

The Legal Landscape for Subscription Patrol and Restitution in Texas¹

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Abstract

We review the laws of Texas as they apply to a new business model: subscription patrol and restitution. It is unlikely that the business would be regulated as an insurance company, but would be regulated as a patrol/guard company and an investigation company. For criminal offenses by perpetrators, the business is subject to some mandatory involvement of government law enforcement, such as having duties to report certain crimes to the police and when using either the citizen arrest power or the privilege of preventing the consequences of theft. Further, there are limitations on private investigation of crime scenes, especially with regard to destruction of evidence and destructive analysis of corpses. Certifications, qualifications, fees, and taxation of the subject business model are summarized. Civil liability due to the novel practice of issuing *Notices of Refusal to Arbitrate* is addressed.

¹ Please do not quote this paper without permission from the corresponding author; it is a draft. Draft date: 08 March 2007. We are indebted to many individuals for comments and suggestions. The remaining errors are our own, of course. Thanks especially go to: Clay Conrad, Brian Drake, Jenifer Dreis, Nancy Fisher, John T. Floyd, Stephan Kinsella, and Mark Worman.

Introduction

Subscription-based patrol and restitution (SPR) services were suggested by Molinari², the Tannehills³, Rothbard⁴, and Friedman⁵. SPR services in this context are business models that tie in a single offering the goods of patrol, insurance against criminal losses, investigation services, and mediation or arbitration with perpetrators⁶. Alternative arrangements have been suggested by Barnett⁷ and Murphy⁸. Criticism has come from Nozick⁹. Research by the authors has not uncovered any historical instance of a company trying to launch an SPR venture. This paper is meant to serve as a legal guide for one launching an SPR venture in Texas. Of course, the legal information in this paper does not constitute legal advice.¹⁰

The Business Model of SPR

Below is an offering from a fictional SPR company (SPRC):

Services:

1. Residential subscription-based patrol, \$35/mo.
2. First-responder for monitoring systems, guaranteed response time
3. Monthly report on area crimes for all subscribers
4. Premium patrol services:
 - a. Once-a-day house check while out of town, first ten days per year included with one-year subscription, \$2/day thereafter
 - b. Mail/newspaper and feed/water pets, first three days per year included with one-year subscription, \$5/day thereafter
 - c. Security inspection of house, free with one-year subscription
5. In the event a current subscriber becomes victim of a property crime:
 - a. Investigation of crime by SPRC
 - b. Attempt by SPRC to engage perpetrator in mediation or arbitration for restitution
 - c. Payment of settlement by SPRC to cover subscriber's losses, capped at the greater of total subscriptions paid in or homeowner's insurance deductible

² "De la production de la sécurité," in *Journal des Economistes* (Feb, 1849), pp. 277-90. Webbed at <http://praxeology.net/GM-PS.htm>

³ *The Market for Liberty* by Linda and Morris Tannehill, Fox and Wilkes, San Francisco, 1993(1970).

⁴ *Power and Market* by Murray Rothbard, Sheed Andrews and McMeel, Kansas City, 1977. Webbed as part of *Man, Economy, and State with Power and Market* at <http://www.mises.org/rothbard/mes.asp>

⁵ *The Machinery of Freedom* by David Friedman, Harper and Row, 1971.

⁶ For a fuller treatment of the business model under consideration, see *On The Viability Of Subscription Patrol And Restitution Services* by Gil Guillory and Brian Drake, March 2006, unpublished working paper webbed at <http://www.mises.org/journals/scholar/guillory2.pdf> and available from the corresponding author.

⁷ *The Structure of Liberty* by Randy Barnett, Oxford University Press, 1998.

⁸ *Chaos Theory: Two Essays on Market Anarchy* by Robert Murphy, private publisher, 2002. Also webbed at <http://www.mises.org/books/chaostheory.pdf>

⁹ *Anarchy, State, and Utopia* by Robert Nozick, Basic Books, New York, 1974.

¹⁰ Carrie Ann made me say that. -Gil

Patrol:

1. Mounted on quiet motorcycles (Honda Helix)
2. Based on community policing model:
 - a. Observation to deter crime
 - b. Active discussion with locals about potential hotspots and potential delinquents in the neighborhood
 - c. Referral of discovered problems to community service organizations
 - d. Particular focus on subscribers and their demands
 - e. Cull for information about crimes committed

Investigation:

1. Reliance on community policing intelligence
2. Preference for SPRC to be first on scene to collect evidence and statements
3. Working relationship with SPRC patrolmen
4. Assessment of losses by SPRC adjuster

Restitution:

1. Confrontation of suspects / parents of minor suspects with evidence
2. Explanation of procedure to suspects:
 - a. Attempt to engage suspect in mediation with victim
 - i. Successful result: contract between suspect and victim
 - b. Attempt to engage suspect in binding arbitration
 - i. Successful result: contract between suspect and victim
 - c. *Notice of Refusal to Arbitrate* sent to neighbors, friends, employer, insurance company, and others that associate with suspects.
 - i. Note: For a suspect to subscribe to SPRC services in the future, suspect must pay a premium for a term of 5 years
3. Payment by SPRC to victim:
 - a. Timing: After procedure above is complete, net 30 days
 - b. Amount:
 - i. Nothing, if mediation or arbitration with suspect is successful
 - ii. Actual losses net of other insurance, capped at total of subscriptions paid in
 - iii. Actual losses as assessed by SPRC adjuster, open to mediation or arbitration at subscriber's option

Hierarchy of Effort, Cost, and Applicable Law

Key SPRC functions can be broken into the following steps along the crime cycle. Costs shown are predicated upon a multitude of assumptions, are works in progress, and are presented in preliminary form merely for illustrative purposes. Overhead and other costs are not shown.

Function	Frequency per 1000 subscribers per year	Work hours required per 1000 subscribers per year	Average Cost to the company per subscriber per month
General and Premium Patrol ¹¹	All subscribers	3708	\$9.97
Pay Indemnity	70	NA	\$1.45 ¹²
Calls (alarm, alleged crime)	400	400	\$1.08
Mediations or Arbitrations	150 ¹³	NA	\$0.83
Investigations	300 ¹⁴	318	\$0.48
Reporting	All subscribers	NA	\$0.39
Successful Med/Arb	80 ¹⁵	NA	NA

As indicated in the table above, an SPRC's primary effort and cost lies in patrol functions, at about \$10 per month. Restitution costs are estimated to be about \$1.50 per month, paid directly to customers due to non-clearance of investigations. Calls are estimated to cost an SPRC about \$1.00 per month, and investigation, mediation/arbitration, and crime reporting are estimated to cost about \$1.70 per month combined.

