Florida State University Law Review

Volume 50 | Issue 3 Article 2

Spring 2023

Confidentiality Clauses in Settlement Agreements after the Consumer Review Fairness Act

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CONFIDENTIALITY CLAUSES IN SETTLEMENT AGREEMENTS AFTER THE CONSUMER REVIEW FAIRNESS ACT

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INTRODUCTION

Consumers use the Internet to research and buy goods and services in continuously exploding numbers.[1] A significant aid to that research is the pervasive presence of online reviews, which are used by millions of consumers when making purchasing decisions. Consumers post about their purchasing experiences on websites such as Yelp, Amazon, and Tripadvisor, as well as on social media sites like Twitter and

* Professor, Texas A&M University School of Law. I would like to thank Texas A&M University School of Law for its generous research assistance provided for this Article. Thanks also to my colleagues Bill Henning and Frank Snyder for their helpful comments while formulating the theses of this Article.

1. Tanya M. Marcum & Sandra J. Perry, *Boiling Mad Consumers Over Boilerplate Language: Non-Disparagement Clauses in Online Sales Contracts*, 68 LAB. L.J. 5, 5 (2017). The first four paragraphs of this introduction are adapted in part from the introduction to my predecessor article. *See* Wayne R. Barnes, *The Good, the Bad, and the Ugly of Online Review: The Trouble with Trolls and a Role for Contract Law After the Consumer Review Fairness Act*, GA. L. REV. 549, 553-55 (2019).

Facebook.[2] These reviews are of great potential benefit to consumers. Reviews can inform would-be purchasers of relevant information both about the goods or services the consumers plan to purchase, as well as the merchants from whom they plan to make those purchases.[3]

Merchants have a different perspective regarding online reviews. Their livelihoods are at stake, and reputation is a key factor in the ongoing success of their businesses.[4] Positive reviews have been found to have a direct correlation to increased revenues; conversely, studies have shown that even a single negative review can precipitate a decline in revenues by 25% or more.[5] Thus, favorable reviews can greatly assist a business in achieving higher profitability. Negative reviews, however, are a significant threat. Consequently, merchants have every incentive and an understandable desire to try to prevent the harm that negative reviews can cause.

One tool that has been used in a variety of scenarios to manage and even prevent such potential future reputational harm is the contractual non-disparagement clause (i.e., non-disclosure clause).[6] Such agreements are often used in the context of compromise and settlement agreements, whereby the party accused of some breach or wrongdoing agrees to pay the alleged victim in exchange for the victim's

2. *See* Trevin Shirey, *20 Business Review Sites to Help Your Small Business*, WEBFX (Apr. 18, 2021), https://www.webfx.com/blog/internet/20-business-review-sites-help-small-business [https://perma.cc/C2RG-EZ53].

3. The value to consumers is dependent on the truthfulness of the posted reviews, an issue about which consumers unfortunately are often left to speculate. "Fake reviews" are a particular problem for online consumers—either effusive reviews posted surreptitiously by the merchants themselves or negative reviews posted by the merchants' commercial competitors. *See, e.g.*, Emma Woollacott, *Amazon's Fake Review Problem Is Now Worse than Ever, Study Suggests*, FORBES (Sept. 9, 2017, 12:13 PM), https://www.forbes.com/sites/emmawoollacott/2017/09/09/exclusive-amazons-fake-review-problem-is-now-worse-than-ever/#4663e4517c0f [https://perma.cc/L6RU-724B].

4. 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. 59, 59 (2016).

5. *See id.* at 92 ("A 2011 Harvard Business School study found that independent restaurants reaped a 5 to 9[%] increase in their revenues when their Yelp ratings rose about one star higher. Conversely, the posting of a single negative review online could cause business revenues to plummet about 25[%] or more." (first citing Paresh Dave, *Small Businesses Struggle to Manage Online Image*, L.A. TIMES (Aug. 9, 2013, 12:00 AM), https://www.latimes.com/business/la-xpm-2013-aug-09-la-fi-tech-savvy-online-reviews-20130810-story.html [https://perma.cc/ZK2U-EAES]; and then citing L. David Russell et al., *Fake It Until You Make It? Battling Fake Online Reviews*, LAW360 (June 9, 2014, 12:17 PM), https://www.law360.com/articles/545366/fake-it-until-you-make-it-battling-fake-online-reviews [https://perma.cc/Z8BC-VKYW])).

6. *See* Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 514-15 (2021) ("NDAs have long been used in certain industry contracts to protect proprietary information and trade secrets. Individuals may enter NDAs to protect privacy and reputational interests. NDAs have also been invoked to silence reports of misconduct, negligence, sexual harassment, and even sexual assault. Corporations, institutions, and individuals accused of, and seeking to avoid publicity concerning, serious misconduct may insist upon an NDA and in exchange pay 'hush money' to settle a dispute." (footnotes omitted)).

agreement to both waive their entitlement to bring legal action and to keep the matter confidential going forward. Indeed, it is widely accepted that the ability to secure the privacy and confidentiality of all contested matters often greatly aids in the facilitation of reaching a compromise and settlement.[7]

In recent years, many businesses—seeking to preemptively counteract the potentially devastating effect of negative online reviews—began incorporating non-disparagement clauses in their form contracts, which are executed at the inception of transactions selling the businesses' goods or services.[8] Such clauses have been generally intended to prohibit consumers from posting negative online reviews regarding the goods or services purchased.[9] Unfortunately for these businesses, a number of reported instances of the attempted enforcement of such clauses were unfavorably received by much of the media and the public.[10] As a result, legislation banning such clauses in form contracts began to be enacted. Several states passed such laws—California passed such legislation in 2014,[11] then Maryland in 2016,[12] and then Illinois in 2017.[13] More importantly, in late 2016, Congress

7. *See* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) ("[O]ur justice system recognizes a variety of situations in which confidentiality is not only acceptable, but essential. Discovery, grand jury proceedings, settlement negotiations, and jury deliberations are conducted far from public view. . . . Valid reasons exist to deny public access to this information. In each instance, confidentiality is deemed essential to accomplish fundamental goals of the justice system that are far more important than the public's need to know every detail of a given case.").

8. *See* Ponte, *supra* note 4, at 67.

9. *Id.* at 67.

10. *See* Tim Cushing, *Law Passed to Protect Customers from Non-Disparagement Clauses and Other Ridiculous Restrictions*, TECHDIRT (Dec. 7, 2016, 1:03 PM), https://www.techdirt.com/articles/20161206/07004036204/law-passed-to-protect-customers-non-disparagement-clauses-other-ridiculous-restrictions.shtml [https://perma.cc/XP3D-U5N2] ("Companies are still including non-disparagement clauses in contracts, despite there being ample evidence all it really does is generate massive amounts of disparagement from parties *not* bound by the contractual language.").

11. *See* Doug Gross, *Yelp Without Fear, Says New California Law*, CNN (Sept. 12, 2014, 2:43 PM), http://www.cnn.com/2014/09/12/tech/web/california-law-yelp/index.html [https://perma.cc/G6J6-9YZK]. The California statute is codified at CAL. CIV. CODE § 1670.8 (West 2022).

12. *See The 'Right to Yelp' Is Now Maryland Law*, NFIB (July 20, 2016), https://www.nfib.com/content/news/legal/the-right-to-yelp-is-now-maryland-law-74679/ [https://perma.cc/NUG3-9DPQ]. The Maryland statute is codified at MD. CODE ANN., COM. LAW § 14-1325 (West 2022).

13. *See* Alexia Elejalde-Ruiz, *New Illinois Law Protects Consumers Who Post Negative Reviews to Sites Like Yelp*, CHI. TRIB. (Aug. 24, 2017, 6:10 AM), https://www.chicagotribune.com/business/ct-illinois-right-to-yelp-law-0824-biz-20170823-story.html [https://perma.cc/JWE4-AM2A]. The Illinois statute is codified at 815 ILL. COMP. STAT. ANN. 505/2UUU (West 2022).

enacted a federal law entitled the Consumer Review Fairness Act (CRFA).[14] The CRFA generally prohibits merchants from including non-disparagement clauses in form contracts executed for selling their goods or services.[15]

These laws[16] barred merchants from including non-disparagement clauses in their form purchase contracts. However, in the aftermath of the CRFA's enactment, certain questions have arisen.[17] One question of some practical importance is this: Although the CRFA prohibits merchants from most usages of non-disparagement clauses in the *form contracts* used in *initially selling* their goods or services (i.e., such contracts occurring at the inception of the commercial relationship), does the statute also prohibit merchants from using non-disparagement clauses in *settlement agreements* used to compromise and settle consumer disputes? The question is of current significance because merchants continue to use confidentiality clauses in settlement agreements, which in turn can include a prohibition against posting on social media and posting online reviews.[18] Other related questions include whether there are different policy objectives and concerns at these two different stages of the consumer relationship (initial contract versus settlement), and whether the language of the CRFA dictates a different result.

This Article seeks to answer these questions. Part I will discuss in more detail the explosion of online commerce and reviews, merchants' use of non-disparagement clauses in their form contracts, and the public reaction to such attempts to prohibit posting online reviews. Part II will discuss the Consumer Review Fairness Act and its general operational structure. Part III will discuss form contracts, settlement contracts, and the different context and policy objectives governing each, as well as analyze whether the CRFA can fairly be construed to apply to settlement agreements.

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14. *See* Elliot Harmon, *President Signs Law Protecting Your Right to Review*, ELEC. FRONTIER FOUND. (Dec. 21, 2016), https://www.eff.org/deeplinks/2016/12/president-signs-law-protecting-right-review [https://perma.cc/4S7U-EN73]. The Consumer Review Fairness Act is codified at 15 U.S.C. § 45b.

15. 15 U.S.C. § 45b(b)(1). The CRFA's prohibition on non-disparagement clauses is subject to several exceptions. *See infra* Part II.

16. Although this Article focuses on the CRFA as the nationally applicable federal law on the issue, all of the discussion applies with relatively equal force to the state statutes in California, Maryland, and Illinois. *See supra* notes 11-14 and accompanying text.

17. One question involves whether businesses are powerless to prohibit certain unlawful or "abusive" reviews, such as those posted by Internet trolls. I have opined previously that, because of certain exceptions in the statute, the CRFA does *not* prevent businesses from prohibiting such abusive reviews—reviews that go far beyond a basic negative, factual review. *See* Barnes, *supra* note 1, at 587.

18. *See, e.g.*, Erin Griffith & Peter Eavis, *This Company Says It Will Fix Your Smile. It May Shush You if It Doesn't.*, N.Y. TIMES (Jan. 21, 2020), https://www.nytimes.com/2020/01/21/technology/smiledirectclub-smile-nda.html [https://perma.cc/9TD5-WQCE].

I. THE RISE OF ONLINE REVIEWS AND SOME MERCHANTS' INITIAL RESPONSES IN THE FORM OF NON-DISPARAGEMENT CLAUSES[19]

The Internet is increasingly utilized by consumers to purchase goods and services. Before making a purchase decision (or a contractor hiring decision, or a hotel reservation decision, etc.), consumers often research online reviews that have been posted by customers who have previously engaged in similar transactions.[20] This ecosystem of online reviews has become an essential part of the online consumer purchasing experience. Favorable reviews tend to increase business and profitability for merchants, whereas negative reviews can be crippling to a business.[21] In recent years, some merchants have attempted to ameliorate the potentially devastating effect of such negative reviews by including a contract provision that prevents customers from posting any negative reviews (a so-called "non-disparagement clause"). This Part addresses the explosion of online commerce, the corresponding rise of online reviews and their effects on businesses, and the use of non-disparagement clauses by some merchants to combat the negative effects of bad online reviews. As this Part will show, the attempt to prevent customers from posting their experiences online was not well received by the public.

A. The Explosion of E-Commerce

Consumer use of the Internet for purchasing goods and services continues to increase. From the modest beginnings of online e-commerce in the 1990s, it is estimated that well over 60% of Internet users worldwide have now purchased goods or service online.[22] In the United States, the numbers are much higher, with 96% of Americans reporting having purchased online.[23] The U.S. Census Bureau reported that, for the second quarter of 2021, U.S. retail e-commerce sales totaled

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19. Part I is adapted in part from my predecessor article concerning the Consumer Review Fairness Act, discussing similar background. *See* Barnes, *supra* note 1, at 556-82.

20. *See* Jon Clark, *18 Online Review Statistics Every Marketer Should Know*, SEARCH ENGINE J. (Jan. 13, 2023), https://www.searchenginejournal.com/online-review-statistics/329701/#close [https://perma.cc/UN4Z-SBFZ] ("According to a 2021 report by PowerReviews, over 99.9% of customers read reviews when they shop online.").

21. *See supra* notes 4-5 and accompanying text.

22. One of the first items purchased on the World Wide Web through an e-commerce transaction was a large Pizza Hut pizza, purchased in 1994. Tucker Schreiber, *Proceed to Checkout: The Unexpected Story of How Ecommerce Started*, SHOPIFY (Nov. 25, 2016), https://www.shopify.co.uk/blog/69521733-proceed-to-checkout-the-unexpected-story-of-how-ecommerce-started [https://perma.cc/8TMX-7CG5]; Daniela Coppola, *Digital Buyer Penetration Worldwide from 2016 to 2021*, STATISTA (Oct. 12, 2021), https://www.statista.com/statistics/261676/digital-buyer-penetration-worldwide/ [https://perma.cc/BPS5-J9AY].

23. Maddy Osman, *Ecommerce Statistics for 2023—Chatbots, Voice, Omni-Channel Marketing*, KINSTA (Feb. 9, 2023), https://kinsta.com/blog/ecommerce-statistics/ [https://perma.cc/WC2Z-3N6L].

