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## Understanding the Consumer Review Fairness Act of 2016

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# UNDERSTANDING THE CONSUMER REVIEW FAIRNESS ACT OF 2016

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Consumer reviews are vitally important to our modern economy. Markets become stronger and more efficient when consumers share their marketplace experiences and guide other consumers toward the best vendors and away from poor ones.<sup>1</sup>

Businesses recognize the importance of consumer reviews, and many businesses take numerous steps to manage how consumer reviews affect their public image. Unfortunately, in a misguided effort to control consumer reviews, some businesses have deployed contract provisions that ban or inhibit their consumers from reviewing them. I call those provisions “anti-review clauses.”<sup>2</sup>

Anti-review clauses distort the marketplace benefits society gets from consumer reviews by suppressing peer feedback from prospective consumers, which in turn helps poor vendors stay in business and diminishes the returns that good vendors get from investments in quality (thus degrading their willingness to make those investments).<sup>3</sup>

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1. Eric Goldman, *An Assessment of the Consumer Review Freedom Act of 2015* (Santa Clara Univ. Legal Studies Research Papers Series, Working Paper No. 2-15, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2686021](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686021) [hereinafter Goldman, *CRFA Assessment*].

2. Another synonym is “gag clause.” The term “non-disparagement clause” is also used, but some anti-review clauses restrict all consumer reviews, even reviews that are not disparaging. The House Report refers to both “gag clauses” and “non-disparagement clauses.” H.R. REP. NO. 114-731, at 5 (2016).

3. ERIC GOLDMAN, THE REGULATION OF REPUTATIONAL INFORMATION IN THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 293-304 (Berin Szoka & Adam Marcus eds., 2010) [hereinafter, GOLDMAN, REPUTATION REGULATION].

Recognizing the threats posed by anti-review clauses, Congress banned them in the Consumer Review Fairness Act of 2016 (the CRFA).<sup>4</sup> As the House Report explains, the law seeks “to preserve the credibility and value of online consumer reviews by prohibiting non-disparagement clauses restricting negative, yet truthful, reviews of products and services by consumers.”<sup>5</sup> By doing so, the CRFA protects the production of information that helps marketplaces function more effectively.

This Essay helps readers understand the CRFA. Part I provides some background about anti-review clauses. Part II describes the new law and how it relates to existing law. Part III considers if the law goes far enough to protect consumer reviews. The Essay then has a short conclusion.

### I. THE RISE OF ANTI-REVIEW CLAUSES.<sup>6</sup>

Many Americans have never personally encountered an anti-review clause; and if they did, they probably wouldn’t realize it because they never read the contract. Yet stopping anti-review clauses fully merited congressional intervention because the clauses are viral—and toxic.

Anti-review clauses initially found the widest deployment in the healthcare field.<sup>7</sup> In the 2000s, a company called Medical Justice encouraged doctors, dentists and other healthcare providers to adopt form contracts that included anti-review clauses. The language and approach of Medical Justice’s clauses varied over the years, ranging from an outright ban on patient reviews to an assignment of patients’ ownership of reviews they had not yet written.<sup>8</sup>

Medical Justice pitched its contracts as a way for healthcare providers to bypass the confidentiality limits in Health Insurance Portability and Accountability Act of 1996 (HIPAA), which limits the ability of healthcare providers to disclose patient information to rebut patient reviews. Due to HIPAA, healthcare providers sometimes feel defenseless against bogus patient reviews, even though HIPAA does not make it impossible to publicly

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4. Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 130 Stat. 1355 (2016).

5. H.R. REP. NO. 114-713. *See also Zero Stars: How Gagging Honest Reviews Harms Consumers and the Economy: Hearing on S. 269 Before the S. Comm. on Commerce, Sci. & Transp.*, 114th Cong. (2015).

6. *See generally* Eric Goldman, *Fining Customers For Negative Online Reviews Isn’t New. . . Or Smart*, FORBES: TERTIUM QUID (Aug. 7, 2014, 10:47 AM), <http://www.forbes.com/sites/ericgoldman/2014/08/07/fining-customers-for-negative-online-reviews-isnt-new-or-smart/> [hereinafter Goldman, *Not Smart*] (giving an overview of attempts to suppress negative online reviews).

7. *See generally* DOCTORED REVIEWS, <http://www.DoctoredReviews.com> (last visited Oct. 1, 2017) (educating consumers about Medical Justice’s attempts to restrict patient online reviews).

8. *The Back Story*, DOCTORED REVIEWS, <https://doctoredreviews.com/patients/the-back-story/> (last visited Oct. 1, 2017).

respond to patient reviews.<sup>9</sup> Furthermore, for reasons discussed in Part II(B), Medical Justice's contract provisions were likely legally ineffectual, so healthcare providers who adopted the clauses almost certainly over-estimated the clauses' usefulness.

Nevertheless, Medical Justice's contracts proved popular with healthcare providers. Perhaps 2,000 healthcare providers adopted Medical Justice's forms,<sup>10</sup> and an estimated one million Americans signed the forms.<sup>11</sup> In many circumstances, patients had little choice about whether or not to sign—patients' choice of healthcare providers may be limited by insurance considerations (especially in non-urban areas); patients may have been experiencing a healthcare emergency that meant they were not in a position to negotiate;<sup>12</sup> or the doctor's front office staff may have simply refused to negotiate. Many patients probably also signed the contract believing it was "standard boilerplate" or overlooked it amongst a blizzard of other papers and forms that patients must complete.