Mediations and arbitrations cost an order of magnitude less than patrol. This decreasing scale of costs makes clear the absurdity of the notion that the private production of

¹¹ Patrol and call frequency and workhours are estimated from selected statistics in the Montgomery County (Texas) Sheriff's Office Patrol Division – 2005 Summary, *available at* <http://www.woodlandsonline.com/dbs/sheriff/files/Patrol%20Division/2005%20YTD%20Stats.pdf> (last visited February 15, 2007).

¹² Estimated from National Crime Victimization Survey data on theft and burglary severity for years 1998 through 2002.

¹³ Estimated from clearance rates in FBI Uniform Crime Reports.

¹⁴ Estimated from FBI Uniform Crime Reports for years 2000 through 2004. *See* <http://www.fbi.gov/ucr/ucr.htm> (last visited February 15, 2007).

¹⁵ The Conflict Resolution Center of Montgomery county reports a 65-70% success rate with their mediations. *See* <http://www.crcmc.org/faqs.html> (last visited February 15, 2007).

security is fundamentally the provision of law.¹⁶ This is not to dispute the *necessity* of the provision of dispute resolution. We merely dispute the *centrality* of dispute resolution to the production of security.

Similar to the hierarchy of functions listed above, laws apply to the SPR company in both daily business functions as well as less frequently. They are, in decreasing order of frequency of an SPRC’s activities:

Function	Relevant Laws	Estimated Cost per month per subscriber¹⁷
Labor Taxes	Worker’s Compensation State Unemployment Tax (SUTA) Federal Unemployment Tax (FUTA) Social Security Tax (employer portion)	NA \$0.07 Included with SUTA \$0.79
Business Taxes	Sales Taxes Personal Property Tax Franchise Tax (if incorporated) Federal Tax on Profits	\$3.01 \$0.10 \$0.47 \$3.33
Patrol and Investigation	Texas Occupations Code (§1702) Private Security Board Rules	\$0.02
Reporting Requirements and Legal Boundaries	Texas Penal Code Texas Code of Criminal Procedure Texas Civil Practice & Remedies Code United States Code Annotated	NA
Indemnification	Texas Insurance Code	NA

These laws will now be reviewed, including the costs and restrictions for SPRC’s.

Worker’s Compensation

Texas does not require employers to obtain worker’s compensation insurance for most lines of work. However, it is customary for guard/patrol service providers to offer worker’s compensation insurance. Because only taxes are considered here, the potential worker’s compensation expense to an SPRC is not estimated.

¹⁶ This view is advanced by Robert Nozick in his *Anarchy, State, and Utopia*; and by Randy Barnett in his excellent *The Structure of Liberty* wherein his fictional Rights Maintenance Organization is called “Blue Coif/Blue Gavel” and receives the most attention, whereas his discussion of “law enforcement” neither mentions its essential tie with insurance, nor recognizes the centrality of those services. The notion of the centrality of dispute resolution is also advanced by Stefan Molyneux in some of his popular articles, e.g., <http://www.lewrockwell.com/orig6/molyneux1.html>, and in many of his 500+ podcasts.

¹⁷ Costs listed here are estimated in the body of the text below.

Basis for Tax Analyses

The following data are used as a basis for tax analyses below. The SPRC serves 4500 subscribers paying \$35 per month. There are 9 patrol staff, paid \$28/hr. There is a general manager, paid \$50/hr. There are two additional office staff, paid \$15/hr. All employees work 2080 hours per year. The capital employed is 9 motorcycles plus patrol and office equipment with a book value of \$200,000. The balance sheet shows net assets of \$200,000. Gross profits are \$47,000 per month.

Unemployment Taxes

An SPRC must pay both state and federal unemployment taxes. Under state law, employers in Texas owe unemployment tax on the first \$9,000 of gross annual salary for each worker. For 2007, the minimum unemployment tax rate is 0.29% and the maximum rate is 7.70%. For the first 18 months in new businesses, new employers (i.e. people who do not merely acquire an existing business) pay state unemployment rates of 2.70% or the applicable industry average tax rate,¹⁸ whichever is higher. After the first 18 months of a new business and for each year thereafter, the state tax rate is based on a number of factors, including the amount of unemployment insurance benefits former employees receive. SUTA is thus $13 \times \$9000 \times 2.70\% = \3159 .

In addition to state unemployment taxes, an SPRC is subject to the Federal Unemployment Tax (FUTA), which is more or less¹⁹ levied on the first \$7,000 of gross annual salary for each worker at a rate of 0.8%. FUTA is thus $13 \times \$7000 \times 0.8\% = \728.00 .

State and federal unemployment taxes together cost \$3887, which equates to approximately \$0.07 per month per subscriber.

Employer's Social Security Tax

Under the Federal Insurance Contributions Act (FICA), an SPRC is subject to a withholding Social Security tax equal to 6.20% of the gross wage amount of each employee, up to but not exceeding the Social Security Wage Base (\$97,500 for 2007). The general manager earning \$50 per hour only marginally exceeds the cap on taxable income for social security, so the excess may be ignored.²⁰ Social Security taxes are thus $2080 \times (9 \times \$28 + 2 \times \$15 + \$50) \times 6.2\% = \$42,815$. This amount equates to \$0.79 per month per subscriber.

¹⁸ According to the Texas Workforce Commission (phone query on 07 Feb 07), NAICS code 5616 Investigation and Security Services has an industry average tax rate of 2.70%. Clarifying, most NAICS codes have a tax rate of 2.70%. There are only a few that have higher rates.

¹⁹ FUTA is paid according to calculations on IRS Form 940. The rules regarding FUTA are explained in the Instructions for Form 940 and other IRS publications. One complicating factor is that up to 5.4% of FUTA can be tax credited by a SUTA payment. Another factor is that if a position is vacated mid-year and then filled by a new employee, it must be remembered that FUTA is paid per employee, not per position. FUTA is a relatively small expense, so we do not dwell on the fine details.

²⁰ Also note that the Social Security Wage Base increases every year.

Sales Tax

Patrol, investigation, and information services in Texas are subject to a 6.25% state sales tax.²¹ Local taxing jurisdictions (such as cities, counties, special purpose districts, and transit authorities) may also impose up to 2% sales and use taxes. So an SPRC may be subject to a combined maximum sales tax rate of 8.25%. A Texas Sales and Use tax permit must be obtained by the SPRC, since it will be a business engaged in selling taxable services in Texas.

Although there is no fee for the Texas Sales and Use tax permit, a person who applies for a tax permit may be required to post a bond or security in an amount that is equal to the greater of \$100,000 or four times the amount of the average monthly tax liability.