$222.5 billion (compared to $1.67 trillion in overall retail sales).[24] These e-commerce sales numbers constituted a 3.3% increase from the prior quarter (first quarter of 2021), and a 9.1% increase over retail e-commerce sales from the second quarter of 2020 (one year prior).[25]

Another indicator of the increasing prevalence of e-commerce is that Cyber Monday 2017 turned out to be the highest volume online shopping day in domestic history to that point—Internet sales totaled over $6.6 million from roughly 81 million Americans that day alone, as reported by the National Retail Federation.[26] About $2 million of these sales were conducted on either smartphones or tablets, making Cyber Monday 2017 the first time such mobile shopping reached that level of volume.[27] The numbers have only increased since then. Cyber Monday 2020 sales totaled $10.8 billion—and, of this amount, 37% (nearly $4 billion) was conducted by smartphone.[28] Moreover, the recent emergence of the COVID-19 pandemic has only hastened the move of more and more consumer purchasing to online e-commerce platforms.[29]

In short, Internet shopping is happening in ever-increasing amounts and volume, both domestically and worldwide. The reasons are readily apparent. E-commerce purchasing provides conveniences in the form of time savings, avoiding the hassles of traveling to and navigating physical storefronts, and having access to greater choices and inventory levels than the limited amounts present at in-person stores. Furthermore, additional qualities make online shopping attractive, including better prices, online discounts, ease of web site navigation, brand reputation and loyalty, and access to online reviews posted by prior consumers.[30] These qualities, coupled with the recent threat posed by the COVID-19 pandemic and occasional government lockdowns and restrictions, has made the ascent of online e-commerce a virtual *fait accompli*, whose ubiquitous permanence seems certain.

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24. Press Release, U.S. Census Bureau, U.S. Department of Commerce, Quarterly Retail E-Commerce Sales 2nd Quarter 2021 (Aug. 19, 2021), https://www2.census.gov/retail/releases/historical/ecomm/21q2.pdf [https://perma.cc/2DL3-PWSA]. All of the dollar amounts cited herein were adjusted for seasonal variation but not for price fluctuations. *Id.*

25. *Id.*

26. *See* Jason Del Rey, *Cyber Monday Was the First $2 Billion Mobile Shopping Day in the U.S.*, VOX (Nov. 28, 2017, 1:31 PM), https://www.vox.com/2017/11/28/16710490/cyber-monday-2017-2-billion-mobile-online-shopping-record [https://perma.cc/B2BK-5PVE].

27. *Id.*

28. Marcia Kaplan, *Sales Report: 2020 Thanksgiving Day, Black Friday, Cyber Monday*, PRAC. ECOM. (Dec. 2, 2020), https://www.practicalecommerce.com/sales-report-2020-thanksgiving-day-black-friday-cyber-monday [https://perma.cc/AME6-TERY].

29. *See* Simon Torkington, *The Pandemic Has Changed Consumer Behaviour Forever—And Online Shopping Looks Set to Stay*, WORLD ECON. F. (July 7, 2021), https://www.weforum.org/agenda/2021/07/global-consumer-behaviour-trends-online-shopping [https://perma.cc/QP8S-7E2C] ("More than 50% of the global consumers responding to [a] June 2021 survey said they had used digital devices more frequently than they had six months earlier, when they had taken part in a prior PwC survey. The report also [found] the use of smartphones for shopping ha[d] more than doubled since 2018.").

30. *Id.*

B. *The Advent of Online Reviews and Their Effects on Businesses*

Businesses attach great significance to their reputation in the marketplace, and they seek to improve that reputation by supplying products and services that are valued, as well as by employing conventional marketing and advertising techniques.[31] The rise of the Internet and e-commerce has presented great opportunities for businesses, but the online world has presented challenges as well.[32] A number of apps and websites have been created for the purpose of empowering consumers to comment on, and even give reviews of, the goods or services purchased and the businesses that sold such goods or services.[33] There are many platforms for such online reviews. Some sites, like Amazon, incorporate customer reviews into their websites or apps right alongside their product listings.[34] Having such a vast repository of online reviews is at least partially responsible for Amazon's success.[35]

There are many other sources for online reviews as well. Some consumer reviews and comments occur via social media sites such as Facebook, Reddit, and Twitter.[36] There are also many independent online review sites, whose sole purpose is to house such reviews—prominent examples include Google Reviews,[37] Tripadvisor,[38] and perhaps most well-known, Yelp.[39] Before the Internet, unhappy

31. *See* Ponte, *supra* note 4, at 62; Sonia K. Katyal, *Stealth Marketing and AntiBranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 804 (2010) ("[B]randing strategies make up a significant portion of general corporate strategy; financial analysts claim that brand equity makes up a tremendous amount of company value. At times, a company's brand equity has been more important than the book value ascribed to a particular product.").

32. *See* Marcum & Perry, *supra* note 1.

33. *Id.*

34. *Id.*; *see also Customer Reviews*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201967050 [https://perma.cc/5BJ6-BMVY] (last visited May 5, 2023).

35. BILL TANCER, EVERYONE'S A CRITIC: WINNING CUSTOMERS IN A REVIEW-DRIVEN WORLD 7 (2014).

36. *See* Marcum & Perry, *supra* note 1; TANCER, *supra* note 35, at 19 ("Due to the explosion of social networks such as Facebook, niche networks dedicated to specific interests, and 140-character opinions of your business broadcast on Twitter, dissemination of consumer reviews are exploding . . . .").

37. Google incorporates business reviews directly into its Google search engine results and Google Maps listings. *See* Kate Bojkov, *How to Get Google Reviews in 2023? [Guide]*, EMBED SOC. (May 3, 2023), https://embedsocial.com/blog/google-reviews/ [https://perma.cc/5CX9-ZETQ].

38. Tripadvisor claims to be the "world's largest travel guidance platform," with over one billion online reviews covering nearly eight million merchants, including hotels, other lodgings, and restaurants. *About Tripadvisor*, TRIPADVISOR, https://tripadvisor.mediaroom.com/US-about-us [https://perma.cc/JG9T-JS27] (last visited May 5, 2023).

39. Yelp is a repository for consumer reviews from many different business categories. As of December 31, 2021, it claimed to host over 244 million reviews. *Fast Facts*, YELP, https://www.yelp-press.com/company/fast-facts/default.aspx [https://perma.cc/46QG-PBPL] (last visited May 5, 2023); *see also* Ponte, *supra* note 4, at 62-63; TANCER, *supra* note 35, at 9 ("The influence of online reviews expands beyond Web site commerce. National retailers,

consumers were limited to personally telling others about their unfavorable opinions of a transaction (i.e., word-of-mouth). However, now Internet consumers have "the online equivalent of a bullhorn" and are able to broadcast their complaints instantly online to millions of people via social media and online review platforms.[40]

The emergence of these online review platforms has fundamentally altered the traditional model where merchants themselves, through advertising, formed the predominantly available basis of information about their goods or services. Instead of the business controlling the narrative through conventional advertising, online reviews now wield a considerable influence over consumers' perceptions, and these reviews are largely outside the power of the businesses to influence.[41] As Bill Tancer points out, "For the first time in business history, aggregate opinions of quality can trump brand, marketing, and advertising spend."[42] And online consumers' reliance on such online reviews is continuously increasing.[43] According to one report, at least 88% of e-commerce consumers read reviews online prior to entering into a transaction.[44] A similar percentage of shoppers report that they have as much confidence in online reviews as they do in a direct recommendation from a family member or friend.[45] Perhaps unsurprisingly, these numbers tend to track along generational lines—millennials tend to prefer online reviews over personal word-of-mouth recommendations, while baby boomers still prefer recommendations that come directly from family or friends.[46]

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such as the cosmetic chain Sephora, have launched mobile applications to help consumers consult online reviews while in their physical stores. In fact, in addition to its mobile app, online review terminals appear in many of Sephora's stores, where consumers can read cosmetic reviews supplied by other customers to help them make informed purchase decisions.").

40. TANCER, *supra* note 35, at 27.

41. Ponte, *supra* note 4, at 63; TANCER, *supra* note 35, at 20 ("If I were to sum up one of the chief concerns that businesses have about online reviews, it's the lack of control. There is a sense among most shop owners, specifically those in the hospitality industry (hotels, motels, restaurants, bars, cafés), that there is a strong causal link between their positive and negative reviews and the success or failure of their businesses.").

42. TANCER, *supra* note 35, at 12.

43. Ponte, *supra* note 4, at 63.

44. Khusbu Shrestha, *50 Stats You Need to Know About Online Reviews*, VENDASTA (Dec. 2, 2022), https://www.vendasta.com/blog/50-stats-you-need-to-know-about-online-reviews [https://perma.cc/2CYU-JADT].

45. *Id.*; *see also* TANCER, *supra* note 35, at 6-7 ("According to a survey of U.S. consumers, close to 80[%] of the population consult online reviews before they make purchase decisions." (citing Zaraida Diaz, *21% of Americans Who Have Left Reviews, Reviewed Products Without Buying or Trying Them*, YOUGOV (Jan. 22, 2014, 10:43 PM), https://today.yougov.com/topics/lifestyle/articles-reports/2014/01/22/21-americans-have-reviewed-products-and-services-t/ [https://perma.cc/9XNZ-L6Y4])).

46. TANCER, *supra* note 35, at 9 ("A 2012 study by Bazaarvoice indicated that baby boomers prefer friend and family recommendations (66[%]) to online reviews (34[%]), while

Perhaps commensurate with the growth of the Internet and social media generally, consumers' appetite for expressing their purchasing experiences online—and obtaining the advantages of others' experiences—seems to be ever on the rise.[47] Bill Tancer, author of *Everyone's a Critic,* observes: "Today everything is reviewable: this book that you're reading right now, what you had for lunch yesterday, the café that you frequent most mornings, your dry cleaner, your doctor, your dentist, your blender, your professor, your favorite music, your date[,] . . . even you."[48] Due to the large scale availability of online reviews, one study calculated that consumers in the United States are involved every day in over two billion communications regarding businesses, their products, and their reputations.[49] These reviews have evolved into a highly sought source of information by individual

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millennials (those born between 1977 and 1995) prefer online reviews (51[%]) to the opinion of friends and family (49[%]).").

One problem with online reviews is that many of them are fake. Pointe, *supra* note 4, at 64. Other problems with online reviews include, but are not necessarily limited to, the following: (1) merchants that pay consumers to write favorable reviews, (2) consumers that threaten merchants with bad reviews unless they are given some payoff, (3) some websites' practice of failing to promote good reviews unless the merchants pay for advertising on the website, and (4) reviews that are irrelevant to the actual transactions (e.g., reviews based on political ideology or farcical reviews intended purely for comedic effect). *See* TANCER, *supra* note 35, at 24-29, 48-51.

One product that (seemingly randomly) has become the subject of numerous humorous reviews is the Hutzler 571 Banana Slicer, which can be purchased on Amazon. The following review is illustrative:

> What can I say about the 571B Banana Slicer that hasn't already been said about the wheel, penicillin, or the iPhone. . . . [T]his is one of the greatest inventions of all time. My husband and I would argue constantly over who had to cut the day's banana slices. It's one of those chores NO ONE wants to do! You know, the old "I spent the entire day rearing OUR children, maybe YOU can pitch in a little and cut these bananas?" and of course, "You think I have the energy to slave over your damn bananas? I worked a 12 hour shift just to come home to THIS?!" These are the things that can destroy an entire relationship. It got to the point where our children could sense the tension. The minute I heard our 6-year-old girl in her bedroom, re-enacting our daily banana fight with her Barbie dolls, I knew we had to make a change. That's when I found the 571B Banana Slicer. Our marriage has never been healthier, AND we've even incorporated it into our lovemaking. THANKS 571B BANANA SLICER!

TANCER, *supra* note 35, at 50.

47. *See* Ponte, *supra* note 4, at 65. Ponte makes the following interesting observations:

> Neurological research indicates that 'self-sharing' activates the same pleasure sensors in our brain associated with food and money, so it may be difficult to dial back this desire in our social media age. About 87[%] of Americans use new media technologies, with about 86[%] preferring to interact with brands online.

Id. at 65 n.14 (first citing JONAH BERGER, CONTAGIOUS: WHY THINGS CATCH ON 33-34 (2013); and then citing CONE LLC, 2010 CONE CONSUMER NEW MEDIA STUDY: FACT SHEET 1-2 (2010), https://static1.squarespace.com/static/56b4a7472b8dde3df5b7013f/t/574269fc45bf2172616be876/1463970313676/consumer_new_media_fact_sheet_final.pdf [https://perma.cc/P3E5-NNA]).

48. TANCER, *supra* note 35, at 4.

49. *Id.* at 12 (citing GOOGLE/KELLER FAY GROUP, U.S., WORD OF MOUTH AND THE INTERNET 2 (2011), http://www.gstatic.com/ads/research/en/2011_Word_of_Mouth_Study.pdf [https://perma.cc/7ZG9-B3B6]).

purchasers, since the reviews provide content that gives some measure of assurance to consumers prior to making transactional decisions.[50] Further, the more reviews are posted, read, and interacted with, the more this continuous exchange of data increases consumer trust and contributes to an ever-increasing volume of consumer e-commerce.[51] To this end, the amount of reviews posted is increasing at an exponentially rapid rate.[52] The presence and influence of these online reviews has also undoubtedly resulted in a significant increase in consumer power over the merchants with whom they transact.[53]

This power that consumers now wield over businesses, in the form of online reviews, can be used to benefit businesses or to harm them. Consumers' motivations for posting reviews are, of course, varied and complex. Tancer observes that some reviewers are "communitarian," merely participating in an online community and fostering relationships in the same manner as those participating on social media.[54] Others are "benevolent reviewer[s]," who are the "pleaser[s] of the online review world," merely seeking to assist favorably received businesses with glowing reviews.[55] These reviewers will often leave positive reviews that greatly benefit the businesses being reviewed. The following is an example of a consumer's review from a stay at a Four Seasons hotel, titled "Excellent [S]tay":

> We stayed with our children and everything was perfect. The children said upon arrival into the room, "I don't know how this day could get any better[."] The room was high quality. The staff recognized our children with personalized treats in the room, stuffed animals and child sized robes on the bed. Classic Four Seasons. We felt welcomed and relaxed. The hotel was beautifully decorated for the holidays.[56]

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50. *Id.* at 4-5.

51. *Id.* at 5.

52. Bill Tancer observed that about 1% of consumers wrote online reviews in 2008, but by 2013, that number had increased to 11.2% (about 25 million consumers). In other words, the percentage of consumers posting online reviews increased by 1000% (ten times) during that timeframe. *Id.* at 70.

