

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: CS/SB 1212

INTRODUCER: Commerce and Tourism Committee and Senator Ring

SUBJECT: Contracts for Goods and Services

DATE: April 17, 2015

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Siples	McKay	CM	Fav/CS
2. Procaccini	Cibula	JU	Favorable
3. Harmsen	Hrdlicka	FP	Favorable

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1212 provides that a contract for goods or services is unlawful if it includes a provision that requires the consumer to waive his or her right to make any statement regarding the seller or lessor or the goods or services. The bill also makes it unlawful for a party to threaten or seek enforcement of such a provision or to penalize the consumer for making a statement regarding his or her experiences with the seller or lessor or the goods or services. The bill provides that any waiver of a consumer's right to provide such a statement is contrary to public policy and would be void and unenforceable. The bill creates civil penalties for violation of its provisions, enforceable against a business or its employers or agents.

II. Present Situation:

Contracts

The formation of a contract requires the following: offer, acceptance, and consideration.¹ A contract may be written or oral.² A contract formed under duress, induced by fraud, or with a

¹ 11 Fla. Jur. 2d *Contracts* s. 25.

² In some cases, there is a statutory requirement that a contract be written.

person that lacks capacity are voidable.³ A contract is void, or without legal effect, if it is unconscionable,⁴ contravenes public policy, or is otherwise illegal.⁵

General provisions and definitions for certain commercial transactions are found in the Florida Uniform Commercial Code (UCC).⁶ Among other things, the UCC applies to the sale of goods and leases, but does not generally govern contracts for services. “Contract” is defined as the total legal obligation that results from the parties’ agreement, consistent with law.⁷

Freedom of Speech

Both the First Amendment of the United States Constitution and Art. 1, s. 4 of the Florida Constitution protect against infringement of free speech. Although one may contractually waive his or her constitutional rights, a court may determine: (1) whether the waiver was voluntary, free, deliberate, and not procured through intimidation, coercion, or deception; and (2) whether the waiver was executed with full awareness of the nature of the rights being abandoned and the consequences of such abandonment.⁸

Customer Reviews

Many internet websites allow a consumer to share his or her experience with a business through publically accessible reviews, rating systems, or commenting sections.⁹ When seeking services or goods, an individual may consider the reviews that others shared about their experience with a company. Online reviews are the second most trusted source of information relied on by consumers, behind recommendations from friends and family.¹⁰

Some businesses have attempted to contractually limit consumers’ abilities to share opinions about the business or the goods or services received via a “non-disparagement clause.” Several stories about such contractual clauses have made the news recently:

- In 2013, an online retailer threatened enforcement of a non-disparagement clause against customers, after the customers left a negative review on a consumer review website. The

³ 11 Fla. Jur. 2d *Contracts* s. 10.

⁴ Unconscionability is common law doctrine that courts may use to refuse to enforce contractual provisions in which one party overreaches the other party to gain “...an unjust and undeserving advantage which it would be inequitable to permit him to enforce...” *Steinhardt v. Rudolph*, 422 So.2d 884, 889 (Fla. 3rd DCA 1982) (citations omitted). Unconscionability may be either procedural, dealing with the factors surrounding the entering of the contract; or substantive, focusing directly on the contract terms. *Steinhardt* at 889 (citations omitted).

⁵ 11 Fla. Jur. 2d *Contracts* s. 11.

⁶ Chapters 670-680, F.S., are cited as the Uniform Commercial Code (UCC). General provisions of the Uniform Commercial Code are found in ch. 671, F.S.; the Uniform Commercial Code – Sales is found in ch. 672, F.S.; and the Uniform Commercial Code – Leases is found in ch. 680, F.S.

⁷ Section 671.201(12), F.S.

⁸ *Peterson v. Florida Bar*, 720 F. Supp.2d 1351, 1358 (M.D. Fla. 2010) (citations omitted).

⁹ For example, see TripAdvisor, *About TripAdvisor*, available at http://www.tripadvisor.com/PressCenter-c6-About_Us.html; Yelp.com, *About Us*, available at <http://www.yelp.com/about>; and Angieslist.com, *Angie’s List*, <http://www.angieslist.com/aboutus.htm> (websites last visited 4/16/2015). Additionally, many search engines, such as Google, Yahoo, or Bing, offer access to consumer reviews within the search engine results.

¹⁰ Nielsen, *Consumer Trust in Online, Social and Mobile Advertising Grows*, (April 10, 2012) available at <http://www.nielsen.com/us/en/insights/news/2012/consumer-trust-in-online-social-and-mobile-advertising-grows.html> (last visited 4/16/2015).

retailer demanded removal of the review or a payment of \$3,500 from the customers. The customer refused to pay and the retailer reported the fine for collection, which negatively impacted the customers' credit ratings. The customers filed a lawsuit in a federal district court in Utah seeking compensation for violations of the Fair Credit Reporting Act and tort law. The lawsuit claimed that the clause was unconscionable and unlawfully restricted the customers' First Amendment rights. Ultimately, the customers obtained a default judgment against the retailer and was awarded compensatory and punitive damages, as well as attorney's fees and expenses.¹¹

- A hotel in New York posted a policy that indicated it would fine wedding parties \$500 for each negative review posted by any member of the wedding party or their guests. After public backlash, this policy was removed.¹²
- Medical Justice provided standard agreements to medical professionals for use in their practices that asked patients to waive the right to, directly or indirectly, provide commentary regarding the practitioner or the services received. Some of the standard agreements required the patient to sign over any written, pictorial, or electronic commentary about the practitioner.¹³ One dentist, using a Medical Justice form contract, was sued by a patient, and in March 2015, a federal district court in New York ruled that the contract was unenforceable and constituted a misuse of copyright law.¹⁴

