

Date of Hearing: January 14, 2020

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1263 (Low) – As Amended January 6, 2020

SUBJECT: Contracts: consumer services: consumer complaints

SUMMARY: This bill would prohibit contracting for, or to propose to contract for, an agreement to not file a complaint with a licensing board or to participate in a license board's investigation into a licensee for a consumer service. Specifically, **this bill would:**

- 1) State that any waiver of the provisions of this section is contrary to public policy and is void and unenforceable.
- 2) Provide that violation of this section by a licensee shall constitute unprofessional conduct subject to discipline by the licensee's licensing board.
- 3) Define "consumer service" to mean any service which is obtained for use primarily for personal, family, or household purposes.
- 4) Define "licensing board" to mean any entity contained in Section 101 of the Business and Professions Code, the State Bar of California, the Department of Real Estate, or any other state agency that issues a license, certificate, or registration authorizing a person to engage in a business or profession.

EXISTING LAW:

- 1) Provides that certain contracts are unlawful if contrary to an express provision of law; contrary to the policy of an express law, though not expressly prohibited; or otherwise contrary to good morals. (Civ. Code Sec. 1667.)
- 2) Prohibits a contract or proposed contract for the sale or lease of consumer goods or services from including a provision waiving the consumer's right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services, and deems any waiver of that prohibition contrary to public policy and unenforceable. (Civ. Code Sec. 1670.8.)
- 3) Establishes the Department of Consumer Affairs (DCA) within the Business, Consumer Services, and Housing Agency. (Bus. & Prof. Code Sec. 100.)
- 4) Provides that the DCA is comprised of thirty-seven licensing boards, bureaus, committees, and commissions, each responsible for regulating various professionals. (Bus. & Prof. Code Sec. 101.)
- 5) Provides that all boards within the DCA are established for the purpose of ensuring that those private businesses and professions deemed to engage in activities which have potential impact upon the public health, safety, and welfare are adequately regulated in order to protect the people of California. (Bus. & Prof. Code Sec. 101.6.)

- 6) States that it is the duty of the Director of Consumer Affairs to receive complaints from consumers concerning violations of provisions of this code relating to businesses and professions licensed by any agency of the DCA. (Bus. & Prof. Code Sec. 325.)
- 7) Establishes the State Bar of California as the entity responsible for regulating legal professionals. (Bus. & Prof. Code Sec. 6000 et seq.)
- 8) Establishes the Department of Real Estate as the entity responsible for regulating real estate professionals. (Bus. & Prof. Code Sec. 10000 et seq.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to prohibit certain unconscionable provisions in consumer contracts. This bill is author-sponsored.

- 2) **Author's statement:** According to the author:

Existing law has already been enacted with the intent to prohibit non-disparagement clauses in consumer contracts. This bill has been introduced [because] companies providing professional services are nevertheless seeking to restrict their customer's authority to make substantiated complaints to regulatory boards through refund agreements and other contracts. This bill would expressly prohibit these provisions in any contract governing the provision of professional services that are subject to licensure and oversight by the state.

- 3) **Background:** During the 2019 sunset review of the Dental Board of California by the Senate and Assembly Committees on Business and Professions Committee, it was uncovered that certain companies offering direct-to-consumer orthodontics products were providing dental services using a lesser standard of diagnostic review than traditional dental offices. Presumably, as a way of preventing consumers from making complaints about any adverse outcomes relating to this service model, one of the larger companies was requiring customers who sought a refund to sign an agreement that they would not disparage the company. The agreement was intended to be kept confidential and required the patient to promise not to "make public, disseminate, release or otherwise reference, allude to, suggest to any person, agency or other entity ... the terms or existence of this General Release."
- 4) **Limitations on contracting for secrecy to further the public interest:** Secret settlements, non-disparagement, and non-disclosure clauses frequently raise public policy concerns with requiring an individual to waive their right to speak or report misconduct to authorities. Existing law disfavors the secret settlement of certain civil actions in which the public has a strong interest in the rights of the individual to disclose certain information about businesses and licensees.