The monthly tax liability will be $4500 \times \$35 \times 8.25\% = \$12,994$. Four times that is only \$51,975. If a bond must be posted, it will be in the amount of \$100,000. The cost of tying up that capital at 6.5% is \$6500 annually. The total annual cost of posting a bond and paying the sales taxes is \$162,425, equivalent to \$3.01 per month per subscriber.

Personal Property Tax

In addition to unemployment, Social Security, and sales taxes, an SPRC also may owe personal property tax. For tax purposes, “personal property” includes all property that is not real property. This includes all physical capital owned by a business, or all “tangible personal property.” If the business owns tangible personal property that is used to produce income, the property must be reported on a rendition form²² to the local county appraisal district, after January 1 and no later than March 31, each year. Business owners must report all inventories, equipment, and machinery. Then the county tax assessor-collector collects personal property taxes on behalf of the county, independent school district, and other special tax districts.

An SPRC located in The Woodlands, Texas in 2007 would be assessed a 0.471% tax by Montgomery County, 0.1338% by Montgomery County Hospital District, 1.7225% by Conroe ISD, and 0.32% by the Woodlands Metro Center, for a total local tax rate of 2.6473%.^{23,24}

The annual Personal Property Tax is thus $\$200,000 \times 2.6473\% = \5295 , which equates to \$0.10 per month per subscriber.

²¹ Texas Tax Publication 96-259.

²² Form 50-144 is available from the Texas Comptroller of Public Accounts at <http://www.cpa.state.tx.us/taxinfo/taxforms/02-forms.html>

²³ Rates are shown on the Montgomery County Tax Office website, <http://www.co.montgomery.tx.us/modx/index.php?q=taxrates>

²⁴ The Montgomery County Appraisal District (mca-d-tx.org) offers a GIS-based CD-ROM for \$100 showing the geographic extent of each tax district in the county. They also have a map room open to the public at no charge.

Franchise Tax

An SPRC in Texas, if it is a corporation or limited liability company, owes a state franchise tax on either net taxable capital or net taxable earned surplus, whichever is greater.²⁵

Net Taxable Capital

Taxable capital is a corporation's stated capital stock *plus* surplus. Surplus means the net assets of a corporation minus its stated capital stock. For a limited liability company, surplus means the net assets of the company minus its members' contributions. The tax rate on taxable capital is 0.25% per year of privilege period.²⁶ The net taxable capital would be very small, according to the assumptions listed in the Basis of Tax Analyses section above. Even if it were \$400,000, the annual tax owed would be $\$400,000 \times 0.25\% = \1000 . An SPRC is not a capital-intensive business, so we will see below that the calculation of franchise tax under Net Taxable Earned Surplus will be greater.

Net Taxable Earned Surplus

Earned surplus includes the corporation's federal net taxable income, plus compensation paid to officers and directors of the corporation. S corporations and corporations with fewer than 36 shareholders are generally exempt from the compensation add-back. It is assumed that the add-back of compensation to officers and directors would not apply. The tax rate on earned surplus is 4.5%.

So, the annual franchise tax by the net taxable earned surplus calculation would be $\$47,000 \times 12 \times 4.5\% = \$25,380$, which equates to \$0.47 per month per subscriber.²⁷

Federal Tax on Profits

In addition to the state and local taxes discussed, an SPRC also owes a federal tax²⁸ on profits. Corporations²⁹ generally owe 15% on the first \$50,000 of annual net profits, 25% on the next \$25,000, and 34% up to about \$10 million of annual net profits.

Under the assumptions of the analysis, annual federal taxes on profits amount to $\$50,000 \times 15\% + \$25,000 \times 25\% + \$489,000 \times 34\% = \$180,010$, which equates to \$3.33 per month per subscriber.

²⁵ Texas Franchise Tax is explained in Texas Tax Publication 96-114.

²⁶ Privilege period is the period of the year that the corporate charter is granted by the state. For the first year of operation, the privilege period would be a fraction of a year.

²⁷ There are complexities to the Franchise Tax. There are a number of tax credits available (such as for the hiring of handicapped persons) which could affect the tax due. Here, we assume no credits. Franchise Tax Credits are covered in Texas Tax Publications 96-1196, 96-766, and 96-686.

²⁸ This is submitted by filing IRS Form 1120.

²⁹ The form of business affects how federal tax is calculated, what is deductible, and whether the tax is levied upon the business or the owners. This is a bare sketch for order-of-magnitude calculation.

Tax Status of Indemnities

An interesting question is the tax status of indemnities paid from the company back to the subscriber. Many warranties are offered as money back guarantees. This is one way to offer the indemnity, and it seems particularly well-suited to a start-up SPRC. First, it allows the reserve fund to grow organically, with caps on indemnities growing with each subscription payment. Second, it discourages subscription lapses. If the indemnity is, in fact, a money-back transaction, then the taxes for that transaction are nullified by their payment. However, this is not a very rich mine for digging since indemnities comprise only \$1.45 per month per subscriber, and the sales taxes accruing to that are on the order of \$0.12 per month per subscriber, meaning that if taxes were nullified on all indemnities paid, the SPRC would save only \$540 annually.

Patrol and Investigation Law

Brief History

The Texas Department of Public Safety Private Security Board (PSB) was created in 1969 to license and regulate the investigations and security industry in Texas. Carl Parker, former Representative of Port Arthur, introduced the legislation which created the Board.³⁰ Legislators passed this legislation the year Parker introduced it, after attempts to pass similar bills had been made by Charles Whitfield, Jr. in 1959³¹ and Sam Murphy and Ralph Hall in 1967.³² When the Texas Board was created, ten other states had already enacted similar programs,³³ though Parker claims he wrote his legislation de novo, with no model from another state or agency.³⁴

Basic Requirements

To own, manage or be employed by a licensed private security company in Texas, a person must:

- be at least 18 years of age;
- not have been arrested, charged indicted, entered into any pre-trial intervention, or convicted of any Class A misdemeanor or felony unless a full pardon has been granted;
- not have been arrested, charged, indicted, entered into any pre-trial intervention, or convicted of any Class B misdemeanor within the last five years;
- be mentally competent;
- not be alcohol or drug dependent; and
- if in the Armed Services, must have been Honorably Discharged.³⁵

³⁰ *Accomplishments of the 61st Legislature – Regular Session*, Texas Legislative Council. Webbed at <http://www.lrl.state.tx.us/legis/summaries61.html>

³¹ “House Measure Would Keep An Eye on ‘Private Eyes’”, Dallas News, 11 March 1959.

³² Email correspondence with Nancy Z. Fisher of the Texas Legislative Research Library, 07 Feb 07.

³³ “Bill to Regulate Undercover Men Is Under Study”, Houston Chronicle, 18 February 1969.

³⁴ Phone interview with Carl Parker, 07 Feb 07.

