

In Form Contracts, Don't Silence Consumers with Gag Clauses: FTC's Consumer Review Fairness Act

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By now, virtually all companies understand the importance and power of consumer reviews, both for and against them, and reviews of their competitors. Especially since negative reviews dampen purchases, companies often attempt to control those evaluations by encouraging positive reviews and impeding negative ones. Some companies include clauses in form contracts stating that bad reviews are prohibited and punishable by fines in hopes of stifling negative reviews, thus precluding the problem. However, the Federal Trade Commission ("FTC") seeks to protect U.S. consumers and ensure fair competition and business practices.

New FTC Consumer Review Fairness Act

Accordingly, the FTC proposed a Consumer Review Fairness Act ("CRFA"), stating that provisions such as those above, *aka* "gag clauses," are illegal and void in form contracts. Form contracts are defined as contracts with standardized terms used in the course of selling or leasing goods or services that are imposed on an individual without a meaningful opportunity for such individual to negotiate and modify the standardized terms. (It should be noted that the term "form contract" does not include employer/employee or independent contractor agreements.)

Many companies and contract attorneys may not be aware of the existence of the CRFA, or its recent enforcements by the Federal Trade Commission. The CRFA is a relatively new Act, which passed both houses of Congress unanimously in December 2016. It has been effective since March 14, 2017, and is intended to promote honest reviews, free speech, and transparency. The CRFA makes it illegal for a company to offer form contracts (including online terms and conditions) with provisions that: 1) prohibit or restrict the ability of an individual who is a party to that contract, to review or assess a company's goods, services, or conduct; 2) impose a penalty or fee against a party to the contract who gives an unfavorable review or assessment; or 3) require people to give up their intellectual property rights in the content of their reviews.

FTC Enforcement and Remedies

There is no private right of action for violation of the CRFA (by individual consumer plaintiffs), but

both the FTC and State Attorneys General have enforcement authority. In May 2019, three companies in very different industries who received the first CRFA-related complaints issued by the FTC accepted proposed Consent Orders (settlements) and await public comment before a final order is entered into. These complaints and orders give the companies even bigger problems than bad reviews, ranging from having to notify customers that the original contract provisions were void, to the FTC violations showing up as the top results of a Google search of the company's name.

All of the companies had "gag clauses" in their form contracts. Specifically, the FTC alleged that A Waldron HVAC, LLC included non-disparagement text in its form contracts (1) prohibiting the customer from publicizing any terms of the contract, including to the Better Business Bureau ("BBB"), (2) prohibiting customers from filing complaints with the BBB, and (3) requiring liquidated damages or two times the contract price, whichever is higher, for such violation. It also alleged that National Floors Direct, Inc. included non-disparagement language in its form contracts that prohibited consumers from disparaging or defaming the company. Similarly, in the FTC's complaint against LVTR, LLC, *dba*, Las Vegas Trail Riding, a recreational horseback riding company, it alleged that LVTR violated the CRFA by having customers sign form contracts with provisions prohibiting them from (1) calling Animal Control or government agencies, (2) making any reports regarding the company, and (3) listing monetary penalties for such violations starting at a minimum of \$5,000.

In each of these three situations, the FTC unanimously voted to issue the companies an administrative complaint, and to ultimately accept the proposed consent agreements. Each of the proposed orders entered into by these companies include injunctive relief, as well as other relief, including but not limited to, the companies sending notifications to the customers who agreed to such contracts on or after March 14, 2017, that the non-disparagement provisions are void and unenforceable, and that they (the consumers) have a right to post honest reviews. Finally, the companies are required to file periodic compliance reports with the FTC. Once such consent orders are finalized, each violation of an order may result in a civil penalty of up to \$42,530.

In early June 2019, the FTC announced similar proposed settlements related to administrative complaints issued to a company that managed rental homes, and another company that rented vacation properties. In the complaint against Shore to Please Vacations, LLC, the FTC alleged that the company's form contracts contained language stating that the consumer agreed to not leave negative reviews--which it defined as a review deemed to be negative by a company officer or member--as well as any review with less than a "5 star" or "absolute best" rating. Also, if consumers breached this provision, it would immediately result in a minimum liquidated damages amount of \$25,000. Shore to Please even filed suits against those who posted "negative" reviews. The FTC alleged that Staffordshire Property Management, LLC used form contracts in rental applications with prohibited language stating, among other things, that the applicants agreed to not disparage any company employees, managers, or agents, and to not communicate, publish, characterize, publicize, or disseminate any information related to the application or application process; and that any breach would support a cause of action and entitle the company to recover damages. In both cases, the proposed settlements also included provisions that the companies must comply with the CRFA, as well as notify the affected consumers that the gag clauses are void, and that they have the right to post honest reviews online. In addition, Shore to Please must dismiss with prejudice the lawsuits it has already filed.

State Cases as Well, e.g., Indiana

Such complaints, negative visibility, and subsequent remedies obviously can be extremely detrimental to a company's reputation and business. The FTC's willingness to rigorously enforce the

CRFA is clear. These cases are only the beginning. State Attorneys General are also likely to soon follow suit. California, Texas, and New York are quite consumer protection oriented, with various state codes and regulations against false advertising and unfair competition already on the books. These state actions—also vigorously investigated and prosecuted—are in addition to the FTC’s authority under the CRFA. Thus, companies drafting form contracts intended for any national offering of goods or services in the U.S. must be doubly careful.

Indeed, there was an eerily similar case vs. a gag clause in a form contract out of Indiana, under a very similar Indiana law, the Deceptive Consumer Sales Act. The scenario was that in March of 2016 a couple seeking a getaway weekend booked a room at a quaint and quiet-sounding hotel called Abbey Inn & Suites. But the room not only had not been cleaned—having dirty sheets, and smelling like sewage—but also had weak water pressure, no a/c, and zero service (no answer from the front desk and a recorded message from the rollover number). The wife understandably felt that this trashy room and hotel deserved to be “trashed” with a negative review. But after her candid review was posted she found that the hotel had charged her debit card \$350; and then she received a letter from the hotel’s attorney threatening legal action, compelling her to delete the review. Her indignation was clear: “they were punishing me for being truthful and I don’t think that’s fair.” The hotel’s policy, which actually permitted them to debit \$350 from customers who disparaged the property online, was detailed in a form contract seven pages long merely appearing on the hotel’s website—not ever signed by guests or even posted in their rooms. When Ms. Arthur discovered that other guests had similar negative experiences, she filed a complaint with the Indiana Attorney General’s office. That office filed a lawsuit in the case in December of 2017, a time frame similar to the CRFA effective date, arguing that the hotel violated the Indiana state act by imposing an “unfair, abusive, and deceptive” policy.

How to Prevent Enforcement and Sanctions

In order to proactively prevent FTC and state actions such as those described above, companies should work with their attorneys to ensure they are in compliance with the CRFA. As a first priority, companies should make sure that any new form contracts do not include gag provisions in violation of the CRFA. Second, companies should review their outstanding form contracts that were entered into after the CRFA was effective, to see if they contain any prohibited clauses, and then consider notifying customers of the invalidity of such clauses. It is also important for companies to understand that, to the extent these types of provisions are in their current contracts, they are unenforceable and leave them vulnerable to a public complaint from the FTC. Thus, companies should themselves treat such gag clauses in past contracts as void, and essentially should ignore negative reviews from a relatively few consumers. In truth, it would be far more productive for companies to instead take those critical reviews to heart, and then improve their goods and services offered in the future.

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