Medical Justice eventually reversed course and started evangelizing consumer reviews,<sup>13</sup> but the healthcare industry still has fewer patient reviews than other industries due to its historical suppression of patient reviews.

Anti-review clauses also gained some traction in the travel and lodging industry, including vacation rentals,<sup>14</sup> hotels,<sup>15</sup> apartment buildings,<sup>16</sup> and pet sitters.<sup>17</sup> In some cases, these vendors can impose a "fine" on an offending

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9. Eric Goldman, *Patients' Online Reviews of Physicians*, MED. ETHICS, Fall 2013, at 6.

10. Letter from Angie Hicks, Founder and Chief Exec. Officer, Angie's List, to U.S. S. Comm. on Commerce, Sci. and Transp. (Nov. 3, 2015) <http://www.angieslist.com/news-releases/angie-hicks-letter-us-senate-committee-commerce-science-transportation-re-consumer/>.

11. Goldman, *Not Smart*, *supra* note 6.

12. See e.g., *Lee v. Makhnevich*, No. 11 Civ. 8665 PAC, 2013 WL 1234829 (S.D.N.Y. Mar. 27, 2013).

13. See generally Medical Justice "retired" its form contract and instead offered to healthcare providers a system for generating more reviews from patients. Eric Goldman, *Medical Justice Capitulates by "Retiring" Its Anti-Patient Review Contracts*, TECH. & MARKETING L. BLOG, (Dec. 1, 2011), [http://blog.ericgoldman.org/archives/2011/12/medical\\_justice.htm](http://blog.ericgoldman.org/archives/2011/12/medical_justice.htm).

14. See, e.g., *Galland v. Johnston*, No. 14-CV-4411, 2015 WL 1290775 (S.D.N.Y. Mar. 19, 2015); Christopher Elliott, *New Confidentiality Clauses Can Influence Vacation Rental Reviews*, ELLIOTT (Apr. 14, 2012), <http://elliott.org/blog/new-confidentiality-clauses-can-influence-vacation-rental-reviews/>.

15. Mara Siegler, *Hotel Fines \$500 for Every Bad Review Posted Online*, PAGE SIX (Aug. 4, 2014), <https://pagesix.com/2014/08/04/hotel-charges-500-for-every-bad-review-posted-online/> (regarding the Union Street Guest House in New York).

16. Joe Mullin, *One Apartment Complex's Rule: You Write a Bad Review, We Fine You \$10k*, ARS TECHNICA (Mar. 10, 2015), <http://arstechnica.com/tech-policy/2015/03/one-apartment-complexes-rule-you-write-a-bad-review-we-fine-you-10k/> (regarding the Windermere Cay apartment complex in Florida).

17. See *McWhorter v. Duchouquette*, No. DC160351, 2016 WL 8445889 (Tex. Dist. Aug. 26, 2016) (dismissing Prestigious Pets' attempt to enforce an anti-review clause pursuant to the Texas Citizens' Participation Act, the Texas anti-SLAPP law); Complaint, *McWhorter*

customer—without going to court—by simply deducting money from the customer’s deposit.

Some online retailers also use anti-review clauses. The most publicized incident involved KlearGear, which fined a customer for leaving an online review and then hurt the customer’s credit standing by reporting an unpaid debt to the credit bureaus when the fine wasn’t paid.<sup>18</sup> Most retailers using anti-review clauses are relatively small, and these businesses liberally “borrow” terms of service from each other, which causes anti-review clauses to proliferate like a virus.

The cut-and-paste virality of anti-review clauses is only part of their pathology. In general, once anti-review clauses take root in an industry, they have the potential to become standard in the industry as competitors imitate each other<sup>19</sup>—especially if businesses think their competitors can purge or suppress negative reviews and thereby gain a competitive edge over businesses that don’t adopt similar techniques.<sup>20</sup> As these “race-to-the-bottom” dynamics play out industry-by-industry, anti-review clauses eventually would have become a standard business practice across the economy.

The CRFA changes this outcome. It creates a level playing field by making sure no industry player thinks it can gain an advantage in consumer reviews over its competitors through contract tricks. While businesses may still try to game the CRFA (as discussed below), the CRFA makes it much more likely that businesses will stop using anti-review clauses altogether.

## II. THE LEGALITY OF ANTI-REVIEW CLAUSES

### A. Overview of the CRFA

The CRFA prevents businesses from contractually suppressing their customers’ reviews of them. The CRFA defines “covered communications” as any “review” or “performance assessment” of goods or services;<sup>21</sup> and it defines “form contracts” as “standardized terms” imposed on consumers

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v. Duchouquette, (Tex. Dist. Ct. 2016), <https://www.citizen.org/documents/PrestigiousPetsDistrictCourtComplaint.pdf>.

18. See *Palmer v. KlearGear*, PUB. CITIZEN, <https://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=851> (last visited Sept. 22, 2017). Another example is *i-Geniuses*. See Paul Levy, *i-Geniuses: Not Too Smart in Threatening Dissatisfied Customers*, PUB. CITIZEN: CONSUMER L. & POL’Y BLOG (Jan. 30, 2017), <http://pubcit.typepad.com/clpblog/2017/01/igeniuses-not-too-smart-in-threatening-dissatisfied-customers.html>.

19. Cf. Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 448 (2008).

20. Cf. *Consumer Review Fairness Act: What Businesses Need to Know*, FED. TRADE COMM’N (Feb. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/consumer-review-fairness-act-what-businesses-need-know> (“another group is also harmed when others try to squelch honest negative reviews: businesses that work hard to earn positive reviews”) [hereinafter FTC Guidance].