53. *See* Wayne Barnes, *Social Media and the Rise in Consumer Bargaining Power*, 14 U. PA. J. BUS. L. 661, 696 (2012); *see also* Marcum & Perry, *supra* note 1, at 6 ("It is clear that the 'power of the public' due to social media and the [I]nternet has created a defensive position by many businesses." (citing Noah C. Davis, *The Yelper and the Negative Review: The Developing Battle Over NonDisparagement Clauses*, 3 GPSOLO EREPORT (Am. Bar Ass'n), May 2014, https://web.archive.org/web/20160329044312/http://www.americanbar.org/publications/gpsolo_ereport/2014/may_2014/yelper_negative_review_developing_battle_nondisparagement_clauses.html [https://perma.cc/4S89-MVZR])).

54. TANCER, *supra* note 35, at 91.

55. *Id.* at 92.

56. Susiefg, *Excellent Stay: Review of Four Seasons Hotel Westlake Village*, TRIPADVISOR (Dec. 18, 2017), https://www.tripadvisor.com/ShowUserReviews-g33258-d623631-r547884547-Four_Seasons_Hotel_Westlake_Village-Westlake_Village_California.html#CHECK_RATES_CONT [https://perma.cc/373Q-V2JA].

All businesses hope for reviews like this, and none would complain upon receiving one. A glowing review lets a business know that the goods or services provided are highly satisfactory, and additional business from future customers is more likely. A 2011 empirical study by a Harvard Business School professor found that restaurants that improved their Yelp rating by one star experienced a 5% to 9% increase in earnings.[57] A subsequent study by a UC Berkeley professor concluded that, by improving its Yelp rating by a mere half-star, a restaurant became 19% more likely to achieve full capacity during its peak dining hours.[58] Other types of businesses might achieve correspondingly favorable earnings improvements with positive reviews as well.

But, of course, there is also the possibility of businesses receiving negative online reviews, which may reveal areas in which a business needs improvement. The following negative review of a Boston pizzeria is illustrative:

> Check out other reviews. They over charged my credit card by double. We ordered when we were staying at the plaza and everything else was cold. We got a buffy chicken calzone and fries. It took [ninety] minutes and everything arrived cold and tasted stale and old. They forced us to give a credit card [number] even though we wanted to pay cash. They told me one cost on the phone but the actual charge on my credit card was double. If you quickly review other reviews you'll see other people had a similar experience. Be careful![59]

From a business perspective, receiving such a review has positive and negative implications. The good news is that the business may be educated about problems that they can fix and thereby improve their operations.[60] Another ancillary benefit of negative reviews is that their presence among otherwise favorable reviews tends to make the entirety of the body of reviews appear more authentic to prospective customers (as opposed to the appearance of uniformly positive reviews, which strikes many as improbable and thus likely fabricated).[61]

However, most businesses understandably treat the prospect of receiving a negative review much more gravely, sensibly worrying that

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57. Dave, *supra* note 5.

58. TANCER, *supra* note 35, at 11 (citing Michael Anderson & Jeremy Magruder, *Learning from the Crowd: Regression Discontinuity Estimates of the Effects of an Online Review Database*, 122 ECON. J. 957, 957 (2012)).

59. Richard K., Review of *Regal Cafe*, YELP (Feb. 24, 2016), https://www.yelp.com/biz/regal-cafe-boston?hrid=CUV30pikFPY03uMwssqGdQ&utm_campaign=www_review_share_popup&utm_medium=copy_link&utm_source=(direct) [https://perma.cc/QS79-AU4Y].

60. *See* TANCER, *supra* note 35, at 5; Ponte, *supra* note 4, at 65. Some studies indicate that dissatisfied consumers will frequently retract their unfavorable reviews if the business involved promptly resolves the problem. Further, roughly 40% of consumers state that they would entertain the possibility of buying from the business again if their unfavorable reviews are quickly addressed. Ponte, *supra* note 4, at 65 n.15 (citing Kendall L. Short, Note, *Buy My Vote: Online Reviews for Sale*, 15 VAND. J. ENT. & TECH. L. 441, 451 (2013)).

61. *See* TANCER, *supra* note 35, at 8 ("[Sixty-eight] percent of consumers trust reviews more when they see both negative and positive reviews on a site . . . .").

it is "another perilous obstacle to their brand image and business or professional success."[62] The Internet is a vast and mysterious terrain, and people may act much harsher online than they would in person. Therefore, the prospect of receiving a negative review can go far beyond the punch of a simple negative factual explanation of some problem. If a business is especially unfortunate, a disgruntled consumer may go further and post an extreme, "trolling" type review, such as the following review of a McDonald's in Chicago:

> The worst McDonald's there is, ever was, and ever will be. It looks like a waiting room in purgatory, it smells like a taxi with a faint hint of bleach, and it tastes like they went rogue and started microwaving breakfast sandwiches from the freezer at Speedway.
>
> I feel substantially worse about myself simply for having been here, and cannot shake the feeling that every good thing I've ever done in my life has just been canceled out.[63]

Or consider the following review of another Boston pizzeria: "Oh my lord. This is the worst place ever. If you want to spend roughly [fifty] dollars to get a pie of pizza that looks like the inside of your brain the [sic] go ahead and go to this dump they call a "Pizzeria[.]"[64]

Bill Tancer has a term for these types of reviewers—the "one-star assassin[s]."[65] The one-star assassin is the reviewer that businesses fear the most.[66] These reviewers simply view the opportunity to leave an online review "as a platform to air their grievances."[67] Tancer further observes that although "[m]any business owners will attest that while most reviewers come to the experience with the altruistic goal of sharing their honest opinion on a meal, stay, or product purchase, there's a *darker and at times bizarre* side to the economy of consumer participation."[68]

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62. Ponte, *supra* note 4, at 65 (citing Dave, *supra* note 5; Dani Girl, *Why Yelp Sucks—Yelp Survival Guide*, BOSSHAWAII (Jan. 30, 2013), http://perma.cc/S27B-SECD [https://perma.cc/57WV-55A3]; Brad Tuttle, *Guess Who's Getting Some Pretty Awful Reviews: User Review Sites*, TIME (Sept. 21, 2103), http://business.time.com/2013/09/21/guess-whos-getting-some-pretty-awful-reviews-user-review-sites/ [https://perma.cc/B4FU-WPCJ]; Stefan Rützel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 TEMP. ENV'T. L. & TECH. J. 1, 36 (1995)).

63. Kate Taylor, *The Most Horrifying Yelp Reviews of McDonald's Locations Across the US*, BUS. INSIDER (Mar. 30, 2016), https://finance.yahoo.com/news/most-horrifying-yelp-reviews-mcdonald-161025999.html [https://perma.cc/M9WP-KQ54].

64. RebelTaxi N., Review of *Regal Cafe*, YELP (June 25, 2016), https://www.yelp.com/biz/regal-cafe-boston?hrid=dpMGl6t2xUJ62g0FphJ8vQ&utm_campaign=www_review_share_popup&utm_medium=copy_link&utm_source=(direct) [https://perma.cc/E2BG-H5ER].

65. TANCER, *supra* note 35, at 94.

66. *Id.*

67. *Id.*

68. *Id.* at 24 (emphasis added).

Sometimes, this type of reviewer is "just a jerk who loves to complain and wants to be heard by anyone who will listen."[69] The reasons why consumers post such scathing reviews is likely varied and complex. Some may just earnestly feel that the poor service warranted the response. Others might believe that posting such reviews is more like a "trauma narrative," whereby the review serves as a "coping mechanism for dealing with the minor trauma people experience" at restaurants or with other merchants.[70] A much more basic explanation is that lots of people just act badly when they are online. Joel Stein notes that "trolls" are "turning the web into a cesspool of aggression and violence,"[71] and in his article, *How Trolls Are Ruining the Internet*, he further elaborates as follows:

> [T]he Internet's personality has changed. Once it was a geek with lofty ideals about the free flow of information. Now, if you need help improving your upload speeds the web is eager to help with technical details, but if you tell it you're struggling with depression it will try to goad you into killing yourself. Psychologists call this the online disinhibition effect, in which factors like anonymity, invisibility, a lack of authority[,] and not communicating in real time strip away the mores society spent millennia building. And it's seeping from our smartphones into every aspect of our lives.[72]

The phenomenon Stein cites—the online disinhibition effect—was coined by John Suler in 2004 as a way to describe the fact that "people say and do things in cyberspace that they wouldn't ordinarily say and do in the face-to-face world. They loosen up, feel less restrained, and express themselves more openly."[73] Too often, this removal of inhibition online results in toxic behavior, such that people online use "rude language, harsh criticisms, anger, hatred, [and] even threats."[74] Key factors which enable this undesirable behavior are the anonymity and invisibility provided to actors online (who often don't use their real names in online reviews or other Internet posts), coupled with the frequent lack of any meaningfully obvious supervision of the online activity.[75]

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69. Roger Wade, *8 Types of Tripadvisor Reviews You Should Completely Ignore*, PRICE OF TRAVEL (July 8, 2013), https://www.priceoftravel.com/3650/8-types-of-tripadvisor-reviews-you-should-completely-ignore/ [https://perma.cc/JBY8-YHU3].

70. Dan Jurafsky et al., *Narrative Framing of Consumer Sentiment in Online Restaurant Reviews*, 19 FIRST MONDAY, no. 4, 2014, at 1, 4 https://firstmonday.org/ojs/index.php/fm/article/view/4944/3863 [https://perma.cc/ND5P-57LV].

71. Joel Stein, *Tyranny of the Mob*, TIME, Aug. 29, 2016, at 26, 27.

72. Joel Stein, *How Trolls Are Ruining the Internet*, TIME (Aug. 18, 2016, 7:09 AM), https://time.com/4457110/internet-trolls/ [https://perma.cc/N4EM-5Q5Z].

73. John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321 (2004).

74. *Id.*

75. *Id.* at 322-24 (describing (1) dissociative anonymity, (2) invisibility, (3) asynchronicity, and (4) minimization of status and authority).

It stands to reason that consumers are also disinhibited when posting unfavorable reviews online. And yet, such negative reviews are of obvious critical significance to the businesses whose very livelihoods and profitability hang in the balance. Although the online reviewer may be casual and flippant in his or her momentary negative post, the stakes are much higher for the affected business. A merchant's reputation in the marketplace is very valuable and constantly at great risk.[76] Experts have no doubt that what businesses fear is true—negative online reviews are potentially quite harmful. One survey established that 86% of consumers reported that unfavorable information online will cause them to hesitate to buy goods or services from a particular business.[77] Moreover, some experts have surmised that even one unfavorable review can potentially lower a merchant's revenue by as much as 25%.[78] Accordingly, businesses have every reason to be seriously concerned about negative online reviews and the potential impact those reviews may have on their operational livelihood. As one legal expert observed, "[N]egative online reviews can be devastating to reputation . . . [as] internet speech is instantaneous, it has global reach, it can be easily forwarded or hyperlinked, it can be anonymous[,] and it is certainly very difficult to get rid of . . . ."[79] And the speed of online communications gives new meaning to the old saying that "a lie can go halfway around the world while the truth is putting on its shoes."[80] This speed and ubiquity is all the more devastating when used to cast a business in a negative light.

C. Merchants' Utilization of Non-Disparagement Clauses in Original Contracts and the Resulting Public Backlash

At some point, enough businesses became sufficiently concerned about the threat posed by negative online reviews that a new tool was conceived—a non-disparagement clause placed in the original consumer form contract, with the effect that any negative online reviews by the consumer were contractually prohibited.[81] Contractual

76. Rützel, *supra* note 62, at 36.

77. *How Negative Reviews Affect Business*, REPUTATION X, https://blog.reputationx.com/impact-negative-reviews [https://perma.cc/Z27Q-ZFYN] (last updated Mar. 23, 2023).

78. *See* Dave, *supra* note 5.

79. *See* Rosa Marchitelli, *'A Year And A Half Of Hell': Customers, Businesses Pay Price for Online Reviews*, CBC NEWS (Nov. 2, 2017), http://www.cbc.ca/news/business/go-public-online-reviews-lawsuit-backlash-1.4369246 [https://perma.cc/PPL5-GL6N].

80. The original authorship (and exact phrasing) of this saying is disputed. Mark Twain and Winston Churchill are among the claimed authors. *See A Lie Can Go Halfway Around the World While the Truth Is Putting on Its Shoes*, QUOTE INVESTIGATOR, https://quoteinvestigator.com/2014/07/13/truth/#note-9363-13 [https://perma.cc/H98G-26K7] (last updated Nov. 6, 2017).

81. Michaela Marx Wheatley, *Non-Disparagement Clauses May Cause Businesses More Trouble than They Are Worth*, THE OKLAHOMAN (June 24, 2015, 9:38 AM), https://www.oklahoman.com/story/sponsor-story/brand-insight/2015/06/24/non-disparagement-

provisions requiring silence or confidentiality have long been enforced in a variety of contexts.[82] The types of contracts where such confidentiality provisions have been regularly enforced include "speech suppression agreements in employment, settlement, franchise, and personal relationship situations."[83] These agreements have traditionally been validated on the basis of freedom of contract and party autonomy in affairs of private ordering.[84] These non-disclosure agreements (NDAs) are frequently perceived as advancing other legal rights or duties, "such as the protection of trade secrets and other intellectual property, the confidentiality of employer-employee and other fiduciary relationships, the preservation of individual privacy, or the nondisclosure of national security concerns."[85]

Based on these general notions of freedom of contract, some merchants began including non-disparagement clauses in their original sales or service agreements, with the intended effect at the outset of prohibiting consumers from posting any negative online reviews. Unfortunately, for these businesses, a few well-publicized disputes seemed to cause these clauses to quickly fall into public disfavor. One such dispute was between a landlord and renters of a vacation property, where the contract provided that "[t]he tenants agree not to use blogs or websites for complaints, anonymously or not."[86] The tenants did not like certain aspects of the property, and they posted unfavorable reviews in violation of the contract provision (which they had not

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clauses-may-cause-businesses-more-trouble-than-they-are-worth/60738790007/ [https://perma.cc/NR88-FL3V].

