The Consumer Review Fairness Act of 2016: Leveling the Online Playing Field for Online Consumers

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“If you don’t have something nice to say, don’t say anything at all.” Mothers have been giving their children that advice for generations, however in reality that is not the world we live in today. Instead, people have taken their fundamental first amendment right of freedom speech to the internet to say both nice, and against their mother’s advisement, not-so nice things regarding their experiences with products and businesses in the form of online reviews. Consumers flock to websites such as Yelp, Angie’s List, Kelly Blue Book, Amazon, Tripadvisor (the list goes on and on) to express their praise or frustrations and the federal government has officially taken steps to protect consumers who do so.

On December 14, 2016, former President Barack Obama made one of his last acts in office to sign into law the Consumer Review Fairness Act of 2016.\(^1\) Essentially, the Act protects consumers’ ability to write honest reviews on the internet, without fear of repercussion or retaliation from the businesses in which they are writing about. Some argue that such a law is not necessary as courts have already frowned upon such hindrances in consumer action and states have even begun to pass legislation achieving the purpose of the law.\(^2\) However, while other states have proposed bills similar to the Consumer Review and Fairness Act, California is the only state that

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\(^2\) Eric Goldman, *How Congress Can Protect Online Consumer Reviews* Forbes, FORBES MAGAZINE (Nov. 3 2015), www.forbes.com/sites/ericgoldman/2015/11/02/how-congress-can-protect-online-consumer-reviews/#63b504232ce7, stating that the imposition of a federal law may be unnecessary given the state movement towards banning such clauses since they are such an “obviously terrible idea”. 
has actually signed the bill into law.\(^3\) The enactment of the Act at the federal level makes it clear and unambiguous and drives home the message that in America, a consumer’s first amendment right to freedom of speech is protected on the internet as well.

**What Prompted the Act**

While it may seem counterintuitive to the average person’s basic understanding of their right to freedom of speech, in reality companies were having their consumers enter into contracts that prohibited them from writing negative reviews about the company’s products or the consumer’s experience with the company. Such clauses have often been referred to anti-disparagement clauses, anti-review clauses, or more bluntly, gag clauses.\(^4\) If consumers violated the contract and wrote a negative review, the company then had the right under the contract terms to monetarily fine them for such actions. The contract also provided the businesses with the right to *not* publish such reviews if they were made on the company’s own website. The major issue with respect to the contracts between the business and the consumer is that they were “form contracts.” Form contracts are those contracts where the terms and conditions are set by one party (the business) and do not allow for the other party (the consumer) to negotiate such terms. These contracts are often referred to as “click through contracts” because they occur at the end of online agreements, are lengthy, and often never actually read by consumers before they click the “I agree” box to continue.\(^5\)

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Unfortunately, this is not a new concept as companies have been utilizing such contracts to their advantage for years. For example, just last year a couple from Texas was sued for up to a million dollars in damages after they reviewed a Dallas pet sitting service on Yelp, giving the company a one star rating. The pet sitting company claimed that due to the review, they lost significant business and brought suit for breach of contract and business disparagement. The court threw out the case on a motion to dismiss after the couple defended themselves under the Texas Anti-SLAPP statute (Strategic Lawsuits Against Public Participation) claiming the suit was frivolous.6 But that is just a more recent case- business have been using this tactic for years. In 2014 a New York hotel made headlines for fining each customer who left a negative review $500 dollars, but changed its policy after hundreds of negative reviews came flooding in from customers outraged about the policy.7 But, most notably these contracts gained attention in 2007 when a medical company provided doctors and dentists with form contracts designed to allow them to veto any negative online reviews from patients. The Department of Health and Human Services found such contracts unethical and the contracts were then altered.8 While it is true that courts have most often sided with the consumers in such issues, it still does not stop the companies from using such policies as scare tactics or what some have called “online bullying.”9 Legislators have

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7 See Harman and Walsh, supra note 5.
8 Id.
9 See Texas Couple Sued by Pet Sitting Business for Negative Yelp Review, CBS NEWS INTERACTIVE (Feb. 16, 2016), www.cbsnews.com/news/yelp-negative-online-review-texas-couple-sued-jeremy-stoppelman/, CEO of Yelp, Jeremy Stoppelman stated “This is essentially online bullying. I mean you’re infringing on people’s rights, their freedom”.
been working for the past eight years to pass legislation forbidding such behavior and have finally succeeded with the Consumer Review Fairness Act.¹⁰

**The Language of the Law**

After significant lobbying over the years, legislators have finally agreed on the provisions of the Consumer Review Fairness Act. Generally, the Act protects consumers by prohibiting companies from entering into or even *offering* to enter into contracts with consumers that require them to refrain from making negative comments or reviews online. The Act is confined to form contracts alone however, and allows for such clauses to exist in individually negotiated contracts (for example, settlement agreements). The law defines what communications by consumers are protected which include written, verbal or photographic reviews, and a catch-all phrase, “or other similar performance of assessment or analysis of.”¹¹ It also broadly prohibits companies from fining consumers for engaging in such communication.