21. 15 U.S.C. § 45b(a)(2) (2016).

without a meaningful opportunity to negotiate.<sup>22</sup> The CRFA declares the following provisions void and unlawful if contained in a form contract:

- Prohibitions of, or restrictions on, covered communications;<sup>23</sup>
- Imposition of a penalty or fee for making a covered communication;<sup>24</sup> and
- Transfer of the intellectual property rights (other than non-exclusive licenses) in “review or feedback content” of a covered communication.<sup>25</sup>

The CRFA applies to photos and videos that constitute a “review” or “performance assessment,”<sup>26</sup> which could invalidate businesses’ efforts to restrict consumers from disseminating photos or videos they take on the business’ premises. For example, stadiums’ restrictions on publicly posting photos or videos of games may violate the law.<sup>27</sup>

The CRFA is less clear about when businesses can ban customers from taking photos/videos while on their property. The law explicitly authorizes such restrictions when photos/videos are “created by an employee or independent contractor of a commercial entity and solely intended for commercial purposes by that entity.”<sup>28</sup> By negative implications, this seems to suggest that other contract limits on customers taking photos/videos could violate the law if they limit or prevent “covered communications.” For example, some restaurants have tried to limit diners’ photographs of their meals.<sup>29</sup> If such a restriction inhibits a consumer’s ability to review the restaurant and is contained in a “form contract,” arguably the CRFA applies.<sup>30</sup>

The law applies to all anti-review clauses, whether implemented before or after the law.<sup>31</sup> The CRFA excludes employment contracts,<sup>32</sup> review web-

22. *Id.* § 45b(a)(3) (because the CRFA only applies to terms “imposed on an individual,” it probably only applies to business-to-consumer contracts, not business-to-business contracts).

23. *Id.* § 45b(b)(1)(A).

24. *Id.* § 45b(b)(1)(B).

25. *Id.* § 45b(b)(1)(C).

26. *Id.* § 45b(a)(4).

27. See Paul Levy, *Two Immediate Applications for the Consumer Review Fairness Act*, PUBLIC CITIZEN: CONSUMER LAW & POLICY BLOG (Dec. 5, 2016), <http://pubcit.typepad.com/clpblog/2016/12/two-immediate-applications-for-the-consumer-review-fairness-act.html> (“The DC United contract that forbids fans from posting written descriptions or pictures of a game (that is, a review or performance assessment of the team’s conduct) is squarely within the law’s prohibition.”).

28. 15 U.S.C. § 45b(b)(2)(D).

29. *E.g.*, Helene Stapinskijan, *Restaurants Turn Camera Shy*, N.Y. TIMES (Jan. 22, 2013), <http://www.nytimes.com/2013/01/23/dining/restaurants-turn-camera-shy.html>.

30. However, other laws could restrict the creation or dissemination of those photos/videos, such as anti-wiretapping or anti-bootlegging laws.

31. 15 U.S.C. § 45b(i).

32. *Id.* § 45b(b)(2)(D).

sites' license agreements ("terms of service") with users who contribute content,<sup>33</sup> protections for trade secrets and confidential information,<sup>34</sup> and more.

The CRFA does not increase businesses' exposure to fake, false, or otherwise bogus reviews.<sup>35</sup> It only prevents businesses from prohibiting consumer reviews *ex ante*. All *ex post* legal remedies remain available to businesses,<sup>36</sup> including defamation and (in the case of fake reviews by competitors) unfair competition doctrines. Businesses also may proactively encourage consumers to write reviews,<sup>37</sup> anticipating that most of those reviews will be positive.<sup>38</sup>

### 1. Remedies

The CRFA specifies three consequences of a statutory violation. First, anti-review clauses are void as a matter of contract law.<sup>39</sup> This does not inherently void the entire contract, though the presence of an anti-review clause may make the contract more vulnerable to unconscionability or void-for-public-policy challenges.

Second, the CRFA says that incorporating an anti-review clause into a contract is "unlawful."<sup>40</sup> It is unclear what this declaration means for federal law. Does it create a federal crime enforceable by the U.S. Department of Justice (DOJ)? That seems inconsistent with Congress' intent,<sup>41</sup> as earlier drafts of the CRFA proposed DOJ enforcement<sup>42</sup> but Congress instead desig-

33. *Id.* § 45b(b)(2)(C).

34. *Id.* § 45b(b)(3)(A).

35. Some commentators nevertheless are frustrated that the law doesn't discourage bogus review. *See e.g.*, Lucille M. Ponte, *A Glass Half Full? Small Business Frustrations Under the Consumer Review Fairness Act of 2016*, May 15, 2017, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2968569](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2968569) ("the Act did not help businesses bedeviled by unfair consumer and competitor reviews").

36. 15 U.S.C. § 45b(2)(B).

37. *Local Consumer Review Survey 2016*, Brightlocal, <https://www.brightlocal.com/learn/local-consumer-review-survey/> ("7 out of 10 consumers will leave a review for a business if they're asked to"). *See In Re AmeriFreight, Inc.*, FTC File No. 142 3249, <https://www.ftc.gov/enforcement/cases-proceedings/142-3249/amerifreight-inc-matter> (showing that it is illegal to pay for consumer reviews if you do not disclose the incentives given to the reviewers); *but cf. Update on Customer Reviews*, AMAZON, Oct. 3, 2016, <https://www.amazon.com/p/feature/abpto3jt7fhh5oc> (stating a policy against allowing for paid reviews).

