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## An Assessment of the Consumer Review Freedom Act of 2015

By Eric Goldman\*

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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>

Despite the social benefits generated by consumer reviews, some businesses try to distort their public reputation by contractually suppressing reviews from their customers.<sup>2</sup> These efforts are categorically illegitimate. The Consumer Review Freedom Act<sup>3</sup> will ensure every consumer has the opportunity to add their voice to the discourse so that other consumers can benefit from their experiences.

Because contractual restrictions on consumer reviews are such a terrible idea, it seems like existing law should already prohibit such practices. Although there is some precedent to support that conclusion,<sup>4</sup> I'll explore two reasons why we still need the Consumer Review Freedom Act.

First, it's not clear if courts will enforce anti-review clauses.<sup>5</sup> Many judges will refuse to do so for unconscionability, public policy or other reasons. However, judges don't like to override contracts, so anti-review contracts aren't guaranteed to fail in court.

For example, in *Galland v. Johnston*,<sup>6</sup> a vacation rental contract required tenants to agree that they would not "use blogs or websites for complaints, anonymously or not." We have no idea how many tenants self-censored due to this contract clause, but we know two tenants defied the ban and criticized the vacation rental online. The landlord sued the tenants in federal court. The court held that the reviews weren't defamatory but the tenants nevertheless may have breached the rental contract. This ruling means the anti-review clause exposed the tenants to liability for sharing non-defamatory reviews.

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<sup>1</sup> Eric Goldman, *The Regulation of Reputational Information* in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 193 (Berin Szoka & Adam Marcus eds.) (2010), <http://ssrn.com/abstract=1754628>.

<sup>2</sup> Eric Goldman, *Fining Customers For Negative Online Reviews Isn't New...Or Smart*, Forbes Tertium Quid, Aug. 7, 2014, <http://www.forbes.com/sites/ericgoldman/2014/08/07/fining-customers-for-negative-online-reviews-isnt-new-or-smart/>.

<sup>3</sup> Consumer Review Freedom Act of 2015, S. 2044 & H.R. 2110 [hereinafter the "CRFA"].

<sup>4</sup> Eric Goldman, *How Congress Can Protect Online Consumer Reviews*, Forbes Tertium Quid, Nov. 2, 2015, <http://www.forbes.com/sites/ericgoldman/2015/11/02/how-congress-can-protect-online-consumer-reviews/>.

<sup>5</sup> Unfortunately, there is no widely accepted term to describe the types of contract clauses at issue here. I use the term "anti-review clauses," but the terms "gag clauses" and "non-disparagement clauses" are also used. I don't prefer the latter because businesses sometimes attempt to restrict all reviews, positive and negative.

<sup>6</sup> *Galland v. Johnston*, 2015 WL 1290775 (S.D.N.Y. Mar. 19, 2015), <http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2014cv04411/428591/32/>; see Eric Goldman, *Court Might Enforce A Contract Ban On Consumer Reviews*, Forbes Tertium Quid, Mar. 27, 2015, <http://www.forbes.com/sites/ericgoldman/2015/03/27/court-might-enforce-a-contract-ban-on-consumer-reviews/>.

The Consumer Review Freedom Act will eliminate any ambiguity over the enforceability of anti-review clauses. It will mean that vacation tenants—and all other customers—will enjoy legal certainty about their rights to speak up.

The second reason we need the Consumer Review Freedom Act is that businesses are always seeking ways to shape and manage their online reputations. As they offer the illusion of such control, anti-review clauses will keep proliferating unless they are banned.<sup>7</sup>

The experiences of the healthcare industry illustrate how this might happen. In the late 2000s, a company called Medical Justice sold form contracts to doctors and other healthcare professionals that contained anti-review clauses.<sup>8</sup> Medical Justice's sales pitch was elegant and tempting: by using its form contract, doctors and healthcare professionals would seemingly get a magic wand to scrub unwanted patient reviews from the Internet. Over the years, perhaps 2,000 healthcare professionals adopted Medical Justice's form contract,<sup>9</sup> and I estimate over 1 million Americans signed an anti-review contract.<sup>10</sup>

The long-term marketplace damage attributable to Medical Justice's misguided campaign is incalculable. Although Medical Justice changed its position in 2011 and told its customers to stop using its forms,<sup>11</sup> even today in 2015 it can be hard to find robust numbers of patient reviews for many healthcare providers.

