The Credit Repair Organizations Act: The Sleeping Giant

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Congress created the Credit Repair Organizations Act (CROA) to protect consumers from unscrupulous providers of credit repair. In the fifteen years since it was enacted, problems have arisen in its application as many of the key provisions of CROA were left undefined and what little case law that has developed has yet to form a coherent understanding of how CROA is to be read. This lack of predictability makes CROA an ineffective piece of legislation in that parties are unable to properly modify their behavior since they are not operating on known terms.

Just as CROA has been neglected by Congress, it has not been subjected to intense scholarly discussion. To facilitate this conversation, this article has compiled and organized the relevant case law so that the present state of CROA can be discerned. This article then compares CROA’s current status to its intended purposes and recommends the best way for Congress to clarify CROA so that it will be a more effective law.
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I. The Sleeping Giant

America is a society that has become increasingly dependent upon borrowing. A person’s credit score is one of the most significant factors that determine whether he or she can take out a new credit card or qualify for a new or refinanced mortgage. As such, it is no surprise that Americans are concerned about their credit scores. Unfortunately for many Americans, their scores are not always as high as they would like them to be. With the country in an economic downturn and many consumers experiencing credit score decreasing events like home foreclosures and higher credit card debt, the number of people unhappy with their credit scores is likely to increase in the near future. Luckily for these people with the “Scarlet Letter” of bad credit, there are plenty of companies in the marketplace who promise that they can repair consumers’ bad credit scores. These credit repair organizations do not do anything that a consumer cannot do for himself for free, but some consumers may find it easier to trust a credit repair organization to handle the process for them. In the past, many of these credit repair organizations were unscrupulous both to their customers and to society in general.

In 1996, Congress responded to these concerns by enacting the Credit Repair Organizations Act (CROA) as an amendment to the Consumer Credit Protection Act.

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1 The author would like to thank UCLA School of Law Professor Emeritus Michael Asimow for his guidance in the creation and development of this paper.
3 The most prominent credit score model is that of the Fair Isaac Corporation (FICO). FICO credit scores range from the best score of 850 to the lowest score of 300. The score is calculated by factoring in five categories of information: 35% payment history, 30% amounts owed, 15% length of credit history, 10% new credit, and 10% types of credit used. For more information, see How Your FICO Credit Score is Calculated, myFICO.com, http://www.myfico.com/crediteducation/whatsinyourscore.aspx.
5 No one may legally remove accurate and timely negative information from a credit report. The Fair Credit Reporting Act (15 U.S.C. §§ 1681 -1681x) allows a person to ask for a free investigation of any information in his or her file that is believed to be inaccurate or incomplete. For more information, see Credit Repair: How to Help Yourself, FTC, Oct. 2008, http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre13.shtm.
6 A consumer is entitled to one free credit report per year from each of the three national consumer reporting companies (Experian, TransUnion, and Equifax). If a consumer wants to dispute an item on his or her credit report, then he or she may submit a dispute in writing to the consumer reporting company on whose report the inaccurate information appears. The consumer reporting company must investigate all non-frivolous disputes within thirty days or remove the disputed item. If a disputed item is determined to be incorrect, the consumer reporting company must notify the other two reporting companies of the error. For more information, see How to Dispute Credit Report Errors, FTC, Sept. 2008, http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre21.shtm. See also Your Access to Free Credit Reports, FTC, Mar. 2008, http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre34.shtm.
became effective on April 1, 1997. Congress’s two stated reasons for creating CROA were that:

(1) Consumers have a vital interest in establishing and maintaining their credit worthiness and credit standing in order to obtain and use credit. As a result, consumers who have experienced credit problems may seek assistance from credit repair organizations which offer to improve the credit standing of such consumers.

(2) Certain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters.

The rationale for CROA was rather straightforward: consumers want to improve their credit scores and some companies in the credit repair business have been bad actors. If these bad actors comply with CROA’s regulations or risk liability for not complying, then consumers will be protected.

In order to accomplish these goals, Congress gave CROA two express purposes. First, CROA was designed to ensure that prospective buyers of the services of credit repair organizations were provided with the information necessary to make informed decisions regarding the purchase of such services. Second, CROA was intended to protect the public from unfair or deceptive advertising and business practices by credit repair organizations. While it certainly possible to argue for a complete revamping of the regulation of credit repair organizations, this paper is focused on clarifying the application of CROA to be consistent with its purposes.

CROA’s difficulties began when Congress commenced drafting the provisions that would accomplish CROA’s objectives. First, Congress failed to explicitly define what and who is bound by CROA which allowed adventuresome plaintiffs and receptive courts to expand CROA to industries like auto dealerships and debt collection agencies that were never the intended targets of CROA. Second, the draconian procedural system created by CROA has led to some well-intentioned credit repair organizations finding themselves liable for violating CROA.