82. *See* Ponte, *supra* note 4, at 71-72.

83. *Id.* (citing Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 268-74 (1998); Jeffrey N. Rosenthal, *Can Nondisparagement Clauses Silence Negative Online Reviews?*, THE LEGAL INTELLIGENCER (June 26, 2014), https://www.law.com/thelegalintelligencer/almID/1202660844112/ [https://perma.cc/L3US-M9KH]).

84. *Id.* at 69-70 (citing Omri Ben-Shahar, *The Myth of the "Opportunity to Read" in Contract Law*, 27 EUR. REV. CONT. L. 1, 2-3 (2009); Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 364, 375 (1970); Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 578-79 (2012); Lucille M. Ponte, *Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer "Products,"* 26 OHIO ST. J. ON DISP. RESOL. 119, 159-67 (2011)).

One notable exception to this general enforceability has recently emerged—confidentiality agreements that conceal evidence of sexual wrongdoing. *See* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019) (discussing state legislation in New York and California regulating such contracts but also advocating for a wider public policy against enforcement of such contracts in the sexual harassment context).

85. Ponte, *supra* note 4, at 72 (citations omitted).

86. *See* Galland v. Johnston, No. 14-cv-4411, 2015 WL 1290775, at *1, *8 (S.D.N.Y. Mar. 19, 2015).

noticed when they signed the contract).[87] All of the landlord's causes of action filed against the renters were dismissed by the court, save for the breach of contract action, based on the clear presence of the clause prohibiting online posts.[88]

Other vacation property conflicts have attracted attention as well, including the case of Tom and Terri Dorow, who signed a contract for a vacation rental which contained a similar non-disparagement clause. When the Dorows nevertheless wrote an unfavorable review about their experience online, in violation of the agreement, the property owner charged the Dorows' credit card for $500.[89] The charge was refunded in exchange for the Dorows' agreement to remove the online review, but their frustration was recounted in the media.[90]

Another scenario occurred when the Duchouquettes, a married couple from Texas, contracted with Prestigious Pets for the care of their pets while they were out of town.[91] The agreement included a non-disparagement clause, which the couple nevertheless violated by posting an unfavorable review of the company.[92] Prestigious Pets initiated litigation for breach of contract, claiming damages of as much as $1 million.[93] Although the case was dismissed based on the Texas Anti-SLAPP statute, the dispute attracted a large amount of publicity in the media.[94]

Several other efforts by merchants to enforce such non-disparagement clauses were reported on in the media, including (1) an action against a magazine for violating a provision in a software license forbidding public reviews of the software without permission,[95] (2) a hotel contract provision in New York that imposed a $500 fine for posting any negative reviews about the hotel stay (a policy which was met with overwhelmingly negative media coverage and even negative reviews

87. *Id.* at *1.

88. *Id.* at *12.

89. Christopher Elliott, *New Confidentiality Clauses Can Influence Vacation Rental Reviews*, ELLIOT REP. (Apr. 14, 2012), http://elliott.org/blog/new-confidentiality-clauses-can-influence-vacation-rental-reviews/ [https://perma.cc/9VJ6-ZY6P].

90. *Id.* Tom Dorow was quoted as stating, "We feel that we should be able to post an accurate accounting of what we experienced, which did not match what they advertised on the VRBO site . . . . If other people are renting this house based on the information in the advertisement, then they need to know what they can expect." *Id.*

91. Claire Z. Cardona, *$1M Lawsuit Dismissed Against Plano Couple Who Gave 1-Star Yelp Review to Pet-Sitting Company*, DALL. MORNING NEWS (Aug. 30, 2016, 7:17 PM), https://www.dallasnews.com/news/courts/2016/08/30/1m-lawsuit-plano-couple-one-star-yelp-review-dismissed [https://perma.cc/DY8C-4BW4].

92. *Id.*

93. *Id.*

94. *Id.* ("The Duchouquettes argued the case should be dismissed based on the Texas Anti-SLAPP statute, meant to allow judges to dismiss frivolous suits filed against people who speak out about a matter of public concern.").

95. *See* People v. Network Assocs. Inc., 758 N.Y.S.2d 466, 467 (Sup. Ct. 2003).

posted by disapproving members of the public),[96] (3) an apartment complex banning all negative reviews and purporting to contractually impose a $10,000 penalty for any reviews posted in violation of the lease provision,[97] and (4) an online retailer including a clause precluding reviews, accompanied by a $3,500 liquidated damages clause—and the retailer sought to impose the penalty against a consumer that purchased a $20 item and thereafter wrote an unfavorable review.[98] All of these episodes were quite unfavorably received by the media and, in turn, seemingly by the public as well. One representative headline describing the New York hotel's practice read "*How to Ruin Your Company's Yelp Reputation in One Easy Step.*"[99] Although these merchants felt that they needed to preemptively combat the negative effects of bad online reviews, the court of public opinion was turning against them.

II. THE CONSUMER REVIEW FAIRNESS ACT[100]

As a reaction to the increasing use of clauses precluding consumers from posting negative reviews online, and in order to basically end the

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96. Charlotte Alter, *'Historic' Inn Charges $500 per Negative Online Review*, TIME (Aug. 4, 2014, 10:29 AM), https://time.com/3079343/union-street-guest-house-negative-review/ [https://perma.cc/H9PP-CNWL]. The clause provided as follows:

> If you have booked the Inn for a wedding or other type of event anywhere in the region and given us a deposit of any kind for guests to stay at USGH[,] there will be a $500 fine that will be deducted from your deposit for every negative review of USGH placed on any internet site by anyone in your party and/or attending your wedding or event. If you stay here to attend a wedding anywhere in the area and leave us a negative review on any internet site[,] you agree to a $500 fine for each negative review.

Id.

97. Joe Mullin, *One Apartment Complex's Rule: You Write a Bad Review, We Fine You $10k*, ARS TECHNICA (Mar. 10, 2015, 9:28 AM), http://arstechnica.com/tech-policy/2015/03/one-apartment-complexs-rule-you-write-a-bad-review-we-fine-you-10k/ [https://perma.cc/6KNE-379B]. The lease included the following explanatory provision:

> There is a growing trend . . . where tenants will post unjustified and defamatory reviews regarding an apartment complex in an attempt to negotiate lower rent payments, or otherwise seek concessions from a landlord. Such postings can cripple a business by creating a false impression in the eyes of consumers. The damages resulting from this false impression can include potentially millions of dollars in economic losses, and have permanent consequences that can unjustly destroy a business.

Id.

98. Daniel D. Barnhizer, *Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts*, 44 SW. L. REV. 215, 225 (2014); *see also* Cyrus Farivar, *KlearGear Must Pay $306,750 to Couple That Left Negative Review*, ARS TECHNICA (June 25, 2014, 8:10 PM), http://arstechnica.com/tech-policy/2014/06/kleargear-must-pay-306750-to-couple-that-left-negative-review [https://perma.cc/DCR9-UB8C].

99. Robert Montenegro, *How to Ruin Your Company's Yelp Reputation in One Easy Step*, BIG THINK (Aug. 5, 2014), https://bigthink.com/surprising-science/how-to-ruin-your-companys-yelp-reputation-in-one-easy-step/ [https://perma.cc/A8CR-SDFP].

100. Part II's general description of the CRFA is adapted in part from my predecessor article concerning the Consumer Review Fairness Act. *See* Barnes, *supra* note 1, at 582-86.

practice, in 2016, Congress passed the Consumer Review Fairness Act (CRFA).[101] The Act was specifically intended to ban certain provisions in consumer form contracts related to the sale of goods or services, to the extent the provisions constrain the right to publicly communicate regarding the transaction—i.e., the CRFA was designed to essentially ban the non-disparagement clauses discussed in the previous Part.[102] The CRFA became law when President Obama signed the bill on December 15, 2016.[103] This Part will outline the text and operation of the CRFA.

The CRFA is codified at 15 U.S.C. § 45b.[104] The Section contains nine subsections, labeled (a) through (i). Subsections (d) through (i) are primarily procedural in nature and are not pertinent to the issues addressed by this Article.[105] Rather, the primary operative provisions of the CRFA are subsections (a), (b), and (c). Subsection (a) is the definitions section of the CRFA, and it provides four definitions, two of which are critical.[106] The first critical definition is for the term "covered communication," which reads as follows:

> The term "covered communication" means a written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party.[107]

This definition seems to apply to any type of conceivable product or service review authored by a consumer, whether on the Internet (on sites such as Yelp or Amazon) or otherwise.

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101. Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 130 Stat. 1355 (codified at 15 U.S.C. § 45b).

102. *Id.* § 2; *see also* Consumer Review Fairness Act of 2016, H.R. 5111, 114th Cong. (2016).

103. Andrew Tarantola, *President Obama Signs the Consumer Review Fairness Act into Law*, ENGADGET (Dec. 15, 2016, 2:52 PM), https://www.engadget.com/2016/12/15/president-obama-signs-the-consumer-review-fairness-act-into-law/ [https://perma.cc/WN3M-T9S4].

104. Consumer Review Fairness Act of 2016, 15 U.S.C. § 45b.

105. Subsection (d) provides that a violation of the CRFA is treated as a violation of § 18(a)(1)(B) of the Federal Trade Commission Act, and also that the Federal Trade Commission (FTC) has enforcement powers (no private cause of action is granted). *Id.* § 45b(d)(1)-(2). Subsection (e) grants states the power to enforce the CRFA as well. *Id.* § 45b(e). Subsection (f) provides that the FTC is to engage in education and outreach to businesses to assist in complying with the CRFA. *Id.* § 45b(f). Subsection (g) provides that the CRFA will not be interpreted to affect any state law cause of action. *Id.* § 45b(g). Subsection (h) is a savings provision, and subsection (i) provides the CRFA's effective dates. *Id.* §§ 45b(h)-(i).

106. The other two definitions are "Commission" (which is defined as the Federal Trade Commission), and "pictorial," which is defined to include "pictures, photographs, video, illustrations, and symbols." *Id.* § 45b(a)(1), (4).

107. *Id.* § 45b(a)(2).

The second critical definition is the definition of "form contract." That definition provides as follows:

> **(A) In general**
>
> Except as provided in subparagraph (B), the term "form contract" means a contract with standardized terms—
>
> (i) used by a person in the course of selling or leasing the person's goods or services; and
>
> (ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.
>
> **(B) Exception**
>
> The term "form contract" does not include an employer-employee or independent contractor contract.[108]

As this Article will show, the effect of this definition is to apply the CRFA to certain "form contracts" that are, by definition, standardized in nature and not generally subject to negotiation of the standardized terms (i.e., the boilerplate). Employer-employee contracts and independent contractor contracts are, however, excluded from this definition and hence from application of the CRFA.

Subsection 45b(b) of the CRFA, entitled "Invalidity of contracts that impede consumer reviews," contains the primary operative provisions of the CRFA. Subsection (b) itself contains three subsections—subsection (1) provides the affirmative rule prohibiting clauses that impede consumers from posting reviews, whereas subsections (2) and (3) provide certain carve-outs or exceptions to the operation of the CRFA's preclusion.[109] Specifically, subsection (b)(1) provides in operative part that

> a provision of a form contract is void from the inception of such contract if such provision—
>
> (A) prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication; [or]
>
> (B) imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication.[110]

Accordingly, the CRFA sets forth an unequivocal prohibition on clauses in form contracts (as defined) that prevent consumer reviews—

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108. *Id.* § 45b(a)(3).

109. *Id.* § 45b(1)-(3). Subsection (1) is entitled "In general," subsection (2) is entitled "Rule of Construction," and subsection (3) is entitled "Exceptions." *Id.*

110. Consumer Review Fairness Act of 2016, 15 U.S.C. § 45b(b)(1)(A)-(B). Subsection (b)(1)(C) additionally provides that a form contract is also void if it

> 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 covered communication about such person or the goods or services provided by such person.

Id. § 45b(b)(1)(C).

whether through a clause prohibiting such reviews outright or by imposing a monetary penalty for posting such reviews. This provision accomplishes what Congress set out to do by enacting the CRFA—provide consumers with the freedom to post online reviews of goods or services, regardless of whether their purchase contracts purport to restrict their power in that regard. Such restrictions are henceforth void.

Subsections (b)(2) and (b)(3) provide various limitations on the operation of the primary prohibition in subsection (1). Specifically, subsection (2) provides that the primary CRFA prohibition of subsection (b)(1) won't affect certain scenarios, including (a) certain legal duties of confidentiality, (b) causes of action for defamation, (c) the right to remove various categories of inappropriate reviews from a website owned by a party, and (d) the right to establish certain terms and conditions regarding the commercial creation of certain photos or video.[111] Subsection (b)(3) provides that subsection (b)(1) "shall not apply to the extent that a provision of a form contract prohibits disclosure or submission of, or reserves the right of a person or business that hosts online consumer reviews or comments to remove" various categories of information, including (a) confidential financial or commercial information, including trade secrets, (b) medical or personnel files, (c) information gathered for compliance with law enforcement requests, (d) different types of unlawful or otherwise inappropriate content, or (e) certain malicious computer files or code, such as viruses or the like.[112]

Therefore, aside from the various specific categories of exclusion set forth in subsections (b)(2) and (b)(3), the principal effect of subsection (b)(1)'s primary operative provision is to enact a federal, nationwide ban on all "form contracts" (as defined) that purport to prohibit or penalize consumers for posting honest reviews of the goods or services they purchase. The efforts of businesses to completely suppress any and all reviews—as documented in Part I—are effectively ended by the enactment of the CRFA. A primary motivating policy factor of the CRFA is to keep the current of information emanating from

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111. *Id.* § 45b(b)(2). "Inappropriate" is a paraphrase I am using as a shorthand in this Article. The actual text of the statutory provision refers to a covered communication that

> (i) contains the personal information or likeness of another person, or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic; (ii) is unrelated to the goods or services offered by or available at such party's Internet website or webpage; or (iii) is clearly false or misleading.

Id. § 45b(b)(2)(C).

