

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

SB 478 (Dodd)
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Fiscal: No
Urgency: No
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SUBJECT

Consumers Legal Remedies Act: advertisements

DIGEST

This bill makes it an unlawful business practice 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.

EXECUTIVE SUMMARY

The issue of “junk” fees and other pricing schemes gained more prominence nationally when President Joe Biden took aim at them in his State of the Union address in February 2023. There are various types of pricing schemes generally deemed unfair or unlawful business practices, but this bill specifically targets price transparency.

When merchants include hidden or “junk” fees in the purchase price of goods and services after putting out a much lower advertised price (“the bait”), consumers are often misled and kept from properly assessing the best prices, thereby hindering the market, especially online.

Generally speaking, the Consumer Legal Remedies Act (CLRA) is intended “to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.” The CLRA enables a consumer who suffers damage as a result of a violation to bring an action for various remedies, including damages and injunctive relief. This bill makes it an unlawful business practice under the CLRA 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.

The bill is sponsored by Attorney General Rob Bonta. It is supported by a variety of groups, including the California District Attorneys Association and CALPIRG. It is opposed by a variety of industry groups, including TechNet.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Consumer Legal Remedies Act (CLRA), which prohibits unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. (Civ. Code § 1750 et seq.)
- 2) Provides that any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 of the Civil Code may bring an action against that person to recover or obtain any of the following:
 - a) actual damages, but in no case shall the total award of damages in a class action be less than \$1,000;
 - b) an order enjoining the methods, acts, or practices;
 - c) restitution of property;
 - d) punitive damages;
 - e) court costs and attorney's fees to a prevailing plaintiff. However, reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith; and
 - f) any other relief that the court deems proper. (Civ. Code § 1780(a), (e).)
- 3) 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. (Bus. & Prof. Code § 17200 et seq.)
- 4) 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 intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.)
- 5) Provides remedies for individuals who have suffered damages as a result of fraud or deceit, including situations involving fraudulent misrepresentations. (See Civil Code §§ 1709-1710, 1572-1573.)

This bill:

- 1) Makes it an unlawful business practice 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) Finds and declares that the above practice is currently prohibited by existing law, including the UCL and FAL.

COMMENTS

1. California's consumer protection laws

The Legislature has long considered consumer protection to be a matter of high importance. State law is replete with statutes aimed at protecting California consumers from unfair, dishonest, or harmful market practices. These consumer-protection laws authorize consumers to enforce their own rights and seek remedies to make them whole.

The UCL (Bus. & Prof. Code § 17200) provides remedies for “anything that can properly be called a business practice and that at the same time is forbidden by law.” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [citations omitted].) The UCL provides that a court “may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.” (Bus. & Prof. Code § 17203; *see also Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146 [“An order for restitution, then, is authorized by the clear language of the [UCL.”].) The law also permits courts to award injunctive relief and, in certain cases, to assess civil penalties against the violator. (Bus. & Prof. Code §§ 17203, 17206.)

The FAL proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.) Violators are subject to a civil penalty not to exceed \$2,500 for each violation in an action brought by the Attorney General or by any district attorney, county counsel, or city attorney. (Bus. & Prof. Code § 17536.) Similar to the UCL, the FAL provides that a person may bring an action for an injunction or restitution if the person has suffered injury in fact and has lost money or property as a result of a violation of the FAL. (Bus. & Prof. Code § 17535.)

The CLRA 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.) The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer,” (Civ. Code § 1770(a)), and prohibits conduct “likely to mislead a reasonable consumer,” (*Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal. App. 4th 663, 680; internal quotation marks omitted.)

Among other things, the CLRA prohibits merchants from “representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law,” or representing that goods “are of a particular standard, quality, or grade” when they are of another. (Civ. Code § 1770.) Consumers who are harmed by unlawful practices specified in the Act have a right of action under the CLRA to recover damages and other remedies, including actual damages; an order to enjoin the unlawful act; restitution; punitive damages; or any other relief that the court deems proper. (Civ. Code § 1780.) Additionally, the statute authorizes courts to award attorney’s fees to prevailing plaintiffs and contains mechanisms for securing remedies on a class wide basis. (Civ. Code §§ 1780, 1781.) Consumers who are over the age of 65 are eligible to additionally seek and be awarded, in addition to the above remedies, up to \$5,000 where the trier of fact finds certain circumstances are met.

2. Pricing transparency

In his prepared speech for his State of the Union address, President Biden took aim at so-called “junk fees”:

My administration is also taking on “junk” fees, those hidden surcharges too many businesses use to make you pay more. For example, we’re making airlines show you the full ticket price upfront and refund your money if your flight is cancelled or delayed. We’ve reduced exorbitant bank overdraft fees, saving consumers more than \$1 billion a year. We’re cutting credit card late fees by 75%, from \$30 to \$8. 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. They make it harder for you to pay the bills or afford that family trip.