The Act also outlines what protections are still afforded to businesses. For example, the Act states what it does not affect, including legal duties of confidentiality, a party’s rights to establish terms and conditions for the creation of photographs and video intended to be used for commercial purposes, and most importantly civil actions for defamation, libel or slander. The Act makes it clear that companies are not barred from suing consumers for reviews that violate defamation, libel or slander laws and seeking civil recourse. They are also able to review comments and not publish any comments that contain personal information, are abusive or harassing, unrelated to the business or product, or those comments that are clearly false or misleading. In

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¹⁰ *See Mcusic, supra* note 4, quoting founder of Angie’s List, “we’ve been talking about these clauses for eight years now”.

addition, companies still have the right to protect themselves by refusing to publish anything on their website related to their trade secrets, medical files, enforcement records, unlawful content, or any damaging computer code that may include computer viruses.

As with any law, there are positive and negative aspects. The broad definitions of "communications" and the anti-punishment aspects make it very hard for businesses to skirt around the law or find loopholes, which is definitely a positive. However, the Act is unclear about what happens when businesses attempt to enter into such contracts or enforce retaliatory penalties in violation of the new law. The statute does state that the FTC has been entrusted with the enforcement authority of this law and the State Attorney General and/or a state’s consumer protection officials can bring claims on behalf of residents. The unanswered question is what happens when those entities do not bring a claim? While the statute does not address this situation, presumably, consumers still have a private right of action against the businesses for statutory violations. However, in that case, consumers could be burdened with significant legal fees fighting the company trying to enforce a gag clause - which in contravention with the purpose of the Act, ultimately harms the consumer in the long run.\(^{12}\) While the Act is clear as to what cannot be done, it is less clear as to what happens after the Act has been violated and how individual consumers can be indemnified for violations.

**The Significance of the Consumer Review Fairness Act of 2016**

According to the Local Consumer Review Survey of 2016 by Bright Local, 84 percent of people trust online reviews as much as a personal recommendation and only 9 percent of

\(^{12}\) See Goldman, *supra* note 2, arguing that this downfall could be corrected with an award of attorney fees and other defense costs to the consumer and the imposition of statutory damages on any businesses that uses gag clauses in their contracts.
consumers do not read online reviews. The power of online reviews in today’s society is undeniable. The ability to post online allows free flow of information which is essential in a free market economy. It not only allows for consumers to inform each other about products enabling them to make informed and efficient decisions, but it also serves as a regulatory mechanism for businesses. Online reviews allow businesses to know what they are doing well so they can continue doing it, and also what they need to work on. Adverse reviews keep businesses in check by acting as negative reinforcement mechanism that ultimately requires them to remedy their reputation in order to remain competitive in the industry.

Aside from the economic concepts, this law is important because it protects consumer’s rights and the basic human right of freedom of speech. Senior policy counsel for the Consumer’s Union, George Slover, stated that this law “Protects the fundamental right of consumers to make their voices heard in the marketplace and hold businesses accountable for the products they sell.”

With the passage of this law, the federal government has shown consumers that changing technology does not diminish those rights. However, the Act makes it clear that the rights of businesses are protected as well, and only honest opinions of consumers will be protected. Defamation and libel laws still stand if consumers attempt to take advantage of the protections provided by slandering a company or product out of spite.

This is important as well, as dishonest opinions are not beneficial to either consumers, the businesses, or the market as a whole. As a result, it would heed consumers to be careful about their reviews and speak about the facts, rather than out of frustration or other emotions. Consumers that simply state that the product did not arrive on time or the customer service representative was rude is more likely to be protected than

14 Mcusic, supra note 4.
15 Ha, supra note 5.
a consumer stating that the company is the worst company in the industry that does not care about its consumers or safety of their products.\textsuperscript{16}

The passage of the Consumer Review Fairness Act calls for a tally in the win column for consumers. While many mothers may not agree with the “not nice” things swirling around the internet, in today’s society such reviews are important and necessary for a more efficient and arguably, fair marketplace. In a world where bargaining power is rarely even, the Consumer Review Fairness Act helps level the online playing field.

\textsuperscript{16} See Mcusic, \textit{supra} note 4.