112. *Id.* § 45b(b)(3). "Inappropriate" content is again a paraphrase I am using to refer to the same categories of content specified above. *See supra* note 111. In fact, subsection (b)(3) explicitly refers back to "the requirements of paragraph (2)(C)" for purposes of this provision, such that the substantive content categories are incorporated by reference. *See* 15 U.S.C. § 45b(b)(3).

consumer reviews flowing on an ongoing basis, such that prospective purchasers will be able to keep relying "on [reviews] more heavily as credible indicators of product or service quality."[113]

Businesses do have credible rationales for seeking to order their commercial affairs through contract with the protections afforded by non-disparagement clauses in the sale of their goods or services.[114] Critical online reviews can be very damaging to a merchant's livelihood and profitability, and so it is easy to understand why many merchants tried (pre-CRFA) to prohibit such negative reviews in their purchase form contracts.[115] Businesses are presently allowed to protect various other interests through contract without a federal prohibition like the CRFA—for example, disclaiming warranties,[116] limiting remedies,[117] and requiring agreements to arbitrate,[118] to identify a few. Nevertheless, the CRFA resolves the issue of reviews against the businesses and in favor of consumers. The CRFA was enacted into law with scant political opposition, establishing that sympathy for protecting consumers' freedom to post online reviews is powerful and that the primary debate over whether to allow provisions in form contracts (as defined in the Act) prohibiting online reviews has been resolved.[119] Henceforth, businesses simply cannot include a ban on online reviews in the form contracts they use when selling their goods and services.

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113. H.R. REP. NO. 114-731, at 5-6 (2016).

114. *See* Barnes, *supra* note 53, at 661-62 ("Buried in form contracts, which have been consented to by masses of consumers, exist a myriad of terms that are both favorable to the companies who drafted the terms and correspondingly unfavorable to the consumers who are held to have consented to them. These terms include things like damages limitations, warranty limitations or exclusions, arbitration clauses, penalty fees, personal information disclosure, and other similar types of contractual clauses. The consumer is legally bound by the terms contained in the form contract, because, in theory, he has a duty (and is able) to read the contract, could have done so if he had desired, and ultimately indicated his assent to the form by signing, clicking, or otherwise outwardly manifesting his assent to the form contract's terms.").

115. *See supra* notes 76-80 and accompanying text; *see also* Franklin G. Snyder & Ann B. Mirabito, *The Death of Contracts*, 52 DUQ. L. REV. 345, 395 (2014) ("Today, ubiquitous ratings systems on popular web sites, sometimes with free and open (and often virulent) commentary, allow individual consumers to extract a measure of vengeance on the businesses that they believe have wronged them. Contracting parties who once were able to view each customer as an isolated transaction, and who saw the harm of dissatisfaction as limited, now face a world in which a handful of disgruntled consumers can seriously affect their reputations and their businesses." (footnote omitted)).

116. *See, e.g.*, U.C.C. § 2-316 (AM. L. INST. & UNIF. L. COMM'N 2022).

117. *See, e.g.*, *Id.* § 2-719.

118. 9 U.S.C. §§ 1-16.

119. *See* Sean Ogino, *The Consumer Review Fairness Act: What You Need to Know*, ANNEX CLOUD, https://www.annexcloud.com/blog/consumer-review-fairness-act/ [https://perma.cc/XDG5-ZWJD] (last visited May 5, 2023) ("With unanimous bipartisan support, this consumer protection legislation passed both the [U.S.] House and Senate. On December 15, 2016, the then [P]resident Obama signed the Consumer Review Fairness Act into law.").

III. APPLICABILITY OF THE CRFA TO SETTLEMENT AGREEMENTS

Merchants in the business of selling goods or services often procure a written contract (either in a tangible writing or electronic form) from the consumer at the *inception* of the transactional relationship. Assuming that the merchant uses a *form contract* (as defined by the CRFA) at such inception, the CRFA directly applies to the contract and thus prohibits the business from including a clause that bans the consumer from posting any consumer reviews, or a clause that penalizes the customer for any such posted reviews.[120] Unless a dispute arises which necessitates a formal settlement agreement, the initial purchase contract will likely be the one and only written contract entered into between the merchant and the consumer with respect to that particular transaction.[121]

But, in a small subset of cases, a dispute between the merchant and the consumer may develop regarding the transaction—and in yet a further subset of such disputes, the business and the consumer will negotiate and come to a mutually beneficial compromise and settlement agreement to fully and finally resolve the dispute. The merchant may well desire to include a confidentiality clause in the settlement agreement, prohibiting the settling consumer from thenceforth discussing the resolved matter. In the event a consumer contractually obligates herself to full confidence, this would generally include, by necessity, a mandate that the consumer refrain from posting on social media or posting consumer reviews in any online or offline forum. But does the CRFA apply—and/or, *should* it apply—to the *settlement agreements* entered into between the business and the consumer at the *conclusion* of their disputed relationship, as it clearly does to *form contracts* at the *inception* of their relationship?

The purpose of this Part—and, indeed, this Article—is to answer this question. To do so, this Part will discuss the nature of incepting form contracts on the one hand, and compromise and settlement agreements on the other hand, including the objectives and characteristics of each. Once these two categories of contracts are definitionally set forth, this Part will then discuss whether settlement agreements should be governed by the CRFA so as to prohibit merchants from

120. 15 U.S.C. § 45b(b)(1).

121. *Cf.* Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213, 230-32 (2016) ("[O]ne study indicated, '[F]or every 1,000 purchases, households in the highest status category voice complaints concerning 98.9 purchases, while households in the lowest status category voice complaints concerning 60.7 purchases.' Consumers in lower socioeconomic status groups generally have fewer resources, expect poor treatment, and are sometimes hindered by limited English proficiency. They also may lack confidence in their ability to obtain remedies if problems arise." (footnotes omitted)).

including confidentiality clauses that have the effect of banning consumer reviews. Both the text of the CRFA, as well as policy concerns surrounding both the Act and settlement agreements generally, will be considered.

A. A Tale of Two Contracts— Form Contracts and Settlement Agreements

1. Form Contracts—Beginning for All

The use of standard form contracts in business is ubiquitous. The vast majority of all formal contracts are likely in the form of standard form contracts.[122] As far back as 1971, David Slawson observed:

> Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.[123]

Nothing has slowed the use of standard form contracts—if anything, their use has undoubtedly proliferated since then, especially with the rise of contracting over the Internet via "click-acceptance."[124]

Businesses from all industries began using standard form contracts—evolving from a more primitive time of the paradigmatic

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122. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002) (citing John J.A. Burke, *Contracts as a Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000)); *see also* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1188-89 (1983) ("Today, very likely the majority of signed documents are adhesive.").

123. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971). The following was recounted in an early academic discussion of what was then a newly emerging phenomenon:

> No longer do individuals bargain for this or that provision in the contract . . . . The control of the wording of those contracts has passed into the hands of the concern, and the drafting into the hands of its legal advisor. . . . In the trades affected it is henceforth futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements.

Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1264 (1993) (quoting OTTO PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND COMMERCIAL LAW 18 (1937)).

124. Wayne R. Barnes, *Toward A Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 229-30 (2007) ("Form contracts, once the purview of Industrial Revolution-era manufacturing companies and insurance companies, have now permeated virtually all industries and trades, and have also been wholeheartedly embraced by merchants in the online contracting environment." (citing Hillman & Jeffrey, *supra* note 122, at 431)).

negotiation between merchant and patron[125]—for fairly straightforward reasons. As the volume of business and transactions grew, economies of scale dictated that individually negotiated contracts with every single purchasing customer would be unrealistic; therefore, merchants began using standardized language across all of their transactions in order to lower the prices that they charged for the goods and services sold.[126] Reusing the same form for every transaction accomplishes this goal. Often, the only major differences from one purchasing customer to the next tends to be the subject matter, price, and quantity.[127] All other language is thereby standardized across every transaction—the same form is thus used to achieve the cost savings realized from such standardization. Indeed, "[t]he prevalent use of standard form contracts is indicative of their near-indispensability to commerce."[128]

When customers want to purchase goods or services from a merchant, the merchant does not generally yield to any negotiation of the standardized terms. Rather, a frequently recurring attribute of the standard form contract in the consumer purchasing context is that the contract is presented on a "take-it-or-leave-it" basis—that is, it is a "contract of adhesion."[129] Todd Rakoff identified seven typical characteristics of adhesion contracts:

(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
(2) The form has been drafted by, or on behalf of, one party to the transaction.
(3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
(4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may

125. Slawson, *supra* note 123, at 529 ("The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance."); *see also* Rakoff, *supra* note 122, at 1216 ("Deeply embedded within the law of contracts, viewed as private law, lies the image of individuals meeting in the marketplace . . . .").

126. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

127. *See, e.g.*, Brian Vito, *A Carrot from Any Other Farmer Will Still Go in the Soup: Uniqueness and Casebook Contract Law*, 9 FLA. ST. U. BUS. REV. 103, 111 (2010) ("[A] form contract [is one] . . . whereby 'the agreement [was] made by filling in names and quantity and price on a printed form . . . .' Also known as a standardized agreement, a standard form contract or a contract of adhesion, a form contract describes a contract where sometimes 'the basic terms relating to quality, quantity, and price are negotiable,' but other terms are standard—the 'boilerplate' language—and not subject to negotiation." (footnotes omitted)).

128. Barnes, *supra* note 124, at 236 (citing Slawson, *supra* note 123, at 530).

129. Rakoff, *supra* note 122, at 1176-77.

be explicit or may be implicit in the situation, but it is understood by the adherent.

(5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.

(6) The adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party.

(7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.[130]

Restatement (Second) of Contracts provides, with respect to addressing the use of standardized form contracts, that when a party "assent[s] to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing."[131]

Although standard form contracts are used in a variety of circumstances, they are probably most frequently used in the purchasing context, when the parties are at the beginning of a transactional relationship.[132] As Shmuel Becher has observed, "[t]he most pervasive kind of contract is the consumer standard form contract. Consumer contracts account for the vast majority of everyday transactions between firms (as sellers) and consumers (as buyers). The ubiquity of consumer [standard form contracts] cannot be exaggerated."[133] In Todd Rakoff's model of adhesion contracts (i.e., standard form contracts proffered on a "take-it-or-leave-it" basis), the seventh and final characteristic listed is that the "adhering party['s]" primary contractual obligation is paying money[134]—this is a characteristic of a purchase transaction. Strictly speaking, as Rakoff states, "[t]he category of 'adherents' is not limited merely to those who are retail consumers, but includes tenants and mortgagors, as well as businesses in many of their purely purchasing transactions."[135] But contracts for the purchase of goods or services are surely a huge portion of the form contracts utilized, and of course constitute all of the contracts governed by the CRFA.[136] Moreover, for

130. *Id.* at 1177.

131. RESTATEMENT (SECOND) OF CONTS. § 211 (AM. L. INST. 1981).

132. *See* Rebecca Frihart Kennedy, *Practice Tips: 7 Tips to Spring Clean Sales Contracts and Forms*, 85 WIS. LAW., Feb. 2012, at 26, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=85&Issue=2&ArticleID=2419 [https://perma.cc/2MK8-AD2K].

133. Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 118-19 (2007).

134. Rakoff, *supra* note 122, at 1177.

135. *Id.* at 1178 n.14.

136. 15 U.S.C. § 45b(a)(3) ("[T]he term 'form contract' means a contract with standardized terms—(i) used by a person *in the course of selling or leasing the person's goods or services*; and (ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms." (emphasis added)).

those transactions in which merchants have the policy of utilizing written or electronic contracts, the form purchasing contract is used in *every single sale transaction* as a matter of course.[137] As will be seen, this is not the case with the settlement agreement, which is used far less often and in a greater variety of circumstances.

2. *Settlement Agreements—The End for a Few*

Usually, the form purchase contract, used at the *inception* of a purchase transaction, will be the one and only written agreement ever entered into between the merchant and the consumer. Whereas a business with a policy of using written or electronic form contracts enters into such contracts with every single one of its customers, the business will enter into far, far fewer *settlement agreements*, for the simple reason that far, far fewer than 100% of the merchant's customers will voice complaints in need of resolution (or even have complaints, for that matter). A settlement agreement is, after all, defined generally as "[a]n agreement ending a dispute or lawsuit."[138] Relatively few contracts give rise to a dispute at all, let alone one in need of resolution in as formal a manner as an executed settlement agreement. Rather, often times a quick exchange or return and refund is all that happens in the event of any problem with the transaction.[139] One researcher found that, out of the total customers that had some complaint regarding the goods or services provided by a merchant, only one out of twenty-six—less than 4% of those who were dissatisfied in some way—voiced their complaint directly to the business.[140] Thus, "[m]ost customers do not even complain directly to the sellers of goods or services

137. Rakoff, *supra* note 122, at 1217-18 ("The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable—the standardized mass contract. A standardized contract, once its contents have been formulated by a business firm, is used in every bargain dealing with the same product or service." (quoting Kessler, *supra* note 126, at 631).

138. *Settlement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

139. *See, e.g.*, U.C.C. § 2-719 (AM. L. INST. & UNIF. L. COMM'N 2012) (noting that a contract for the sale of goods may "limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts").

140. Steven MacDonald, *Why Customer Complaints Are Good for Your Business*, SUPEROFFICE, https://www.superoffice.com/blog/customer-complaints-good-for-business [https://perma.cc/T6AC-U6NM] (last updated Feb. 21, 2023); Esteban Kolsky, *CX for Executives*, SLIDESHARE (Sept. 3, 2015), https://www.slideshare.net/ekolsky/cx-for-executives [https://perma.cc/64BQ-Q4SE].

they find unsatisfactory."[141] As a result, the typical merchant will likely enter into written settlement agreements with only a tiny fraction of its overall customer base.

