

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 131
Economic Matters

(Delegate Waldstreicher, *et al.*)

Finance

Commercial Law - Nondisparagement Clauses in Consumer Contracts -
Prohibition

This bill prohibits a contract or a proposed contract for the sale or lease of consumer goods or services from including a provision waiving the consumer's right to make specified statements. The bill also prohibits a person from seeking enforcement of specified contract provisions, threatening reprisals, or penalizing a consumer for making any statement protected under the bill.

Violation of the bill is an unfair and deceptive trade practice under the Maryland Consumer Protection Act (MCPA), subject to MCPA's civil and criminal penalty provisions.

Fiscal Summary

State Effect: The bill does not materially affect governmental finances or operations. If the Consumer Protection Division of the Office of the Attorney General receives fewer than 50 complaints per year stemming from the bill, the additional workload can be handled with existing resources. Because consumers can sue for violations of provisions of the bill, there may be increased case filings. However, the Judiciary can handle the bill's requirements with existing resources.

Local Effect: The bill's imposition of existing penalty provisions does not have a material impact on local government finances or operations.

Small Business Effect: Potential minimal. The legislation may affect small businesses that have nondisparagement provisions in their contracts of sales or services. If small businesses do not comply with the provisions of the bill, they could be subject to civil and criminal penalty provisions of MCPA.

Analysis

Bill Summary: The bill defines “consumer” as an actual or a prospective purchaser, lessee, or recipient of consumer goods or services. The bill also defines “consumer goods or services” as goods or services that are primarily for personal, household, or family purposes. The bill specifies that a contract or a proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to make any statement concerning:

- the seller or lessor;
- employees or agents of the seller or lessor; or
- the consumer goods or services.

The bill also specifies that a waiver of any provision of the bill is contrary to public policy and is void and unenforceable. Finally, the bill clarifies that it is not intended to prohibit or limit a person (1) that hosts online consumer reviews or comments from removing a statement that is otherwise lawful to remove; (2) from including in a contract (or a proposed contract) for the sale or lease of consumer goods or services a provision prohibiting a consumer from disclosing proprietary information, techniques, or processes; or (3) from bringing an action alleging defamation.

Current Law: An unfair or deceptive trade practice under MCPA includes, among other acts, any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. The prohibition against engaging in any unfair or deceptive trade practice encompasses the offer for or actual sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; the collection of consumer debt; or the offer for or actual purchase of consumer goods or consumer realty from a consumer by a merchant whose business includes paying off consumer debt in connection with the purchase of any consumer goods or consumer realty from a consumer.

The Consumer Protection Division is responsible for enforcing MCPA and investigating the complaints of aggrieved consumers. The division may attempt to conciliate the matter, issue a cease and desist order, or file a civil action in court. A merchant who violates MCPA is subject to a fine of up to \$1,000 for the first violation and up to \$5,000 for each subsequent violation. In addition to any civil penalties that may be imposed, any person who violates MCPA is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000 and/or imprisonment for up to one year.

Background: According to the news outlet “The Consumerist,” more companies are including provisions known as “nondisparagement clauses” in their terms of services or in other provisions of consumer contracts. The clauses are intended to prevent a customer from leaving a critical review, especially in an online forum or online review site, such as www.amazon.com. California has enacted a state law banning enforcement of consumer nondisparagement clauses, the only state to do so to date.

Under consideration in the U.S. Congress, among other bills, is S. 2044, the federal “Consumer Review Freedom Act” which passed the Senate by unanimous consent and was referred to the House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade in December 2015. The federal bill would void a contractual provision that prohibits or restricts an individual from engaging in written, oral, or pictorial reviews or other similar assessments of goods, services obtained from, or the conduct of a person who is also party to the contract. The bill would also prohibit the imposition of penalties or fees or the transfer of intellectual property rights in review or feedback content.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Office of the Attorney General (Consumer Protection Division), Judiciary (Administrative Office of the Courts), *The Consumerist*, www.techdirt.com, www.congress.gov, Department of Legislative Services

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