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10 15 U.S.C. § 1679. CROA became applicable 6 months after September 30, 1996 and contracts entered into before such period are not bound by CROA.
11 15 U.S.C. § 1679(a). Although at first blush Congress’ express concern for those of limited economic means may seem a little patronizing and that concern for the many persons who have been taken by credit repair organizations who do not consider themselves to be of limited economic means was downplayed, it stands to reason that people of limited economic means and who are inexperienced in credit matters would be the most prone to having poor credit scores. Because of their inexperience in financial and credit matters, it was a reasonable presumption of Congress to determine that this group would be especially at risk for being taken advantage of by unscrupulous credit repair organizations.
14 Only an extreme libertarian would argue for the abolishment of CROA. Most people agree that fraud should be punished and that disclosure is necessary for the market to function properly. The issue becomes what level of disclosure is appropriate. If CROA were to be revamped, it is likely conservatives would argue for a less imposing regulatory regime than currently exists while liberals might push for more extensive disclosures and procedural requirements. Rather than reinventing the wheel, Congress should focus its efforts on clarifying the current ambiguities that have developed in the case law interpreting CROA.
15 See infra Part II.
16 See infra Part III.
Third, derivative issues of CROA lawsuits, such as damages, contractual waiver of rights, and class actions, have been made less clear by contradictory court decisions stemming from CROA’s silence on these matters.\footnote{17 See infra Part IV.}

While there are undoubtedly many consumers seeking to repair their credit and many organizations offering to provide this service, by its own terms, CROA was intended to only address the behavior of credit repair organizations. However, whether by sloppy drafting or creative lawyering, laws are not always applied as simply as they first appear. This is what Eugene Kelley, Jr., John Ropiequet, and Andrea Durkin worried about when they wrote \textit{The Credit Repair Organization Act: “The Next Big Thing?”}\footnote{18 Eugene J. Kelley, Jr., John L. Ropiequet, & Andrea J. Durkin, \textit{The Credit Repair Organization Act: The “Next Big Thing?”}, 57 CONSUMER FIN. L.Q. REP. 49 (2003).} in 2003. In analyzing the then six years worth of cases that had been decided since CROA had been passed, they were concerned that despite CROA’s seemingly apparent purpose and limited scope, it was on a path of being applied more broadly than was intended and in so doing, covered defendants who were not in the credit repair business.\footnote{19 Id. at 50.}

There have been sporadic CROA cases and scant scholarly analysis of CROA since Kelley, Ropiequet and Durkin wondered aloud if CROA was indeed the “next big thing.” This dearth might indicate that they were in fact wrong about CROA’s future importance in America’s litigation pantheon. However, they were correct in their prediction of CROA being interpreted in ways that seem to be outside the scope of what Congress intended. This shaky case law foundation that CROA has been built upon has only increased the potential for CROA to become a major factor in future consumer litigation.

As the many issues that were spawned by CROA continue to percolate in random district courts, its creators in Congress seem as oblivious to its possible effect as they were when they wrote it. The major financial related legislation currently being discussed, the Consumer Finance Protection Agency Act (CFPAA),\footnote{20 A draft of the Consumer Financial Protection Agency Act is available at Financialstability.gov, \url{http://www.financialstability.gov/docs/CFPA-Act.pdf}. For more information on the bill, see Opencongress.org, H.R. 3126, \textit{Consumer Financial Protection Agency Act of 2009}, \url{http://www.opencongress.org/bill/111-h3126/show}.} does not mention credit repair.\footnote{21 See \textit{id}. The recently passed Wall Street Reform and Consumer Protection Act only mentions credit repair in section 4601(a)(5)(C)(i) to make clear that the act does not affect the Federal Trade Commission’s enforcement of CROA. H.R. 4173, 111th Cong. § 4601(a)(5)(C)(i) (2009), \textit{available at http://financialservices.house.gov/Key_Issues/Financial_Regulatory_Reform/FinancialRegulatoryReform/111_hr_firsrv_4173_full.pdf}.} This is unfortunate since the CFPAA could serve as a suitable vehicle through which to amend CROA because both acts focus on consumers and their credit.\footnote{22 The proposed CFPAA would create a federal Consumer Financial Protection Agency responsible for making sure that marketing and financial disclosures are easy for consumers to understand, for conducting financial literacy education and research, for taking consumer complaints and for writing rules and enforcing them regarding issues like credit card dispute arbitration. See Jennifer Saranow Schultz, \textit{New Consumer Agency Passes One Hurdle}, NYTimes.com, \url{http://bucks.blogs.nytimes.com/2009/12/14/consumer-financial-protection-agency-passes-one-hurdle/}. The regulation of credit repair organizations would seem to be consistent with these other purposes and having an agency like the Consumer Finance Protection Agency to interpret CROA’s ambiguities would avoid having to amend CROA as this paper recommends in Part V.} Without CROA having some form of guidance from an entity like the Consumer Finance Protection Agency, it is left to the Federal Trade Commission to be the federal interpreter of CROA. The FTC has done a diligent job of...
prosecuting CROA violators, but its settlements have not aided the development of the case law in interpreting CROA’s ambiguous provisions.

With all things considered, the best solution would be for Congress to amend CROA now rather than sit by while the case law continues to diverge and create more uncertainty. As long as the development of CROA is left to district courts from around the country addressing only the specific issues before them, CROA will continue to be a murky lake for businesses and persons who arguably offer credit repair services. As the economy continues to stall, unemployment continues to increase, and new fly-by-night credit repair businesses open to make a quick buck off of consumers looking for an easy way out of their financial difficulties, CROA is indeed a sleeping giant. Consumers and businesses alike should hope that Congress will wake up to these issues before CROA litigation wreaks havoc in the courts and credit repair industry.