Although the healthcare industry's adoption of anti-review contracts may be an extreme case,<sup>12</sup> we're likely to see similar effects in other industries dominated by small businesses and professional service providers.

Why small businesses and professional service providers? In many cases, these proprietors' self-identities are closely linked to their professional reputations. Negative feedback about their business feels like it reflects on them as an individual. If a vacation tenant says she didn't like the rental's décor, the landlord might take that as criticism of her aesthetic tastes. Or if a patient says that she didn't like her doctor's bedside manner, the doctor may feel like her personality is being criticized. Small business owners and professional service providers will be attracted to anti-

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<sup>7</sup> Elliot Harmon & Kit Walsh, *Consumer Review Freedom Act Would Protect Customers' Right to Post Reviews*, EFF, Nov. 3, 2015, <https://www.eff.org/deeplinks/2015/11/consumer-review-freedom-act-would-protect-customers-right-post-reviews>.

<sup>8</sup> See doctoredreviews.com. The exact terms of the anti-review clause varied over the years. At some points, the contract banned reviews; other times, the contract assigned the IP rights to the patients' reviews. See <http://doctoredreviews.com/patients/the-back-story/>.

<sup>9</sup> Angie Hicks letter to US Senate Committee on Commerce, Science & Transportation re: Consumer Review Freedom Act, Nov. 3, 2015, <http://www.angieslist.com/news-releases/angie-hicks-letter-us-senate-committee-commerce-science-transportation-re-consumer/>.

<sup>10</sup> Eric Goldman, *Fining Customers For Negative Online Reviews Isn't New...Or Smart*, Forbes Tertium Quid, Aug. 7, 2014, <http://www.forbes.com/sites/ericgoldman/2014/08/07/fining-customers-for-negative-online-reviews-isnt-new-or-smart/>

<sup>11</sup> Eric Goldman, *Medical Justice Capitulates by "Retiring" Its Anti-Patient Review Contracts*, Tech. & Mktg. 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).

<sup>12</sup> Eric Goldman, *Patients' Online Reviews of Physicians*, MEDICAL ETHICS (a journal published by Lahey Health), Fall 2013, at 6, <http://ssrn.com/abstract=2367092>.

review clauses to prevent these public ego blows.<sup>13</sup> Therefore, without the Consumer Review Freedom Act, I expect other industries will embrace anti-review clauses like the healthcare industry did—and we as consumers will be poorer for those efforts.

Consumer reviews are worth fighting for, and I'm thrilled to see Congress taking on that fight. In the supplement, I provide a more detailed statutory critique of what the Consumer Review Freedom Act does well, what might be changed, and how Congress can support consumer reviews.

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<sup>13</sup> Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS \_\_\_ (2015), <http://ssrn.com/abstract=2611326>.

## **SUPPLEMENT: STATUTORY CRITIQUE OF THE CONSUMER REVIEW FREEDOM ACT<sup>14</sup>**

For many Americans, the First Amendment is the alpha and omega of free speech protection. However, the First Amendment just sets a minimum level of free speech in our society. Legislatures, including Congress, may freely enact laws that go beyond the First Amendment to protect free speech. If done properly, those laws can help free speech more than the First Amendment.

The Consumer Review Freedom Act of 2015 (S. 2044 and H.R. 2110) is an example of a law that would helpfully supplement the First Amendment's protection of free speech. The Act would prevent businesses from contractually restricting their customers from reviewing them online (what I call "anti-review clauses"). Although it may be hard to believe any business would ever ask its customers to do something so anti-consumer, it's likely that millions of Americans have agreed to such clauses. The Consumer Review Freedom Act would benefit them—and all of us.

