No. 778
1-2 (In the Senate - Filed February 11, 2009; March 4, 2009,
1-3 read first time and referred to Committee on Business and Commerce;
1-4 March 30, 2009, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 7, Nays 0; March 30, 2009,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 778 By: Watson

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to the licensing and regulation of identity recovery
1-11 service contract providers and the inclusion of identity recovery
1-12 service agreements in certain service contracts and vehicle
1-13 protection products; providing penalties.

1-14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-15 SECTION 1. Section 348.001, Finance Code, is amended by
1-16 adding Subdivision (8-a) to read as follows:

1-17 (8-a) "Service contract" includes an identity
1-18 recovery service contract as defined by Section 1306.003,
1-19 Occupations Code.

1-20 SECTION 2. Subsection (b), Section 1304.003, Occupations
1-21 Code, is amended to read as follows:

1-22 (b) A service contract may also provide for:

1-23 (1) incidental payment or indemnity under limited
1-24 circumstances, including towing, rental, and emergency road
1-25 service; ~~or~~

1-26 (2) the repair or replacement of a product for damage
1-27 resulting from a power surge or for accidental damage incurred in
1-28 handling the product; or

1-29 (3) identity recovery, as defined by Section 1306.002,
1-30 if the service contract is financed under Chapter 348, Finance
1-31 Code.

1-32 SECTION 3. Title 8, Occupations Code, is amended by adding
1-33 Chapter 1306 to read as follows:

1-34 CHAPTER 1306. IDENTITY RECOVERY SERVICE CONTRACT PROVIDERS AND
1-35 ADMINISTRATORS

1-36 SUBCHAPTER A. GENERAL PROVISIONS

1-37 Sec. 1306.001. SHORT TITLE. This chapter may be cited as
1-38 the Identity Recovery Service Contract Regulatory Act.

1-39 Sec. 1306.002. DEFINITIONS. In this chapter:

1-40 (1) "Administrator" means a person, other than the
1-41 provider of the identity recovery service contract or an employee
1-42 of the provider, who is responsible for the third-party
1-43 administration of an identity recovery service contract.

1-44 (2) "Commission" means the Texas Commission of
1-45 Licensing and Regulation.

1-46 (3) "Consumer" means an individual who purchases an
1-47 identity recovery service contract.

1-48 (4) "Department" means the Texas Department of
1-49 Licensing and Regulation.

1-50 (5) "Executive director" means the executive director
1-51 of the department.

1-52 (6) "Identity recovery" means a process, through a
1-53 limited power of attorney and the assistance of an identity
1-54 recovery expert, that returns the identity of an identity theft
1-55 victim to pre-identity theft event status.

1-56 (7) "Identity recovery service contract holder" means
1-57 a person who purchases or otherwise holds an identity recovery
1-58 service contract.

1-59 (8) "Person" means an individual or an association,
1-60 company, corporation, partnership, or other group.

1-61 (9) "Provider" means a person who is contractually
1-62 obligated to an identity recovery service contract holder under the
1-63 terms of an identity recovery service contract.

(10) "Reimbursement insurance policy" means a policy of insurance issued to a provider to:

(A) reimburse the provider under an identity recovery service contract the provider issued or sold; or

(B) pay on behalf of the provider all covered contractual obligations that are incurred by the provider under an identity recovery service contract the provider issued or sold and that the provider does not perform.

Sec. 1306.003. IDENTITY RECOVERY SERVICE CONTRACT. In this chapter, "identity recovery service contract" means an agreement:

(1) to provide identity recovery;

(2) that is entered into for a separately stated consideration and for a specified term; and

(3) that is financed through a retail installment contract under Chapter 348, Finance Code.

Sec. 1306.004. CONTROLLING PERSON. (a) In this chapter, "controlling person" means an individual who:

(1) possesses direct or indirect control of at least 25 percent of the voting securities of a corporation;

(2) possesses the authority to set policy and direct the management of a business entity;

(3) is the president, the secretary, or a director of a corporation; or

(4) is a general partner of a partnership.