A settlement agreement, or release, is of course a contract between private parties "that gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised."[142] What is being released is usually a claim or legal cause of action against the party compensating for the release, such that once the agreement is finalized, the releasing party has received some consideration and, in exchange, the compensating party is no longer under threat of litigation or other pursuit of the released remedy.[143] The law greatly favors settlement agreements and the compromise and resolution of disputes.[144] A primary reason for the law's favor of settlement agreements is "because of the public policy favoring the finality of negotiated settlements that avoid costs and the uncertainties of protracted litigation."[145] Therefore, it is fair to say that settlement agreements enjoy a degree of favor that is several notches above the typical standard form adhesion contract. Because the law so highly favors dispute resolution, "when parties have entered into a definite, certain, and unambiguous agreement to settle, it should be enforced."[146]

A common component in many types of settlement agreements is a confidentiality clause, or nondisclosure agreement. Such clauses are provisions contained in settlement agreements that contractually obligate the settling parties to remain silent about the disputed issues being resolved—i.e., it obligates them "to maintain confidentiality."[147] These confidentiality agreements have enjoyed longstanding use in many business contexts to protect a variety of interests, including

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141. LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 86 (Routledge 2d ed. 2018). Singer further notes: "Only a very few dissatisfied consumers use any third-party complaint mechanism, whether through the courts, private associations (such as a stock exchange or Better Business Bureau), government consumer offices, or media action lines." *Id.* Notably, Singer cites statistics from a 1977 Ralph Nader study that found that around one-third of dissatisfied consumers either complained directly to the sellers or returned the items seeking a refund of the purchase price. *Id.* While still a minority of overall dissatisfied consumers complain to the merchant—let alone a very small subset of total customers overall—it is striking to consider the possibility that the number of consumers complaining directly to the merchant in the event of a problem may have declined from 1977 to the present. Some of that may be captured by the fact that many consumers will—rather than complain through direct channels to the merchant—instead take their complaints to others. *See* Kolsky, *supra* note 140 (finding 13% of dissatisfied customers report their complaints to fifteen or more people). Of course, with the advent of social media and online reviews, the audience a consumer can likely reach is significant.

142. 66 AM. JUR. 2D *Release* § 1 (2022).

143. *Id.*

144. *Id.* § 2.

145. *Id.*

146. *Id.*

147. *See* Weston, *supra* note 6, at 514-15.

privacy, trade secrets, and reputation, as well as to keep any alleged tortious wrongdoing confidential.[148] In recent years, the use of confidentiality agreements in settlement disputes involving sexual misconduct has come under some heavy criticism for its role in perpetuating dangerous conduct that could cause great harm to future victims.[149] Some states have even introduced legislation in the wake of the #MeToo movement that is designed to limit the use of confidentiality agreements in the sexual misconduct context.[150]

But confidentiality provisions in settlement agreements outside the sexual misconduct context remain widely used and largely enforceable. They are, of course, subject to defenses available to any contract at common law, "such as fraud, duress, incapacity, unconscionability, and violation of public policy."[151] But absent these being applicable, a confidentiality agreement or NDA is a "legally binding contract."[152] Thus, the principle of freedom of contract means that parties may enter into whatever type of contract they see as mutually beneficial.[153] Indeed, "[i]n a legal regime that provides for freedom of contract, parties are generally free, absent public policy or First Amendment restraints, to commit to being silent about almost anything."[154] Businesses commonly seek to utilize confidentiality agreements in order to protect their economic interests.[155] Contractually securing a person's silence helps to prevent any feared future economic harm to the business.[156] Such harm could arise from the disclosure of secret corporate information, or it could be a negative reputational opinion that the business seeks to suppress. The fear of negative opinions could relate to some potentially serious risk to the public, such as a product that poses a risk of danger; on the other end of the spectrum, it could also simply relate to a desire to keep someone's unfavorable opinion about the company or product out of the public sphere so as to minimize any suppressing effect on future sales.

Absent some compelling statutory or public policy reason to the contrary, therefore, confidentiality agreements in the context of settlement agreements should generally be enforced. As noted above, public policy greatly favors the settlement and resolution of disputes.[157] As

148. *Id.* at 515.

149. *See, e.g.*, Hoffman & Lampmann, *supra* note 84; Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (2018); Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109 (2020); Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 53 (2018).

150. *See* Hoffman & Lampmann, *supra* note 84, at 187-89.

151. Weston, *supra* note 6, at 515.

152. Duchicela, *supra* note 149, at 63.

153. Garfield, *supra* note 83, at 264.

154. *Id.* at 268.

155. *Id.* at 269.

156. *Id.*

157. *See supra* notes 144-46 and accompanying text.

Arthur Miller observed in an influential article, "our justice system recognizes a variety of situations in which confidentiality is not only acceptable, but *essential.*"[158] Negotiated settlements, Miller notes, are among the scenarios where confidentiality is essential.[159] Miller reasoned: "Valid reasons exist to deny public access to this information. In each instance [including settlement], confidentiality is deemed essential to accomplish fundamental goals of the justice system that are far more important than the public's need to know every detail of a given case."[160]

In the case of settlement, the valid reasons for sanctioning confidentiality are so that the benefits of settling disputes—rather than contesting and litigating them—can be accomplished. These benefits include, at minimum, the following: (1) avoiding placing additional strain on the courts, (2) reducing the costs and risks of litigation, and (3) reducing the mental toll of the uncertainty of a pending dispute.[161] One observer has also noted the following more abstract benefits of settlement:

> Settlement may also be preferable to litigation when viewed from the very different perspective of the potential substantive content of the resolution of a dispute. In particular, settlement can result in a more satisfying resolution than would occur in litigation, because in negotiation the parties are free to consider the entire spectrum of relevant facts and principles, whether or not they are formally cognizable in law. Further, the parties have the flexibility to craft more creative—and potentially more responsive—solutions to their problems, because they are neither limited to the traditional legal remedies nor "binary, win/lose results." In addition, the parties' participation in working out a resolution of their dispute may produce greater commitment to and cooperation in seeing through that resolution.[162]

There are thus compelling reasons to encourage settlement of disputes.

Further, confidentiality agreements frequently facilitate settlement, and some scholars have asserted that the presence of a confidentiality agreement will make parties—particularly the merchant concerned—more likely to be willing to settle in the first place.[163] Certainly, there is every reason to believe that avoiding any reputational harm to a business—which might otherwise result from a disgruntled customer disappointed in the performance of a product or the rendition

158. Miller, *supra* note 7, at 429 (emphasis added).

159. *Id.* ("Indeed, our justice system recognizes a variety of situations in which confidentiality is not only acceptable, but essential. Discovery, grand jury proceedings, settlement negotiations, and jury deliberations are conducted far from public view.").

160. *Id.*

161. Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 36-37 (1996).

162. *Id.* at 37 (footnotes omitted).

163. Gordon, *supra* note 149, at 1125; *see also* Miller, *supra* note 7, at 485-86.

of services communicating her disappointment to a large audience of friends, family, and social media consumers—would be a powerful incentive (in addition to obtaining the consumer's release of any claims for breach of contract, warranty, etc.) for the merchant to settle.[164] So, in a word, settlement is a highly favored function in the law, and confidentiality agreements can help facilitate settlement.

B. By Its Plain Text, the CRFA Does Not Apply to Settlement Agreements

As written, does the text of the CRFA apply to settlement agreements? An inspection of the actual text of the CRFA reveals plainly that it does not. As a general matter of statutory construction, it is axiomatic that the first resort is to the plain text of the statute itself:

> As a rule, where the language of a statute is clear and unambiguous, its clear meaning may not be evaded by an administrative body or a court under the guise of construction. In such circumstances, there is no room for judicial interpretation, and the language should generally be given effect without resort to extrinsic guides to construction. In this regard, it has been said that the starting point in statutory interpretation is the language of the statute itself.[165]

Accordingly, a review of the pertinent text of the CRFA is warranted to determine its applicability (or not) to the execution of settlement agreements entered into for the purpose of resolving a consumer dispute with a merchant in the aftermath of a transaction involving goods or services.

Recall that subsection (b) of the CRFA, entitled "Invalidity of contracts that impede consumer reviews," contains the primary operative provisions of the CRFA. For present purposes, the primary rule is contained in subsection (b)(1), which provides in relevant part:

> [A] provision of a *form contract* is void from the inception of such contract if such provision—
>
> (A) prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication; [or]
>
> (B) imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication . . . .[166]

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164. *See* Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314-15 (2018) ("[A] defendant might . . . have breached a contract with a vendor, and then negotiated a payment to avoid suit by the disappointed vendor. Other vendors may benefit from knowledge of this breach and settlement . . . . If the breaching party fears some reputational loss, it can ask for a confidentiality clause. Courts will respect and facilitate this agreement . . . .").

165. 73 AM. JUR. 2D *Statutes* § 104 (2022) (footnotes omitted).

166. 15 U.S.C. § 45b(b)(1)(A)-(B) (emphasis added). As noted previously, subsection (b)(1)(C) additionally provides that a form contract is also void if it

> 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

What cannot be banned by merchants under the CRFA is a consumer's posting of a "covered communication"—namely for our purposes, a consumer review of a product or service.[167]

But, importantly, the CRFA only precludes merchants from banning consumer reviews *by the vehicle of a "form contract" (as defined by the CRFA).* Hence, the critical definition in the CRFA, for purposes of this Article, is the definition of "form contract." If the merchant tries to ban consumer reviews through a "form contract" as defined, it comes within the CRFA's proscription. On the other hand, if the confidentiality provision is included within a contract that is *not* a "form contract" (again, as narrowly defined by the CRFA), then the CRFA presents no obstacle to the use of the confidentiality provision (which may have as its effect, among others, the prohibition of posting consumer reviews which would violate the required confidentiality).

The CRFA's definition of "form contract" is provided again as follows: "a contract with standardized terms—(i) used by a person *in the course of selling or leasing the person's goods or services*; and (ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms."[168] This definition of "form contract" contains at least three primary components. Two of them might apply to any number of contracts, including both sales contracts and settlement contracts. But a third is clearly limited to sales contracts alone.

In perhaps the reverse order of significance for purposes of this Article's thesis, the first component is that the contract form contains a number of "standardized" terms. This is the essence of a "form" contract. As discussed earlier, when merchants use a "form" to contract, they are by definition using a preexisting form with numerous boilerplate clauses that they likely use invariably in all transactions.[169] This is certainly bound to be true in almost any and all standardized contracts utilized by merchants selling goods or services to consumers on a regular basis. For that matter, in fairness, many

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exception of a non-exclusive license to use the content, that the individual may have in any otherwise lawful covered communication about such person or the goods or services provided by such person.

Id. § 45b(b)(1)(C).

167. *See supra* notes 106-07 and accompanying text.

168. 15 U.S.C. § 45b(a)(3)(A) (emphasis added). The definition contains an exception which provides that "[t]he term 'form contract' does not include an employer-employee or independent contractor contract." *Id.* § 45b(a)(3)(B). The exception is not pertinent here, as this Article is focusing solely on the scenario of merchants selling goods and services, as primarily governed by the CRFA.

169. *See supra* notes 122-31 and accompanying text.

settlement agreements utilized by merchants in resolving disputes may likely contain a number of standardized boilerplate terms as well, although the terms of a settlement may tend to be more negotiated than a typical sale transaction.

The second component of the CRFA "form contract" definition is that the individual bound to the form contract is subjected to the standardized "form" terms "without a meaningful opportunity . . . to negotiate the standardized terms."[170] That is—at least with respect to the standardized, recurring "boilerplate" invariably used by the merchant in all of its contracts—the individual consumer does not have the realistic power to negotiate and bargain for different terms (say, negotiate for a stronger warranty, or a lesser limitation of remedies, or remove a company's standard arbitration clause). In this sense, then, the CRFA definition requires that, at least with respect to the *standardized* terms, the contract is a "take-it-or-leave-it" contract—a classic, adhesion contract.[171] Again, this is likely to be true in virtually all ordinary merchant-consumer transactions in which a merchant sells goods or services to a consumer. The consumer's power to negotiate is likely often limited to which good or service she will purchase and in what quantities. The remainder of the terms are generally standardized, and thus fit the CRFA definition. Again, in fairness, a settlement agreement could likely—when viewed in isolation—satisfy this element as well, as most merchants will likely have a standard set of form terms they utilize in most settlement agreements resolving consumer disputes (albeit perhaps a few more terms are open to negotiation in settlement agreements versus mass market consumer sales transactions).

That brings us to the third—and for purposes of this Article, critical—component of the CRFA's definition of "form contract": the provision limiting the definition to a contract used by a person "*in the course of selling or leasing the person's goods or services.*"[172] That is, only form contracts (with standardized terms) that are used "in the course of selling or leasing the person's goods or services" are governed by the CRFA's proscription of clauses banning consumer reviews. The phrase used—"in the course of"—is synonymous with phrases like "at the same time as," "at the time," "in the time of," "as," in the "midst" of, and other like phrases.[173] Therefore, the definition refers to form contracts entered into as part of the *initial purchase transaction*. That is, the CRFA applies to the standard form contract that the merchant uses as its standard sales contract, and this is the form that the merchant has the consumer execute at the *inception* of the transaction. As

170. 15 U.S.C. § 45b(a)(3)(A)(ii).

171. *See supra* notes 129-30 and accompanying text.

172. 15 U.S.C. § 45b(a)(3)(i) (emphasis added).