I know how unfair it feels when a company overcharges you and gets away with it. Not anymore. We’ve written a bill to stop all that. It’s called the Junk Fee Prevention Act. We’ll ban surprise “resort fees” that hotels tack on to your bill. These fees can cost you up to \$90 a night at hotels that aren’t even resorts. We’ll make cable internet and cellphone companies stop charging you up to \$200 or more when you decide to switch to another provider. We’ll cap service fees on tickets to concerts and sporting events and make companies disclose all fees upfront. And we’ll prohibit airlines from charging up to \$50 roundtrip for families just to sit together. Baggage fees are bad enough – they can’t just treat your child like a piece of luggage.

Americans are tired of being played for suckers.¹

¹ *Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery* (February 7, 2023) The White House Briefing Room, <https://www.whitehouse.gov/briefing-room/speeches/>

While the Biden Administration has clearly declared war with hidden fees at the federal level, a host of bills have been introduced in the California Legislature this year to combat these deceptive practices at the state level.

This bill broadly targets the offering of a price for a good or service that does not include all attendant fees and charges, commonly referred to as *drip pricing*. The Federal Trade Commission (FTC) defines drip pricing as a “pricing technique in which firms advertise only part of a product’s price and reveal other charges later as the customer goes through the buying process. The additional charges can be mandatory charges, such as hotel resort fees, or fees for optional upgrades and add-ons.”²

As part of its rulemaking, the FTC has made the case for why government action in response to these practices is critical to protecting consumers:

Junk fees are especially likely to cause consumer harm when they arise “without real notice, unconnected to any additional service, in an industry where advertising is essential.” Junk fees manifest in markets ranging from auto financing to international calling cards and payday loans. A 2019 poll conducted by Consumer Reports found that eighty-two percent of those surveyed had spent money on hidden fees in the previous year. The respondents cited telecommunications and live entertainment as sources of hidden fees more than any other industries.

Junk fees not only are widespread but also are growing. In various industries, fees are increasing at higher rates than the base prices of the goods or services to which they are added. For example, in higher education and hospitality, fees are increasing faster than tuition or posted room rates. After first emerging in the late 1990s, hotel “resort fees” accounted for \$2 billion, or one-sixth of total hotel revenue, by 2015. With rising prices, fees are becoming more prevalent, allowing some businesses to raise effective prices without appearing to do so.

Junk fees impose substantial economic harms on consumers and impede the dissemination of important market information. A Commission analysis of hotel “resort fees” that were mandatory and undisclosed in the posted room rates concluded that such fees “artificially increas[e] the search costs and the cognitive costs” for consumers carrying out the transaction. Junk fees force consumers either to accept a higher actual price for a service or product after beginning the transaction or to spend more time searching for lower actual prices elsewhere. Consumers faced

[remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/](https://www.whitehouse.gov/the-press-office/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/). All internet citations are current as of March 22, 2023.

² *The Economics of Drip Pricing*, FTC, <https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing>.

with such fees pay upward of twenty percent more than when the actual price was disclosed upfront. These fee practices can be found throughout the economy but appear to be particularly widespread in markets for travel such as hotels, room-sharing, car rentals, and cruises. Tickets for live events appear to be another market with widespread junk fees.³

These fees artificially disrupt the balance of the market, resulting in “significant market misallocations.” “Because in a price-obscuring transaction consumers initiate purchasing decisions without knowing the actual cost, “[t]ickets will not necessarily go to the consumers who value them the most.”⁴

This troubling practice is particularly well-suited for government regulation as market participants are not best situated to refrain from such pricing practices if competitors are not held to account. The FTC conducted a workshop that “highlighted the inability of market participants to correct this course without intervention.” Case in point: “After a market leader took unilateral action to phase out hidden fees, the platform ‘lost significant market share and abandoned the policy after a year because consumers perceived the platform’s advertised prices to be higher than its competitors’ displayed prices.’”⁵

According to the author, this bill aims to make that intervention:

SB 478 combats the bait-and-switch 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.

Bait-and-switch 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, from car rental agencies to hotels to concert ticket sellers, more and more businesses 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

³ Federal Register, *Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011* (November 8, 2022) FTC, <https://www.govinfo.gov/content/pkg/FR-2022-11-08/pdf/2022-24326.pdf>.

⁴ *Ibid.*

⁵ *Ibid.*

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 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.

The bill effectuates this intervention by amending the CLRA to make unlawful advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges other than taxes. This empowers consumers to enforce their own rights and to go after those that engage in these deceptive practices.

3. Stakeholder positions

Attorney General Rob Bonta, the sponsor of the bill, writes:

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, restaurants and food delivery, telecom and internet service, and car rentals and purchases. . . .

Accordingly, SB 478 would prohibit this deceptive advertising practice across the board in California, and allow broad civil enforcement of violations under the CLRA.

Working families are dealing with enough in life – they shouldn't have to waste their time trying to figure out what goods and services will really cost them and which advertised prices are false. Simply put, the advertised price should be the price Californians pay. When pricing is not transparent, it alters the fair balance of information that is vital for a free market economy to operate. Lack of pricing transparency not only hurts competition and honest businesses, but also hurts consumers.

Writing in support, CALPIRG asserts:

California consumers deserve complete pricing information to help inform our purchases. That is why CALPIRG supports SB 478 to require transparency of all mandatory charges other than taxes or fees imposed by the government.