(b) An individual who is a controlling person of a corporation or other business entity that is the general partner of a limited partnership is a controlling person of the limited partnership.

Sec. 1306.005. EXEMPTIONS. This chapter does not apply to:

(1) an identity recovery service contract sold or offered for sale to a person who is not a consumer; or

(2) an identity recovery service contract sold by a motor vehicle dealer on a motor vehicle sold by that dealer, if the dealer:

(A) is the provider;

(B) is licensed as a motor vehicle dealer under Chapter 2301; and

(C) covers its obligations under the identity recovery service contract with a reimbursement insurance policy.

Sec. 1306.006. EXEMPTIONS FROM CERTAIN OTHER LAWS. Marketing, selling, offering for sale, issuing, making, proposing to make, and administering an identity recovery service contract are exempt from the Insurance Code and other laws of this state regulating the business of insurance.

Sec. 1306.007. PURCHASE REQUIREMENT PROHIBITED. A person regulated by Chapter 2301 may not require the purchase of an identity recovery service contract as a condition of a loan or the sale of a vehicle.

Sec. 1306.008. GENERAL INVESTIGATIVE POWER OF EXECUTIVE DIRECTOR. (a) The executive director may investigate a provider, administrator, or other person as necessary to enforce this chapter and protect identity recovery service contract holders in this state.

(b) On request of the executive director, a provider shall make the records required by Section 1306.105 available to the executive director as necessary to enable the executive director to reasonably determine compliance with this chapter.

[Sections 1306.009-1306.050 reserved for expansion]

SUBCHAPTER B. REGISTRATION REQUIREMENTS

Sec. 1306.051. REGISTRATION REQUIRED; EXEMPTION FROM OTHER LICENSING REQUIREMENTS. (a) A person may not operate as a provider or administrator of identity recovery service contracts sold in this state unless the person is registered with the department.

(b) Except for the registration requirement of this subchapter, a provider, identity recovery service contract seller, administrator, or other person who markets, sells, or offers to sell identity recovery service contracts is exempt from any licensing requirement of this state that relates to an activity

regulated under this chapter.

(c) If a person registered under Chapter 1304 registers under Chapter 1306, the financial security used to comply with Section 1304.151 fulfills the requirements of Section 1306.101.

Sec. 1306.052. APPLICATION FOR REGISTRATION OR RENEWAL; GENERAL REQUIREMENTS. (a) An applicant for registration or registration renewal must submit an application to the executive director.

(b) The application must:

(1) be in the form prescribed by the executive director; and

(2) include evidence satisfactory to the executive director of compliance with the applicable financial security requirements prescribed by Section 1306.101, if the application is for a provider registration or renewal.

(c) The department may refuse to issue or renew a registration if the applicant or a controlling person of the applicant has violated this chapter or a rule adopted or order issued by the commission or executive director.

(d) A person who makes a false statement in an application or in any document provided with an application is subject to disciplinary action under Subchapter D, including denial of the application or suspension or revocation of a registration.

Sec. 1306.053. ADDITIONAL REGISTRATION AND RENEWAL REQUIREMENTS FOR PROVIDERS. (a) In addition to the requirements of Section 1306.052, an applicant for issuance or renewal of a provider registration must file with the application:

(1) the reimbursement insurance policy required by Section 1306.102, if the provider is using a reimbursement insurance policy; and

(2) a biographical affidavit, in a form prescribed by the executive director, for each controlling person of the provider.

(b) The executive director may not issue or renew a registration to a provider unless the provider provides evidence to the executive director that:

(1) each controlling person of the provider is trustworthy and can competently manage the affairs of the provider in compliance with this chapter; and

(2) the provider can meet the provider's obligations under identity recovery service contracts and this chapter.