### **About The Act<sup>15</sup>**

The Act defines "covered communications" to include written, verbal or photographic consumer reviews.<sup>16</sup> The Act says that any form contracts that ban, impose fines for, or attempt to obtain the intellectual property rights to, covered communications are void.<sup>17</sup> The Act also declares such contracts unlawful and authorizes the federal government and state attorneys' general to bring enforcement actions for imposing such contracts (the House bill designates the U.S. Department of Justice as the principal federal enforcement entity;<sup>18</sup> the Senate bill, the Federal Trade Commission<sup>19</sup>).

### *What's Good*

Some of the best aspects of the Act:

\* **Broad Definition**. Consumers can critique businesses in lots of ways. The Act's multi-media definition of "covered communications" should be broad enough to cover all of those possibilities.

\* **Broad Prohibitions**. Businesses seeking to gag their consumers have tried many different contract tricks. The Act prohibits all of the known tricks (bans, fines and IP assignments), so it will not be easy for a business to skirt around this law.

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<sup>14</sup> This portion is based on Eric Goldman, *How Congress Can Protect Online Consumer Reviews*, Forbes Tertium Quid, Nov. 2, 2015, <http://www.forbes.com/sites/ericgoldman/2015/11/02/how-congress-can-protect-online-consumer-reviews/>.

<sup>15</sup> I'll critique and quote the Senate bill's language, but the House and Senate versions are pretty similar.

<sup>16</sup> CRFA § 2(a)(2).

<sup>17</sup> CRFA § 2(b)(1).

<sup>18</sup> CRFA § 2(e) (House version).

<sup>19</sup> CRFA § 2(d).

\* Remedies. The Act makes anti-review clauses both void and unlawful. Void means that no court will enforce them, and unlawful means that it's illegal for businesses to include an anti-review clause in its form, even if the business never plans to enforce it.

### *Possible Tweaks*

While I support the Act in its current form, a few tweaks are worth considering:

\* Restriction to Form Contracts. The Act applies only when the anti-review clause is in a "form contract," defined as "a standardized contract used by a person and imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms."<sup>20</sup> This definition excludes individually negotiated non-disparagement clauses, which are sometimes found in settlement agreements. (A non-disparagement clause says that a person won't publicly say negative things--even if true--about someone else). Still, the statutory language leaves room for debate over whether a contract qualifies as a "form contract." Because I am skeptical that non-disparagement clauses are legitimate in any situation, I would favor extending the restrictions to all contracts, form or negotiated.

\* Trade Secret Exception. The Act does not apply to "trade secret" protections,<sup>21</sup> which makes sense because businesses should have the ability to protect their trade secrets. Unfortunately, businesses sometimes have ridiculously overexpansive views about what constitutes their trade secrets--including asserting that information disclosures to customers in ordinary buying-and-selling interactions constitute the business' trade secrets. To preserve trade secret protection but curb abusive overreaching, the Act could specify that ordinary business-consumer interactions can't qualify as trade secret disclosures.

\* No Consumer Redress. The Act doesn't give consumers any affirmative recourse if a business attempts to impose or enforce an anti-review clause. This could be fixed in two ways. First, if a business makes the unwise decision to bring a lawsuit based on an anti-review clause, the court should award attorneys' fees and other defense costs to the consumer. Second, the statute should impose statutory damages on any businesses that includes anti-review clauses in their contracts.

\* State Law Preemption. The Act doesn't preempt state laws (the Act says "Nothing in this section shall be construed to affect any cause of action brought by a person that exists or may exist under State law").<sup>22</sup> This might be a good thing because it increases the range of legal tools to combat anti-review clauses. On the other hand, one of the principal benefits of federal law is that it can establish uniform rules across the country. Although I favor a multi-fronted effort to extinguish anti-review clauses, I probably favor legal uniformity a little more.

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<sup>20</sup> CFRA § 2(a)(3).