³⁵ Texas Occupations Code, Title 10, Chapter 1702.

Before licensing people to work at private security companies, the PSB checks the criminal history of all potential private security workers. For this purpose, potential employees, managers, and owners must submit classifiable fingerprints to the PSB. The PSB reviews all evidence of criminal history. If the criminal history is of a prohibitive nature, the PSB immediately denies a license and the person may not work in private security unless and until he meets the PSB's requirements for licensure.

In addition to the requirements above, the manager of a guard or investigation company (i.e., the person responsible for all the activities of a licensed private security company) must also:

- have three years of investigative experience or a bachelors degree in criminal justice for investigations company license;
- have two consecutive years of legally acceptable experience in the guard company business; and
- pass a two-hundred-question examination administered by the PSB

Licensed security companies must maintain an effective certificate of proof of liability insurance on file with the PSB. If a company's insurance expires or is cancelled, their license is immediately suspended and they must cease operation until all insurance requirements are met and the license is properly reinstated.

Guard company employees must be uniformed, and the uniform designs must meet particular standards of wording and visibility, and be approved and on file with the Private Security Board.

Training and Testing

To become licensed as a security officer, manager, or investigator, the individual must undergo training. Levels 1 and 2 are offered on the PSB website at no charge. Levels 3 and 4 are given by certified private companies. The management exam is administered by the PSB.

Training Level	Required for	Topics Covered	Cost
Level 1	all registrants except alarm installers, alarm salespersons, owners, officers, partners and shareholders	Introduction, Professionalism, Leadership, Safety, Registrants, Commissioned Security Officers, Licensees, Field Note Taking And Report Writing, The Bureau	None ³⁶
Level 2	noncommissioned security officers, commissioned security officers and personal protection officers	The Responsibilities of the Security Officer, Power to Arrest, Relations with Local Police, Observation and Report Writing, Authority to Question, The Security Officer's Legal Responsibilities and Liabilities, Factors to Consider Before Making an Arrest, Apprehensible Offenses, Private Person's Arrest, Making an Arrest, After the Arrest	None

³⁶ Training Levels 1 and 2 are available on the DPS website, and Gil Guillory has taken both of these courses and passed both exams. Certification of these results is not possible unless the individual is employed by a licensed guard company.

Training Level	Required for	Topics Covered	Cost
Level 3	commissioned security officers ³⁷ and personal protection officers	The powers of the commission, non-commissioned officers, standards of conduct, authority to arrest, and the use of force. Relevant sections of the Texas statutes are reviewed followed by a review of field note taking and writing reports. Additional topics include: response to emergency situations, the public's perception of security officers, conflict resolution, radio procedure and course concludes with firearm training.	\$150/person ³⁸
Level 4	personal protection officers ³⁹	how to protect the principal when alone or as a team, threat avoidance techniques, how to plan and scout escape routes, defensive tactics, transportation tips, and the importance of proper planning	\$240/person
Manager Training	manager	The Manager Examination is administered by the PSB at its office in Austin, Texas. Examinations are scheduled individually in conjunction with a new company license application or to replace the Manager of an existing company. The study materials for this exam are Texas Occupations Code Chapter 1702 and the Private Security Bureau Rules.	Included in manager application fee, however, a preparatory course is recommended at a cost of \$610/person

³⁷ Commissioned Security Officers are authorized by the Private Security Board to carry a firearm.

³⁸ Prices for Level 3 and Level 4 training and manager prep course are those offered by National Security Academy, 2600 South Loop West, Suite 210, Houston, Texas, 77054. www.nsa2.com

³⁹ This training is not required for the business model under consideration.

Licensing Costs

An SPRC would be classified as a Class C company. The company licensing fees are:

	Initial cost	Yearly cost
Class C license	\$556	\$556
Owner, officer, partner, or shareholder registration	\$55/person	\$55/person
Commissioned Security Officer, Manager, or Investigator registration	\$55/person	\$55/person
FBI fingerprint check	\$25/person	NA

Assuming a staff of 9 patrol guards and 1 manager, and 1 non-working owner (office staff need not be registered) serve 4500 customers, then the annual costs are \$1161, equal to \$0.02 per month per subscriber. Initial costs are somewhat greater, \$1436 in licensing costs, due to the fingerprint charges; plus \$150/patrol guard and \$760/manager.

Investigation, Detention, and Arrest

According to the Laws of the State of Texas, certain crimes must be reported to the state, and for certain crimes the state has a positive right to first access to a crime scene.

Crime	SPR can legally investigate?	Insurance company requires police report?	Duty to report to state?
Vandalism	Yes	Deductible	No
Theft	Yes	Deductible	No
Motor vehicle theft	Yes	Yes	No
Robbery	Yes	Deductible	No
Burglary of motor vehicle	Yes	Deductible	No
Burglary of Habitation	Yes	Deductible	No
Aggravated Assault	Yes	NA	Standard
Battery	Yes	NA	Standard
Rape	Yes	NA	Standard
Child Abuse	Yes	NA	Yes ⁴⁰
Murder	Yes ⁴¹	Yes	Yes ⁴²
Arson	Yes	Yes	No
“Deductible” means if the insured wishes to make a claim that is greater than the deductible on his policy, then the insurance company will most likely require a police report. “Standard” means that a duty to report exists if a reasonable person would believe that serious bodily injury or death may have resulted.			

Investigation

Generally, investigative activities are limited by only a few statutory provisions. A person commits an offense⁴³ if the person, knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of, or official proceeding related to, the offense. Proper investigation will not expose the SPRC to liability under this provision, which is a felony of the third degree. As noted in footnote 40, it is also a crime to disturb, damage, dissect, in whole or in part, or carry away a human corpse. Therefore, state medical examiners must have first access of this sort.

⁴⁰ Subchapter B, Chapter 261 of the Texas Family Code

⁴¹ The only caveat is that it is a crime in Texas to disturb, damage, dissect, in whole or in part, or carry away a human corpse. Tex. Penal Code § 42.08

⁴² Texas Penal Code § 38.171 requires reporting if the citizen “observes the commission of a felony under circumstances in which a reasonable person would believe that an offense had been committed in which serious bodily injury or death may have resulted”.