Sec. 1306.054. FEES. (a) As prescribed by this section, a provider must pay annual registration and renewal fees and quarterly fees based on the number of identity recovery service contracts sold or issued and in force in this state. As prescribed by this section, an administrator must pay annual registration and renewal fees.

(b) To register or renew a registration, a provider or administrator must pay the appropriate fee. The commission shall set by rule the amounts of the registration and renewal fees required to cover the costs of administering this chapter.

(c) Not later than the 30th day after the date each calendar quarter ends, a provider must report to the department the number of identity recovery service contracts sold or issued to consumers in this state during the calendar quarter and submit to the department a fee equal to \$1 for each of those contracts.

(d) The information concerning the number of identity recovery service contracts sold or issued by a provider that is submitted under Subsection (c):

(1) is a trade secret to which Section 552.110, Government Code, applies; and

(2) may be used only by the executive director and the department for the purposes of this section.

(e) The commission shall adopt rules to implement this section.

Sec. 1306.055. RENEWAL. The commission shall adopt rules regarding the renewal of a registration issued under this chapter.

[Sections 1306.056-1306.100 reserved for expansion]

SUBCHAPTER C. PRACTICE BY IDENTITY RECOVERY SERVICE CONTRACT
PROVIDERS AND ADMINISTRATORS

Sec. 1306.101. FINANCIAL SECURITY REQUIREMENTS. (a) To ensure the faithful performance of a provider's obligations to its identity recovery service contract holders, each provider must:

(1) insure the provider's identity recovery service contracts under a reimbursement insurance policy issued by an insurer authorized to transact insurance in this state or by a surplus lines insurer eligible to place coverage in this state under Chapter 981, Insurance Code;

(2) maintain a funded reserve account covering the provider's obligations under its identity recovery service contracts that are issued and outstanding in this state and place in trust with the executive director a financial security deposit consisting of:

(A) a surety bond issued by an authorized surety;
(B) securities of the type eligible for deposit by an authorized insurer in this state;

(C) a statutory deposit of cash or cash equivalents;

(D) a letter of credit issued by a qualified financial institution; or

(E) another form of security prescribed by rules adopted by the commission; or

(3) maintain, or have a parent company that maintains, a net worth or stockholders' equity of at least \$100 million.

(b) If the provider ensures its obligations under Subsection (a)(2), the amount maintained in the reserve account may not be less than an amount equal to 40 percent of the gross consideration the provider received from consumers from the sale of all identity recovery service contracts issued and outstanding in this state, minus any claims paid. The executive director may review and examine the reserve account. The amount of the security deposit may not be less than the greater of:

(1) \$25,000; or
(2) an amount equal to five percent of the gross consideration the provider received from consumers from the sale of all identity recovery service contracts issued and outstanding in this state, minus any claims paid.

(c) If the provider ensures its obligations under Subsection (a)(3), the provider must give to the executive director on request:

(1) a copy of the provider's or the provider's parent company's most recent Form 10-K or Form 20-F filed with the Securities and Exchange Commission within the preceding calendar year; or

(2) if the provider or the provider's parent company does not file with the Securities and Exchange Commission, a copy of the provider's or the provider's parent company's audited financial statements showing a net worth of the provider or its parent company of at least \$100 million.

(d) If the provider's parent company's Form 10-K, Form 20-F, or audited financial statements are filed to show that the provider meets the financial security requirement, the parent company shall agree to guarantee the obligations of the provider relating to identity recovery service contracts sold by the provider in this state.

(e) The executive director may not require a provider to meet any additional financial security requirement.

Sec. 1306.102. REIMBURSEMENT INSURANCE POLICY. (a) A reimbursement insurance policy that a provider uses to comply with Sections 1306.053 and 1306.101(a)(1) must state that:

(1) the insurer that issued the policy shall:

(A) reimburse or pay on behalf of the provider any covered amount the provider is legally obligated to pay; or

(B) provide the service that the provider is legally obligated to perform according to the provider's contractual obligations under the insured identity recovery service contract;

(2) if the covered service is not provided to an identity recovery service contract holder before the 61st day after the date of proof of loss, the insurer shall pay the covered amount directly to the identity recovery service contract holder or provide the required service; and

(3) if a refund is not paid to the identity recovery service contract holder or credited to the identity recovery service contract holder's account as required by Section 1306.108, the insurer, after receiving written notice, shall pay the refund amount directly to the identity recovery service contract holder.

