

CAUSE NO. 2006-21887

AMERICAN HOME SHIELD
OF TEXAS, INC.
Plaintiff

v.

STATE OF TEXAS
Defendant

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IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
295TH JUDICIAL DISTRICT

DEPUTY
06 APR 12 11:41 AM '10
CLERK OF DISTRICT COURT
HARRIS COUNTY TEXAS

**STATE OF TEXAS' COUNTERCLAIM AND ORIGINAL PETITION AND
APPLICATION FOR PERMANENT INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant and Counter-Plaintiff the STATE OF TEXAS (hereinafter "Plaintiff"), acting by and through the Attorney General of Texas, GREG ABBOTT, complains of Plaintiff and Counter-Defendant AMERICAN HOME SHIELD OF TEXAS, INC. (hereinafter "Defendant"), and for cause of action would respectfully show:

I. DISCOVERY PLAN

1.1 The discovery in this case is intended to be conducted under Level 3 pursuant to TEX.R.CIV.P.190.4.

II. JURISDICTION

2.1 This action is brought by Attorney General Greg Abbott, through his Consumer Protection Division, in the name of the STATE OF TEXAS and in the public interest under the authority granted to him by Section 17.47, Texas Deceptive Trade Practices -- Consumer Protection Act, TEX. BUS. & COM. CODE ANN., §17.41, *et seq.* ("DTPA") permitting the Consumer Protection Division of the Attorney General's office to bring an action to restrain, by temporary restraining order, temporary injunction, or permanent injunction, the use of any method, act or practice declared to be unlawful by TEX. BUS. & COM. CODE ANN. §17.46, where such proceedings are in the public interest. The Attorney General files this suit against Defendant on the grounds that:

- A. Defendant, American Home Shield of Texas, Inc. ("AHS") has engaged in false, misleading and deceptive acts and practices in the course of trade and commerce as

defined herein and as declared unlawful pursuant to the Texas Deceptive Trade Practices--Consumer Protection Act, TEX. BUS. & COM. CODE § 17.41 et seq.;

- B. This suit is brought against Defendant for injunctive relief, actual damages, restoration of money or other property, civil fines and penalties, costs, and attorney's fees as a result of the violations of the DTPA.

III. DEFENDANT

3.1 Defendant, AMERICAN HOME SHIELD OF TEXAS, INC. is a corporation organized and existing under the laws of the State of Texas, with its principal place of business located at 860 Ridge Lake Boulevard, Memphis, Tennessee, 38120. Defendant AMERICAN HOME SHIELD OF TEXAS, INC. may be served by serving its registered agent, CT Corporation Systems, 350 N. St. Paul, Dallas, Texas 75201.

IV. VENUE

- 4.1 Venue of this suit lies in Harris County, Texas for the following reasons:
 - A. Under TEX. CIV. PRAC. & REM. CODE ANN. §15.002(a)(1) venue is proper because a substantial part of the events or omissions giving rise to Plaintiff's claim alleged herein occurred in Harris County, Texas;
 - B. Under the DTPA § 17.56(b)(2), venue is proper because Defendant and its authorized agents solicited transactions made the subject of the action at bar in Harris County Texas.
 - C. Under the DTPA § 17.47(b), venue is proper because Defendant has done business in Harris County, Texas.

V. PUBLIC INTEREST

5.1 Because Plaintiff State of Texas has reason to believe that Defendant has engaged in, and will continue to engage in the unlawful practices set forth below, Plaintiff State of Texas has reason to believe Defendant has caused and will cause immediate, irreparable injury, loss and damage to the State of Texas, and will also cause an adverse effect upon consumers who reside in this State. Therefore, the Consumer Protection Division of the Office of the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

VI. TRADE AND COMMERCE

6.1 Defendant has at all times described below, engaged in conduct which constitutes “trade” and “commerce” as those terms are defined by § 17.45(6) of the DTPA.