II. Credit Repair Organizations

Intuitively, Congress’s intended target in passing a law entitled the “Credit Repair Organization Act” seems pretty clear. But this only begs the question, what exactly is a “credit repair organization?” While CROA defines a “consumer” simply as “an individual” and a “consumer credit transaction” as “any transaction in which credit is offered or extended to an individual for personal, family, or household purposes,” the definition of a “credit repair organization” is much more complex. Under CROA, a “credit repair organization”:

(A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express purpose of:

(i) improving any consumer’s credit record, credit history, or credit rating; or

(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i); and

(B) does not include

(i) any nonprofit organization which is exempt from taxation under section 501(c)(3) or title 26;

(ii) any creditor (as defined in section 1602 of this title), with respect to any consumer, to the extent the creditor is assisting the consumer to restructure any debt owed by the consumer to the creditor; or

(iii) any depository institution (as that term is defined in section 1813 of title 12) or any Federal or State credit union (as those terms are defined in section 1752 of title 12), or any affiliate or subsidiary of such a depository institution or credit union.


As will be detailed in Part III below, the procedural requirements and the possibility of committing fraud under CROA make it a very difficult statute with which to comply. This has led many defendants to admit that they did not comply with CROA and instead base their defense on CROA not applying to them. A variety of companies and persons have been alleged to have violated CROA with each fact-specific case adding a new wrinkle to the already ambiguous case law. CROA violations have been alleged in a variety of industries, but even within most industries it is still unclear who is bound by CROA.

II.A. The Meaning of “Person”

The first issue that has caused confusion with determining to whom CROA applies is the statute’s dichotomy between “credit repair organizations” and “persons.” The drafting of CROA left ambiguity over what exactly this difference is and how a “person” was to be defined. There is a split of authority on the issue with some courts holding that Congress’s use of “person” was meant to expand CROA to possible defendants beyond credit repair organizations whereas other courts have held that the “person” must be involved with a credit repair organization to fall under CROA. The latter interpretation holds the better argument here as the former risks expanding CROA to areas and defendants who are beyond the contemplation of the types of activities Congress sought to regulate and should be codified to make this clear. If the former interpretation gains prevalence, it is possible that every person in the country could find themselves needing to comply with CROA.

Some courts have held that a “person” does not have to be involved with credit repair for CROA to apply to them. In Lacey v. William Chrysler Plymouth, the court interpreted CROA’s imposition of the standard of reasonable care on “the credit repair organization, officer, employee, agent, or other person” to conclude that the use of the word “or” at the end of the list meant for “credit repair organization” and “other person” to be interpreted as alternatives. The court then denied the defendant car dealership’s motion for summary judgment to have claims against its finance manager dismissed. According to the Lacey court, any officer, employee, or agent, regardless of whether they have anything to do with a credit repair organization can be subject to CROA. The Lacey court expressed doubt that Congress really intended to have CROA apply to every person within the jurisdiction of the United States. Nevertheless, it claimed it was bound by the statutory language that Congress had drafted.

The Lacey court is not alone in interpreting “person” to apply beyond the credit repair context. The court in Stith v. Thorne held that, even though the defendants were involved in lending and not credit repair, they could still be liable for violation of 1679b(a)(4) which prohibits any “person” from engaging in fraud or deception in connection with the offer or sale of credit.

27 See infra Part III.
29 For example, compare infra Part III.A. to Part III.B.
of the services of the credit repair organization. The defendants’ alleged predatory lending scheme required the plaintiff to work with a credit repair organization before having her loan refinanced. Similar to the *Lacey* court’s focus on the presence of the word “or,” the *Stith* court reasoned that since Congress used “person” instead of “credit repair organization,” it must have meant the terms to have different meanings. Accordingly, 1679b encompassed more than credit repair organizations and applied to the defendants’ indirect fraudulent actions taken in connection with the offer of credit repair services.

The more clear interpretation of CROA is that the “person” must be involved with a credit repair organization for CROA to apply to him or her. The court in *Henry v. Westchester Foreign Autos* decided to follow this common sense approach. In *Henry*, the court held that Congress did not intend to have CROA apply to all persons, regardless of their association with credit repair. Rather, only a credit repair organization or a “person” associated with a credit repair organization could violate CROA.

In a recent case, *Lopez v. ML #3*, the court echoed *Henry* in holding that CROA applies to only persons associated with a credit repair organization. The *Lopez* court, reading the statute as a whole, held that it was clear that CROA was meant to apply only in the credit repair context. Further, even reading 1679b(a)(1) on its own, it was clear to the court that just as “officer, employee, [or] agent” means officers, employees, or agents of a credit repair organization, the introductory phrase “no person” should equally be understood to exist in relation to credit repair organizations. The court stated that the interpretation of CROA “would bear no relationship to the Act’s explicitly stated purposes.”

While the extent to which a person is related to a credit repair organization in order to be subject to CROA is an issue that will continue to be delineated, the majority of cases have agreed with *Henry* and *Lopez* that “person” only applies within the credit repair context. Since the purpose of CROA was to address problems with the offering of credit repair services, this appears to be the proper reading. The *Lacey* and *Stith* interpretations are problematic since they could potentially make any person subject to CROA, regardless of his or her association, or lack thereof, with a credit repair organization. Despite the fact that *Lacey* and *Stith* appear to be outliers, no appellate court has yet addressed the issue and it would be best for Congress to

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36 Id.
37 Id.
38 Id.
40 Id. at 614.
41 Lopez v. ML #3, LLC, 607 F.Supp. 2d 610, 613-14 (N.D. Fla. 2009).
42 Id. at 1313. The court also concluded that a broader reading of CROA would create a federal cause of action for any false statement in a credit application without a requirement of an effect on interstate commerce or any other federal jurisdiction hook. It then noted that such an expansive federal regulation would be both constitutionally suspect and contrary to CROA’s stated purposes. However, this constitutional issue is beyond the scope of this paper.
43 Id. at 1314.
44 Id. at 1312.
clearly explain whether a person has to be related to a credit repair organization or not before other courts follow the misguided *Lacey* and *Stith* approach.

