

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 891 (Cunningham)
Version: March 11, 2021
Hearing Date: June 8, 2021
Fiscal: No
Urgency: No
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SUBJECT

Contracts: parental consent

DIGEST

This bill provides that a representation by a minor that the minor's parent or legal guardian has consented shall not be considered to be consent for purposes of this chapter.

EXECUTIVE SUMMARY

Existing law provides four elements that are essential to the existence of a contract: parties capable of contracting; their consent; a lawful object; and a sufficient cause or consideration. As to consent, the law requires it to be free, mutual, and communicated by each to the other. A minor cannot make a contract relating to real property or relating to any personal property not in the immediate possession or control of the minor. However, a minor may otherwise make a contract in the same manner as an adult, subject to the power of disaffirmance. A minor may disaffirm the contract any time before reaching the age of majority or within a reasonable time afterwards.

Despite these laws, one issue that has arisen, prominently in the online world, is companies seeking to secure the consent of a parent or guardian *through* minors, often passively in the terms and conditions for various internet services.

The author brings this bill in order to ensure that a contract cannot be formed based solely on a minor's representation that their parent or guardian consented thereto. The bill provides that a representation by a minor that the minor's parent or legal guardian has consented shall not be considered to be consent for purposes of contract formation.

This bill is sponsored by the Children's Advocacy Institute at the University Of San Diego School of Law. It is supported by Children Now and Common Sense. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that a contract must include parties capable of contracting, their consent, a lawful object of the contract, and a sufficient cause or consideration. (Civ. Code § 1550.)
- 2) Provides that a minor may make a contract in the same manner as an adult, subject to the power of disaffirmance. (Fam. Code § 6700.) The only exceptions are that a minor cannot give a delegation of power; make a contract relating to real property or any interest therein; or make a contract relating to any personal property not in the immediate possession or control of the minor. (Fam. Code § 6701.)
- 3) Provides that, except as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards or, in case of the minor's death within that period, by the minor's heirs or personal representative. (Fam. Code § 6710.)
- 4) Prohibits a contract, otherwise valid, entered into during minority, from being disaffirmed on that ground either during the actual minority of the person entering into the contract, or at any time thereafter, if all of the following requirements are satisfied:
 - a) the contract is to pay the reasonable value of things necessary for the support of the minor or the minor's family;
 - b) these things have been actually furnished to the minor or to the minor's family; and
 - c) the contract is entered into by the minor when not under the care of a parent or guardian able to provide for the minor or the minor's family. (Fam. Code § 6712.)
- 5) Provides that if, before the contract of a minor is disaffirmed, goods the minor has sold are transferred to another purchaser who bought them in good faith for value and without notice of the transferor's defect of title, the minor cannot recover the goods from an innocent purchaser. (Fam. Code § 6713.)
- 6) Establishes various matters involving medical treatment to which a minor may consent and which are not subject to disaffirmance. (Fam. Code § 6920 et seq.)
- 7) Provides, through the California Consumer Privacy Act, a consumer the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. This right may be referred to as the right to opt-out. (Civ. Code § 1798.120(a).)

- 8) Prohibits a business, notwithstanding the provision above, from selling the personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age, unless the consumer, in the case of consumers between 13 and 16 years of age, or the consumer's parent or guardian, in the case of consumers who are less than 13 years of age, has affirmatively authorized the sale of the consumer's personal information. A business that willfully disregards the consumer's age shall be deemed to have had actual knowledge of the consumer's age. This right may be referred to as the "right to opt-in." (Civ. Code § 1798.120(c).)
- 9) Provides that a business that has not received consent to sell a minor consumer's personal information shall be prohibited from selling the consumer's personal information, unless the consumer subsequently provides express authorization for the sale of the consumer's personal information. (Civ. Code § 1798.120(d).)
- 10) Requires, pursuant to the Parent's Accountability and Child Protection Act, a person or business that conducts business in California, and that seeks to sell any product or service in or into California that is illegal under state law to sell to a minor to, notwithstanding any general term or condition, take reasonable steps, as specified, to ensure that the purchaser is of legal age at the time of purchase or delivery, including, but not limited to, verifying the age of the purchaser. (Civ. Code § 1798.99.1(a)(1).)
- 11) Establishes the Privacy Rights for California Minors in the Digital World (PRCMDW), which prohibits an operator of an internet website, online service, online application, or mobile application ("operator") from various practices directed at minors. (Bus. & Prof. Code § 22580.)
- 12) Requires, pursuant to the PRCMDW, certain operators to permit a minor user to remove the minor's content or information and to further inform the minor of this right and the process for exercising it. (Bus. & Prof. Code § 22581.)
- 13) Establishes the federal Children's Online Privacy Protection Act (COPPA) to provide protections and regulations regarding the collection of personal information from children under the age of 13. (15 U.S.C. § 6501 et seq.)

