

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1900 (Weber)
Version: June 3, 2024
Hearing Date: June 11, 2024
Fiscal: No
Urgency: No
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SUBJECT

Consumer refunds: nondisclosure agreements

DIGEST

This bill provides that any provision in a contract or agreement that prohibits a consumer from publishing or making statements about the business as a condition of receiving a partial or complete refund, or any thing of value, is void and unenforceable.

EXECUTIVE SUMMARY

Consumer reviews have become the lodestar for fellow consumers interested in learning more about a product, service, or experience. Whether a product review on Amazon or a detailed account of a restaurant on Yelp, consumers trust that these and other forms of word of mouth are authentic and paint an accurate picture of what a business has to offer.

However, some unscrupulous businesses have attempted to silence unsatisfied customers by requiring, as a condition of receiving a refund, the customer to sign a nondisclosure agreement, preventing other consumers from getting the full picture.

To address this practice, this bill provides that any contractual provisions that prohibit a consumer from publishing or making statements about the business as a condition of receiving a partial or full refund or other consideration or thing of value is void and unenforceable.

This bill is author-sponsored. It is supported by the Consumer Attorneys of California. No timely opposition was received by the Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits a debt settlement provider from posting directly, or indirectly causing to be posted, an online review or ranking on an internet website if the provider, or its agent, provided anything of value in exchange for favorable treatment in that review or ranking. (Civ. Code § 1788.302(a).)
- 2) Provides that every person in California may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of this right. (Cal. Const., Art. I, § 2.)
- 3) Identifies certain types of contracts as unlawful or contrary to public policy and therefore void and enforceable. (Civ. Code §§ 1667-1670.10.)

This bill provides that any provision in a contract or agreement that prohibits a consumer from publishing or making statements about the business as a condition of receiving a partial or complete refund, or other thing of value, is contrary to public policy and void and unenforceable.

COMMENTS

1. Stated intent of the bill

According to the author:

Several studies show that over 90% of consumers read reviews before making a purchase and that “consumers’ attention to negative comments is significantly greater than that to positive comments.” Still, no business should attempt to block the transparency of this information to conceal potentially poor and unsatisfactory business practices.

Unfortunately, we have seen this practice being used in recent history. In 2015, a consumer sued a telecommunications company after he had cancelled his cable service, but was still being charged for the cable box. That charge accumulated to several hundreds of dollars, at which point the consumer requested a refund. The company stated that they would release the customer of their financial obligation, but only if they did not “disclose or allow to be disclosed any of the negotiations regarding the matter, or the terms, conditions, or amounts of settlement.”

2. Protecting transparency for consumers

This bill is motivated by reports that businesses have conditioned refunds on consumers contractually agreeing to refrain from publishing or otherwise making negative statements about the business. According to an NBC Bay Area report:

NBC Bay Area responds to consumer complaints and holds companies accountable. But some businesses are firing back, and silencing the consumers we assist.

Our stories are often about issues with products or services; the frustrated people who paid for them; and how we helped. This story is about consumer disputes, too:

Faulty solar panels costing \$25,000
A shady used car deal worth \$15,000
Bad hearing aids to the tune of \$9,000

But you won't be reading about any of those consumers. They had to sign a confidentiality agreement, sometimes called a non-disclosure agreement or NDA, to get their refunds.

That meant no TV interview, no posts on social media -- not even a word to their friends and neighbors.

