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## Proposed California Legislation Would Limit and Possibly Punish Non-Disparagement Clauses in Online Consumer Contracts

By Tenaya Rodewald on April 28, 2014

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On Tuesday, April, 22, the California Assembly Judiciary Committee voted 10-0 to approve a so-called “Yelp bill” that would prohibit companies from suppressing negative consumer reviews through the use of “non-disparagement clauses” in contracts with consumers. Such clauses would be unlawful unless the consumer had knowing, voluntary, and intelligently waived his or her right to voice a negative opinion, and consumers would have the right to sue companies to collect civil penalties if the companies violate the law. The Bill Analysis, which also includes amended language of the Bill, states that the Bill aims to make it clear that non-disparagement provisions—by which customers may unknowingly or involuntarily waive Constitutionally-protected free-speech rights—are not appropriate and are unenforceable in contracts of adhesion and in online consumer transactions for goods and services.

The measure, Assembly Bill 2365, was authored by Assembly Speaker John A. Pérez, who explained that he drafted it after learning of a Utah couple penalized \$3,500 for posting a negative review on the website RipoffReport.com, in which they complained about their experience with an online retailer and said that they never received the products they ordered. The retailer claimed the negative review violated a non-disparagement clause in the in its Terms of Use that allegedly governed the husband’s online purchase, and demanded the couple pay a \$3,500 penalty. According to a lawsuit filed by the couple, when they refused to pay the \$3,500, the retailer instigated debt collection proceedings and reported the ‘debt’ to credit reporting agencies, damaging the couple’s credit and causing them a variety of hardships.

Speaker Pérez explained in his written statement, “[m]ost of us assume we have just as many rights after making a purchase as we did before,” therefore, “[i]f a merchant thinks our First Amendment free speech rights need to be curtailed, they should say so, up front, and in plain language.”

AB 2365 would add a section to the California Civil Code relating to unlawful contracts. Under the new

provision, any “contract or proposed contract for the sale or lease of consumer goods or services” would be unlawful “if it includes a provision requiring the consumer to waive his or her right to make any statement regarding the consumer’s experience” unless the consumer made a “knowing, voluntary, and intelligent” waiver of this right. In addition, it would be unlawful for a company to “threaten or seek to enforce” such a provision or to “otherwise penalize a consumer for making such a statement” unless the consumer had provided the required knowing, voluntary and intelligent waiver. The company would have the burden of proving that the waiver was knowing, voluntary and intelligent. Finally, the law would allow a consumer, the California Attorney General, or a district attorney or city attorney to bring a civil action to collect a civil penalty from any company that violates the law. As amended by the Judiciary Committee vote on Tuesday, the penalties would be up to \$2,500 for a first violation, \$5,000 for each subsequent violation, and \$10,000 where the violation is willful, intentional or reckless. The language of the current Bill indicates that a company could violate the law, and trigger these penalties, by including a provision in violation of the law in its online terms of sale or terms of use. However, it is unclear whether any *potential* consumer would then be able to sue for the statutory penalty, or if the penalty would only apply as to consumers who entered into a transaction with the company.

As the Bill Analysis explains, under current law and under the proposed Bill, contractual waivers of Constitutionally-protected rights—such as waivers of free-speech rights through non-disparagement clauses—must be ‘knowing, voluntary and intelligent.’ However, the analysis asserts that even if such clauses would be found unenforceable under current law, the Utah case illustrates that consumers may still face intimidation and heavy burdens in trying to resist such clauses.

The Bill is now with the Assembly Appropriations Committee, and is not yet close to being enacted. It must also make its way through the Senate committee process and be voted on and passed by both the Assembly and Senate before making its way to the Governor’s desk for his signature.