38. *E.g.*, Jerry Lin, *Most Online Patient Reviews Rate Doctors Highly. Really.*, The Health Care Blog, Mar. 7, 2013, <http://thehealthcareblog.com/blog/2013/03/07/most-online-patient-reviews-rate-doctors-highly-really/>; *see, An Introduction to Yelp Metrics as of June 30, 2017*, YELP (Oct. 1, 2017), <https://www.yelp.com/factsheet> (showing that 68% of Yelp reviews are 4 or 5 star).

39. 15 U.S.C. § 45b(b)(1).

40. *Id.* § 45b(c).

41. The House Report does not mention any possible enforcement by the Department of Justice, and it only analyzes enforcement costs borne by the FTC. H.R. Rep., *supra* note 2, at 7.

42. Consumer Review Freedom Act of 2015, H.R. 2110, 114th Cong.

nated the Federal Trade Commission (FTC) as the federal enforcement agency.

While the implications of the “unlawful” declaration are unclear for federal law, it’s clear that an unlawful contract clause creates various state law claims. For example, in California, an “unlawful act” by a business may support claims pursuant to the Consumer Legal Remedies Act (CLRA),<sup>43</sup> Unfair Competition Law (UCL),<sup>44</sup> and False Advertising Law (FAL).<sup>45</sup> In New Jersey, an unlawful anti-review clause may violate the Truth-in-Consumer Contract, Warranty, and Notice Act (TCCWNA),<sup>46</sup> which prohibits businesses from entering into contracts “that violates any clearly established legal right of a consumer.”

Third, the CRFA specifies that using an anti-review clause constitutes an “unfair or deceptive act or practice,”<sup>47</sup> and it designates the FTC as the primary enforcement agency.<sup>48</sup> The CRFA extends enforcement authority to state attorneys general and other state enforcement agencies, but the FTC must be given notice and can intervene in the case (and an FTC action preempts parallel state enforcement).<sup>49</sup>

Finally, the CRFA does not preempt state laws,<sup>50</sup> so it leaves in place any remedies under California’s law banning anti-review clauses (discussed below) and other applicable laws.

The CRFA does not contain a loser-pays attorneys’ fees provision, but unsuccessful plaintiffs might owe attorneys’ fees to consumers in states with robust anti-SLAPP that apply to consumer reviews<sup>51</sup> (anti-SLAPP laws are discussed more below) or when contracts have an attorneys’ fees clause.<sup>52</sup>

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43. See CAL. CIV. CODE § 1770(a)(14) (2017) (prohibiting “Representing that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law”).

44. CAL. BUS. & PROF. CODE § 17200 (1993).

45. CAL. BUS. & PROF. CODE § 17500 (1999).

46. N.J. STAT. ANN. § 56:12-14 – 18 (1981).

47. 15 U.S.C. § 45b(d)(1).

48. H.R. REP. NO. 114-731, *supra* note 2, at 4 (“The Federal Trade Commission (FTC) is the primary enforcer of H.R. 5111”).

49. 15 U.S.C. § 45b(e).

50. 15 U.S.C. § 45b(g).

51. See, e.g., Eric Goldman, *CA Anti-SLAPP Cases Involving Consumer Reviews as Matters of Public Concern*, TECH. & MKTG. LAW BLOG (Feb. 3, 2011) [http://blog.ericgoldman.org/archives/2011/02/ca\\_antislapp\\_ca.htm](http://blog.ericgoldman.org/archives/2011/02/ca_antislapp_ca.htm).

52. If the form contract only provides for attorneys’ fees to the vendor (a “one way” attorneys’ fees clause), some states automatically make that obligation mutual. See, e.g., CAL. CIV. CODE § 1717.



### B. Illegality of Anti-Review Clauses Beyond the CRFA

Anti-review clauses are probably unenforceable and illegal irrespective of the CRFA.<sup>53</sup> As a matter of contract law, the clauses are already subject to unconscionability and void-for-public-policy defenses. The most egregious clauses, such as categorical bans on consumer reviews or prospective copyright assignments of unwritten consumer reviews, are almost certainly void pursuant to standard contract law.

Nevertheless, judges often try to enforce contracts in accordance with their own terms. Indeed, at least one judge nominally upheld an anti-review clause, holding that the plaintiff couldn't sue the reviewers for defamation but nevertheless could sue for breach of the contract's anti-review clause.<sup>54</sup>

Anti-review clauses also violate consumer protection laws. In *People v. Network Associates*,<sup>55</sup> a New York lower court held that an anti-review clause in a software end-user license agreement (EULA) violated New York's consumer protection law.<sup>56</sup> More recently, New Jersey obtained a consent order against a fertility clinic that used a contract imposing fines on customers for posting online reviews, positive or negative.<sup>57</sup> The FTC similarly obtained a stipulated injunction against an anti-review clause.<sup>58</sup>

Anti-review clauses can create other legal problems. For example, if the contract claims the copyrights of unwritten consumer reviews and the business sends DMCA takedown notices<sup>59</sup> to review websites, the business faces

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53. See Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer 'Gag' Contracts in an Age of Crowdsourced Ratings and Reviews*, 7 WM. & MARY BUS. L. REV. 59, 101–140 (2015); Elliot Harmon & Kit Walsh, *Consumer Review Freedom Act Would Protect Customers' Right to Post Reviews*, ELECTRONIC FRONTIER FOUND. (NOV. 3, 2015), <https://www.eff.org/deeplinks/2015/11/consumer-review-freedom-act-would-protect-customers-right-post-reviews>.