Attorney Scott Kaufman sues automakers. Like us, he's seen companies hushing more consumers. "It's horrible," Kaufman said. "What they're saying is 'Look, we've been cheating people and hurting people, but we don't want anyone to know.'"¹

The author points to a large scale instance of this practice carried out by SmileDirectClub that was the subject of litigation in Washington, D.C.:

"SmileDirectClub promised a simple, safe, and affordable way to straighten teeth and touted five-star reviews—but behind the scenes, the company silenced dissatisfied consumers and buried complaints about injuries caused by its products," said AG Schwalb. "Now, because of the effective work of the OAG legal team, SmileDirectClub can no longer use NDAs to silence consumers as a prerequisite for seeking refunds, and thousands of SmileDirectClub customers across the country will be

¹ Chris Chmura, Joe Rojas & James Jackson, NDA: When a Company Tries to Buy Your Silence (May 29, 2018) NBC Bay Area, <https://www.nbcbayarea.com/news/local/nda-when-a-company-tries-to-buy-your-silence/2041427/>. All internet citations are current as of May 23, 2024.

released from gag provisions in agreements they previously signed. This litigation and settlement sends a clear message to other businesses that using NDAs to silence customer feedback can be an unfair and deceptive trade practice and a violation of DC consumer protection law.”

SmileDirectClub, which sells clear dental aligners directly to consumers and markets them as a faster, cheaper alternative to braces, promised easy refunds to consumers. However, SmileDirectClub required almost all consumers seeking a refund to sign a restrictive NDA before they could get any money back. The NDAs used by SmileDirectClub effectively prevented dissatisfied and harmed consumers – including consumers who suffered injuries or permanent harm that required medical treatment – from publicly sharing their experiences. The NDAs prohibited most consumers from making any negative comments about SmileDirectClub or its products and required them to delete any negative reviews, social media posts, or comments they had already made. These NDAs also prohibited consumers from notifying government regulators about problems with the company’s product and required them to withdraw complaints they had already filed. Additionally, under the NDAs, consumers could not even acknowledge the existence of the agreement, and they were subject to severe penalties for violations, including fines of \$10,000 per violation and threats of litigation.²

This bill prohibits such practices. Specifically, it makes void and unenforceable any contractual provision that prohibits a consumer from publishing or making statements about the business as a condition of receiving a refund.

Writing in support, the Consumer Attorneys of California make the case for the bill:

Consumer reviews of a product, service or experience provide highly valuable information in the marketplace as consumers are making their own choices; whether it is to determine the quality of a product, customer service, sizing, or overall satisfaction. Several studies show that consumers read reviews before making a purchase; we agree that businesses should not attempt to block the transparency of this information to conceal potentially poor and unsatisfactory business practices.

² Press Release, *AG Schwalb Announces SmileDirectClub Must Release Consumers Nationwide From Restrictive Nondisclosure Agreements* (June 22, 2023) Office of the Attorney General for the District of Columbia, <https://oag.dc.gov/release/ag-schwalb-announces-smiledirectclub-must-release>.

SUPPORT

Consumer Attorneys of California
Consumer Protection Policy Center

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1149 (Leyva, 2022) would have limited the ability of litigants to enter into agreements or obtain court orders restricting the disclosure of factual information in civil cases involving a defective product or environmental hazard that has caused, or is likely to cause, significant or substantial bodily injury or illness or death. SB 1149 failed passage on the Assembly Floor.

SB 820 (Leyva, Ch. 953, Stats. 2018) prohibited a provision within a settlement agreement that prevents the disclosure of factual information related to specified claims or complaints, including sexual assault and sexual harassment claims. Plaintiffs in such actions retain the right to request provisions in settlement agreements that shield their identity.

AB 1682 (Stone, Ch. 876, Stats. 2016) prohibited a confidentiality or secrecy provision in a settlement agreement in a civil action for an act of childhood sexual abuse or an act of sexual assault against an elder or dependent adult and made a confidential settlement agreement void as a matter of law and against public policy. It also subjected an attorney that fails to comply with those requirements to discipline by the State Bar of California.

AB 2875 (Pavley, Ch. 151, Stats. 2006) prohibited the confidential settlement of a civil action the factual basis for which is a cause of action for "an act that may be prosecuted as a felony sex offense."

PRIOR VOTES:

Assembly Floor (Ayes 75, Noes 0)
Assembly Judiciary Committee (Ayes 12, Noes 0)