**II.B. Credit Repair “Services”**

The type of services that a company provides can determine whether or not it is a credit repair organization, and ultimately subject to CROA. CROA defines a credit repair organization as a person who sells, provides, or performs credit repair services, or represents that one can or will sell, provide, or perform credit repair services.  The critical question is what type of services fall under the rubric of credit repair services.

It should be noted that companies do not actually have to sell, provide, or perform credit repair services to be liable under CROA. Merely representing that one can or will perform these services, even if a person does not have any plans of ever providing them, is enough to make CROA apply.  If a defendant simply delivered its products to consumers without any communication between the defendant and consumers, no credit repair services would have been provided for CROA purposes. However, if a defendant’s representatives communicated with consumers “in any way” about repairing a consumer’s credit situation, this would constitute a representation of a credit repair service and make the defendant a credit repair organization as occurred in *In re National Credit Management Group*.  

One defendant attempted to skirt the “services” definition altogether by claiming that it provided a “product” instead of a service. This argument was rejected since the defendant’s “product” analyzed and reviewed a consumer’s credit report as well as calculated his credit score, thus clearly providing services.  The court’s decision was made even easier because the defendant had: made representations of its product as a service to the media, investors, and consumers; registered the product as a service mark with the U.S. Patent and Trademark Office; and successfully argued in another case that the product was a service.  If there were not these supplementary factors that gave the court a safety net for its decision, it is possible that the defendant’s “product” defense to the accusation of providing credit repair services may have been better received.

The “product not a service” argument could be a more persuasive argument if made by a defendant who did not have so many countervailing facts against it. Although it would severely limit a company’s business, it is plausible that a credit repair product could be developed that did not provide services in any way. If such a product were developed, courts would have to address whether CROA applies to credit repair services and products or solely to services. This seems to be a remote possibility since anything that is used to improve a consumer’s credit would have service-like aspects that a court could use to make CROA apply. It would be best for Congress to nip this possible product exception to CROA in the bud and make clear that CROA applies to both credit repair services and credit repair products.

**II.C. Entities Exempt From CROA: Nonprofits, Creditors, And Banks**

Before delving into the different types of businesses besides pure credit repair organizations that have been found liable under CROA, it is important to point out which entities

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49 *Id.* at 458 (referring to an informal opinion letter from the FTC with respect to the issue).  
51 *Id.* at 509-10.
are expressly exempt from it. The most frequently employed exemption is for nonprofits. Nonprofit organizations that are exempt from taxation under 26 U.S.C. 501(c)(3) are also exempt from CROA.\(^{52}\) It is important to note that the tax exempt entity must actually operate as a nonprofit since this is an independent requirement for the entity to have tax-exempt status under 501(c)(3).\(^{53}\) As the First Circuit explained, if Congress had intended to define “nonprofit” simply by referencing an entity’s 501(c)(3) tax-exempt status, it would have done so.\(^{54}\)

The only entities that fall into this trap for the unwary are organizations that are not actually operating as nonprofits despite claiming to be. In \textit{Baker v. Family Credit Counseling Corp.}, the defendant was alleged to have been created as a nonprofit solely to evade liability for consumers’ CROA claims.\(^{55}\) In permitting the plaintiff’s CROA claim to proceed, the court noted that an entity must be both organized and operated as a nonprofit in order to be tax-exempt, thus making CROA a secondary check on a defendant’s true nonprofit status.\(^{56}\) Moreover, allowing plaintiffs to sue entities that use their nonprofit status to shield themselves from liability advances CROA’s purpose of protecting the public from credit repair organizations’ unfair or deceptive advertising and business practices.\(^{57}\)

In addition to nonprofit 501(c)(3) entities, section 1679a(3)(A) excludes depository institutions, federal and state credit unions, and their respective subsidiaries from CROA.\(^{58}\) Thus, even if a bank is engaged in credit repair, it does not have to follow CROA.\(^{59}\) Additionally, in reasoning similar to that used by the non-\textit{Lacey} courts to determine that “person” applies only in the credit repair context,\(^{60}\) the court in \textit{Moret v. Select Portfolio Servicing} dismissed a claim based on section 1679b(a)(1) against a bank and servicing company on the grounds that CROA was not intended to apply where no credit repair organization was involved.\(^{61}\)

What is unclear is whether banks can offer credit repair services and have the same exemption as nonprofits. Both of their exemptions are from the same subsection of entities expressly excluded from the definition of a credit repair organization.\(^{62}\) The plain meaning of

\(^{52}\) 15 U.S.C § 1679a(3)(B)(i).

\(^{53}\) The determination of whether a company operates as a nonprofit is dependent primarily on whether the entity did not distribute profits to stockholders or others. See \textit{Town of Brookline v. Gorsuch}, 667 F.2d 215, 221 (1st Cir. 1981). For example, a credit repair organization that claims to be a nonprofit but its primary purpose is to make money for its owners and operators through exorbitant salaries could lead a court to determine that the company is not operating as a nonprofit. See \textit{Zimmerman v. Cambridge Credit Counseling Corp.}, 409 F.3d 473, 475-76 (1st Cir. 2005).