173. *In the Course of*, THESAURUS.COM, https://www.thesaurus.com/browse/in%20the%20course%20of [https://perma.cc/3W72-VH5L] (last visited May 5, 2023).

discussed above, unless a subsequent dispute arises, this will likely be the only contract signed or assented to by the consumer with respect to the purchase.[174] The consumer will generally only be focused on the subject matter (e.g., the laptop model or the type of hotel room) and price of the transaction, as those are the main "deal points" that are at the forefront of the consumer's thought process—the boilerplate will almost never be read, as is the case with adhesion contracts generally.[175]

The form contract agreed to by the consumer at the formation of the transaction has well-known attributes. For one, the form contract is indispensable to businesses for its efficiency; but, from the consumer's perspective, it is not generally worth the trouble to actually read all of the fine print terms.[176] Rather, it makes more sense for the consumer to "trust . . . the good faith" of the business and assume that the business's other customers are agreeing to the same terms and conditions.[177] The judicial acceptance of such boilerplate language, even though consumers regularly do not read or understand it, recognizes that consumers are trading comprehension for convenience.[178] The prevailing legal view is that when a consumer signs a contract they are bound by it—in fact, it is said that the consumer had a "duty to read" it.[179] Of course, this is a total fiction. Individual consumers generally do not read the fine print.[180] Instead, they take note of things like price and quantity, and they give blanket assent to the rest.[181]

So, if Bill goes to a hotel website and books a room for the weekend in San Diego at a seaside Hilton hotel, he is well aware of the nightly cost per room, whether it has a king-sized bed or not, a view of the ocean, etc. He will likely agree to the terms and conditions online when booking the room by just clicking "I accept" without perusing them in any detail—that is, at the *inception* of purchasing the hotel's services. That is likely the one and only "contract" that will be entered into between Bill and the Hilton hotel. He won't be aware of the boilerplate in the Hilton's terms and conditions because consumers almost never are. It is *this contract*—the Hilton's "form contract" required by Hilton *"in the course of selling" the Hilton's services*—that is governed by the CRFA. This contract was required at the same time Hilton was selling—and Bill was purchasing—the hotel room. Notice also that it is a

174. *See supra* note 121 and accompanying text.

175. *See, e.g.*, Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 264 (E.D.N.Y. 2019), *aff'd*, 815 F. App'x 612 (2d Cir. 2020).

176. *Id.* (citing Barnes, *supra* note 124, at 254-56; Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 596-600 (1990)).

177. *Id.* (citing RESTATEMENT (SECOND) OF CONTS. § 211 cmt. b (AM. L. INST. 1981)).

178. *Id.*

179. *Id.* (citing Rakoff, *supra* note 122, at 1185-87).

180. *Id.*

181. Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 264-65 (E.D.N.Y. 2019) (citing Slawson, *supra* note 123, at 533), *aff'd*, 815 F. App'x 612 (2d Cir. 2020).

classic form *purchase* contract, both in accordance with the CRFA definition (a contract "used by a person in the course of selling . . . the person's goods or services"), and in accordance with Rakoff's classic formula for the vast majority of standard form adhesion contracts (language is routine and standardized, it is offered on a take-it-or-leave-it basis, and "the principal obligation of the adhering party . . . is the payment of money").[182] Therefore, the CRFA clearly applies and Hilton would be prohibited from including a provision limiting Bill from his right to post reviews of his experience at the Hilton. That is, the CRFA applies to form contracts entered into *at the time* the sale is made—at the beginning of the relationship, where the merchant is selling goods or services and the consumer is paying money for them.

What about settlement agreements? Say Bill has a dispute with Hilton, insofar as some items left in the hotel room were damaged by the cleaning staff? Bill didn't realize this until he got back home after his weeklong vacation. Bill lodges a complaint, which is passed up through the channels of the customer service tree. Unsatisfied with the response he is getting, he eventually threatens legal action if he is not compensated to his satisfaction. At that point, a senior level manager with Hilton contacts Bill, and they negotiate terms of a dispute resolution. The terms could include anything the parties agree upon, but are likely to include some money or refund to Bill, and maybe some credits for future stays at Hilton properties. And—critically for this Article—Hilton may also desire to require a confidentiality clause as part of the settlement. Hilton might have any number of reasons for requesting this. It may be embarrassed by the fact that its staff caused the damage and wishes to avoid the negative publicity. Certainly related to this, it may wish to avoid any detrimental effect on its future business. Further, Hilton may wish to avoid publicizing the fact that it is willing to settle claims such as Bill's out of fear that it may invite a multitude of claims from other customers, who may or may not have legitimate claims. To accomplish these goals, Hilton may insist upon (in addition to releasing all claims)—as a central bargaining chip in the settlement agreement—that Bill agree to a complete confidentiality clause. This would necessarily include a prohibition against Bill posting anything about his experience on social media, online review sites, or the like.

So, does the CRFA apply to prohibit the confidentiality clause in the Bill-Hilton settlement agreement? No. The settlement agreement cannot be said, in the language of the CRFA, to be a contract used by Hilton "in the course of *selling*" Hilton's services.[183] At this point in time, Hilton has already sold the services to Bill. It did this at the time

182. *See* Rakoff, *supra* note 122, at 1177; *see also supra* notes 129-30 and accompanying text (identifying Rakoff's seven factors characteristic of standard form consumer contracts).

183. *Cf.* 15 U.S.C. § 45b(a)(3)(A)(i) (emphasis added).

Bill first booked the hotel room (or purchased the laptop, or the car, etc.). The sale is in the past and was at the inception of the transactional relationship. It involved a bargained-for exchange where Bill paid money in exchange for Hilton's services.[184] But the settlement is qualitatively and chronologically different. It comes *after* the sale transaction where Hilton sold the services. In contrast to the thousands (or more likely, millions) of hotel consumers Hilton sells to annually, Bill has emerged as part of a much smaller subset of Hilton's customers that have (1) voiced a complaint, and (2) gone to lengths such that a formal settlement agreement has been executed in order to resolve it.[185] Negotiated settlement agreements—rather than having anything to do with *selling services*—has to do with *settling a live dispute.* That is, the settlement serves as the vehicle for resolving a post-transactional *dispute* between the parties. Bill is not paying money now. Rather, likely *Hilton* is paying money (and/or possibly offering credits toward future stays) in exchange for Bill's agreement to release his claims (for breach of contract, breach of warranty, or perhaps tort claims of some kind, etc.), and also perhaps for Bill's agreement to also "pay" with his silence by operation of a confidentiality agreement.

By the plain text of the CRFA, since a settlement agreement has nothing to do with the course of selling goods or services, and rather everything to do with settling a dispute that comes *subsequent* to the sale, the provisions of the CRFA do not apply to settlement agreements. Therefore, under the plain language of the CRFA, businesses are not precluded from including broad confidentiality clauses—which could implicate and prevent posting reviews of the consumer's experiences or otherwise—in settlement agreements.

C. *Important Policy Rationales for Excluding Settlement Agreements from the CRFA*

As has now been set forth, this Article takes the position that the plain language of the CRFA does not apply, by its own terms, to *settlement agreements* that are entered into after the sale of goods or services (as opposed to a form contract entered into in the course of selling such goods or services).[186] This result is apparent from the plain text. However, there are several rationales for why differentiating settlement agreements from form purchase contracts makes sense and is

184. *See* RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981).

185. *See Hilton Worldwide Holdings—Statistics & Facts*, STATISTA (Mar. 29, 2022), https://www.statista.com/topics/1880/hilton-worldwide/#topicHeader__wrapper [https://perma.cc/BL7W-RT8L]. Hilton had 1.07 million hotel rooms worldwide as of 2021, and its average occupancy rate worldwide for 2021 was 57.2%, which was down from 75.7% in 2019. *Id.*; *see also supra* notes 138-41 and accompanying text (discussing the low numbers of customers that lodge complaints against selling merchants).

186. *See supra* Section III.B.

normatively desirable. These rationales are set forth below for the following purposes: (1) to reinforce the soundness of Congress's policy choice from a plain text position; (2) to posit that, in the event of any perceived statutory ambiguity in the CRFA, interpreting the Act so as not to be applicable to settlement agreements is warranted;[187] and (3) to urge that, if necessary, Congress amend the CRFA to make even plainer that settlement agreements are carved out from its provisions precluding prohibitions on consumer reviews.

The first rationale for excluding settlement agreements—and confidentiality agreements specifically—from the provisions of the CRFA is that it simply serves the purposes of more greatly encouraging settlement, which is highly favored by the law. A settlement agreement in this consumer context is typically a bargained-for exchange whereby the consumer gives up some claim regarding a failing of the merchant (or its goods or services) in exchange for money or other compensation from the breaching merchant.[188] The full and final settlement of legal disputes is highly favored and thus encouraged.[189] And many if not most businesses will be more likely to freely enter into settlement agreements that make just recompense to disappointed consumers if they are assured that the consumer will keep the settlement agreement confidential, as well as all of the matters and allegations comprising the dispute.[190] The fact that confidentiality in the settlement context will greatly aid in increasing the number of disputes that settle is a good policy basis for differentiating between consumer form purchase contracts on the one hand (covered by CRFA) and dispute-resolving settlement agreements on the other hand (not covered by the CRFA).

A second rationale—related to the first—is that confidentiality agreements are widely enforceable in the settlement context, and Congress was undoubtedly well aware of this fact and most likely did not intend to drastically alter the dispute resolution landscape in the consumer goods and services context.[191] Rather, the CRFA and its narrow language pertaining only to form contracts "in the course of selling goods or services" must be read in light of the otherwise broad

187. *See* 73 AM. JUR. 2D *Statutes* § 162 (2022) ("It is generally regarded as permissible to consider the consequences of a proposed interpretation of a statute where the act is ambiguous in terms and fairly susceptible of two constructions. Under such circumstances, it is presumed that undesirable consequences were not intended; instead, it is presumed that the statute was intended to have the most beneficial operation that the language permits. A construction of which the statute is fairly susceptible is favored which will avoid all objectionable, mischievous, indefensible, wrongful, evil, and injurious consequences." (footnotes omitted)).

188. *See supra* notes 142-43 and accompanying text.

189. 66 AM. JUR. 2D *Release* § 2 (2022).

190. *See* Gordon, *supra* note 149, at 1125; *see also* Miller, *supra* note 7, at 485-86.

191. *See supra* notes 147-48 and accompanying text (noting the common enforceability of confidentiality agreements in a wide variety of contexts, including settlement).

applicability of confidentiality agreements in the context of settlement and other commercial settings. A general rule of statutory interpretation is "to assume that the legislature in the enactment of a statute was aware of established rules of law applicable to the subject matter of the statute. Upon enactment, the statute becomes a part of, and is to be read in connection with, the whole body of the law."[192] This is all the more buttressed by the fact that settlement agreements are appreciably different in kind than uniform mass consumer purchase contracts. As discussed previously, a merchant's settlement agreements with consumers involve a vastly smaller population of the merchant's customers than its form purchase contracts (which are used globally for all customers).[193] Moreover, consumers are much more likely to be mindful of exactly what they are giving up at the time of the settlement agreement, since the parameters of the dispute will be forefront in their mind.[194] Given that settlement agreements are qualitatively different than form purchase contracts, and given that Congress is presumed to have been aware of the broad usage and general enforceability of confidentiality agreements in *settlement* agreements (versus form *purchase* agreements), it would be passing odd to nevertheless conclude that, post-CRFA, a business could continue to include a confidentiality provision in any settlement agreement resolving a consumer dispute *except insofar as it purported to prevent postings online or on consumer review sites.* This would effectively eviscerate the business's ability to include a confidentiality provision at all. Rather, in the twenty-first century, almost any meaningful disclosure the consumer might make about the dispute and settlement would take place online and in the form of what could otherwise be likely characterized as a "covered communication" under the CRFA.

A third rationale, closely related to the first two, is that implicit in the CRFA's narrow definition of "form contract" as being limited to contracts used "in the course of selling goods or services," is that there is a significant distinction between limiting allowed provisions in the initial contract at the *inception* of the relation and more broadly allowing provisions in the dispute-resolving settlement agreement at a *subsequent* point in time. This observation is certainly not unique to this

192. 73 AM. JUR. 2D *Statutes* § 91 (2022) (footnotes omitted).

193. *See supra* notes 132-41 and accompanying text.

194. *See* Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 729 (2016) ("[W]hile a settling plaintiff may be an unsophisticated or vulnerable consumer or employee negating her claim by trading away an important right (the right to litigate it), such individuals consent to that trade when they tend to have their greatest understanding of and appreciation for that right."). Moreover, the form purchase contract is nearly invariably an exchange of goods or services for money. Settlement agreements, on the other hand, may be at least as varied as the types of claims that consumers come to possess. Some customers may have a claim that the product was defective, where others may have a claim that it was delivered late. Still others may have a claim that it did not operate as warranted; others still may claim that the product caused some injury to person or property. Claims regarding services are at least as varied.

Article. In the legislative history to the California statute that also prohibits clauses in form consumer purchase contracts banning online reviews, the committee commentary noted this same distinction:

> A non-disparagement clause generally restricts individuals from making statements or taking any other action that negatively impacts an organization, its reputation, products, services, management or employees. *Non-disparagement clauses are commonly and appropriately found in negotiated legal settlement agreements*, but are more recently beginning to find their way into [form purchase] consumer transactions [including online].[195]

Further, this initial contract/settlement agreement distinction is well known in other areas of the law. Take redemption rights in property. The right to redeem mortgaged property is the general right of the debtor/mortgagor to "redeem"—i.e., get the property back from the clutches of a foreclosure by the foreclosing lender/mortgagee (who has obtained a mortgage interest in the property, usually to secure a debt owed by the mortgagor to the mortgagee).[196] It is well settled in property law that "[t]he right to redeem a mortgage is of such utmost importance that laws may not permit it to be waived in a mortgage instrument or in a contemporaneous agreement."[197] So, a bank is generally not allowed, at the inception of the mortgage relationship, to insert a boilerplate waiver of redemption clause. However, *subsequently,* as in a settlement or workout scenario, waivers of the debtor's redemption right are freely allowed.[198] Article 9 of the Uniform Commercial Code, governing secured transactions in personal property, has roughly analogous rules. Waiving the debtor's right to redeem personal property at the outset (i.e., in the security agreement) is prohibited;[199] however, Article 9 allows for some agreements (e.g., settlement agreements) to waive the right of redemption, so long as they are far *subsequent* to the initial contract (in Article 9's case, not until after default on the secured obligation/loan).[200]

Another example of this initial contract/settlement contract dichotomy is contained in a separate federal statute—the Bankruptcy Code.

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195. *Unlawful Contracts: Non-Disparagement Clauses: Hearing on Assemb. B. 2365 Before the Assemb. Comm on Judiciary*, 2013-2014 Assemb. (Cal. 2014) [hereinafter *Hearing on Assemb. B. 2365*] (statement of Bob Wieckowski, Assembly Comm. on Judiciary) (emphasis added).

196. 55 AM. JUR. 2D *Mortgages* § 743 (2022).

197. *Id.* § 774 (footnotes omitted).