⁴³ Texas Penal Code § 37.09 (d) (1)

Citizen Arrest

Under Texas State Law, a licensed security officer, with or without a commission to carry a firearm, has rights equal to any other private person in the state. A security officer cannot impersonate a government agent. A private person in Texas can arrest a suspect when the offense is committed in view, and if the offense is *malum in se*.⁴⁴ However, an arrest must involve the state. If a person arrests a suspect,⁴⁵ that person must expeditiously deliver up the suspect to either a magistrate or peace officer. Those government agents, in turn, have positive duties under criminal law. In particular, the police must take custody of the suspect. The police may choose to simply cite and release the suspect pending a hearing, or release the suspect with no citation. This often happens in the case of private security guards and theft by minors. Generally, police are satisfied with private solutions to offenses.⁴⁶

Detention Under the Privilege to Investigate Theft

Texas Civil Practice Chapter 124 “privilege to investigate theft” states that a person who reasonably believes that another has stolen or is attempting to steal property is privileged to detain that person in a reasonable manner and for a reasonable time to investigate the ownership of the property. A person who voluntarily responds to questioning and is free to go at any time is detained. If a person is being detained, it is legal to “frisk” that person for safety.

Preventing the Consequences of Theft

Detention is similar to a provision in Article 18.16 of the Code of Criminal Procedure titled “preventing the consequences of theft” which states that all persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. The power under “preventing the consequences of theft” is broader than the citizen arrest power, since the offense need not have been witnessed.

⁴⁴ Strictly speaking, Article 14.01 of the Code of Criminal Procedure states that the offense must be either classified as a felony or as an offense against the public peace. These include felonies such as aggravated assault, arson, theft, burglary, kidnapping, robbery, sexual assault, manslaughter, murder; and misdemeanors such as criminal mischief, criminal trespass, indecent exposure, or disorderly conduct. Disorderly conduct includes offenses such as displaying or discharging a firearm, fighting with another in a public place, or making unreasonable noises in a public place or near a private residence that he has no right to occupy.

⁴⁵ To be lawful, an arrest must involve telling the person he is under arrest, the charges, and by what authority the arrest is made. Once the arrest is made, it is unlawful to discharge him; only a government agent can do that.

⁴⁶ This opinion was voiced by a Texas criminal defense attorney, and is consonant with our experience.

Criminal Liability, Prosecutorial Discretion, and Agreements with CA/DA's

It may be assumed by some readers that the SPRC would like to avoid or eliminate criminal liability for a suspect as a carrot to induce him to settle the matter privately, and that by doing so, the SPRC increases its likelihood of obtaining restitution for its clients. However, there seems to be no way that an SPRC can contract away a suspect's criminal liability.

It *would* be legal for a CA or DA⁴⁷ to make a contract with an SPRC to agree not to prosecute certain offenses, provided that the victim, a client of the SPRC, is satisfied with either the mediation agreement or arbitration agreement facilitated by the SPRC.⁴⁸ Lawyers are not prohibited from using criminal prosecution as leverage in a civil case,⁴⁹ so this does not prevent the execution of such an agreement. However, prosecutorial discretion prevents such an agreement from being enforceable.

The term "prosecutorial discretion" is descriptive of the fact that District Attorneys and County Attorneys in Texas are agents of the State, and are free to act within very broad limits. For instance, the positive, primary duty "of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done"⁵⁰ can be used as an argument to violate an agreement between a CA/DA and an SPRC.⁵¹

All this said, the reality is that CA/DA's are generally people of good will, and they are also typically overloaded.⁵² There should be no practical problems in the private

⁴⁷ The elective offices of District Attorney and County Attorney are created by the Texas Constitution, Article 5, Section 2. The term of office is four years.

⁴⁸ An interesting aside is that in the absence of such an agreement with the CA/DA, a mediation or arbitration agreement between a suspect and victim would be considered tampering with a witness if charges have been filed by a CA/DA. Texas Penal Code §36.05 (c) states that it is a defense to prosecution of tampering if the benefit received is reasonable restitution for damages suffered by the complaining witness as a result of the offense; *and* it is a result of an agreement negotiated with the assistance or acquiescence of an attorney for the state who represented the state in the case. So, such an agreement between the SPRC and the CA/DA would limit legal exposure to tampering charges if nothing else, in this special circumstance.

⁴⁹ See *When Lawyers Threaten Criminal Prosecution in a Civil Case* by Kenneth L. Jorgensen, *Minnesota Lawyer* (April 24, 1998), webbed at <http://www.courts.state.mn.us/lprb/fc042498.html> Jorgensen points out that DR 7-105(A) of the former Code of Professional Responsibility stated: "A lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter." However, the DR 7-105(A) was deliberately omitted from the ABA Model Rules of Professional Conduct when they were adopted in 1981, and ABA Formal Ethics Opinion 92-363 (7/6/92) states emphatically: "[The Rules of Professional Conduct] do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process." These are precisely the facts under consideration here, where the tort and crime would be for the same action.

⁵⁰ Texas Code Of Criminal Procedure, Chapter 2, Article 2.01

⁵¹ This is analogous to the fact that a contract between a legislator and a citizen for the legislator to adhere to certain actions while occupying state office is not enforceable. The struggle over legislative term limits is illustrative.

⁵² This is a systemic problem whose cause is the provision of a free good.

settlement of meat-and-potatoes property crime cases such as vandalism, theft, and burglary. Formal agreements between the SPRC and CA/DA's are not likely to be enforceable, and their value as instruments to limit legal exposure to a case of tampering is minimal. Therefore, agreements of this nature are possible but not recommended.

Attorney General, Special Prosecutors, Federal Prosecutors

There are other prosecutors at the state level, as well as prosecutors from the US Department of Justice. The involvement of these prosecutors in property crimes is rare. Even offenses such as aggravated assault, battery, rape, murder, and arson are typically handled by the CA/DA. Some treatment of federal officers is considered in a later section titled *Outer Limits of Investigation*.

Encouraging Mediation or Arbitration

Besides an agreement with a CA/DA, there are two other things that the SPR could do to improve the chance that the suspect will engage in mediation or arbitration.

First, it could offer to keep things quiet. In theory, what the prosecutor does not know, he cannot prosecute. This is not a particularly good solution, though. The community at large and the SPRC's customers benefit from having high-quality and complete crime data, and it is in direct conflict with the second method listed below. Further, the SPRC can only obtain crime data missing from its data set by cooperating openly with local governmental authorities.

Second, as specified in the outline of the business model at the beginning of the paper, a *Notice of Refusal to Arbitrate* (NRA) could be communicated to many parties. This may increase the chance that government officials learn of the crime, and its contents point to evidence for prosecutors to use against the suspect in criminal court.⁵³ However, this is the preferred method of improving the chances that the suspect will engage in mediation or arbitration. It does not rely upon state action or inaction, and has the potential to grow in importance as the business grows. Once enough NRA's per year are issued, actuaries at insurance companies may consider using them to assess whether insureds with NRA's are in a different risk class than those without NRA's.

Harassment and Notices of Refusal to Arbitrate

Some might wonder whether sending a *Notice of Refusal to Arbitrate* to a person's employer, neighbors, insurance companies, and associates would constitute the crime of harassment. This does not seem to be the case.