VII. NOTICE BEFORE SUIT

7.1 The Consumer Protection Division of the Office of the Attorney General informed the Defendant of the alleged unlawful conduct through its letters and Civil Investigative Demands at least (7) days prior to filing suit.

VIII. ACTION OF AGENTS

- 8.1 Whenever in this Petition it is alleged that a Defendant did any act, it is meant that:
- A. The Defendant performed or participated in the act; or
 - B. The Defendant’s officers, agents or employees performed or participated in the act on behalf of and under the authority of the Defendant.

IX. STATEMENT OF FACTS

9.1 Defendant markets a home warranty/home service contract which operates like an extended warranty for repair or replacement of appliances and systems such as air-conditioners, garbage disposals, plumbing, trash compactors, dishwashers, heating, ranges/ovens, duct work, water heaters, cook tops, electrical systems, built-in microwaves, pool-spa common equipment, spas, well pumps, garage door openers, pools, clothes washers, refrigerators and clothes dryers. Defendant develops, promotes, markets and sells home appliances and systems warranty contracts representing that it will protect, repair and replace residential homeowner’s major systems and appliances, regardless of age, make or model. Defendant’s advertising promises comprehensive coverage for breakdowns due to normal wear and tear.

9.2 Defendant represents that its warranty contract will save property owners time and money on repairs, that no inspection is required for coverage and that the age of the appliance or systems is irrelevant, that they will replace appliances and systems if they are unable to repair the problem or the consumer may receive cash in lieu thereof. Defendant advertises that the appliance or system must only be in good working order at the time the coverage is purchased.

9.3 Defendant represents that it uses service technicians who are independent contractors to provide repairs and service to Texas consumers. Defendant represents and warrants that it will

receive service calls 24 hour a day, seven days a week and that a technician will contact the consumer within 4 hours during normal business hours, and 48 hours on weekends and holidays.

9.4 Defendant solicits the services of other companies such as: Aurora, Bank of America, Bank One, Chase, CitiMortgage, Countrywide, First Advantage Credit Union, First Horizon Home Loans, First Nationwide, First Tennessee, First Union, First USA, GE Capital, Hibernia, Option One, Union Planter, Wachovia, Washington Mutual and Wells Fargo to promote, market and sell its home warranty contracts.

9.5 Defendant solicits the services of real estate agents and brokers to promote, market and sell its home warranty contracts. Defendant, through its agents, represents and warrants that its contracts offer valuable protection on major systems and appliances including home heating, plumbing, electrical and central air conditioning systems.

9.6 Some consumers must purchase the home warranty contract before a copy of the contract is provided to them. In some instances, Defendant charges an administrative/cancellation fee when the Consumer decides to cancel the contract during the review period. Some consumers don't have an opportunity to cancel the contract before the 30 day grace period, and are forced to pay administrative fees to cancel even though they are not given 30 days to review the contract as promised. Other consumers attempt to cancel their home warranty contracts, and continue to be billed or sent to collection firms if they refuse to continue paying.

9.7 Defendant has engaged in false, deceptive or misleading acts or practices in the marketing and sale of home warranty contracts by refusing to repair or replace residential homeowner's major systems and appliances as represented and warranted. After payment of the policy premiums, and when a claim is made, Defendant routinely denies most of the big ticket, high dollar claims, including A/C repairs and replacements, water heater replacements, and most plumbing repairs. Instead of making good on their promises to consumers, Defendant routinely denies replacement of expensive heating and/or air-conditioning systems. Defendant denies coverage based on false assertions that consumers failed to properly maintain the appliance when, in some instances, the alleged failure to properly maintain was during a period of time when the consumer was not in possession of the property, and when the warranty promises coverage regardless of age, make or model, as long as the appliance is in "working order at the time of the purchase of

the policy.” To categorize the multitude of denials, Contractors are asked a series of questions by Defendant, and when the consumers’ claims are denied, Defendant tracks the denials under categories such as “lack of maintenance, (maintenance) Not normal wear/tear, Chemical/Sedimentary build-up, Code violations, Collapsed duct in first 30 days, improper install, improper repair, inadequacy, lack of capacity, not in G/W/O (not in good working order), parts missing, permits, poor design, rust in first 30 days, structural changes, upgrades, or known existing defect” so as to somehow lend credence to its corporate culture to deny claims whenever possible.