(b) For a reimbursement insurance policy to comply with Section 1306.101(a)(1), the insurer issuing the policy must:

(1) maintain surplus as to policyholders and paid-in capital of at least \$15 million and annually file with the executive director copies of the insurer's audited financial statements, National Association of Insurance Commissioners annual statement, and actuarial certification if the certification is required and filed in the insurer's state of domicile; or

(2) maintain surplus as to policyholders and paid-in capital of at least \$10 million but not more than \$15 million, demonstrate to the satisfaction of the executive director that the insurer maintains a ratio of net written premiums, wherever written, to surplus as to policyholders and paid-in capital of not more than three to one, and annually file with the executive director copies of the insurer's audited financial statements, National Association of Insurance Commissioners annual statement, and actuarial certification if the certification is required and filed in the insurer's state of domicile.

(c) The insurer may not cancel the reimbursement insurance policy until the insurer delivers to the provider and the executive director a written notice of cancellation that complies with the notice requirements prescribed by Subchapters B and C, Chapter 551, Insurance Code, for cancellation of an insurance policy under those subchapters. Cancellation of the policy does not affect the insurer's liability for an identity recovery service contract issued by the provider and insured under the policy before the effective date of the cancellation.

(d) If the insurer or provider cancels the reimbursement insurance policy, the provider named on the policy may not issue a new identity recovery service contract after the effective date of the cancellation unless:

(1) the provider files with the executive director a copy of a new policy that meets the requirements of this section and that provides coverage after that date; or

(2) the provider complies with other financial security requirements provided by Section 1306.101(a).

(e) A provider is considered the agent of an insurer that issues a reimbursement insurance policy for purposes of obligating the insurer to the identity recovery service contract holder in accordance with the identity recovery service contract and this chapter. The insurer issuing the reimbursement insurance policy is considered to have received the premium for the policy on the date the identity recovery service contract holder pays the purchase price of the identity recovery service contract.

(f) This chapter does not prevent or limit the right of the insurer to seek indemnification or subrogation against a provider for any amount the insurer pays or is obligated to pay to an identity recovery service contract holder on behalf of the provider.

(g) In this section, "net written premiums" means the sum of direct written premiums and assumed reinsurance premiums, minus ceded reinsurance premiums.

Sec. 1306.103. APPOINTMENT AND RESPONSIBILITIES OF ADMINISTRATOR. (a) A provider may appoint an administrator registered under this chapter to be responsible for:

(1) all or any part of the administration or sale of identity recovery service contracts; and

(2) compliance with this chapter, except for Section 1306.101.

(b) The appointment of an administrator under this section does not affect a provider's responsibility to comply with this chapter.

Sec. 1306.104. PROVIDER REQUIREMENTS. A provider may not sell, offer for sale, or issue an identity recovery service contract in this state unless the provider gives the identity recovery service contract holder:

(1) a receipt for, or other written evidence of, the purchase of the contract; and

(2) a copy of the contract within a reasonable period after the date of purchase.

Sec. 1306.105. PROVIDER RECORDS. (a) A provider shall maintain accurate accounts, books, and other records regarding transactions regulated under this chapter. The provider's records must include:

(1) a copy of each unique form of identity recovery service contract sold;

(2) the name and address of each identity recovery service contract holder who provided the holder's name and address;

(3) a list of each location at which the provider's identity recovery service contracts are marketed, sold, or offered for sale; and

(4) written claims files that contain at least the date and a description of each claim related to the identity recovery service contracts.