⁵³ Note that SPRC investigation reports, unlike mediation and arbitration proceedings, are not privileged communications, and are therefore subject to subpoena. Furthermore, the SPRC will have a Policy of Transparency that allows for public inspection of these documents.

Under the Texas Finance Code,⁵⁴ harassment in the context of debt collection is defined. Examples of proscribed behaviors are: using profane language, placing telephone calls without disclosing the name of the individual making the call and with the intent to annoy, causing a person to incur a long distance telephone toll and causing a telephone to ring repeatedly or continuously. These sorts of things would not be done, and clearly do not apply.

Under the Texas Penal Code,⁵⁵ harassment is a class B misdemeanor and is defined in a manner similar to stalking.⁵⁶ initiates communication and in the course of the communication is obscene; threatens to inflict bodily injury; causes the telephone of another to ring repeatedly; sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another. It is clear that sending an NRA would not be harassment under the Penal code. Note that this last provision refers to electronic communications, which by the code includes faxes, but it applies only to repeated communications.

Under the Texas Civil Practice and Remedies Code,⁵⁷ harassing behavior is defined as “conduct by the defendant directed specifically toward the claimant, including following the claimant, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the claimant.” This is the broadest definition of harassment in all Texas statutes, and it would seem that sending an NRA would be reasonably likely to annoy, alarm, or embarrass a person. However, this definition, in the Civil Practice and Remedies Code, has to do with filing frivolous pleadings and motions (§ 10.001), not with the definition seen in the Penal Code.

Sending a written *Notice of Refusal to Arbitrate* via mail to a suspect’s employer(s), neighbors, insurance companies, and other associates, would not be considered harassment under the laws of Texas. Sending NRA’s more than once to the same person via electronic means might be; but even this could only be harassment of the receiving party, not the suspect.

Civil Liability and Notices of Refusal to Arbitrate⁵⁸

Most of the elements of this business model are already practiced by businesses: patrol, investigation, mediation, arbitration, reporting crimes. The one innovative feature is use of NRA’s. Like all innovative practices, it presents certain risks to the business that first tries it. One of those risks is that the subject person of an NRA may sue the company.

⁵⁴ Texas Finance Code, Chapter 392 treats of Debt Collection.

⁵⁵ Texas Penal Code § 42.07 defines harassment.

⁵⁶ This is a highly edited definition, not verbatim from the code.

⁵⁷ Texas Civil Practice and Remedies Code § 85.001 lists definitions.

⁵⁸ Information for this section was drawn from a variety of sources, including:

<http://en.wikipedia.org/wiki/Tort> and related entries on wikipedia; *Business Law: Negligence and Torts*, Frank B. Cross, The Teaching Company, 1994; *Torts in a Nutshell*, Edward J. Kionka, West Publishing Company; 2nd ed., 1999; *Essentials of Torts*, William P. Statsky, West Legal Studies, 2001; and *Introduction to the Law and the Legal Process* by Bernard Cataldo, Frederick Kempin, Jr., John Stockton, and Charles Weber, John Wiley & Sons, Third Edition, 1980.

This section outlines some of the torts the business may be open to because of this practice, and gives recommendations to minimize legal exposure.

Infliction of Emotional Distress. The elements of this tort include extreme and outrageous conduct, intent, causation, and that the plaintiff must actually suffer emotional distress. The weak part of the attack is extreme and outrageous conduct. General factors that will persuade that the conduct was extreme and outrageous are: (1) there was a pattern of conduct, not just an isolated incident; (2) the plaintiff was vulnerable and the defendant knew it; (3) the defendant was in a position of power; (4) racial epithets were used; and (5) the defendant owed the plaintiff a fiduciary duty. Only point 1 could be true for the practice of the NRA. However, the conduct must be atrocious, totally intolerable, and shocking behavior. This civil liability seems to be wholly dependent upon the reasonable understanding of whether the practice is extreme and outrageous, so it is the most difficult to mitigate. On the other hand, the authors do not regard this practice to be anywhere near the standards of extreme and outrageous conduct.

Defamation (Libel). The elements of this tort include that the plaintiff must prove that the information was published, the defendant was directly or indirectly identified, the remarks were defamatory towards the plaintiff's reputation, the published information is false, and that the defendant is at fault. The weakest part of this argument is the fact that the NRA will be true. Defenses also include substantial truth and statements made in a good faith and with reasonable belief that they were true. This liability seems to be very low.

Invasion of privacy (Public Disclosure of Private Facts). Usually associated with public disclosure, invasion of privacy can apply to a limited dissemination of information. Elements of this tort include that it is true, offensive to a reasonable person, not of concern to public, and so intimate that publication outrages the public's sense of decency. It seems that this attack is weak, since such information is clearly a concern to the recipient of the information. Again, there is the subjective standard of "offensive to a reasonable person". Defenses include newsworthiness, which in this context is the question of interestedness, and here it is clear that the recipient of an NRA would be interested in the news. Other defenses include consent; qualified privilege; does not outrage community notions of decency; and the event took place in public. This last defense suggests an interesting strategy for the business. It could preface interactions with the suspect (verbal) or state on communications (written) that the business's communications are open to inspection by the public because of its Policy of Transparency,⁵⁹ and therefore communications with the business should be considered to be events that are transpiring in public. With this policy in place, the risk of civil liability accruing to this tort should be reduced.

Interference with Contract or Business Relations. Elements of this tort include: the existence of a contractual relationship or beneficial business relationship between two parties (here, the suspect and, say, his employer or insurance company); knowledge of

⁵⁹ For a defense of this policy, see *A Sketch of the Visionary Libertarian Security Company* by Gil Guillory webbed at <http://lewrockwell.com/orig3/guillory9.html>.

that relationship by a third party (here, the SPRC); intent of the third party to induce a party to the relationship to breach the relationship; lack of any privilege on the part of the third party to induce such a breach; and damage to the party against whom the breach occurs. This could be a major source of civil liability if not carefully controlled. If issuing an NRA to the suspect's employer causes the employer to fire the suspect or in any way alter his business relationship, there may be action here. The prime defense to be made is that the interest of the SPRC and the suspect are aligned, since the SPRC has unilaterally obliged itself in a suretyship with the SPRC as the surety and the suspect as the principal. These facts suggest the defense that breach is not induced. Other possible defenses include invoking a privilege to protect the interest of the SPRC or someone else, either the subscriber/victim or the suspect(!). To make this defense strong, thereby lessening the risk of liability under this tort, and to make clear the SPRC's intentions, the NRA should be worded not just as a notice, but as a request to persuade the suspect to engage in binding arbitration.