9.8 Defendant attempts repairs in lieu of replacement regardless of the unreasonable time necessary to obtain parts and/or service, even though Defendant warrants that their home warranty contract will save the consumer time and money on repairs.

9.9 Defendant’s home warranty contract provides for replacement of heating and air-conditioning units with like kind and quality. When such a claim is not denied, and when replacement is occasionally undertaken, Defendant replaces heating and air-conditioning units with cheaper and less efficient models.

9.10 Although the Defendant represents and warrants that cash may be provided in lieu of replacement, Defendant exercises this option by offering consumers less cash than the cost for the consumer to repair or replace the appliance or system.

9.11 Defendant has engaged in false, deceptive or misleading acts or practices in the marketing and sale of home warranty contracts, by failing to provide qualified contractors to repair or replace appliances or systems and to do so within the time period represented and warranted. Instead of fulfilling a home warranty that provides for independent qualified technicians, Defendant uses American Residential Services (ARS) which is owned by Service Master, Inc., the parent company of Defendant. The Contractors who report to Defendant have a built-in incentive to assist in the efforts of Defendant to deny claims. High denial rates increase Defendant’s agents’ and contractors’ chances of obtaining more business from Defendant, and decrease their chances of being placed on Defendant’s “VOID” list. Defendant tracks denial rates of claims for each of its Contractors, and the Contractors who do not meet Defendant’s goals with regard to its accepted rate of denial of consumer claims are dismissed or “VOIDED.” ARS, the sister company of AHS, consistently maintains the highest denial rates, and consistently enjoys the highest level of referrals

from Defendant. Defendant maintains purported "independent" contractors who will support their program of denial, not those who will advocate for or support the consumer or who will be fair or impartial. In many instances, these contractors/agents fail to make proper repairs causing further damage to consumers' appliances and/or systems.

9.12 The Defendant further represents that the home warranty contract covers plumbing repairs, when in fact, there is no significant plumbing repair that is covered by the contract.

X. CAUSE OF ACTION

Texas Deceptive Trade Practice Act ("DTPA")

10.1 Plaintiff hereby incorporates the preceding paragraphs above.

10.2 Plaintiff alleges that Defendant has in the course of trade and commerce engaged in false, misleading or deceptive acts and practices declared unlawful in §17.46(a) and (b) of the DTPA.

Such acts include:

- A. Engaging in false, misleading or deceptive acts or practices in the conduct of trade or commerce, in violation of §17.46(a) of the DTPA;
- B. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, in violation of §17.46(b)(2) of the DTPA;
- C. Causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another, in violation of §17.46(b)(3) of the DTPA;
- D. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have, in violation of §17.46(b)(5) of the DTPA;
- E. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another, in violation of § 17.46(b)(7);
- F. Advertising goods or services with the intent not to sell them as advertised, in violation of §17.46(b)(9) of the DTPA;
- G. Representing that an agreement confers or involves rights, remedies, or

obligations which it does not have or involve, or which are prohibited by law in violation of §17.46(b)(12) of the DTPA;

- H. Knowingly making false, or misleading statements of fact concerning the need for parts, replacement or repair service, in violation of § 17.46(b)(13);
- I. Representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, in violation of § 17.46(b)(20);
- J. Failing to disclose information concerning goods or services which was known at the time of the transaction with the intent to induce the consumer into a transaction he or she would not have otherwise entered into, in violation of §17.46(b)(24) of the DTPA.

XI. TRIAL BY JURY

11.1 Plaintiff herein requests a jury trial and tenders the jury fee to the Harris County District Clerk's office pursuant to TEX. R. CIV. P. 216 and TEX. GOV'T CODE ANN. §51.604.