\(^{54}\) On remand, the district court held that the defendant did not operate as a nonprofit and was thus subject to CROA. \textit{Zimmernann v. Cambridge Credit Counseling Corp.}, 529 F. Supp. 2d 254, 278 (D. Mass. 2008).


\(^{56}\) \textit{Id.}

\(^{57}\) \textit{Id.} at 406. Other courts have commented that if credit repair organizations could become exempt from CROA simply by obtaining 501(c)(3) status, they could then engage in outrageous credit repair abuses without impediment until the IRS took away their tax-exempt status. See \textit{Polacek v. Debtcilated Consumer Counseling, Inc.}, 413 F. Supp. 2d 539, 550 (D. Md. 2005). Another defendant which was organized as a for-profit company was not entitled to a similar Texas state law exemption and was subsequently found to have violated CROA. In re \textit{Zuniga}, 332 B.R. 760, 786-87, 788 (Bankr. S.D. Tex. 2005).


\(^{59}\) See \textit{Tejada v. Countrywide Home Loans, Inc.}, No. 08-61979-CIV, 2009 WL 2046138, at *3 (S.D. Fla. July 9, 2009); \textit{see also Vance}, 1999 WL 731764 at *4.

\(^{60}\) \textit{See supra} Part II.A.

\(^{61}\) \textit{Moret}, 2009 WL 1288062 *3; \textit{see also Hyppolite v. Citi Residential Lending, Inc.}, No. 08-62022-CIV, 2009 WL 1109320, at *3 (S.D. Fla. Apr. 24, 2009).

the statute would seem to indicate that neither a bank nor any of its subsidiaries or affiliates could ever be bound by CROA. Such an interpretation would invite the possibility of banks emerging as the main providers of credit repair. It could be a beneficial to allow banks to package credit repair services for their customers, but it could also invite companies that intended on providing credit repair services to open a bank through which to supply its credit repair services in order to avoid CROA’s strict procedures.

Without any guidance from Congress or court decisions interpreting the bank exemption, this is an issue that could become a major concern if wisely counseled companies decide to roll the dice and set up a bank focused on credit repair. The best guidance on this issue is that of the aforementioned Baker court which rejected the defendant’s nonprofit exemption defense on the grounds that it had become a nonprofit solely to skirt CROA’s restrictions. If a court confronted with the bank exemption was to follow Baker and withdraw the banking exemption on the grounds that the company became a bank solely to avoid CROA, then that would probably be enough to discourage other companies from trying this tactic. Again, in the absence of Congressional guidance, it will take a company willing to go through the process of setting up a bank for the purpose of credit repair in order for this issue to be determined by the courts.

II.D. Credit and Debt Related Companies

Since CROA is targeted at companies who promise to repair consumers’ credit, all businesses in the credit industry could potentially fall under CROA’s regulation. In fact, even a credit provider, such as a credit card company or bank, could be labeled as a credit repair organization if it represents that a consumer can improve his or her credit by using the credit provider’s non-credit repair services. To understand how far beyond pure credit repair organizations CROA has been applied to, it is necessary to look at the various forms of credit related businesses and how CROA has been interpreted in each separate context.

II.D.1. Credit Counseling Agencies

A major issue that has developed in CROA analysis is the dichotomy between credit repair organizations and credit counseling agencies. Whereas credit repair organizations work to repair already damaged credit retrospectively, credit counseling agencies prospectively try to teach consumers proper behavior to improve their credit in the future. With such a subjective definition, it is understandable that a fine line exists between the two types of businesses. This fine line is the source of much confusion for plaintiffs and defendants attempting to determine who is and who is not a credit repair organization.

This line was crossed in Zimmerman v. Cambridge Credit Counseling Corp. There the court held that the defendants crossed the line from credit counseling to credit repair by making repeated representations to consumers that the defendants’ services could help improve

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63 If other exceptions were created for businesses like debt collection agencies, debt management agencies, and auto dealerships, the same Baker analysis would likely apply to them as well.
64 See Banks, 2005 WL 1563220 at *2.
65 See Limpert v. Cambridge Credit Counseling Corp., 328 F. Supp. 2d 360, 364 (E.D.N.Y. 2004) (“Legitimate credit counseling, which endeavors to gradually improve clients’ credit by encouraging creditworthy behavior going forward, is distinct from illegitimate forms of credit repair in which clients are given false hopes of absolution for confessed past credit sins.”).
66 Id. (“[T]here is a fine line, in advertising and soliciting for credit counseling services to an unsophisticated audience of lower-income debtors, between promising future rewards for creditworthiness, and implying that existing bad credit records may be prematurely expunged.”).
consumers’ credit and allow a “fresh start” despite a past history of poor credit. Although these services superficially appeared to be prospective, the court reasoned that the message that they intended to convey to consumers was that the defendants’ services could modify the effect of consumers’ past credit history on their credit scores. The defendants’ service of re-aging consumers’ debt in order to get creditors to forgive late payment fees and not report late payments, helped the court conclude that the defendants were engaged in retrospective services to allow consumers to escape the consequences of past uncreditworthy behavior.

