

Date of Hearing: June 27, 2023

ASSEMBLY COMMITTEE ON JUDICIARY

Brian Maienschein, Chair

SB 478 (Dodd) – As Amended May 18, 2023

SENATE VOTE: 31-3

SUBJECT: CONSUMERS LEGAL REMEDIES ACT: ADVERTISEMENTS

KEY ISSUE: SHOULD ADVERTISING A GOOD OR SERVICE THAT DOES NOT INCLUDE ALL MANDATORY FEES AND CHARGES BE A VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT?

SYNOPSIS

According to a 2018 survey by Consumer Reports, at least 85 percent of Americans have encountered an unexpected or hidden fee over the previous two years. The same study found that approximately 50 to 60 percent of the respondents reported spending more than they budgeted because of hidden fees in transactions for hotels, air travel, car rentals, telecom, or tickets for live events. The Legislature has long considered consumer protection from deceptive or misleading advertisements to be a matter of high public importance. State law is replete with statutes aimed at protecting California consumers from unfair, dishonest, or harmful market practices. For example, the Consumer Legal Remedies Act (CLRA) in Civil Code Section 1770 et seq. was enacted “to protect the statute’s beneficiaries from deceptive and unfair business practices,” and to provide aggrieved consumers with “strong remedial provisions for violations of the statute.” This Attorney General-sponsored measure would clarify that advertising a good or service that does not include all mandatory fees and charges, other than taxes imposed by a government, is a violation of the CLRA. Opponents of the bill include coalitions of industry associations, including the Chamber of Commerce and TechNet, who argue that the bill is unnecessary given existing consumer protection laws. Other opponents include members of industry, such as car dealers and car rental companies, who seek amendments cross-referencing disclosure statutes specific to their industries and transactions, deeming compliance with those specific disclosure statutes as compliance with SB 478. The author and sponsor have engaged in meaningful discussion with the opposition, and have expressed a willingness to address concerns as this bill continues to move through the legislative process. Should this bill advance out of this Committee these issues will be heard and considered by the Assembly Committee on Privacy and Consumer Protection.

SUMMARY: Establishes that an advertised good or service must include all mandatory fees and charges. Specifically, **this bill:**

- 1) Makes it an unlawful business practice under the Consumers Legal Remedies Act to advertise, display, or offer a price for a good or service that does not include all mandatory fees or charges other than taxes imposed by a government.
- 2) Deems providers of broadband that comply with the broadband consumer label requirements adopted by the Federal Trade Commission compliant with 1).

- 3) Establishes that a holder of a dealer's license issued under the Vehicle Code who does not advertise, display or offer certain vehicle-related charges, as specified, does not violate 1).

EXISTING LAW:

- 1) Establishes the Unfair Competition Law (UCL), which provides a statutory cause of action for any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising, including over the internet. (Business and Professions Code Section 17200 *et seq.*)
- 2) Establishes the False Advertising Law (FAL), which proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with the intent to directly or indirectly dispose of real or personal property. (Business and Professions Code Section 17500 *et seq.*)
- 3) Establishes the Consumers Legal Remedies Act (CLRA), which proscribes certain unfair methods of competition and certain unfair or deceptive acts or practices undertaken by a person in a transaction intended to result or that results in the sale or lease of goods or services to a consumer, including advertising goods or services with intent not to sell them as advertised. (Civil Code Section 1770 *et seq.*)
- 4) Defines "goods" as "tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property." (Civil Code Section 1761 (a).)
- 5) Defines "services" as work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods. (Civil Code Section 1761 (b).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: SB 478 specifically confronts the deceptive advertising practice in which a seller uses an artificially low headline price to attract a customer and usually either discloses additional required fees in smaller print, or reveals additional charges later in the buying process.

According to the author:

SB 478 combats the deceptive price advertising practice in which a seller uses an artificially low headline price to attract a customer and usually either discloses additional required fees in smaller print, or reveals additional charges later in the buying process.

Deceptive price advertising to hide fees is a significant problem facing consumers that appears to be proliferating in more and more sectors of the economy. Hiding required fees is nothing more than a deceptive way of hiding the true price of a good or service.

Transparency and full disclosure in pricing are crucial for fair competition and consumer protection. Unfortunately, more and more businesses today are hiding unavoidable charges from consumers.