As a general matter, a contract should be interpreted in a manner that will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties. At the same time, "a contract provision unlawful if it is contrary to an express provision of law; contrary to the policy of express law,

though not expressly prohibited; or, otherwise contrary to good morals.” (Civ. Code Sec. 1667.)

Increasingly, the Legislature has scrutinized, and prohibited nondisclosure agreements when countervailing public policy supports individual rights to both settle legitimate claims and also make public if desired, the basis for the claims. In 2018, the Legislature passed SB 820 (Leyva, Ch. 953, Stats. 2018) to prohibit contracting for secrecy imposed on individuals who settle claims for specified sexual assault or harassment offenses. It also passed AB 3109 (Stone, Ch. 949, Stats. 2018) to prohibit contracting for a party to waive the right to testifying in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment of a party to the contract. Similarly, in 2016, the Legislature prohibited gag clauses in settling a civil case of sexual abuse of a minor, or an elder or dependent adult. In the same vein, the State Bar has the authority to investigate an attorney who advises (or demands) that a party or client sign a confidential settlement agreement in a civil action in specified cases.

The Legislature’s actions to explicitly bar certain contracting activity serves to ensure that unenforceable contracts are not entered into in the first place, thereby protecting consumers and providing redress for consumers if companies and their legal counsel include in their contracts provisions that are contrary to public policy. Additionally, declaring that certain contractual provisions are void and unenforceable ensures compliance and thwarts attempts to keep unlawful contracts secret due to confidentiality clauses. The effect is to promote integrity in contracting generally.

This bill seeks to accomplish a similar purpose by establishing that a licensee regulated by the State should not be permitted to suppress misconduct or other potentially embarrassing information by limiting an individual’s ability to report the activity about a licensee’s business practice to authorities. Too often, companies settling disputes bargain for secrecy as a matter of course. The bargaining power generally weighs in favor of the companies, who typically draft settlement agreements and ultimately can compensate the individual or require litigation. This bill shifts this power to permit the consumer to both settle valid claims and report misconduct to licensing authorities.

- 5) **Regulation of speech on matters of public concern:** Libel laws exist to protect companies from false and malicious speech. To the extent that a person makes statements of fact that are false and which harm the reputation of the identifiable licensee or company, the laws of defamation stand to provide redress for the defamed. (Civ. Code Secs. 44-46.) That being said, when the State regulates a person’s professional activity through licensing boards, that person agrees to be subject to scrutiny to maintain their license. For this reason, suppressing any claim of misconduct or preventing a consumer from reporting to a licensing entity potential misconduct, is contrary to public policy and the purpose of licensing generally. Indeed, free speech principles support reporting unlawful activity. The right to speak freely in public forums on public matters is enshrined in California’s constitution and laws, including the state’s anti-SLAPP statute. (Code Civ. Proc. Sec. 425.16.)

A SLAPP suit is a “Strategic Lawsuits against Public Participation;” a lawsuit that seeks to use the court to squash speech that is of public concern. Under the anti-SLAPP statute, lawsuits that hinder a person’s right of petition or free speech are subject to a special motion to strike which stays litigation and demands the prompt resolution of the SLAPP motion.

The findings and declarations of the anti-SLAPP statute provide that “it is in the public interest to encourage continued participation in matters of public significance.” The anti-SLAPP statute seeks to ensure that this public participation “should not be chilled by abuse of the judicial process.” It encompasses activities protected under the First Amendment and California’s constitution, including petitioning the government for the redress of grievances.

Contract provisions that prevent individuals from reporting to government entities important information of misconduct are subject to scrutiny under anti-SLAPP laws. This bill, like the anti-SLAPP law, seeks to ensure that nondisclosure agreements will not chill public participation in matters of public significance.

REGISTERED SUPPORT / OPPOSITION:**Support**

None on file

Opposition

None on file

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