(b) The records required by this section may be maintained in an electronic medium or through other recordkeeping technology. If a record is not in a hard copy, the provider must be able to reformat the record into a legible hard copy at the request of the executive director.

(c) Except as provided by Subsection (d), a provider shall retain the records required by this section until at least the first anniversary of the expiration date of the specified period of coverage under the identity recovery service contract.

(d) A provider that discontinues business in this state shall retain its records until the provider furnishes the executive director with proof satisfactory to the executive director that the provider has discharged all obligations to identity recovery service contract holders in this state.

(e) An administrator appointed to maintain the provider's records is responsible for compliance with this section to the same extent as the provider.

Sec. 1306.106. FORM OF IDENTITY RECOVERY SERVICE CONTRACT AND REQUIRED DISCLOSURES. (a) An identity recovery service contract marketed, sold, offered for sale, issued, made, proposed to be made, or administered in this state must:

(1) be written, printed, or typed in clear, understandable language that is easy to read;

(2) state the name and address of the provider;

(3) state the purchase price of the contract and the terms under which the contract is sold;

(4) state the terms and restrictions governing cancellation of the contract by the provider or the identity recovery service contract holder before the expiration date of the contract;

(5) identify:

(A) any administrator;

(B) the contract seller; and

(C) the identity recovery service contract holder, if the identity recovery service contract holder provides the holder's name;

(6) state the amount of any deductible;

(7) specify the services to be provided under the contract and any limitation, exception, or exclusion;

(8) specify any restriction governing the transferability of the contract; and

(9) state the duties of the identity recovery service contract holder, including any duty to protect against any further damage and any requirement to follow the instructions in the

identity recovery service contract.

(b) The identity of a person described by Subsection (a)(5) is not required to be preprinted on the identity recovery service contract and may be added to the contract at the time of sale.

(c) The purchase price is not required to be preprinted on the identity recovery service contract and may be negotiated with the identity recovery service contract holder at the time of sale.

(d) An identity recovery service contract insured under a reimbursement insurance policy under Section 1306.102 must:

(1) state the name and address of the insurer;

(2) state that the identity recovery service contract holder may apply for reimbursement directly to the insurer if:

(A) a covered service is not provided to the identity recovery service contract holder by the provider before the 61st day after the date of proof of loss; or

(B) a refund or credit is not paid before the 46th day after the date on which the contract is returned to the provider under Section 1306.107; and

(3) contain a statement substantially similar to the following: "Obligations of the provider under this identity recovery service contract are insured under an identity recovery service contract reimbursement insurance policy."

(e) An identity recovery service contract that is not insured under a reimbursement insurance policy must contain a statement substantially similar to the following: "Obligations of the provider under this identity recovery service contract are backed by the full faith and credit of the provider."

Sec. 1306.107. RETURNING AN IDENTITY RECOVERY SERVICE CONTRACT. An identity recovery service contract must require the provider to allow the identity recovery service contract holder to return the contract to the provider not later than:

(1) the 20th day after the date the contract is mailed to the identity recovery service contract holder; or

(2) the 10th day after the date of delivery, if the contract is delivered to the identity recovery service contract holder at the time of sale.

Sec. 1306.108. VOIDING AN IDENTITY RECOVERY SERVICE CONTRACT. (a) If an identity recovery service contract holder returns an identity recovery service contract in accordance with Section 1306.107 and a claim has not been made under the contract before the contract is returned, the contract is void.

(b) An identity recovery service contract holder may void the identity recovery service contract at a later time as provided by the contract.

(c) If an identity recovery service contract is voided under Subsection (a), the provider shall refund to the identity recovery service contract holder or credit to the account of the identity recovery service contract holder the full purchase price of the contract. If the provider does not pay the refund or credit the identity recovery service contract holder's account before the 46th day after the date the contract is returned to the provider, the provider is liable to the identity recovery service contract holder for a penalty each month an amount remains outstanding. The monthly penalty may not exceed 10 percent of the amount outstanding.

