Consumers Helping Consumers—the Consumer Review Fairness Act

Steven Gard, Senior Assistant Attorney General, Office of Attorney General, State of Florida. This article represents the views of the author and not necessarily those of the Office of the Attorney General, State of Florida.

When I was a young man, my father told me “don’t get mad—get even.” With the enactment of the Consumer Review Fairness Act, Congress provided consumers with a powerful tool to redress the harm caused them by unfair and deceptive practices in the business marketplace. According to the FTC, the Consumer Review Fairness Act ("CRFA") “protects consumers’ ability to share their honest opinions about a business’s products, services, or conduct, in any forum, including social media.”

It has been shown that printed and online ratings and reviews have a profound effect upon a business’s revenues and profits. For example, Cornell University researchers found that a one-star swing in a hotel’s online rating at sites such as Travelocity or TripAdvisor can result in an 11% increase or decrease in average room rates. These days virtually everything is rated or reviewed online, including businesses, charities, health care providers, and even lawyers and judges. Businesses are acutely aware of the effects of these publicly-available ratings and reviews. Some businesses have responded by “astroturfing”—the practice of posting false or misleading favorable online customer reviews, which is itself a deceptive practice.

In addition to “astroturfing,” some businesses have filed lawsuits against customers who posted negative reviews of the business and/or against the media that published those reviews. One such case was Seaton v. TripAdvisor, LLC, in which a hotel owner sued TripAdvisor for listing his hotel first on a list of “Dirtiest Hotels” based upon reviews by travelers.

In order to protect the right of consumers to post such reviews and ratings, and the right of the media to publish them, a few states such as California and Maryland enacted statutes to

---

5 728 F.3d 592 (6th Cir. 2013).
protect the publication and posting of these opinions.\textsuperscript{6} Congress wasted little time extending these protections nationwide through the passage of the CRFA in 2016.

Broadly speaking, the CRFA protects a wide variety of consumer reviews and ratings, including online reviews and ratings, social media posts, blogs, and uploaded photos and videos.\textsuperscript{7} The law prohibits businesses from using form contracts that restrict or impose any penalty upon customers or consumers who post opinions, ratings, or reviews about that business.\textsuperscript{8} This includes restrictions and penalties that are buried in “terms of use” clauses on websites. Statutory exceptions include employee or independent contractor contracts and postings that include trade secrets or confidential information, law enforcement records, postings that are clearly false or misleading, and postings that contain computer viruses or malware.\textsuperscript{9} Significantly, the statute also does not prohibit contractual “gag orders” or agreements to take down negative ratings or reviews that are individually-negotiated as part of a settlement of a dispute between a business and a consumer. The FTC, acknowledging the danger of competitors posting negative reviews of a business in order to achieve a competitive advantage, notes that reviews that are “libelous, harassing, or abusive” or are “clearly false or misleading” are not protected by the CRFA, and may be removed by a business. The FTC added, however, that “it’s unlikely that a consumer’s assessment or opinion with which you disagree meets the ‘clearly false or misleading’ standard.”\textsuperscript{10}

The CRFA may be enforced by the FTC, state attorneys general, or “any other consumer protection officer of a State who is authorized by the State to do so.”\textsuperscript{11} Actions to enforce the CRFA must be brought in federal court in any district meeting the venue requirements of 28 U.S.C. §1391.\textsuperscript{12} There is no private right of action granted directly to consumers for a violation of the CRFA or to enforce any provision of the CRFA. Congress delayed the effective date of enforcement of the CRFA until December 14, 2017, so it is unlikely that any enforcement actions have yet been filed.\textsuperscript{13}

Although no courts have yet considered the CRFA in the context of an action to enforce the statute, one court has commented upon the public policy underlying the CRFA. In \textit{CrowdStrike, Inc. v. NSS Labs, Inc.},\textsuperscript{14} the court said with respect to the CRFA, “[t]he court finds

\textsuperscript{6} See CAL. CIV. CODE § 1670.8 (West 2017); MD. CODE ANN. COM. LAW § 14-1325 (West 2018).
\textsuperscript{8} 15 U.S.C.S. § 45b(b), (c) (2018).
\textsuperscript{10} See note 2.
that the public has a very real interest in the dissemination of information regarding products in the marketplace.”

With the enactment of the CRFA, any consumer with access to a computer, tablet, or smart phone now has the ability to let other consumers know about deceptive or unfair business practices. Through the CRFA, Congress has given legislative effect to the observation of Justice Louis D. Brandeis in his concurring opinion in Whitney v. California, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”

Each month, the Center for Consumer Protection will provide an article written by an assistant attorney general. If you would like to provide an article, please email Blake Bee at bbee@naag.org.

15 274 U.S. 357, 377 (1927).