*Defamation*¹⁵

If a business is concerned about false reviews that may have a negative impact on its business, it may bring a civil action against a consumer who publishes false or misleading reviews. To prevail, the business must show that the customer:

- Published a false statement about the business;
- The false statement was published to a third party; and
- The falsity of the statement caused injury to the business.¹⁶

III. Effect of Proposed Changes:

Section 1 creates s. 725.09, F.S., to prohibit the inclusion of a provision that limits a consumer's right to make statements regarding his or her experiences with the seller or lessor, the seller's or lessor's employees, or the goods or services in a contract for the sale or lease of consumer goods or services. The bill makes it unlawful to threaten or seek to enforce a provision made unlawful under this bill, or otherwise penalize a consumer for making a statement protected under this bill.

¹¹ Nelson, Steven, *Retailer That Fined Couple \$3,500 for Negative Review Hit with Lawsuit*, U.S. NEWS & WORLD REPORT, (December 13, 2013) available at <http://www.usnews.com/news/articles/2013/12/18/retailer-that-fined-couple-3500-for-negative-review-hit-with-lawsuit>; and Volokh, Eugene, *Default Judgment Against KlearGear, the Company that Billed Customers for \$3,500, Because They Posted a Negative Review*, THE WASHINGTON POST, (May 16, 2014) available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/16/default-judgment-against-kleargear-the-company-that-billed-customers-for-3500-because-they-posted-a-negative-review/> (websites last visited 4/16/2015).

¹² Hetter, Katia, CNN, *A \$500 Fine for Bad Reviews? Inn's Policy Pummeled*, (August 5, 2014) available at <http://www.cnn.com/2014/08/04/travel/bad-hotel-review-fine-backlash/> (last visited 4/16/2015).

¹³ Doctored Reviews, available at <http://doctoredreviews.com/patients/the-back-story/> (last visited 4/16/2015).

¹⁴ Lexology.com, *Court Finds Dentist Misused Copyright Law to Stop Bad Yelp Reviews*, (March 17, 2015) available at <http://www.lexology.com/library/detail.aspx?g=56373e86-0715-4b86-97c7-68582badf0cd> (last visited 4/16/2015).

¹⁵ Defamation is defined as the unprivileged publication of false statements that naturally and proximately result in an injury to another. Under Florida law, defamation also includes libel and slander. 19 FLA. JUR. 2D s. 2.

¹⁶ *Razner v. Wellington Regional Medical Center, Inc.*, 837 So. 2d 437, 442 (Fla. 4th DCA 2002) (citations omitted).

Any statement of penalty for undesired reviews about the business included within a contract is null and void.

The bill creates a civil action for the violation of the provisions of the bill, which may be brought by a consumer, the Office of Attorney General, or the state attorney for the county in which the violation occurred. A court may impose a civil penalty of no more than \$2,500 for the first violation and no more than \$5,000 for each subsequent violation. Willful, intentional, or reckless violations may incur an additional civil penalty of up to \$10,000. The civil penalty will be awarded to the consumer, if he or she brought the civil action, or to the general fund of the Office of Attorney General or the state attorney, if one of these entities brought the action. The imposition of these civil penalties does not affect any other relief or remedy available by law.

The bill does not limit the ability of a host of online consumer reviews or comments from removing consumer reviews or comments that the host may lawfully remove.

Section 2 provides an effective date of July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The United States Constitution and the Florida Constitution prohibit the state from passing any law impairing the obligation of contracts.¹⁷ “[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear.”¹⁸ If a law does impair contracts, the courts will assess whether the law is deemed reasonable and necessary to serve an important public purpose.¹⁹ The

¹⁷ U.S. Const. Article I, s. 10; Art. I, s. 10, Fla. Const.

¹⁸ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 779 (Fla. 1979) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). See also *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

¹⁹ *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980); *Yellow Cab Co. of Dade County v. Dade County*, 412 So. 2d 395, 397 (Fla. 3rd DCA 1982) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)).

factors that a court will consider when balancing the impairment of contracts with the public purpose include:

- Whether the law was enacted to deal with a broad, generalized economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the parties undertook their contractual obligations, or whether it invades an area never before subject to regulation; and
- Whether the law results in a temporary alteration of the contractual relationships of those within its scope, or whether it permanently and immediately changes those contractual relationships, irrevocably and retroactively.²⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Businesses and their employees or agents may be subject to civil actions and penalties for violations of the provisions of the bill, including the inclusion of a contractual provision or seeking to enforce such provision on a customer to waive the ability to make statements regarding his or her experiences.

C. Government Sector Impact:

To the extent that businesses, or their employees or agents, violate the provisions of the bill, there may be an insignificant, negative fiscal impact to the state court system or legal agencies seeking to enforce the provisions of the bill.²¹ However, some of those costs may be offset by the recovery of civil penalties.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 725.09, Florida Statutes.

²⁰ See *supra* note 18.

²¹ Office of the State Courts Administrator, *2015 Judicial Impact Statement: CS/SB 1212* (March 31, 2015).

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism Committee on March 23, 2015:

The committee substitute moves the bill's provisions from ch. 672, F.S., to ch. 725, F.S.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