Other courts have attempted to provide a better map of exactly where the line is between repair and counseling. A New York district court held that a defendant’s representations that it would reestablish consumers’ spotty credit reports could make the defendant liable under CROA. Likewise, a Pennsylvania district court held that a credit counseling agency, which sold debt management plans to reduce consumers’ credit interest rates and payments, could be classified as a credit repair organization. Another credit counseling agency was deemed a credit repair organization by using television commercials, its website, and other materials to represent to consumers that the agency could assist consumers in improving their credit history or rating.

A Maryland district court noted that while CROA’s aim was primarily at credit repair organizations, its scope made it clearly extendible to credit counseling agencies. By preparing proposals to creditors, communicating with creditors, and receiving, depositing, and disbursing client budget plan payments, the defendant could be liable under CROA. The Maryland court did note that if a credit counseling agency’s credit repair activities were so ancillary to its counseling activity as to be de minimis, it might not be considered a credit repair organization and not subject to CROA.

These courts’ reasoning is instructive since they looked beyond the actual representations made by the defendants and more towards their actual activities and purposes. It appears that if there is a conflict between what a defendant represents (which would not make the defendant liable) and what the defendant actually does (which would make the defendant liable), a court following Zimmerman would be inclined to side with what the defendant actually does. It is important to remember that CROA’s purpose was to prevent credit repair organizations from taking advantage of consumers. With this in mind, it is no surprise that a defendant can be both liable for representations of credit repair services it never intends to perform as well as for performing credit repair services disguised as credit counseling. In sum, if a credit counseling

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67 Zimmerman, 529 F. Supp. 2d at 275.
68 Id. at 277.
69 Id.
72 In re Zuniga, 332 B.R. at 786 (determining that the defendant was a “credit services organization” under a Texas credit repair law before holding the defendant liable for violating CROA).
73 Polacsek, 413 F. Supp. 2d at 546-47.
74 Id. at 548.
75 Id. at 546.
76 Conversely, if a defendant somehow advertised that they provided credit repair but actually offered something that was not bound by CROA such as credit counseling, they could still be subject to CROA under section 1679a. See supra Part II.B.
78 See supra Part II.B.
If Congress did not intend for credit counseling agencies to be bound by CROA, it would be beneficial for it to amend CROA to state this. Specific guidance on what type of activities are prospective (credit counseling) or retrospective (credit repair) would also help courts better define the line between services that CROA covers and those that it does not. By making these two additions to CROA, businesses will be in a better position to self-regulate whether they are offering credit repair and hence must abide by CROA or credit counseling and not bound by CROA. This would also help to weed out counseling agencies from CROA cases and make interpretation of CROA’s other provisions more clear by making those decisions all squarely within the context of credit repair.

II.D.2. Credit Monitoring Services

By its very title, a credit monitoring service would not seem to have much to do with repairing a consumer’s credit. Repairing implies an active role in a consumer’s credit whereas monitoring merely indicates that the company will watch over a consumer’s credit and notify him or her if a problem arises. Some defendants have been surprised to find that this assumption is incorrect and that just like credit counseling agencies, credit monitoring services can also find themselves subject to CROA.

In an early CROA case, the court in In re National Credit Management Group held that a credit monitoring service did not have to provide credit repair services to be subject to CROA. The defendant’s mere representations that it would monitor consumers’ credit and advise them about how to establish or improve their credit ratings was enough for them to be liable under CROA. The court focused on section 1679(a)(3)(A)’s language defining credit repair organization activities to include providing advice or assistance to any consumer with regard to improving their credit record, credit history, or credit rating. The court rejected the defendant’s commentary based argument that credit monitoring programs were not meant to be covered by CROA because the cited commentary clearly conflicted with CROA’s plain statutory language.

Similarly, based on CROA’s plain statutory language, another credit monitoring service was held to be a credit repair organization in Helms v. Consumerinfo.com. The defendant admitted that it charged an annual membership fee for services which included monitoring of consumers’ credit histories, assembling and calculating consumers’ credit scores, and providing consumers with prewritten dispute letters. The defendant’s advertising—which included statements that the defendant would provide consumers with personalized tips on how to establish, rebuild, or improve their credit or credit scores—implied that the defendant would help consumers improve their credit scores. Because the defendant provided a service for money

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79 In re National Credit Management Group, 21 F. Supp. 2d at 457-58.
80 Id.
81 Id.
82 Id. at 458.
83 Because CROA is a consumer protection statute with a remedial purpose, it should be given a liberal or broad interpretation. Helms, 436 F. Supp. 2d at 1229 (N.D. Ala. 2005) (citing Parker v. 1-800 Bar None, A Financial Corp., No. 01 C 4488, 2002 WL 215530 at *2) (N.D. Ill. Feb. 12, 2002)).
84 Helms, 436 F. Supp. 2d at 1232.
85 Id. at 1224.
86 Id. at 1230-31.
and represented that this service would improve a customer’s credit rating, the court concluded that the defendant was a credit repair organization.\(^{87}\) The court further stated that the plaintiff did not need to show that he relied on the defendant’s statements to bring the defendant under CROA.\(^{88}\)