<sup>21</sup> CFRA § 2(b)(3)(A).

<sup>22</sup> CFRA § 2(g).

## Aren't Anti-Review Clauses Already Illegal?<sup>23</sup>

Because anti-review clauses are such an obviously terrible idea, such clauses are already running into legal trouble. For example, a 2003 New York case (*People v. Network Associates*) struck down an anti-review clause;<sup>24</sup> the Department of Health and Human Service's Office for Civil Rights has told doctors they can't use anti-review clauses;<sup>25</sup> in 2014, California enacted a law against businesses banning consumer reviews;<sup>26</sup> and in October 2015, the Federal Trade Commission obtained a preliminary injunction prohibiting Roca Labs from using anti-review clauses.<sup>27</sup> With all of this precedent indicating that anti-review clauses aren't permissible, do we need a federal law too?

Yes, we do. Anti-review clauses keep proliferating through different industries, so not every business has gotten the message. California's law is a helpful start, but that still leaves 49 states without comparable statutes. Plus, at least one case suggested that anti-review clauses may be enforceable.<sup>28</sup> We need to put a decisive and unambiguous end to these anti-consumer, anti-competitive practices, and the Consumer Review Freedom Act would do just that.

## A Final Thought

In addition to the Consumer Review Freedom Act, Congress should enact a federal anti-SLAPP law<sup>29</sup>—another example of how Congress can extend the First Amendment's free speech protections. Anti-SLAPP laws help protect consumers from businesses making spurious legal claims that negative consumer reviews are defamatory. Businesses often intimidate consumers into removing reviews by threatening costly legal action (even if the review is completely legitimate), so the procedural and financial protections in a federal anti-SLAPP law would curb such abusive threats. The combination of the Consumer Review Freedom Act and federal anti-SLAPP protection would provide a solid legal foundation for the continued growth and success of online consumer reviews.

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<sup>23</sup> See generally 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. \_\_ (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2579172](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579172).

<sup>24</sup> *People v. Network Assoc. Inc.*, 195 Misc.2d 384 (2003), [http://www.leagle.com/decision/2003579195Misc2d384\\_1519.xml/PEOPLE%20v.%20NETWORK%20ASSOC.,%20INC.](http://www.leagle.com/decision/2003579195Misc2d384_1519.xml/PEOPLE%20v.%20NETWORK%20ASSOC.,%20INC.)

<sup>25</sup> <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/allcases.html#case29>.

<sup>26</sup> Cal. Civil Code § 1670.8; see Eric Goldman, *California Tells Businesses: Stop Trying To Ban Consumer Reviews*, Forbes Tertium Quid, Sept. 10, 2014, <http://www.forbes.com/sites/ericgoldman/2014/09/10/california-tells-businesses-stop-trying-to-ban-consumer-reviews/>

<sup>27</sup> *Fed. Trade Comm'n v. Roca Labs*, 8:15-cv-02231-MSS-TBM (M.D. Fla. Oct. 29, 2015), <https://www.ftc.gov/system/files/documents/cases/151029rocoprelim.pdf>.

<sup>28</sup> *Galland v. Johnston*, 2015 WL 1290775 (S.D.N.Y. Mar. 19, 2015), <http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2014cv04411/428591/32/>; see Eric Goldman, *Court Might Enforce A Contract Ban On Consumer Reviews*, Forbes Tertium Quid, Mar. 27, 2015,

<http://www.forbes.com/sites/ericgoldman/2015/03/27/court-might-enforce-a-contract-ban-on-consumer-reviews/>.

<sup>29</sup> Eric Goldman, *59 Legal Scholars Sign Letter Supporting SPEAK FREE Act To Create Federal Anti-SLAPP Law*, Forbes Tertium Quid, Sept. 16, 2015, <http://www.forbes.com/sites/ericgoldman/2015/09/16/59-legal-scholars-sign-letter-supporting-speak-free-act-to-create-federal-anti-slapp-law/>.