

CRFA Insights

June 6, 2023 | [Catherine M. "Cathy" Brennan](#)

One of the downsides of working with the public is that sometimes the public will be disappointed with the service you offer. And in this era of the internet, the number one remedy consumers have is to complain about companies online. Numerous websites abound that provide a forum for consumer complaints. There are many things companies can do to minimize these complaints, but an important thing to remember is that you cannot prohibit consumers from complaining.

That's because the Consumer Review Fairness Act of 2016 ("CRFA"), which^[1] took effect on December 14, 2016, protects consumers' ability to freely share their opinions about a business. The CRFA voids provisions of form contract between sellers and individual consumer if the provision:

- prohibits or restricts the ability of an individual who is a party to the form contract to engage in complaining;
- imposes a penalty or fee against an individual who is a party to the form contract for engaging in complaining; or
- transfers or requires an individual who is a party to the form contract to transfer to any person any intellectual property rights in review or feedback content, with the exception of a non-exclusive license to use the content, that the individual may have in any otherwise lawful complaint about such person or the goods or services provided by such person.^[2]

Since 2016, only a few courts had dealt with the CRFA and those decisions can be divided into two general categories, with important lessons for business.

First, courts have generally affirmed that the CRFA does not create a private cause of action. The statute provides that only the Federal Trade Commission, State Attorney General, and other consumer protection officers of a state have the enforcement power under the CRFA.^[3] Three courts have considered the issue of whether a private plaintiff can bring an action under the CRFA and all three courts dismissed the plaintiff's CRFA claim because the CRFA does not create a private cause of action.^[4]

Second, courts have considered what happens to the consumer contract when it contains a prohibited provision. The statutory language of the CRFA states that "a *provision* of a

form contract is void from the inception of such contract if such provision" meets the requirements as mentioned above.[5] Courts have split over whether this language means the entire contract is void or only the prohibited provision. In a case decided in the U.S. District Court for the Eastern District of Tennessee, the court addressed whether only the provision with the prohibited language is void or the whole contract is void.[6] The court relied on the remedies available under the Federal Trade Commission Act, which provides that the relief "may include, but shall not be limited to, recession or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respective the rule violation or the unfair or deceptive act or practice." [7] The court concluded that although not required, the consumer may elect recession of the contract as a civil remedy for a CRFA violation, thus "voiding" the entire agreement.[8] In contrast, in *FTC v. Grand Teton Professionals, LLC*, [9] the FTC and the defendants negotiated an agreement that only voided the provision that banned consumer complaints.

At least one court has also used the violation of the CRFA to form a basis for invalidating a different provision of the form contract, thus demonstrating that a CRFA violation can have unanticipated consequences. In *Seibert v. Precision Contract Solutions, LP*, [10] the court found that the violation of the CRFA could form a basis to void the arbitration clause in the contract between the parties.

If you are a business that hasn't reviewed your consumer agreements in a while, it is worth the effort to take a look in those agreement to see if they contain an anti-complaining provisions. This is the kind of low hanging fruit of interest to a consumer protection attorney that can result in far-reaching negative consequences for your business if you don't address it.

[1] 15 U.S.C.A. § 45b.

[2] 15 U.S.C.A. § 45b(b)(1).

[3] 15 U.S.C.A. § 45b(d)(2)(A); 15 U.S.C.A. § 45b(e)(1), (6).

[4] *See Ebanks v. Ruiz*, No. 22CV02350JSSIL, 2023 WL 2970443 (E.D.N.Y. Jan. 24, 2023); *Precision Contracting Sols., LP v. ANGI Homeservices, Inc.*, 415 F. Supp. 3d 113 (D.D.C. 2019); *Quigley v. Yelp, Inc.*, 17-CV-03771-RS, 2018 WL 7204066 (N.D. Cal. Jan. 22, 2018).

[5] 15 U.S.C.A. § 45b(b)(1).

[6] *Tennessee ex rel. Skrmetti v. Ideal Horizon Benefits, LLC*, 323CV00046DCLCJEM, 2023 WL 2299570 (E.D. Tenn. Feb. 28, 2023)

[7] *Id.* at *5 (quoting 15 U.S.C. § 57b(b)).

[8] *Id.*

[9] 3:19-CV-00933-VAB, 2019 WL 3297001, at *4 (D. Conn. July 23, 2019).

[10] CV 18-818 (RMC), 2019 WL 935637 (D.D.C. Feb. 26, 2019).

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