Contrary to the decisions in the cases of *In re National Credit Management Group* and *Helms*, the court in *Hillis v. Equifax Consumer Services* reached a different conclusion. There, the defendant provided a service which reviewed each consumer’s credit report, calculated the consumer’s credit score, and analyzed the report.\(^{89}\) Despite numerous statements that the defendant would improve a consumer’s credit record that would seem to indicate credit repair services, the court denied the plaintiff’s motion for summary judgment and refused to declare that the defendant was a credit repair organization as a matter of law.\(^{90}\) The *Helms* court noted that the average consumer might interpret the defendant’s statements to mean that its service would help one improve his or her credit score in the future alluding to the prospective/retrospective line used in credit counseling agency analysis.\(^{91}\) Additionally, the plaintiff failed to show that “the” purpose rather than “a” purpose of the defendant’s service was to improve a consumer’s credit record.\(^{92}\)

As *In re National Credit Management Group* and *Helms* showed, courts are likely to classify credit monitoring services as credit repair. If a credit monitoring service can convince the court that its services were prospective in nature and more akin to credit counseling rather than credit repair, it may be able to avoid summary judgment on the issue like the defendant in *Hillis*. Both of these outcomes seem to be consistent with the purposes of CROA and should not be seen as overreaching or in need of change.

\section*{II.D.3. Debt Collection Agencies}

Debt collection agencies are companies that collect debts on behalf of the consumer’s creditors. The collection of debts does not seem to involve the type of credit services that CROA targets. Nevertheless, this has not stopped some courts from holding that debt collection agencies can be liable under CROA.

The court in *Bigalke v. Creditrust Corp.* denied the defendant debt collector’s motion to dismiss. The court’s basis for this holding was that one of the defendant’s collection letters stated that if the debtor paid his or her debt, the defendant would report the account as satisfied to the credit bureau.\(^{93}\) The court held that the defendant did not fit into section 1679a(3)(B)(ii)’s exemption for creditors as it was not the initial entity that extended credit to the plaintiff (the defendant had purchased delinquent debts at a discount from the initial creditor and then sought to collect from the debtor).\(^{94}\) The court’s reading of the creditor exemption as only applying to

\(^{87}\) *Id.* at 1232.
\(^{88}\) *Id.* at 1231 n.13. However, because the plaintiff did not present sufficient evidence for a jury to conclude that he himself individually relied upon the defendant’s statements, the defendant’s motion for summary judgment was granted. *Id.* at 1238.
\(^{89}\) *Hillis*, 237 F.R.D. at 493-94.
\(^{90}\) *Id.* at 517.
\(^{91}\) *Id.* at 516-17 (“There is at least a genuine issue of material fact as to whether Defendants, through their representations, implied to the average consumer that they performed a form of credit repair or instead merely engaged in a form of legitimate credit counseling to help consumers improve their FICO scores over time.”).
\(^{92}\) *Id.* at 517.
\(^{93}\) *Bigalke v. Creditrust Corp.*, 162 F. Supp. 2d 996, 998 (N.D. Ill. 2001).
\(^{94}\) *Id.* at 998-99. Under 15 U.S.C. 1602, the term creditor refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by
the initial creditor is sound, but to bind a debt collection agency under CROA because it explained the basic facts of credit reporting—namely that if the consumer paid off the debt, then the collection agency would report the debt as satisfied—seems to be an incorrect extension of CROA to an area beyond its purpose of regulating credit repair services.

Likewise, another defendant debt collector had its motion to dismiss denied in Nielsen v. United Creditors Alliance Corp. The defendant had sent a letter to the plaintiff offering to settle the plaintiff’s debt. This did not seem to have anything to do with credit repair. Unfortunately for the defendant, in the letter a sentence was included stating, “Take advantage of this opportunity to repair your credit at a substantial savings.” This statement was enough to defeat the defendant’s motion to dismiss. Clearly, any company which makes a representation that something it provides will “repair your credit” makes it rather easy for a court to determine that it could be a credit repair organization.

Nevertheless, a debt collection agency can avoid being deemed a credit repair organization even if it does make such a representational mistake. Like the defendant in Nielsen, the defendant in Oslan v. Collection Bureau of Hudson Valley made a representation stating, “To take advantage of this great opportunity to help restore your credit…” in an attempt to get a delinquent debtor to pay her debt to the defendant. Unlike in Nielsen, the Oslan court sided with the defendant and denied the plaintiff’s motion to amend her complaint to add a CROA claim holding that collection agencies—which do not seek compensation for credit repair services—do not engage in the type of activities Congress was concerned with when it enacted CROA. Since the court held that the defendant was not a credit repair organization, it did not decide whether the creditor exemption to CROA applied since the exemption only comes into play once a creditor is deemed a credit repair organization.

The court in White v. Financial Credit Corp. came to a similar conclusion as the Oslan court. In granting the defendant’s motion for summary judgment, the court held that the defendant was a debt collector providing a service for creditors and for its own account, not performing services for the purpose of improving the plaintiff’s credit history. The defendant’s suggestion to the plaintiff, that settlement of his debt could improve the plaintiff’s credit history by having the debt reported as satisfied, did not make the defendant a credit repair organization because it was merely following the standard business procedure of reporting the satisfaction of a debt. To hold otherwise would not serve the underlying intent of CROA.

In sum, because CROA is targeted at companies which represent to consumers that they can repair consumers’ credit, debt collection agencies which avoid such representations and only collect debts should not be subject to CROA. An express CROA exemption like the nonprofit,

agreement in more than four installments or for which payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable.