This bill provides that a representation by a minor that the minor's parent or legal guardian has consented shall not be considered to be consent for purposes of contract formation.

COMMENTS

1. Stated intent of the bill

According to the author:

We seek parental consent for a child's behavior to protect the child; because the child is, in fact, a child, and often incapable of recognizing the consequences of their actions. A business that seeks parental consent not by asking a parent but by asking the child - the very person whose judgment is supposed to be checked by a parent's consent - defeats the whole purpose of such parental consent. This bill underscores that parental consent in fact means consent of the parent.

2. Protecting the privacy of children

At the federal level, COPPA, 15 U.S.C. Section 6501 et seq., charges the Federal Trade Commission (FTC) with the duty to issue and enforce regulations protecting the privacy of children online. The FTC has issued and amended the COPPA Rule in accordance with that directive. COPPA, and its attendant regulations, require an operator of an internet website or online service directed to a child, as defined, or an operator of an internet website or online service that has actual knowledge that it is collecting personal information from a child, to provide notice of what information is being collected and how that information is being used, and to give the parents of the child the opportunity to refuse to permit the operator's further collection of information from the child. (15 U.S.C. § 6502.) According to the FTC: "The primary goal of COPPA is to place parents in control over what information is collected from their young children online. The Rule was designed to protect children under age 13 while accounting for the dynamic nature of the Internet."¹

COPPA requires covered operators to obtain parental consent through a method that is "reasonably calculated to ensure that the person providing consent is the child's parent." It details several methods that meet this criteria:

- Providing a consent form to be signed by the parent and returned via U.S. mail, fax, or electronic scan (the "print-and-send" method);
- Requiring the parent, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;

¹ Federal Trade Commission, *Complying with COPPA: Frequently Asked Questions* (Mar. 20, 2015) <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#Verifiable%20Parental> [as of May 24, 2021].

- Having the parent call a toll-free telephone number staffed by trained personnel, or have the parent connect to trained personnel via video-conference; or
- Verifying a parent's identity by checking a form of government-issued identification against databases of such information, provided that [the operator] promptly delete the parent's identification after completing the verification.

California law also provides strong protections for privacy and, in particular, the privacy of children. Article I, Section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

In 2013, the Legislature passed SB 568 (Steinberg, Ch. 336, Stats. 2013), establishing PRCMDW to protect minors online by: requiring that operators of internet websites, online services, online applications, or mobile applications permit minors to remove information they personally posted on the operator's site, service or application; and prohibiting operators from displaying advertisements for products or services, that state law expressly prohibit minors from purchasing, on the operator's site, service or application directed to minors or when the operator has actual knowledge that a minor is visiting the site at the time the advertisement is displayed.

The author of SB 568 argued that "because of their still developing capacity for self-regulation, still developing critical thinking skills, still developing ability to use sound judgment, and susceptibility to peer pressure, children and adolescents are at greater risk than adults as they navigate through the digital world and experiment with social media." He further argued that "children are more susceptible to online marketing of harmful products" and that "it is the state's responsibility to ensure that children are not bombarded with inappropriate advertisements while they are navigating sites directed towards children or served advertisements for products public policy deem are harmful for minors." Senator Steinberg reasoned that "it is especially inappropriate for operators to subject children to advertisements for products those children are legally barred from purchasing when the operator knows the person visiting the site at the time the advertisement is displayed is a minor." The Legislature unanimously approved SB 568.