Breach of confidence. This tort is when private information conveyed in confidence is sent to a third party. This underlines the importance of the Policy of Transparency mentioned above, to include information in the investigation report, such as interviews with witnesses and suspects.

Conclusions. To limit civil liability against the innovative practice of issuing *Notices of Refusal to Arbitrate*, the SPRC should practice a Policy of Transparency in everything it does and word the NRA's not as mere notices, but as clear requests to the recipients to persuade the suspect to engage in binding arbitration. The Policy of Transparency means that in every communication from commencement of investigation to commencement of mediation or arbitration, the SPRC must state that the business's communications are open to inspection by the public because of its Policy of Transparency, and therefore communications with the business should be considered to be events that are taking place in public.

Outer Limits of Investigation

While an SPRC will undoubtedly work to maintain the most cooperative and amicable relationship with all governmental offices, in this section we consider what boundaries exist in the extreme cases, and the implications of the unlikely involvement of federal officers.

SPRC's will find it advantageous to investigate a crime scene before state or federal officers enter the premises. First access to evidence could prove instrumental in identifying and locating the perpetrator and controlling fraudulent claims. SPRC's may therefore desire to delay or interrupt government investigations following a crime. SPRC's will therefore require that homeowners endeavor to give SPR agents first access to the premises as a condition of receiving indemnities. Under most circumstances, the law criminalizes interference with state and federal investigations.

Government Access Rights

Federal officers may not search a private dwelling without a warrant unless (1) to arrest a person who has or will commit a federal offense, or (2) the occupant of the premises consents.⁶⁰ So if an SPRC subscriber is home when a federal officer attempts to investigate the crime scene, the homeowner may simply refuse the officer entry. As long as entry is not required to arrest the perpetrator, federal officers generally must respect the owner's privacy.

Like federal officers, state officers have a duty to "interfere without warrant to prevent or suppress crime."⁶¹ Thus, state officers may access a crime scene, over the protests of an owner or occupant, if access is necessary to prevent or suppress crime.

SPRC Access Rights

Under Texas law, a person may not interrupt, disrupt, impede, or otherwise interfere, in a non-verbal manner, with a peace officer who is performing his legally authorized duties.⁶² A person may be guilty of interference even when he interferes only negligently (i.e. carelessly) and not with the intent to do so.⁶³

As previously discussed, Texas peace officers have a duty to interfere to prevent or suppress crime. Neither an SPRC subscriber nor an SPRC can legally impede an officer's investigation at a crime scene if the investigation is necessary to prevent or suppress crime.⁶⁴ But if entry by the officer is not necessary to prevent or suppress crime, the officer does not have a right to enter a crime scene without either a search warrant or the owner's permission.

Search Warrants

Under state law, peace officers have a duty to search and seize property as directed by a search warrant.⁶⁵ Interfering with an officer's execution of a search warrant is a state crime, just as it is a crime to interfere with any duty of a peace officer including the duty to prevent or suppress crime.⁶⁶

⁶⁰ 18 U.S.C.A. § 2236. The penalty for violation by a federal officer is fine, imprisonment of not more than one year, or both.

⁶¹ Tex. Code Crim. Proc., Art. 2.13.

⁶² Tex. Penal Code, Tit. 8, § 38.15. To violate this statute, a person must act with criminal negligence, *id.*, meaning he was or should have been reasonably aware of a substantial and unjustifiable risk under the circumstances that his actions would interfere with a peace officer. *See id.* § 6.03.

⁶³ *Carney v. State*, 31 S.W.3d 392, 395 (Tex. App. 2000); *see also* Tex. Penal Code, § 6.03(d) (defining criminal negligence as when a person ought to be aware of a substantial and unjustifiable risk under the circumstances that the result will occur).

⁶⁴ Note that this is a very strong standard. Only in the cases of imminent danger or with evidence that serial crimes were underway would this standard even apply.

⁶⁵ Tex. Code Crim. Proc., § 18.01(a).

⁶⁶ *See* Tex. Penal Code, § 38.15 (criminalizing interference with officer's duty).

It is also a federal crime to forcibly resist or interfere with any person authorized to execute a search warrant.⁶⁷ In fact, under federal law, an officer with a warrant to search a house may break open a door or window if he is refused entry.⁶⁸

Further, when an officer is authorized to search for or seize property, a person may not knowingly transfer or damage the property for the purpose of preventing or impairing the government's lawful authority to seize such property.⁶⁹ Therefore, not only is it a crime for a homeowner or SPRC agent to deny access or interfere with an officer's crime scene investigation, but it is also likely a crime to hide evidence from an officer with a warrant to seize it.⁷⁰

Thus, neither a homeowner nor SPRC may legally delay or impede an officer with a search warrant or hide or remove any evidence subject to seizure under the warrant. Yet warrants require time, effort, and procedure to obtain.

Only a judge may issue a search warrant.⁷¹ Under federal law, a judge issues a warrant only if there is "probable cause" to search property for evidence of a crime.⁷² For a warrant under Texas law, there must be sufficient facts to establish probable cause that (1) a specific offense has been committed, (2) the specifically described property to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property constituting the evidence is located at the particular place to be searched.⁷³

Duty to Report Crimes

If a state or federal officer does not arrive to investigate a crime scene, neither the subscriber nor the SPRC generally has a duty to contact government authorities. In other words, there is generally no duty to report a crime. There are several exceptions, such as when child abuse has occurred or when serious bodily injury or death has resulted from a felony.⁷⁴ But aside from these specific instances, the subscriber and SPRC may choose to proceed with their business and without government involvement when officers are not present and there is no search warrant.

⁶⁷ 18 U.S.C.A.A. § 2231.

⁶⁸ 18 U.S.C.A.A. § 3109.

⁶⁹ 18 U.S.C.A. § 2232(a). The penalty for violation is a fine, imprisonment for not more than five years, or both.

⁷⁰ Particularly, it is a crime in Texas to disturb, damage, dissect, in whole or in part, or carry away a human corpse. Tex. Penal Code § 42.08. However, the original purpose of this law is most likely related to religious and/or public health reasons.

⁷¹ Tex. Code of Crim. Proc., § 18.01; Fed. R. Crim. Proc., § 14(b).

⁷² Fed. R. Crim. Proc., § 41(b)-(c).

⁷³ Tex. Code Crim. Proc., § 18.01(c).

⁷⁴ Tex. Fam. Code, § 261.101 (persons required to report child abuse); Tex. Penal Code, § 38.171 (failure to report felony).