54. See *Galland v. Johnston*, No. 14–cv–4411, 2015 WL 1290775 (S.D.N.Y. Mar. 19, 2015); Eric Goldman, *Court Might Enforce a Contract Ban on Consumer Reviews*, FORBES (Mar. 27, 2015), <http://www.forbes.com/sites/ericgoldman/2015/03/27/court-might-enforce-a-contract-ban-on-consumer-reviews/>; see also *FreeLife Int'l v. Am. Educ. Music Publ'ns, Inc.*, No. CV07–2210–PHX–DGC, 2009 U.S. Dist. LEXIS 97680 (D. Ariz. Oct. 1, 2009) (holding that a nondisparagement clause in a form online distributor agreement may be enforceable).

55. See *People v. Network Assocs., Inc.*, 758 N.Y.S.2d 466 (Sup. Ct. 2003).

56. N.Y. GEN. BUS. L. § 349.

57. Consent Order at 11–13, *Fertility Bridges, Inc.*, (Fed. Trade Comm'n Dec. 14, 2016) [http://www.nj.gov/oag/newsreleases17/Fertility-Bridges\\_Consent-Order.pdf](http://www.nj.gov/oag/newsreleases17/Fertility-Bridges_Consent-Order.pdf); see also *California Fertility Clinic Agrees to Stop Barring Consumers from Posting Negative Online Reviews Following New Jersey Division of Consumer Affairs Investigation*, NEW JERSEY OFFICE OF THE ATTORNEY GENERAL (Jan. 4, 2017), <http://www.nj.gov/oag/newsreleases17/pr20170104a.html>.

58. Preliminary Injunction and Order for Other Equitable Relief at 3, *FTC v. Roca Labs, Inc.*, 2017 U.S. Dist. LEXIS 5298 (M.D. Fla. 2017) (No. 8:15-cv-02231-MSS-TBM). In 2011, the Center for Democracy and Technology (CDT) filed a complaint with the FTC about Medical Justice's practices. See generally *Complaint and Request for Investigation, Injunction, and Other Relief at 1, Medical Justice Corp.* (F.T.C.) [https://cdt.org/files/pdfs/20111129\\_medjustice\\_complaint.pdf](https://cdt.org/files/pdfs/20111129_medjustice_complaint.pdf).

59. Pursuant to 17 U.S.C. § 512(c)(3) (2012).

potential liability for sending illegitimate takedown notices<sup>60</sup> if the copyright transfer fails or the review publication qualifies as fair use.<sup>61</sup> In the health-care industry, the Office of Civil Rights in the Department of Health and Human Services prohibited the use of an anti-review clause in Medical Justice's form contract.<sup>62</sup> Though not a legal consequence, the Better Business Bureau (BBB) may deny or revoke its accreditation of businesses using anti-review clauses.<sup>63</sup>

Because many legal doctrines cast doubt on the viability of anti-review clauses, if Congress hadn't enacted the CRFA, courts would have eventually concluded that anti-review clauses are illegal or ineffective. The CRFA accelerates this inevitable outcome. The CRFA also establishes uniform national law, a cleaner outcome than geographically dispersed courts interpreting local laws could have achieved in any reasonable time frame.

The clarity and national scope of the CRFA's rules makes it virtually impossible for businesses to capitalize on legally uncertain rules, such as bullying consumers into removing reviews based on empty threats of enforcing a void contract provision. Furthermore, the legal risks arising from adopting anti-review clauses should help drive the clauses out of existence.

*The California Law.* In 2014, California banned anti-review clauses in Cal. Civil Code § 1670.8 (CC 1670.8).<sup>64</sup> The California law overlaps the CRFA a fair amount. Some of the major differences:

- CC 1670.8 protects “the consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services,”<sup>65</sup> while the CRFA applies to a possibly narrower set of consumer-authored material called “reviews” and “performance assessments.”
- CC 1670.8 applies to all business contracts containing anti-review clauses, whether form contracts or individually negotiated contracts.<sup>66</sup> The CRFA only applies to form contracts.

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60. See 17 U.S.C. § 512(f).

61. See *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015).

62. U.S. Dep't of Health and Human Servs., *Health Information Privacy: All Case Examples*, HHS.GOV, <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/examples/all-cases/index.html#case29> (last reviewed June 7, 2017).

63. “BBB accredited businesses are not allowed to use non-disparagement clauses, which are not compatible with BBB’s Standards for Trust.” Better Bus. Bureau, *How Writing a Review Could End Up Hurting Your Wallet*, BBB.ORG (Sept. 23, 2016), <https://www.bbb.org/central-texas/news-events/news-releases/2016/09/how-writing-a-review-could-end-up-hurting-your-wallet/>.

64. Assemb. B. 2365, 2013th Assemb., Reg. Sess. (Cal. 2014).

65. CAL. CIV. CODE § 1670.8(a)(1).

66. *Id.*; Songmee L. Connolly, *Don't Disregard California's Non-Disparagement Clause Ban*, LAW360 (Oct. 8, 2014), <https://www.law360.com/articles/585252/don-t-disregard-calif-s-non-disparagement-clause-ban>.