Hidden fees cost consumers billions of dollars each year, hurting vulnerable families at a time when every dollar matters. Families cannot accurately compare prices, plan, or budget when prices are inflated by hidden required fees. This deceptive advertising practice not only makes price comparison difficult, but also harms honest competitors, disincentivizes true price competition, and leads to higher prices for the market without any corresponding benefit to consumers forced to pay these hidden fees. The final purchase price for a good or service shouldn't be a mystery for California consumers. The price they see should be the price they pay.

Senate Bill (SB) 478 would prohibit the deceptive price advertising practice of hiding unavoidable fees, and instead require honest price advertising and full disclosure in pricing across the board for the protection of California consumers and businesses who are up-front about their prices. Specifically, SB 478 would make it clear that it is unlawful under the Consumer Legal Remedies Act (CLRA) to advertise a price for a good or service that does not include all required fees or charges other than taxes or fees imposed by a government on the transaction.

What the Fee!?! Undisclosed “junk fees” plague virtually all consumer transactions.

According to a 2018 survey by Consumer Reports, at least 85 percent of Americans have encountered an unexpected or hidden fee over the previous two years. The same study found that approximately 50 to 60 percent of the respondents reported spending more than they budgeted because of hidden fees in transactions for hotels, air travel, car rentals, telecom, and tickets for live events. (Wang, *Protect Yourself from Hidden Fees*, Consumer Reports (May 29, 2019) available at: <https://www.consumerreports.org/fees-billing/protect-yourself-from-hidden-fees-a1096754265/>). A large body of evidence shows that mandatory fees charged at the back-end of the buying process – sometimes referred to as “drip” prices – along with other types of junk fees make it harder to comparison shop. This causes consumers to underestimate the total price of what they're buying, often increasing total payments. (Deese, et al., *The President's Initiative on Junk Fees and Related Pricing Practices* (October 26, 2022).) And a forthcoming academic paper points to data establishing that even if disclosures are provided such as “additional surcharges may apply,” consumers may not fully attend to the disclosure or may underestimate the magnitude of those surcharges. (Santana, et al., *Consumer Reactions to Drip Pricing*, Marketing Science (forthcoming).)

Both the Biden administration and the California Legislature have recently taken aim at undisclosed “junk fees.” In his most recent State of the Union speech, President Biden declared war on junk fees, lamenting the adverse effect they have on the average American family. “Junk fees may not matter to the very wealthy, but they matter to most folks in homes like the one I grew up in. They add up to hundreds of dollars a month,” Biden said in his speech. “I know how unfair it feels when a company overcharges you and gets away with it.” (*Remarks of President Joe Biden – State of the Union as Prepared for Delivery* (February 7, 2023), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/>.)

The federal *Junk Fee Prevention Act* advances President Biden's objectives by requiring full prices be shown upfront, for anything from short-term rentals to concert seats to airline tickets, putting an end to unnecessary and excessive fees, and empowering the Federal Trade Commission and Federal Communications Commission to step in and issue new rules and enforcement guidelines. The battle against non-disclosure of junk fees has also come to the

Legislature. This bill is one of several bills currently pending before the Legislature this session dealing with similar issue areas:

- *AB 537 (Berman)* requires a place of short-term lodging and any online platform that advertises that lodging to include in the advertised hotel room rate or short-term rental rate all mandatory fees that will be charged in order for the consumer to stay in the hotel room or short-term rental. *AB 578 is pending in the Senate Judiciary Committee.*
- *SB 683 (Glazer)* requires any person who advertises a hotel or short-term rental to include in the advertised hotel room rate or short-term rental rate all mandatory fees that will be charged in order for the consumer to stay in the hotel room or short-term rental. *SB 683 is pending in the Assembly Judiciary Committee.*
- *AB 8 (Friedman)* imposes various disclosure requirements on ticket sellers relating to ticket prices, including that the ticket seller display the total cost and fees for a ticket prior to the ticket being selected for purchase. *AB 8 is pending in the Senate Business, Professions and Economic Development Committee.*
- *SB 611 (Menjivar)* requires landlords or their agents who advertise or provide a quote for residential property for rent and who include a specific or range of monthly rent rates to include specified information in the monthly rate. *SB 611 is pending in the Assembly Judiciary Committee.*
- *SB 785 (Caballero)* updates laws regulating ticket sellers by establishing new categories of ticket sellers and establishing various requirements for certain types of ticket sellers; prohibits an original ticket seller or a ticket reseller from listing, marketing, or selling a ticket before owning, possessing, or having the contractual right to the ticket; and prohibits event presenter likeness from being used on any website. *SB 785 is pending in the Assembly Arts, Entertainment, Sports, and Tourism Committee.*