(d) The right to void an identity recovery service contract is not transferable.

Sec. 1306.109. CANCELING AN IDENTITY RECOVERY SERVICE CONTRACT. (a) A provider may cancel an identity recovery service contract by mailing a written notice of cancellation to the identity recovery service contract holder at the identity recovery service contract holder's last known address according to the records of the provider. The provider must mail the notice before the fifth day preceding the effective date of the cancellation. The notice must state the effective date of the cancellation and the reason for the cancellation.

(b) The provider is not required to provide prior notice of cancellation if the identity recovery service contract is canceled because of:

(1) nonpayment of the consideration for the contract;

(2) a material misrepresentation by the identity recovery service contract holder to the provider; or

(3) a substantial breach of a duty by the identity recovery service contract holder.

Sec. 1306.110. LIMITATIONS ON PROVIDER NAME. (a) A provider may not use a name that:

(1) includes "insurance," "casualty," "surety," or "mutual" or any other word descriptive of the insurance, casualty, or surety business; or

(2) is deceptively similar to the name or description of an insurance or surety corporation or to the name of any other provider.

(b) A provider may include in its name "guaranty" or a similar word.

(c) This section does not apply to a provider that, before September 1, 2009, included a word prohibited under this section in its name. A provider described by this subsection must include in each identity recovery service contract a statement substantially similar to the following: "This agreement is not an insurance contract."

Sec. 1306.111. MISLEADING STATEMENTS PROHIBITED. A provider or the provider's representative may not, in the provider's identity recovery service contracts or literature:

(1) make, permit, or cause to be made any false or misleading statement; or

(2) deliberately omit a material statement if the omission would be considered misleading.

[Sections 1306.112-1306.150 reserved for expansion]

SUBCHAPTER D. DISCIPLINARY ACTION

Sec. 1306.151. DISCIPLINARY ACTION. On a finding that a ground for disciplinary action exists under this chapter, the commission may impose an administrative sanction, including an administrative penalty as provided by Subchapter F, Chapter 51.

Sec. 1306.152. INJUNCTIVE RELIEF; CIVIL PENALTY. (a) The executive director may institute an action under Section 51.352 for injunctive relief to restrain a violation or a threatened violation of this chapter or an order issued or rule adopted under this chapter.

(b) In addition to the injunctive relief provided by Subsection (a), the executive director may institute an action for a civil penalty as provided by Section 51.352. The amount of a civil penalty assessed under this section may not exceed:

(1) \$2,500 for each violation; or
(2) \$50,000 in the aggregate for all violations of a similar nature.

Sec. 1306.153. MULTIPLE VIOLATIONS. For purposes of this subchapter, violations are of a similar nature if the violations consist of the same or a similar course of conduct, action, or practice, regardless of the number of times the conduct, act, or practice occurred.

Sec. 1306.154. ADMINISTRATIVE PROCEDURE. Sections 51.305, 51.310, and 51.354 apply to disciplinary action taken under this chapter.

SECTION 4. Section 2306.003, Occupations Code, is amended by adding Subsection (c) to read as follows:

(c) A vehicle protection product may also include identity recovery, as defined by Section 1306.002, if the vehicle protection product is financed under Chapter 348, Finance Code.

SECTION 5. (a) The change in law made by this Act applies to an identity recovery service contract entered into on or after January 1, 2010. An identity recovery service contract entered into before January 1, 2010, is covered by the law in effect on the date the contract was entered into, and the former law is continued in effect for that purpose.

(b) Not later than November 1, 2009, the Texas Commission of Licensing and Regulation shall adopt rules to implement Chapter 1306, Occupations Code, as added by this Act.

SECTION 6. (a) Except as provided by Subsection (b) of this section, this Act takes effect September 1, 2009.

9-1 (b) Section 1306.051 and Subchapter D, Chapter 1306,
9-2 Occupations Code, as added by this Act, take effect January 1, 2010.

9-3 * * * * *