- CC 1670.8 only restricts “waivers” of consumer rights to make public statements about the business,<sup>67</sup> although it also says it’s unlawful to “penalize a consumer for making any statement protected under this section.”<sup>68</sup> The CRFA covers prohibitions, imposing fines or penalties, and intellectual property ownership transfers. Courts may ultimately conclude that CC 1670.8 applies to all of the different drafting tricks regulated by the CRFA, but they could also conclude that CC 1670.8 applies to a narrower group of clauses.
- CC 1670.8 authorizes consumer lawsuits with statutory damages (\$2,500 for the first violation, \$5,000 for subsequent violations, \$10,000 for “willful, intentional, or reckless” violations).<sup>69</sup> The CRFA does not directly permit consumer lawsuits over anti-review clauses, though (as discussed above) state consumer protection or unfair competition laws may indirectly enable consumer claims.
- CC 1670.8 only applies when California has jurisdiction over the regulated business. The CRFA applies nationally.

To my knowledge, no court case has discussed CC 1670.8;<sup>70</sup> and I’m not aware of any lawsuits based on it.

Rather than enact the CRFA, Congress could have let states follow California’s lead in banning anti-review clauses. However, state-by-state development of this law would have taken substantial time and resources, while the CRFA immediately establishes a floor of consumer protection across the nation. (States may still adopt their own parallel statutes, although the CRFA leaves them little reason to do so). Actions under the CRFA also avoid any issues with state extraterritorial reach or the Dormant Commerce Clause.

### III. DOES THE LAW GO FAR ENOUGH?

#### A. *Getting Around the CRFA*

The CRFA clearly signals Congress’ desire to stop businesses from banning consumer reviews. I expect most businesses will honor that intent. Even if the business finds a gap in the CRFA, the anti-review clause will face the legal challenges discussed in Part II(B). Most businesses will conclude that an anti-review clause isn’t worth the effort and risk.

Should businesses nevertheless try to game the CRFA, some of the angles they may try:

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67. CAL. CIV. CODE § 1670.8(a)(1).

68. *Id.* § 1670.8(a)(2).

69. *Id.* § 1670.8(c) & (d).

70. On January 16, 2017, I pulled up the statute in both Westlaw and Lexis and then checked for any court citations to the statute. There were none.

*“Negotiable” Terms.* The CRFA applies only when consumers lack “a meaningful opportunity for such individual to negotiate the standardized terms.” To avoid the CRFA, a business could let consumers negotiate the terms.

Usually, the benefits of any anti-review clause won’t be worth the cost of individualized contract negotiations. Instead, businesses may try to create the illusion of negotiation. For example, businesses sometimes include arbitration clauses in their standard terms of service but let consumers “opt-out” by mailing an opt-out notice soon after contract formation.<sup>71</sup> Would a similar opt-out mechanism for an anti-review clause satisfy the CRFA’s “negotiation” requirement?

This creates potential opportunities for unscrupulous businesses to offer consumers a nominal ability to configure or modify their form contracts, knowing that consumers don’t read standardized contracts—and the few who do read the contract nevertheless will not take any affirmative steps to exercise their rights, even if those steps are modest in time and cost. As a result, courts should interpret the statute’s “negotiate” requirement narrowly to exclude any technical tricks that prey on consumers’ lack of incentives and motivation to push back on standardized contracts.

*Protecting Trade Secrets.* The CRFA excludes “trade secrets or commercial or financial information obtained from a person and considered privileged or confidential.”<sup>72</sup> Businesses might claim that interactions with their consumers are trade secrets or confidential information. Indeed, some vacation rental contracts include non-disclosure provisions to suppress consumer reviews.<sup>73</sup>

While the statute should not have provided a trade secret exception,<sup>74</sup> I doubt businesses can easily exploit it. A consumer’s experiences with a business do not satisfy the definition of a “trade secret.”<sup>75</sup>

As for confidentiality clauses, sometimes it makes sense for businesses to treat information about consumers as confidential; many laws—ranging from HIPAA to banking privacy to attorney regulations—require such confidentiality. It usually makes little sense for a consumer to treat information

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71. E.g., Brian A. Berkley, *Can Opt-Out Provisions Save Arbitration Clauses?*, LAW360 (June 8, 2016, 12:49 PM), <https://www.law360.com/articles/804659>.

72. 15 U.S.C. § 45b(b)(3)(A).

73. Christopher Elliott, *New Confidentiality Clauses Can Influence Vacation Rental Reviews*, ELLIOTT.ORG (Apr. 14, 2012), <http://elliott.org/blog/new-confidentiality-clauses-can-influence-vacation-rental-reviews/>.

74. Goldman, CRFA Assessment, *supra* note 1.

75. Trade secret law only protects information that “derives independent economic value, actual or potential, from not being generally known to . . . another person who can obtain economic value from the disclosure or use of the information.” 18 U.S.C. § 1839(3)(b) (2016); *see also* UNIF. TRADE SECRET ACT § 1(4)(i) (UNIF. LAW COMM’N 1985) (using virtually identical language). The consumer’s disclosure of his or her experience with a business does not allow a third person to obtain economic value from that information.

about a business' goods or services as confidential, especially for aspects of a product or service that thousands or even millions of consumers may experience in common. Because confidentiality clauses in form contracts with consumers rarely make sense and could undermine the CRFA's goals, courts should be extremely skeptical of any confidentiality clause that purports to suppress a consumer's review.