XII. APPLICATION FOR PERMANENT INJUNCTION

12.1 Because Defendant has engaged in the unlawful acts and practices described above, Defendant has violated and will continue to violate the law as alleged in this Petition. Unless restrained by this Honorable court, Defendant will continue to violate the laws of the STATE OF TEXAS and cause immediate, irreparable injury, loss and damage to the State of Texas and to the general public. Therefore Plaintiff requests a Permanent Injunction as indicated below.

XIII. PRAYER

13.1 WHEREFORE, Plaintiff prays that Defendant be cited according to law to appear and answer herein; and upon notice and hearing a Permanent Injunction be issued, restraining and enjoining Defendant, Defendant's agents, servants, employees and attorneys and any other person in active concert or participation with Defendant from engaging in the following acts or practices:

1. Offering cash in lieu of replacement, when the cash offered is:
 - A. At the sole determination of AHS; and
 - B. Less than an amount at which the Consumer can replace the appliance or system with the same or equivalent make and/or model;
2. Charging an administrative/cancellation fee should the Consumer decide to

cancel the contract, unless the cancellation is beyond the review period, and the consumer is given a full thirty days with the policy in hand to review the policy, and there is notice on the cover in conspicuous language that the consumer has only 30 days from date of receipt to cancel the contract without administrative fees being accessed.

3. Representing that its home warranty contract covers plumbing repairs, when in fact, there is no significant plumbing repair that is covered by the contract;
4. Denying coverage based on failure to properly maintain an appliance or system when the warranty promises coverage regardless of age, make or model, as long as the appliance is in "working order at the time of the purchase of the policy" unless Defendant conducts a pre-contract inspection and specifically excludes the appliance from the warranty;
5. Representing that a home warranty contract provides for repair or replacement of covered appliances or systems unless Defendant pre-inspects such appliances and systems and certifies that they are covered by the warranty prior to accepting premiums for coverage;
6. Representing that Defendant's contractors are independent contractors, when, in fact AHS uses American Residential Services (ARS) which is owned by Service Master, Inc., the parent company of American Home Shield;
7. Representing that its home warranty contract provides for replacement of heating and air-conditioning units with like kind and quality;
8. Failing to honor its representations and warranties to consumers relating to the repair and replacement of covered items under its agreement with consumers.

XIV. REQUEST FOR FINDINGS OF ACTUAL FRAUD AND FALSE REPRESENTATION

14.1 The jury should make findings at the conclusion of this case that the Defendant engaged in actual fraud and false representation in that Defendant has made repeated and materially

false representations to the public concerning the benefits and coverage of their product, which were known to be false when made. Such false representations were made with the intention that they be acted upon by the parties to whom the misrepresentations were made. Reliance upon these false representations has resulted in injury to consumers in the State of Texas.

14.2 In addition, Plaintiff, STATE OF TEXAS respectfully prays that this Court will:

- A. Adjudge against Defendant civil penalties in favor of Plaintiff STATE OF TEXAS in the amount of Twenty-Thousand Dollars (\$20,000) for each such violation of the DTPA, pursuant to §17.47(c)(1) of the DTPA;
- B. Adjudge against Defendant civil penalties in favor of Plaintiff STATE OF TEXAS in the amount of Two-Hundred Fifty-Thousand Dollars (\$250,000) for each act or practice which was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older when the act or practice occurred pursuant to §17.47(c)(2) of the DTPA;
- C. Order Defendant to pay Plaintiff for their attorney fees, investigative costs, and costs of court pursuant to TEX. GOV'T CODE ANN. §402.006(c).
- D. Order Defendant to compensate identifiable persons for their actual damages or to restore to such persons property or money that may have been acquired by means of any unlawful act or practice;
- E. Plaintiff further prays that this Court grant all other relief to which the Plaintiff STATE OF TEXAS may show itself entitled.

DATED this 12 of April, 2006.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent to all parties or their attorneys of record by facsimile on this the 12th day of April, 2006 as follows:

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