Contracts to Refuse Government Access

Because there is generally no duty to report a crime to a government officer, and because a subscriber may often simply refuse entry to a government officer without a search warrant, an SPRC may wish to affirmatively instruct or encourage its subscriber *not* to contact an officer after a crime has been committed or to refuse entry to a warrantless officer. For example, the SPRC policy may specify that subscribers forfeit their indemnities, if any are owed, upon reporting a crime to the government when state or federal officers are not otherwise involved or aware of the crime, or when subscribers consent to search by an officer without a search warrant. Would such requirements constitute the crime of obstruction of justice by the SPRC? Apparently not.

Under federal law, obstruction of justice prohibits willful use of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any federal criminal statute to a federal criminal investigator.⁷⁵ The paradigm case of obstructing justice is a criminal threatening to harm an informant if the informant talks to a government investigator. The purpose of the statute, of course, is to protect potential informants from coercion or injury.⁷⁶ Yet the statute also serves “to keep unobstructed the ‘communication of information...to a criminal investigator.’”⁷⁷ Since the agreement would ante-date any federal investigation, SPRC would probably not be guilty of obstructing justice under federal law.

Under Texas state law, obstruction of justice requires a threat to harm another person “by an unlawful act.”⁷⁸ Refusing to provide indemnities is not an unlawful act, so threatening to withhold indemnities would not constitute obstruction of justice in Texas.

Regulation of Suretyship

The SPRC promises to partially assume⁷⁹ the financial burden of unspecified third parties to the subscriber in the event that a) a third party damages or steals the property of a subscriber, and b) EITHER the third party fails to be identified OR the identified third party defaults in his duty⁸⁰ to pay restitution to the subscriber. This promise is recognized under the law as a suretyship. Specifically, it is an offer to guaranty⁸¹ at a future time, since the guaranty is contingent upon, and comes into existence at the moment of, the commission of a civil wrong against the subscriber. Since it is subject to the Statute of

⁷⁵ 18 U.S.C.A. § 1510. The elements of obstruction of justice are that (1) there was a pending federal investigation of a violation of federal criminal law; and (2) there was a third person with information relating to such violation who conveyed or intended to convey the information to federal investigators. U.S. v. Williams, 470 F.2d 1339 (8th Cir. 1973).

⁷⁶ U.S. v. San Martin, 515 F.2d 317, 320 (5th Cir. 1975).

⁷⁷ U.S. v. Fraley, 538 F.2d 626 (4th Cir. 1976).

⁷⁸ Tex. Penal Code, § 36.06.

⁷⁹ There will be limits on the types of events covered, and caps on claim payments.

⁸⁰ This duty is contingent. The duty would be expressly stated in either a mediation contract or in the outcome of binding arbitration; or, failing that, in the judgment of a civil suit.

⁸¹ Traditionally a guaranty was distinguished from a surety in that the surety's liability was joint and primary with the principal, whereas the guaranty's liability was ancillary and derivative, but many jurisdictions do not recognize this distinction and we do not use the distinction here.

Frauds⁸², the suretyship is not enforceable unless it is in writing and signed by the guarantor (that is, the surety, the SPRC).

The Texas Insurance Code states that “the following acts in this state constitute the business of insurance in this state...making or proposing to make, as guarantor or surety, a guaranty or suretyship contract as a vocation and not merely incidental to another legitimate business or activity of the guarantor or surety”.⁸³ Since the suretyship portion of the SPRC model is a pure premium of about \$1.50 out of a \$35 monthly fee, there is prima facie evidence that this suretyship is merely incidental to the main business of patrol, investigation, and seeking restitution from perpetrators. A non-binding opinion confirming this interpretation was requested from the Texas Department of Insurance, but they do not issue opinions.^{84, 85}

If this interpretation of the Texas Insurance Code is incorrect, the filing fee for regulation as a property & casualty insurance company is \$1000, and turnaround of applications are about 60 days. But the most troubling feature of this regulation would be the minimum requirements of \$1 million in paid-in surplus and \$1 million in capital stock; and the statutory deposit requirement of \$50,000. These minima are not appropriate to this business model. There are ongoing fees associated with each required filing of paperwork to the TDI. Most likely, if this interpretation is incorrect, then a number of options are present: creation of new regulation that specifically exempts the business model from regulation as an insurance company, as are residential service contracts and service contracts, treated below; outsourcing of insurance activities and acting only as an agent of an insurance company; or, accept regulation as a P&C company, but negotiate a reasonable set of requirements for this business model.

It also appears to be the case that the SPR business model does not qualify as a “residential service contract”⁸⁶ or a “service contract”⁸⁷ as defined in the Texas Occupations Code. A residential service contract is defined⁸⁸ as an agreement under which, in exchange for a fee, a person undertakes for a specified period to maintain, repair, or replace all or any part of a structural component, an appliance, or an electrical, plumbing, heating, cooling, or air-conditioning system of a residential property. The SPRC will not maintain, repair, or replace these things. They will pay for damages to or theft of these things. A service contract is defined⁸⁹ as an agreement under which a

⁸² Texas Business & Commerce Code, Chapter 26 is the Statute of Frauds. Texas Business & Commerce Code § 26.01 (b)(2) states that the Statute of Fraud applies to “a promise by one person to answer for the debt, default, or miscarriage of another person”.

⁸³ Texas Insurance Code §101.051 (b)(2)

⁸⁴ The regulating body for insurance is the Texas Department of Insurance, phone 800-578-4677 (in Texas). See also <http://www.tdi.state.tx.us/>

⁸⁵ The authors would like to thank the Manager of Property and Casualty at TDI, Mark Worman, and TDI Program Attorney Cass Burton for their emails and telephone discussions on these matters.

⁸⁶ The regulating body for residential service contracts is the Texas Real Estate Commission; phone 800-250-8732. See also <http://www.trec.state.tx.us/index.asp>

⁸⁷ The regulating body for service contracts is the Texas Department of Licensing and Regulation; phone 800-803-9202. See also <http://www.license.state.tx.us/>

⁸⁸ Texas Occupations Code §1303.002 (5)

⁸⁹ Texas Occupations Code §1304.003 (2)

provider agrees to repair, replace, or maintain a product, or provide indemnification for the repair, replacement, or maintenance of a product, for operational or structural failure caused by a defect in materials or workmanship or by normal wear. The indemnification is against theft or damage from a third party, not against failure caused by defect in material or workmanship or by normal wear.

Conclusion

The Laws of Texas are amenable to the launch of a Subscription Patrol and Restitution Company. Taxes are much more burdensome than regulation. There is nothing that prevents indemnification against all crimes, though some reporting and investigation issues exist for crimes such as child abuse and those involving serious bodily injury or death. Market research and actuarial analysis will dictate which indemnifications are of highest value to the consumer, and which ones are profitable. Insurance regulation does not seem to apply. Civil liability concerns suggest the use of a policy of transparency and a specifically stated intention on the *Notice of Refusal to Arbitrate*.