AB 375 (Chau, Ch. 55, Stats. 2018) created the California Consumer Privacy Act (CCPA), which was recently amended by Proposition 24 (2020). In addition to providing consumers certain rights over their personal information, the CCPA provides stronger rights to minors in connection with the sale of their information. Pursuant to the act, consumers have the right to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information, known as the "right to opt-out." (Civ. Code § 1798.120.) However, if the business has actual knowledge that the consumer is 16 years of age or younger, the business cannot sell the consumer's personal information without affirmative authorization, known as the

“right to opt-in.” If the child is between 13 and 16, the child can affirmatively authorize such sales, and if the child is younger than 13, the business is required to get the parent or guardian’s consent.

3. Ensuring meaningful parental consent

As discussed above, companies wishing to establish a binding contract with a minor generally need the consent of the minor’s parent or guardian. A growing and troubling trend found in connection with various websites and internet services is the use of terms and conditions that state a minor’s use of those services is considered a representation that the minor’s parent or guardian has consented. While this sort of legal manipulation is of dubious legality and enforceability, any ambiguity in the law should be settled given the stakes. This bill makes clear that such a representation by a minor shall not be considered to be consent for purposes of forming a contract.

The Children’s Advocacy Institute at the University Of San Diego School of Law, the sponsor of this bill, highlight many troubling examples of this practice. Highlighting that the popularity of such clauses rose after Facebook relied on such assumed consent in connection with its services:

This bill addresses the widely denounced way Facebook used to obtain parental consent for its program whereby third-party advertisers paid to have product “likes” of child users spread automatically to the child’s friends.

Imagine if parental permission slips, instead of asking a parent to sign, asked the child to sign saying, “I promise I asked my parents and they said it was OK.”

That is how technology giant Facebook allegedly honored the role of parents and obtained parental consent. Buried in generalized “fine print” terms and conditions was a provision that astonishingly elicited *from children a promise that they have obtained consent from their parents* for the child to participate in privacy-implicating, marketing behavior. The exact language used reads:

“If you are under the age of eighteen (18), you represent that a parent or legal guardian also agrees to this section on your behalf.”

...

Sadly, even though Facebook ended the program for which this non parental [consent] was deployed, Facebook’s method of “obtaining” parental consent by directing an inquiry *to the child* whether the child has obtained it has spread all over the Internet, necessitating a legislative response.

Children Now write in support:

Under this bill, a business required by law to seek parental consent cannot, as technology giant Facebook used to and as many other companies inspired by its former policy still do, ask the child if the parent has consented. This bill is essential to promoting the safety and privacy rights of minors online.

Writing in support, Common Sense stresses the need for the bill: "Never before in our history has protecting the integrity and efficacy of parental consent been more important."

SUPPORT

Children's Advocacy Institute at the University Of San Diego School of Law (sponsor)
Children Now
Common Sense

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known

Prior Legislation:

AB 2008 (Cunningham, 2020) would have provided that where parental consent is required by law, it shall not be obtained through the minor. The bill died in the Senate Judiciary Committee.

AB 1665 (Chau, 2019) would have provided that a business that operates an internet website or application must obtain consent to sell a minor's personal information in a manner that is separate from the social media internet website or the application's general terms and conditions. It would have further provided that parental consent shall not be obtained through the minor. The bill was gutted and amended and later died in the Senate Business, Professions and Economic Development Committee.

AB 375 (Chau, Ch. 55, Stats. 2018) *See* Comment 2.

SB 568 (Steinberg, Ch. 336, Stats. 2013) *See* Comment 2.

AB 2511 (Chau, Ch. 872, Stats. 2018) created the Parent's Accountability and Child Protection Act, requiring a person or business that conducts business in California and that seeks to sell specified products or services, to take reasonable steps to ensure that the purchaser is of legal age.

PRIOR VOTES:

Assembly Floor (Ayes 74, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)