Existing law prohibits false and misleading advertising, including with respect to advertised prices. The Legislature has long considered consumer protection from deceptive or misleading advertisements to be a matter of high public importance. State law is replete with statutes aimed at protecting California consumers from unfair, dishonest, or harmful market practices. For example, the Consumer Legal Remedies Act (CLRA) in Civil Code Section 1770 *et seq.* was enacted “to protect the statute’s beneficiaries from deceptive and unfair business practices,” and to provide aggrieved consumers with “strong remedial provisions for violations of the statute.” (*Am. Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11.) Among other things, the CLRA prohibits merchants from representing that goods have “characteristics, ingredients, uses, benefits, or quantities which they do not have,” or representing that goods “are of a particular standard, quality, or grade” when they are of another. (Civil Code Section 1750 *et seq.*) Consumers who are harmed by unlawful practices specified in the Act may recover damages and other remedies. Similarly, California’s Unfair Practices Act protects California consumers from “unlawful, unfair or fraudulent business act[s] or practice[s].” (Section 17000 *et seq.*)

Likewise, California’s False Advertising Law (Business and Professions Code Sections 17500-17606) makes it unlawful for any person doing business in California to make false or misleading advertising claims to California consumers. In addition to potential civil liability to a person who is harmed by false or misleading advertising claim, a person or business that engages

in false or misleading advertising can also be subject to civil actions brought by various government officials for injunctive relief or civil penalties. The public officials who may bring an action under the False Advertising Law include the California Attorney General, any district attorney, county counsel, or city attorney. Prior to bringing an action based upon false or misleading advertising, a public official may request that a person or business suspected of engaging in false or misleading advertising provide evidence to support the veracity of specific advertising claims. If the person or business to whom the request is made fails to respond or provide satisfactory evidence in support of the claim, the public official may do either or both of the following: (1) seek an injunction ordering the person or business to terminate or modify the false or misleading claim; (2) disseminate information to consumers about the nature of the false or misleading claim.

The Attorney General has successfully brought claims for false price advertising under existing law, including a recent \$20 million judgment against Paul Blanco's Good Car Company and its affiliates for engaging in unlawful business practices, including false advertising about credit and discount programs, making false statements on credit applications, and deceiving customers into purchasing add-on products. (Attorney General Bonta Announces Settlement Banning Paul Blanco's Good Car Company from Operating in California, Nov. 7, 2022, <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-settlement-banning-paul-blanco%E2%80%99s-good-car>.)

This bill clarifies that the practice of hiding required fees is deceptive and unfair to consumers wherever it occurs—not just in certain industries. It does this by adding a single provision to the CLRA's list of unfair or deceptive acts or practices: “advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges other than taxes or fees imposed by a government on the transaction.” This simple language is intentionally broad to capture any fee or charge that a consumer cannot reasonably avoid.

The bill does not include any definitions, but relies on the existing definitions in the CLRA for “goods” and “services.” (Civil Code Sections 1761 (a)-(b).) “Mandatory fees” are not defined anywhere in the bill or the CLRA. The bill does expressly exclude taxes and fees that are imposed by a government. This suggests that any fee which the consumer cannot avoid, and which is not imposed by the government, must be advertised.

Importantly, the bill focuses on price *advertising* as opposed to price *disclosure*. The distinction is somewhat nuanced, but important: price transparency must happen at the initial point of advertising, not just before the point-of-sale. The rationale for initial transparency is rooted in psychology (and consistent with common daily experiences shopping). Consumers are likely to choose a lower base-option product, and after fees and add-ons disclosed later on are then more likely to make a financial mistake (i.e., selecting a product or service that has a lower base fare, but its ultimate price after fees and charges exceeds the seemingly more expensive offer that included those rates at the point of advertisement.) Relatedly, even if consumers recognize that the product they end up purchasing is more expensive than they anticipated, they are loath to start their search all over and continue with the transaction anyway. (Santana, et al., Consumer Reactions to Drip Pricing, Marketing Science, *supra*.) This bill thus focuses on the very initial price advertising for two related reasons: first, to ensure that consumers are presented with full and complete price information before they make a purchase that may be to their financial detriment; and second, to level the playing field among advertisers, so that the advertiser who

seeks to lure a consumer through the real or online “door” cannot do so by under-disclosing the actual cost of their good or service in their advertisements.