SB 478 and the transparency it will provide consumers is critical to ensure a fair marketplace. The bill would level the playing field for businesses who are up-front about their prices, encouraging true price competition.

A coalition of business groups, including the Civil Justice Association of California, write in opposition:

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.

The California New Car Dealers Association writes in an oppose-unless-amended position:

The automotive sales process is highly regulated under current law. The California Vehicle Code (VEH § 11713 et seq.) imposes a myriad of consumer protections related to the advertisement of motor vehicles by dealers licensed by the Department of Motor Vehicles (DMV). These protections include rules that expressly regulate how dealers must advertise the price of motor vehicles. (VEH § 11713.1) These laws were designed with consumers in mind to protect them during the car buying process and prevent practices like “hidden” and “junk” fees.

Unfortunately, as currently drafted, SB 478 conflicts with existing law regulating how vehicles are advertised. Unless SB 478 is amended, dealerships that adhere to Vehicle Code advertising requirements would be exposed to lawsuits under the California Consumer Legal Remedies Act.

CNCDA respectfully requests car dealers that are appropriately licensed and following current law in California be exempted from the expanded legal remedies in SB 478. This amendment will allow dealerships to continue to operate under the current regulatory environment which provides clear and enforceable requirements around advertising and the imposition of fees and charges during the automotive sales process.

SUPPORT

Attorney General Rob Bonta (sponsor)
California District Attorneys Association
California Low-income Consumer Coalition
CALPIRG
Consumer Attorneys 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 Association of Realtors
California Attractions and Parks Association
California Broadband & Video Association
California Chamber of Commerce
California Credit Union League
California New Car Dealers Association
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
East Bay Rental Housing Association
Escrow Institute of California
Family Business Association of California
Flasher Barricade Association
TechNet

RELATED LEGISLATION

Pending Legislation:

SB 644 (Glazer, 2023) requires a hotel, third-party booking service, hosting platform, or short-term rental to allow a reservation to be canceled without penalty if the cancellation is commenced within 24 hours of the reservation being finalized so long as the reservation is made 24 hours or more prior to the day of check-in. The bill prescribes certain procedures for issuing the attendant refunds. It authorizes the Attorney General to bring civil actions seeking civil penalties and makes violations actionable under the UCL. SB 644 is currently in the Senate Appropriations Committee.

SB 683 (Glazer, 2023) requires a person that publicly advertises a rate for a hotel room or short-term rental in or from this state to include in the advertised rate all mandatory fees and to make certain disclosures clearly and conspicuously. It authorizes the Attorney General to bring civil actions seeking civil penalties and makes violations actionable under the UCL and FAL. SB 683 is currently in the Senate Appropriations Committee.

SB 829 (Wilk, 2023) prohibits the operator of an entertainment facility and a primary ticket seller from entering into a contract that provides for the primary ticket seller to be the exclusive ticket seller for the operator of the entertainment facility. SB 829 is set to be heard in this Committee the same day as this bill.

AB 8 (Friedman, 2023) requires a ticket seller to disclose to a purchaser the total price of the ticket and the portion of that price that represents any fees or surcharges. The seller must also provide a link to an internet webpage that includes certain refund requirements, as specified. AB 8 is currently in the Assembly Privacy and Consumer Protection Committee.

AB 537 (Berman, 2023) prohibits a place of “short-term lodging,” which includes short-term rentals and hotels, from advertising or offering a room rate that does not include all taxes and fees required to book or reserve the short-term lodging. This prohibition extends to applications and online platforms whereby rental of a place of short-term lodging is advertised or offered. This bill is currently in the Assembly Business and Professions Committee.

Prior Legislation:

AB 1904 (Grayson, Ch. 324, Stats. 2022) requires financial service and product providers to clearly disclose in solicitations that the material is an advertisement and to include their name and contact information.

AB 790 (Quirk-Silva, Ch. 589, Stats. 2021) makes clear that the Consumer Legal Remedies Act’s prohibition on certain home solicitations of senior citizens applies to Property Assessed Clean Energy (PACE) assessments that are part of a pattern or practice in violation of PACE regulations.

AB 1556 (Friedman, Ch. 180, Stats. 2021) requires for cancelled events, that a refund be made within 30 calendar days of the cancellation; and requires a ticket price at any event which is postponed, rescheduled, or replaced with another event at the same date and time be fully refunded to the purchaser by the ticket seller upon request within 30 calendar days of the refund request.

SB 342 (Hertzberg, Ch. 162, Stats. 2020) makes it unlawful to register, traffic in, or use the name of a professional sports team or the names of professional sports leagues, among others, in a domain or subdomain name of a website to sell tickets in a fraudulent, deceptive, or misleading manner. It provides a private right of action to a person who suffers an economic injury as a result of such misconduct.

AB 3235 (Kansen Chu, 2020) would have prohibited a place of short-term lodging, an internet or mobile website, application, or centralized online platform from advertising a room rate that does not include all of the required fees to be paid in order to stay at the place of lodging, as specified. The bill declared that its provisions regarding fee disclosures were declaratory of existing law. The bill failed passage in the Assembly Business and Professions Committee.
