



# ROSS WILLIAMS EXPLORES THE CONSUMER REVIEW FAIRNESS ACT ON LAW360

February 08, 2017

Partner [Ross A. Williams](#) authored the *Law360* article titled, “How I Learned To Love The New Consumer Review Fairness Act.” The piece delves into the recently enacted federal Consumer Review Fairness Act (CRFA), a law governing how businesses can preemptively prevent and later respond to negative consumer reviews. Specifically, Williams details: provisions of contracts and retaliatory behavior the CRFA prohibits; exceptions to the law; potential penalties; and how businesses should view and adapt to this development.

Full text of the article is below and can be accessed on Law360 by clicking [here](#).

## How I Learned To Love The New Consumer Review Fairness Act

*In the movie Snatch, London gangster and porcine dietary aficionado Brick Top (one of film's campiest villains) encounters a customer who is publicly critical of his gambling tips. Top puts the customer in what might be delicately referred to as an illegal hold and warns him in a thick cockney accent, “If I throw a dog a bone, I don't want to know if it tastes good or not.” Top then threatens the gambler with grievous bodily harm for any further, similar critiques.[1]*

*This vicious approach doesn't win Top any new friends or protect his reputation in a constructive way in the long-term: He meets a brutal end thanks to his cruel tactics.[2] The Consumer Review Fairness Act of 2016[3] (CRFA) prohibits businesses from engaging in less violent forms of self-destructive image control, tactics that businesses concerned with protecting and building their reputations and good will should have already avoided.*

*In the last few years, some businesses have included so-called “gag clauses” in their agreements to discourage and punish customers who post negative online reviews. Efforts to enforce gag clauses have proven oppressive for consumers faced with stiff penalty bills pursued for payment by collection agencies. Those same efforts have also occasionally backfired on the businesses by triggering the “Barbra Streisand effect” — the phenomenon whereby an attempt to hide, remove or censor a piece of information has the unintended consequence of publicizing the information more widely.*

*The CRFA protects consumers and businesses from the double-edged dangers of using gag clauses in “form contracts” — defined as goods and services contracts (other than employment or independent contractor agreements) imposed on a consumer without a meaningful opportunity to negotiate standard terms. Specifically, the CRFA:*

- Voids clauses in form contracts that limit a consumer’s right to post truthful negative reviews online;*
- Voids clauses that threaten penalties against the authors of negative reviews; and*
- Prohibits efforts to make reviewers turn over intellectual property rights related to their reviews.*

*So when does this law become effective, is it retroactive, what are its exceptions, what are its penalties, and what are businesses to do?*

### **Effective Date**

*The CRFA became effective in part when it was signed into law by President Barack Obama on Dec. 14, 2016, but the provisions invalidating and prohibiting gag clauses do not go into effect until March 14, and the federal and state enforcement provisions do not kick in until Dec. 14, 2017.*

### **Retroactivity**

*The CRFA is retroactive in the sense that it invalidates and prohibits the enforcement of contracts “in effect” as of the effective date. Gag clause enforcement efforts before the effective date are not punishable under the CRFA due to the U.S. Constitution’s ex post facto prohibition. Businesses would be wise, however, to have immediately ceased enforcement of prohibited clauses once the CRFA was signed. After the effective date, enforcement efforts on pre-existing clauses, or the mere offer of a new contract with a prohibited clause, are punishable under the CRFA.*

### **Exceptions**

*The main exceptions for businesses that could have used gag clauses before are the exclusions of employment or independent contractor agreements, nonform contracts and unlawful reviews. A business can still prohibit defamatory posts and those that:*

- 1. Breach confidentiality obligations imposed by law;*
- 2. Reveal confidential or privileged trade secret, commercial or financial information;*



3. Contain personnel, medical, law enforcement or other similar information clearly considered private; and
4. contain malware.

Websites also retain the right to remove or refuse to display content of a covered post if it: contains a person's image; is libelous, harassing, vulgar or obscene; is inappropriate with respect to a person's intrinsic characteristics; is unrelated to the goods or services on the site; or is "clearly false or misleading." And businesses may still put terms and conditions on the creation of commercial media that the business had created for its own commercial purposes.

## **Penalties**

CRFA violators face potential investigations, lawsuits, penalties and fines by the Federal Trade Commission for unlawful and deceptive practices under the Federal Torts Claims Act (FTCA), and similar actions by coordinate state attorneys general and state trade or consumer protection agencies, as may be provided by state law.

There is also the potential under the CRFA for liability under state deceptive trade practices acts. The CRFA itself provides no private cause of action for consumers. And, while the CRFA references the FTCA, that law provides no private cause of action for consumers, either. But the CRFA does specifically provide that it "shall be unlawful for a person to offer a form contract containing a provision" the CRFA prohibits. And, it specifically provides that it shall not be "construed to affect any cause of action brought by a person that exists or may exist under state law."

Various deceptive trade practices act (DTPA) statutes may provide a private cause of action for "representing that an agreement confers rights, remedies or obligations which ... are prohibited by law." [4] It wouldn't take much for a creative plaintiffs attorney to connect those dots for a consumer and bring a private DTPA action, which carries the threat of treble damages and attorneys' fee recovery should a business engage in a prohibited practice knowingly or intentionally.

## **What To Do**

*In light of the CRFA, businesses can:*

1. Immediately change form contracts for goods and services to eliminate prohibited gag clauses;
2. Instruct staff to not enforce pre-existing gag clauses;
3. Take advantage of Section (f) of the CRFA, which provides that "not later than 60 days after the date of the enactment of this act, the commission shall commence conducting education and outreach that provides businesses with nonbinding best practices for compliance with this act," to get employees trained; and
4. Not worry too much about the CRFA once they've taken these steps.

*Step four may seem strange, because businesses today have no choice but to protect their online reputations. But businesses should have already been avoiding, and now must avoid, overly restrictive gag clauses and attempts to stifle legitimate customer reviews. This is what the CRFA is meant to prohibit.*

*Businesses should welcome legitimate negative reviews as an opportunity to refine their processes, take corrective action with employees and improve their goods and services. Legitimate negative reviews also present a golden opportunity for a business to gain positive publicity by responding directly and publicly to the review with an apology and an offer to correct the problem or offer compensation in the form of gift certificates or other incentives. Such actions build goodwill.*

*And a smattering of less-than-perfect reviews may actually make a business's review history look more authentic and believable to internet-savvy consumers who know that some businesses choose (however ill-advised that choice may be) to pay for fake positive reviews.*

*Businesses may still prohibit unlawful reviews and move to have them taken down. Doing so may be advisable when a particularly pernicious, illegitimate review wrongfully threatens a good business's positive reputation. But they shouldn't offer form contracts with prohibited gag clauses anymore — that is, unless you want your business's reputation for fairness to consumers fed to the pigs.*

Originally published on Law360, January 27, 2017. Posted with permission

[1] <https://www.youtube.com/watch?v=nnLk7dbDWII>.

[2] <https://www.youtube.com/watch?v=AR8SkOhKG9Y>.

[3] Full text of the CRFA and related legislative materials are at <https://www.congress.gov/bill/114th-congress/house-bill/5111/text>.

[4] Tex. Bus. & Comm. Code § 17.46(b)(12).

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Ross Angus Williams