This bill proposes adding language to the CLRA, which imposes a private right of action. This means that any consumer who has been damaged by an advertisement for a good or service that does not include all mandatory fees and charges (other than government imposed taxes and fees) can sue for actual and punitive damages. This liability risk may be particularly worrisome to certain industries that have nuanced pricing structures, as discussed below.

Oppositions’ concerns are varied. A large coalition of business associations, including TechNet and the Chamber of Commerce, oppose the measure because they “do not believe the creation of a new, more robust private right of action is necessary.” Specifically, they argue that California’s false advertising laws provide sufficient protection. While the author and the Committee agree that misleading price advertising is already prohibited under California law, this bill is nevertheless beneficial in clarifying that not disclosing all mandatory fees up front is tantamount to false advertising.

Another set of opposition comes from families of travel brands, including Expedia.com, which argue that SB 478 “could create unworkable burdens for global platforms such as Expedia Group” without providing any further explanation. They point to President Biden’s and other’s efforts at the federal level to legislate price transparency as a potential complication. While they are correct that federal legislation may preempt these price transparency measures, California can still do what it does best—lead the way.

Yet another set of opposition comes from industries who have price disclosure obligations under existing law and seek amendments clarifying that compliance with those industry/transaction-specific disclosures is deemed compliance with this broader mandate under SB 478. To the extent the disclosure obligations they rely on impose transparency in advertising (as opposed to just at the point-of-sale), the canons of statutory construction suggests that their concerns are overstated. It is elementary that a specific statute relating to a particular subject will govern as to that subject as against a more general statute, even though the latter, standing alone, is comprehensive enough to include the subject to which the more specific provision relates. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal. 4th 571, 577; *Woods v. Young* (1991) 53 Cal. 3d 315, 325.) This canon still applies even if the more general statute is enacted at a date later than the more specific statute.

The Committee nevertheless recognizes the unease expressed by these industries who have negotiated specific and comprehensive disclosure regimes over the years and now fear facing separate liability under SB 478. *The Committee believes that the Legislature should be encouraging such negotiation with industry and should provide some reassurance—whether in the form of a specific statutory cross-reference or broader language codifying the principle that compliance with industry/transaction-specific statutes will shield them from liability under SB 478.* The author has already taken certain amendments cross-referencing industry/transaction-specific statutes, such as companies providing broadband internet access and holders of dealer’s licenses, effectively deeming their compliance with more specific disclosure statutes compliance for purposes of SB 478.

Examples of industries that have requested cross-references include the American Car Rental Association that point to Civil Code 1939.19, which requires rental quote to include “good faith estimate of the rental rate and all additional mandatory charges, as well as the total charges for

the entire rental.” Another example is the California New Car Dealers Association, which points to the California Vehicle Code and its myriad consumer protections related to the advertisements of motor vehicles by dealers licensed by the Department of Motor Vehicles.

Finally, online retailers and marketplaces have also expressed concerns with SB 478’s language. For example, an online marketplace where buyers and sellers could negotiate prices are unable to advertise a true, complete price in the first instance. Relatedly, shipping costs vary based on the size of the item, expediency of the shipping options, and geographic locations. Shipping might technically be mandatory when purchasing an online product, and therefore would fall within the bill’s scope, but the variability described does not lend itself to the “all-in” advertised price mandate of SB 478.

The author and the Attorney General’s Office, the sponsor of this measure, are well-aware of these concerns and have been in communication with industry representatives. They have agreed to continue working through them as this bill moves through the legislative process.

ARGUMENTS IN SUPPORT: The Attorney General, who is sponsoring the bill, states:

The Attorney General is pleased to sponsor Senate Bill 478 (Dodd and Skinner) to prohibit the practice of hiding required fees, and instead require honest price advertising and full disclosure in pricing across the board for the protection of California consumers and businesses who are up-front about their prices. Specifically, SB 478 would make it unlawful under the Consumer Legal Remedies Act (CLRA) to advertise a price for a good or service that does not include all required fees or charges other than taxes imposed by a government.