*Restricting "Unlawful" Content.* The CRFA says form contracts cannot transfer ownership of the intellectual property in "any otherwise *lawful* covered communication,"<sup>76</sup> and its restrictions don't apply to "content that is *unlawful*."<sup>77</sup> Arguably, "defamatory" content is "unlawful."<sup>78</sup> That means businesses probably can contractually restrict consumers from posting "defamatory" reviews without violating the CRFA.<sup>79</sup> Indeed, the FTC's guidance on the CRFA practically encourages businesses to retain restrictions on unlawful reviews, repeating *nine times* that the law protects "honest" reviews—loudly signaling to businesses that the law doesn't restrict contracts against dishonest reviews.<sup>80</sup>

Superficially, this does not sound like a big deal. If defamation is already unlawful, how does it hurt consumers to contractually promise not to commit defamation?

The problem is that defamation is a legal conclusion that is often hotly contested. Based on a "no-defamatory-reviews" contract clause, businesses can spuriously claim that a review is defamatory and then take one of the actions otherwise prohibited by the CRFA, i.e., threaten to sue consumers for contract breach, impose a fine/penalty on the consumer, or send copyright takedown notices to review websites based on the purported intellectual property ownership transfer. Even if a court would ultimately conclude the review wasn't defamatory, most consumers will have acquiesced to the business' demands long before then. Thus, businesses may try to use "no-defamatory-reviews" contract clauses to improperly scrub legitimate reviews.

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76. Consumer Review Fairness Act of 2016, H.R. 5111, 114th Cong. § 45b(b)(1)(C) (2015-2016).

77. *Id.* § 45b(b)(3)(D). The CRFA also excludes content that "(i) contains the personal information or likeness of another person, or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic; (ii) is unrelated to the goods or services offered by or available at such party's Internet website or webpage; or (iii) is clearly false or misleading."

78. Content determined to be a false statement of fact is not protected by the First Amendment; e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

79. See Elliot Harmon, *Copyright Loophole Could Undermine Important Consumer Protection Bill*, ELECTRONIC FRONTIER FOUNDATION (Sept. 22, 2016), <https://www EFF.ORG/deeplinks/2016/09/copyright-loophole-could-undermine-important-consumer-protection-bill/>. The Electronic Frontier Foundation focused on businesses requiring copyright assignments to defamatory reviews, but its analysis applies to contractual prohibitions on, or fines and penalties, for defamatory reviews.

80. *FTC Guidance*, *supra* note 20.

*Technological Self-Help.* Businesses may have the technical capacity to remotely control Internet-enabled products even when the items are in consumers' hands. In these situations, a business can punitively use this technical capacity to restrict or disable the product—sometimes called “bricking”—as retaliation for unwanted consumer reviews.<sup>81</sup> Further, in the product's contract terms, the business could obtain authorization from consumers to brick the item as a way of deterring such reviews in the first place (i.e., “if you write a negative review of this product, we can brick it”). Furthermore, the mere threat of bricking as punishment for an unwanted review, even if not contained in the contract (and possibly not legal), may be enough to dissuade consumers from writing reviews—especially in cases where a bricked item might create health or safety concerns for the consumer.

The CRFA did not contemplate this technological self-help, and it's unclear if the CRFA applies to contractual permissions to brick. It may depend on whether bricking an item constitutes a “penalty” for a “covered communication.” If the issue comes up in court, judges should interpret “penalty” broadly to include the deprivation of an asset owned by the consumer.

I'm hopeful none of these CRFA workarounds will succeed (or will even be tested). Otherwise, Congress should revisit the CRFA to squash those efforts.

### B. *Additional Steps Congress Should Take*<sup>82</sup>

The Consumer Review Fairness Act is an important step towards protecting consumer reviews, but Congress can do more. Three suggestions:

(1) *Preserve Section 230.* In 1996, Congress enacted 47 U.S.C. § 230 (Section 230) as part of the Communications Decency Act.<sup>83</sup> Section 230 immunizes websites from liability for third party content, and consumer reviews are one of Section 230's greatest “success stories.” Consumer reviews don't really exist in the offline world,<sup>84</sup> so the existence of consumer reviews owes a great deal to Section 230's protection of consumer review websites.<sup>85</sup>

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81. See Sean Gallagher, *IoT Garage Door Maker Bricks Customer's Product After Bad Review*, ARS TECHNICA (Apr. 4, 2017), <https://arstechnica.com/information-technology/2017/04/iot-garage-door-opener-maker-bricks-customers-product-after-bad-review/> (discussing how Denis Grisak, the proprietor of the Garadget, bricked a customer's garage door opener as punishment for a negative review).

82. See generally Goldman, *Reputation Regulation*, *supra* note 3.

83. Telecommunications Act of 1996 § 509, Pub. L. No. 104-104 (1996).

84. See Eric Goldman, *Online Word of Mouth and its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 404, 411-412 (Graeme B. Dinwoodie & Mark D. Janis eds., Edward Elgar Press 2008).

85. See Goldman, *Reputation Regulation*, *supra* note 3, at 298.

Unfortunately, plaintiffs recently have found cracks in Section 230's immunity,<sup>86</sup> including rulings that implicate consumer reviews. In 2016, courts held that: Section 230 may not protect compiled star ratings;<sup>87</sup> content from "super-users" such as moderators may not qualify as third-party content;<sup>88</sup> and review websites can be ordered to remove defamatory reviews, even if the review website didn't participate in the lawsuit or have an opportunity to defend its interests.<sup>89</sup>

The CRFA assumes that consumers can share their reviews via review websites,<sup>90</sup> but continued degradation of Section 230's protection for consumer review websites threatens that assumption—and undermines the CRFA's free speech payoffs. To ensure the full benefits of the CRFA, Congress should carefully monitor how well Section 230 continues to immunize review websites.