198. *Id.* ("[A] mortgagor may, at any time *after* the execution of the mortgage, by a *separate and distinct transaction*, sell or release his or her equity of redemption to the mortgagee. One who is entitled to redeem may waive their right to do so." (emphasis added) (footnotes omitted)).

199. U.C.C. § 9-602(11) (AM. L. INST. & UNIF. L. COMM'N 2022).

200. *Id.* § 9-624(c) ("Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under Section 9-623 only by an agreement to that effect entered into and authenticated after default.").

The individual debtor's goal in most bankruptcy cases is to receive a discharge. A discharge is the elimination of the debtor's personal liability on her pre-bankruptcy debts.[201] Courts have overwhelmingly held that any attempt to obtain a waiver of the debtor's future right to receive a discharge in bankruptcy is void and unenforceable as against public policy.[202] This would certainly include, primarily, a prohibition on including such a waiver-of-discharge provision in the *initial* debt agreement between the creditor and debtor.[203] However, in contrast to the pre-bankruptcy prohibition on advance discharge waivers (which would usually be attempted in the contract entered into at the *inception* of the transactional relationship), the Bankruptcy Code explicitly authorizes such waivers to be entered into in Chapter 7 cases *after* bankruptcy has been filed, with approval by the bankruptcy court.[204] This is often in the context of a debtor and creditor working out a post-bankruptcy workout or settlement agreement to govern the debt relationship going forward.[205] As one bankruptcy court observed:

> Where Congress has failed to include language in statutes, it is presumed to be intentional when it has used such language elsewhere in the Code. . . . Here, Congress'[s] failure to authorize prepetition waivers of discharge, while at the same time authorizing certain postpetition waivers of discharge . . . must be viewed as intentional.[206]

By the same token, Congress's language in the CRFA banning clauses that prohibit posting reviews in *form contracts for the purchase of goods or services*, while remaining *silent* on using such clauses in *other contracts,* such as settlement agreements specifically, is highly indicative of the likelihood that Congress did not intend the CRFA to apply to settlement agreements intended to fully and finally resolve all disputes. As shown in the examples of redemption rights and discharge rights, there is a common theme insofar as clauses that are buried in fine print at the outset of a contract are far less favored than

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201. 11 U.S.C. § 524(a) ("A discharge in a case under this title—(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under [the various chapters of the Bankruptcy Code] . . . ."). Section 524 also enjoins parties from seeking to assert such liability against the debtor, after the conclusion of the bankruptcy case. *Id.*

202. *See, e.g.*, Hayhoe v. Cole (*In re* Cole), 226 B.R. 647, 651-52 (B.A.P. 9th Cir. 1998).

203. *See, e.g.*, First Ga. Bank v. Halpern (*In re* Halpern), 50 B.R. 260, 262 (Bankr. N.D. Ga. 1985) ("Policy considerations dictate that dischargeability questions cannot be predetermined either by a state court or by agreement of the parties prior to or in anticipation of the possible filing of a bankruptcy case."), *aff'd sub nom. In re* Halpern, 810 F.2d 1061 (11th Cir. 1987); Johnson v. Kriger (*In re* Kriger), 2 B.R. 19, 23 (Bankr. D. Or. 1979) ("It is a well settled principle that an advance agreement to waive the benefit of a discharge in bankruptcy is wholly void, as against public policy.").

204. 11 U.S.C. § 727(a)(10).

205. *See In re Cole*, 226 B.R. at 653 ("Section 727(a)(10) permits a debtor to waive the discharge of all debts simply by executing a postbankruptcy written agreement that is approved by the bankruptcy court.").

206. *Id.* at 653-54.

centrally negotiated terms (such as a confidentiality clause) contained in a settlement agreement designed to fully resolve all disputes. Moreover, as indicated above, the California legislature expressly mentioned this dichotomy in passing California's version of the CRFA—expressing concern and the need to ban such clauses in online form purchase contracts while simultaneously noting that "[n]on-disparagement clauses are commonly and appropriately found in negotiated legal settlement agreements."[207] There is no reason to believe that Congress did not have this same dichotomy in mind.

A fourth rationale circles back to the devastating effect of extremely negative reviews on a business. Specifically, it concerns vindicating businesses' ability to protect themselves from the effects of such potentially negative reviews by agreeing to enter into a full and final settlement that resolves all such disputes and purchases the consumer's confidentiality with a good-faith, specifically negotiated agreement. As discussed previously, a merchant's reputation in the marketplace is incredibly significant to the ongoing success of the business.[208] When a business receives good reviews, it can have a direct positive impact on its revenues.[209] But bad reviews can have the opposite effect. As reported previously, it has been estimated that just one single unfavorable review can lower a business's revenues by up to 20%.[210] And up to 80% of the buying public may have been persuaded not to transact with a particular business because of negative information on the Internet.[211] The prospect of negative reviews is problematic for the following additional two reasons: (1) disappointed customers are 50% more likely to post reviews than satisfied customers,[212] and (2) prospective purchasers who read reviews tend to place greater weight on the negative reviews than on the positive ones.[213]

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207. *See Hearing on Assemb. B. 2365*, *supra* note 195.

208. *See supra* note 31 and accompanying text.

209. *See supra* notes 57-58 and accompanying text.

210. Dave, *supra* note 5.

211. *See* Ponte, *supra* note 4, at 66 n.19 (citing CONE COMMC'NS INC., GAME CHANGER: CONE SURVEY FINDS 4-OUT-OF-5 CONSUMERS REVERSE PURCHASE DECISIONS BASED ON NEGATIVE ONLINE REVIEWS 1, 3 (2011)).

212. Eleanor Vaida Gerhards, *Your Store Is Gross! How Recent Cases, the FTC, and State Consumer Protection Laws Can Impact a Franchise System's Response to Negative, Defamatory, or Fake Online Reviews*, 34 FRANCHISE L.J. 503, 503 (2015) ("Online reviews drive business. They have a powerful, lasting impact but people are more likely to share their negative reviews. While 45[%] of people use social media to share bad customer service experiences, only 30[%] use social media to share good customer service experiences." (citing DIMENSIONAL RSCH., CUSTOMER SERVICE AND BUSINESS RESULTS: A SURVEY OF CUSTOMER SERVICE FROM MID-SIZE COMPANIES (2013), https://d16cvnquvjw7pr.cloudfront.net/resources/whitepapers/Zendesk_WP_Customer_Service_and_Business_Results.pdf [https://perma.cc/63QN-BM9R])).

213. Ponte, *supra* note 4, at 92.

Recall that many of these reviews, because of Suler's observed online disinhibition effect,[214] can be truly virulent and hostile—rising to the "troll" level.[215] Any business who is engaging in settlement discussions with a consumer making a claim might well understandably want part of the exchange to involve a confidentiality agreement—indeed, the biggest damage that the consumer can do is likely not to recover the individual money damages on her own claim, but rather to post negative reviews and thereby put a serious dent in the merchant's overall future business. Given businesses' very legitimate desire to avoid such a consequence, there is every reason to enforce a confidentiality agreement that is part of the central settlement bargain being struck (as opposed to being included in the boilerplate of a form purchase contract). A fully negotiated confidentiality agreement, included as part of the settlement agreement fully and finally resolving a consumer's claim, should be enforced and not subject to the CRFA, given businesses' very legitimate and understandable motivation to protect themselves from otherwise disappointed customers. Such customers cannot claim the same level of surprise as those who unsuspectingly have a non-disparagement clause tucked away into the boilerplate of a form purchase contract without mention or discussion.

It should also be noted that the three states that enacted similar legislation at or around the time the CRFA was enacted—California, Maryland, and Illinois—have similarly narrow language in their operative provisions. The California statute provides: "A contract or proposed contract *for the sale or lease of consumer goods or services* may not include a provision waiving the consumer's right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services."[216] Like the CRFA, the California statute is limited in its applicability to contracts "for the sale or lease of consumer goods or services." As with the CRFA, this is a provision that is narrowly applicable to the typical form *purchase* contract entered into at the *inception* of the transactional relationship. As stated above, the legislative history of the California provision notes the need for this provision, while expressly acknowledging that confidentiality provisions in *settlement* agreements are fully appropriate and enforceable.[217] The Maryland and Illinois statutes are substantially similar to the California provision—both are also limited in their applicability to form purchase contracts for consumer goods or services from the inception of the transactional relationship.[218] These statutes are fully

214. *See supra* notes 71-75 and accompanying text.

215. *See supra* notes 59-72 and accompanying text.

216. CAL. CIV. CODE § 1670.8(a)(1) (West 2022) (emphasis added).

217. *See supra* note 195 and accompanying text.

218. MD. CODE ANN. COM. LAW § 14-1325(b)(1)-(3) (West 2022) ("A contract or a proposed contract for the sale or lease of consumer goods or services may not include a provision

consistent with the dichotomy between the initial form contract and the settlement agreement discussed throughout this Article, and serve to further illustrate that dichotomy. Hence, for the same reasons that the CRFA should be narrowly construed so as not to prohibit confidentiality clauses in dispute-resolving settlement agreements, these state statutes (and any similar to them) should not be construed any differently.

CONCLUSION

The Internet is an amazing tool, enabling uses and functions that would have seemed impossible only a few years ago.[219] The rich source of online reviews of merchants, goods, and services is one aspect of the Internet that has made many consumers' lives better by helping them to make more informed purchasing decisions.[220] But these online reviews can also be a great danger to businesses, as negative reviews can have a significantly negative effect on a business's profitability and even survival.[221] And an appreciable portion of these negative online reviews rise to "troll-like" levels of hostility and aggression, having an effect on the business which is often disproportionate to the level of expression that would be considered reasonable.[222]

In this light, it is understandable that businesses, for a time, attempted to cut off consumers' rights to inflict this damage by inserting a boilerplate provision in their form purchase contracts, which had the effect of prohibiting the consumer from posting such reviews.[223] However, although businesses have a legitimate interest in protecting themselves from the deleterious effects of negative reviews, consumers have a countervailing interest in their freedom to express themselves online and elsewhere by posting reviews of their experiences in dealing with a particular merchant or the goods or services themselves. In passing the Consumer Review Fairness Act (CRFA)—along with a handful of states passing similar legislation—Congress weighed these competing factors and decided in favor of consumers.[224] Henceforth, for most purposes, merchants are precluded from including provisions

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waiving the consumer's right to make any statement concerning: (1) The seller or lessor; (2) Employees or agents of the seller or lessor; or (3) The consumer goods or services."); 815 ILL. COMP. STAT. ANN. 505/2UUU(a) (West 2022) ("A contract or a proposed contract for the sale or lease of consumer merchandise or services may not include a provision waiving the consumer's right to make any statement regarding the seller or lessor or the employees or agents of the seller or lessor or concerning the merchandise or services.").

219. *See* Bill Buchanan, *The Internet Is Still One of the Most Amazing Things That Has Ever Been Created*, MEDIUM (Mar. 17, 2019), https://medium.com/asecuritysite-when-bob-met-alice/the-internet-is-still-one-of-the-most-amazing-things-that-has-ever-been-created-3f8657f3634b [https://perma.cc/MD2U-2KEF].

220. *See supra* Section I.B.

221. *See supra* notes 76-80 and accompanying text.

222. *See supra* notes 62-75 and accompanying text.

223. *See supra* Section I.C.

224. *See supra* Part II.

banning their customers from posting reviews, to the extent such provisions are included in their *form purchase contracts*—i.e., their contracts used "in the course of selling or leasing the person's goods or services."[225] This ban applies to the form purchase contracts that merchants use at the *inception* of the transactional relationship.[226]

However, as this Article asserts, merchants should still be able to use confidentiality provisions—including provisions that have the effect of precluding consumers from posting reviews of their experiences—in any post-purchase *settlement agreement* that has the purpose of fully and finally resolving any disputes that have arisen between the merchant and the consumer regarding the transaction of goods or services at issue. This is because the CRFA, by its plain language, only applies to form contracts used in *selling* the goods or services.[227] But a settlement agreement is not a merchant selling goods. It is the consumer selling (or, rather, agreeing to forbear from asserting) the right to assert a cause of action in exchange for money or other consideration (including the consumer's silence).[228]

Moreover, in addition to this plain text conclusion, there are many good reasons for excluding settlement agreements from applicability of the CRFA and similar statutes. Allowing confidentiality agreements likely encourages settlement, which is highly favored in the law.[229] Confidentiality agreements are broadly enforceable in the context of settlement and dispute resolution; Congress was well aware of this when it enacted the CRFA, and there is every reason to believe they had this distinction in mind when enacting the statute.[230] There is a qualitative difference—recognized in other areas of the law—between allowing a clause prohibiting the consumer's rights in the boilerplate of the *initial* purchase contract (where it is disfavored because it is too restrictive of the consumer's rights at too early a point in time, and is further unlikely to be noticed by the consumer in giving his assent) and allowing it in the context of a *settlement* agreement, where it is more likely to be contemplated by the consumer and also more likely to be a centrally-negotiated term.[231] Finally, the problem of the effects of negative reviews remains a significant one, and avoiding the fallout from such damaging disclosures is a primary reason for the historic inclusion of confidentiality agreements in the settlement context, and for enforcing them as a matter of vindicating the parties' autonomy and freedom of contract.[232]

225. 15 U.S.C. § 45b(a)(3)(A)(i).

226. *See supra* notes 165-76 and accompanying text.

227. *See supra* Section III.B.

228. *See supra* notes 141-43 and accompanying text.

229. *See supra* notes 186-89 and accompanying text.

230. *See supra* notes 191-94 and accompanying text.

231. *See supra* notes 195-207 and accompanying text.

232. *See supra* notes 208-15 and accompanying text.

The CRFA should thus be interpreted in such a way that settlement agreements are not implicated by its provisions; alternatively, it should be amended to expressly create this exception for settlement agreements. This strikes an appropriate compromise—pun intended—between valuing consumers' freedom to express themselves online regarding transactions they enter into, and merchants' ability to enter into negotiated settlement agreements that resolve consumer disputes and protect the merchants from any future consequences of post-settlement negative reviews filed by a disgruntled consumer who wants to have his cake and eat it too.