While existing laws against unfair competition and false advertising already prohibit deceptive practices related to pricing, this bill makes clear that hidden required fees are illegal wherever they occur. It specifically combats the deceptive advertising practice in which a seller uses an artificially low headline price to attract a consumer and usually either discloses additional required fees in smaller print, or reveals additional required charges later in the buying process. These additional, unavoidable charges often are hidden in small type and with vague descriptions (e.g., “service fee”) or bundled in a misleading way with taxes, such as quoting a single amount for “taxes and fees.” Deceptive price advertising makes price comparison difficult, takes business from honest competitors, disincentivizes true price competition, and leads to higher prices for the market without any corresponding benefit to consumers.

Deceptive price advertising to hide required fees is a significant problem facing consumers that appears to be proliferating in more and more sectors of the economy. Hidden required fees are now charged for a variety of goods and services, such as lodging, tickets for live events, and restaurants and food delivery.

...

Here in California, we need not wait for federal action. Attorney General Bonta believes now is the time to pass a state law that recognizes that the practice of hiding required fees is deceptive and unfair to consumers wherever it occurs—not just in certain industries. Accordingly, SB 478 would prohibit this deceptive advertising practice across the board in California, and allow broad civil enforcement of violations under the CLRA.

The California Low-Income Consumer Coalition, another of the bill's sponsors, explains the impetus for the bill:

California's families already have a tough enough time paying for the things they need. They shouldn't also have to worry about whether a product's advertised price is the actual price. Hidden fees impact all Californians, but the burden is heaviest on low-income families. When budgets are tight, hidden fees can change a family meal into an extravagance, or a saved-for vacation into a debt. With SB 478, struggling Californians are just asking businesses to tell the truth: give us the real price of the goods and services you are asking us to buy. The bill would simply require that the advertised price of a good or service include all mandatory fees: not sales taxes; not shipping fees that vary; not costs that change depending on what features a consumer may select; just the full price of the item including any charge that is required and is the same for all consumers.

ARGUMENTS IN OPPOSITION: The Chamber of Commerce, along with a coalition of business associations, including TechNet oppose this measure, arguing that it is unnecessary:

California already has a law that allows both public attorneys or private individuals to sue businesses who utilize false advertising – Business & Professions Code 17500, also known as the False Advertising Law (FAL). To state a claim for false advertising under the FAL, the plaintiff must show that (1) the statements in the advertising are untrue or misleading and (2) the defendants knew, or by the exercise of reasonable care should have known, that the statements were untrue or misleading. To be clear, a blatant lie is not necessary to hold an advertiser liable under the FAL. “To succeed on the merits of a false advertising claim, the plaintiff need only show that members of the public are likely to be deceived.” *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir.1995). As noted above, the FAL can be enforced by a range of public sector attorneys (including the Attorney General, or any district attorney, or any city attorney, or city prosecutors) or by members of the public on their own behalf.

In short: for situations where an advertisement misstates a price for any good or service by failing to include mandatory fees or misleading a consumer, an action under the FAL could already be brought by either public prosecutors or private counsel.

In fact, as recently as 2019, the Attorney General utilized the FAL to bring one of the largest used car dealership networks in California (the former Paul Blanco's Good Car Company) to its knees. There, the Attorney General successfully settled an action against Paul Blanco based on false statements in his advertisements, among other practices, using California's False Advertising Law and its specific prohibitions on false advertising. The settlement left no doubt as to the power of the Attorney General's action – Paul Blanco was forbidden from ever operating another car dealership in California and faced a judgment of \$27.5 million. It was a clear victory utilizing the existing tools at the AG's disposal, including the False Advertising Law.

REGISTERED SUPPORT / OPPOSITION:

Support

California Department of Justice
California District Attorneys Association
California Low-Income Consumer Coalition

CALPIRG, California Public Interest Research Group
Consumer Attorneys of California
Consumer Federation of California
Consumer Watchdog
Oakland Privacy

Opposition

Acclamation Insurance Management Services
Affordable Housing Management Association -Pacific Southwest
Allied Managed Care
Apartment Association of Orange County
California Attractions and Parks Association
California Chamber of Commerce
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
East Bay Rental Housing Association
Escrow Institute of California
Expedia Group
Family Business Association of California
Flasher Barricade Association
Technet
Travel Technology Association

Opposition Unless Amended

American Car Rental Association (ACRA)
California Association of Realtors
California Credit Union League
California Mortgage Bankers Association
California Financial Services Association
California Mortgage Association
California Community Banking Network
California Bankers Association

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