(2) *Enact Federal Anti-SLAPP Legislation.* "SLAPP" is an acronym for "strategic lawsuits against public participation"—basically, lawsuits designed to suppress socially beneficial speech. Anti-SLAPP laws typically provide two important benefits for defendants. First, they provide a "fast lane" to end illegitimate cases quickly. Second, they typically provide that a successful defendant can recover his or her attorneys' fees.

Collectively, the quick resolution and fee-shift help protect consumer reviews. In particular, without a fee-shift, most consumers won't pay the substantial legal fees required to defend their reviews. Instead, in response to businesses' threats and intimidation tactics, consumers will choose the cheapest path to resolution.

Existing state anti-SLAPP laws may protect consumer reviews, but not completely. Not every state has anti-SLAPP laws, and some state anti-SLAPP laws are so narrow that they don't include consumer reviews.<sup>91</sup> A federal anti-SLAPP law would fix both problems. It would ensure that all Americans are protected by anti-SLAPP laws, and it should ensure that law-

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86. See Eric Goldman, *Ten Worst Section 230 Rulings of 2016 (Plus the Five Best)*, TECH. & MARKETING L. BLOG, Jan. 4, 2017, <http://blog.ericgoldman.org/archives/2017/01/ten-worst-section-230-rulings-of-2016-plus-the-five-best.htm>.

87. *Consumer Cellular v. ConsumerAffairs.com*, No. 3:15-CV-1908-PK, 2016 WL 3176602, at \*12 (D. Ore. Feb. 29, 2016) (trial court adopted the magistrate report on June 2, 2016 (2016 WL 3176584)).

88. See *Enigma Software Group USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263 (S.D.N.Y. 2016).

89. See *Hassell v. Bird*, 247 Cal. App. 4th 1336 (Cal. App. Ct. 2016). The California Supreme Court granted Yelp's petition for review in this case on September 21, 2016, making the appellate court opinion not-binding.

90. FED. TRADE COMM'N, CONSUMER REVIEW FAIRNESS ACT: WHAT BUSINESSES NEED TO KNOW (2017), <https://www.ftc.gov/tips-advice/business-center/guidance/consumer-review-fairness-act-what-businesses-need-know>.

91. See *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/>.

suits over consumer reviews are covered by the anti-SLAPP law.<sup>92</sup> Thus, a federal anti-SLAPP law would enhance the CRFA by providing a fast lane and fee-shift if any businesses illegitimately sue to suppress consumer reviews.

(3) *Create a “Threats” Action.* Anti-SLAPP laws protect consumers once a lawsuit is filed, but it doesn’t help in pre-litigation situations. When businesses send nasty demand letters, most consumers fold in response to threats—even if they could win in court and get an anti-SLAPP fee-shift. To address this pre-litigation dynamic, Congress should create another cause of action, sometimes called a “threats” action in Commonwealth countries, for sending bogus demand letters threatening consumer reviews.

This concept is not unprecedented in the United States. For example, in the Digital Millennium Copyright Act, Congress created a cause of action for sending bogus copyright takedown notices,<sup>93</sup> though this has proven relatively ineffective because the provision was miscalibrated.<sup>94</sup> Similarly, some states have enacted statutes against sending bogus patent demand letters.<sup>95</sup> A similar law should protect consumers who receive bogus threats over their reviews.

#### CONCLUSION

We often regard the First Amendment as the primary legal mechanism for protecting free speech rights. However, the First Amendment simply sets a Constitutional floor on the level of free speech in our society. Legislatures are allowed to, and often do, statutorily protect free speech above the Constitutional minimum.

The Consumer Review Fairness Act is an excellent example of a “speech-enhancing” statute. It promotes consumers’ rights to speak out about the businesses they transact with; and it does so for the right reason—because protecting high-value speech improves our society. The Consumer Review Fairness Act contributes to the legal “infrastructure” that helps consumer reviews—and the marketplace generally—thrive.

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92. Most drafts of federal anti-SLAPP legislation I’ve seen would apply to lawsuits over consumer reviews; *see, e.g.*, Speak Free Act of 2015, H.R. 2304, 114th Cong. § 4208(1)(E) (2015); H.R. 4364, 111th Cong. § 11(5) (2009).

93. 17 U.S.C. § 512(f) (2011).

94. *See* Eric Goldman, *It Takes a Default Judgment to Win a 17 USC 512(f) Case - Automattic v. Steiner*, TECH. & MARKETING L. BLOG (Mar. 13, 2015), <http://blog.ericgoldman.org/archives/2015/03/it-takes-a-default-judgment-to-win-a-17-usc-512f-case-automattic-v-steiner.htm>; *see generally* Eric Goldman, *Want To End The Litigation Epidemic? Create Lawsuit-Free Zones*, FORBES: TERTIUM QUID (Apr. 10, 2013, 2:40 PM), <https://www.forbes.com/sites/ericgoldman/2013/04/10/want-to-end-the-litigation-epidemic-create-lawsuit-free-zones>.

95. *See, e.g.*, Eric Goldman, *Vermont Enacts The Nation’s First Anti-Patent Trolling Law*, FORBES: TERTIUM QUID (May 22, 2013, 2:22 PM), <https://www.forbes.com/sites/ericgoldman/2013/05/22/vermont-enacts-the-nations-first-anti-patent-trolling-law>.