95 The credit exemption from CROA defines creditors via reference to 15 U.S.C. § 1602 which in turn defines creditors as “the person to whom the debt arising from the consumer credit transaction is initially payable.” 15 U.S.C. § 1602(f)(2).
97 Id. at *2-3.
99 Id. at *2.
100 Id. (“[I]n order for the qualified creditors exception to become relevant, an entity must first meet the definitional requirements of § 1679a(3)(A)…”).
102 Id.
II.D.4. Debt Management Programs

In contrast to debt collection agencies that work for lenders to get debtors to pay back their debts, a debt management program attempts to work with the debtor to pay off his or her debts, usually at a reduced amount. Like other businesses that may be tangentially related to credit repair, if a debt management company makes no representations with respect to repairing or restoring a consumer’s credit, then it will most likely not be deemed a credit repair organization and thus outside of CROA’s scope. The only two cases involving debt management programs both involved the same defendant, Edge Solutions, Inc., and had conflicting results.

Since debt management programs can end up harming a consumer’s credit, it is no coincidence that these programs often are coupled with credit restoration programs. Such was the defendant’s business model in Cortese v. Edge Solutions where the court denied the defendant’s motion for summary judgment. Since the credit restoration program that followed the defendant’s debt management plan sought to rehabilitate or repair the consumer’s credit score, the defendant could be deemed a credit repair organization. Again, the use of advertising terms was critical as the terms “rehabilitate” and “restoration” implied a reestablishment of good credit. The fact that the plaintiff was not eligible to participate in the credit restoration program did not effect whether the defendant could be a credit repair organization since CROA only requires a representation of providing credit repair. Importantly, the court also noted that there was nothing in the statutory definition of credit repair organization that suggested that credit repair services must be the principal or only services of the defendant. As a result of these facts, the Cortese court held that Edge Solutions could be a credit repair organization.

Edge Solutions had better luck in New York in Plattner v. Edge Solutions where the court granted Edge Solutions’ motion for summary judgment. The Plattner court stated that Congress was only concerned with credit repair organizations and CROA should only reach entities whose focus is the improvement or repair of a consumer’s credit record, credit history, or credit rating. The defendant did not fit into this category and was therefore not a credit repair organization. Unlike in Cortese, the Plattner court concluded that improved credit from the defendant’s debt management program was merely a byproduct of the program and that the defendant’s other credit related services were focused on prospective creditworthy behavior similar to credit counseling. Finally, the court noted that the purpose of the defendant’s credit

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103 The creditor exemption, section 1679a(3)(B)(ii), has not had any published cases other than the aforementioned Bigalke case supra notes 93 and 94.
105 Id.
106 Id. at *6.
107 Id. at *7.
108 Id. at *7. But see Hillis, 237 F.R.D. at 517.
109 Plattner v. Edge Solutions, Inc. 422 F. Supp. 2d 969, 975 (N.D. Ill. 2006).
110 Id. at 976.
repair services was to undo the damage done to the consumer’s credit from the debt management program, not to improve the consumer’s credit score. 111

Unlike debt collection agencies, debt management programs present a difficult issue. On the one hand, it is beneficial to society for consumers to pay off their debts and companies which help consumers accomplish this should be encouraged. To make such a company subject to CROA’s strict regulations could discourage or make more costly these types of businesses. On the other hand, consumers should not lose their CROA protection when credit repair services have been offered simply because the repair was in conjunction with, or because of, a debt management program. Since the only cases regarding debt management programs involve the same defendant, precedent will be shaped via future court decisions based on specific factual circumstances. 112 Congress could address this issue, but until there are more court decisions, it may be best for Congress to leave the fate of debt collection agencies to the courts for now.

II.E. Auto Dealerships

It is understandable that companies involved in credit and debt related business could plausibly be accused of offering credit repair services. More perplexing is the number of CROA cases involving automobile dealerships. These cases usually revolve around the financing of automobiles and their possible affect on a consumer’s credit. Unlike in other contexts where the case law is ambiguous, the weight of authority with regards to auto dealerships has rather consistently held that auto dealerships are not credit repair organizations. 113

As in other contexts like debt collection agencies, since auto dealerships are not directly involved in credit repair, as long as they are careful to avoid representing that they perform credit repair services then they will likely not be deemed a credit repair organization. 114 However, even if an auto dealership makes advertisements that include phrases like “reestablishing credit,” it still can avoid being considered a credit repair organization on the grounds that its primary purpose is to sell and lease cars, not to perform credit repair services. 115 The prospective analysis of credit counseling services has also been used to determine that an auto dealership was

111 Id.
112 Since debt management programs usually involve some form of credit counseling, it may make sense for debt management programs to be analyzed under the credit counseling rubric described in Part II.D.2. rather than their own separate analysis. As of now, both of these areas have avoided the confusion of other areas and do not require Congressional attention.
113 See, e.g., Berry, 2009 WL 1971391 at *2; Nixon, 2008 WL 4544369 at *7.
114 See Henry, 522 F. Supp. 2d at 614. Many plaintiffs suing auto dealerships for CROA violations have their claims fail due to the fact that they are unable to show additional consideration for credit repair services since auto dealerships usually do not charge a fee for arranging for consumer financing. See Rodriguez v. Lynch Ford, Inc., No. 03 C 7727, 2004 WL 2958772, at * (N.D. Ill. Nov. 18, 2004); Sannes, 1999 WL 3313134 at *3.
115 See Berry, 2009 WL 1971391 at *2. Even an auto dealer discussing the repair of consumers’ credit in its advertisements may not be enough to render it a credit repair organization, particularly when the advertisement is in the automobile classified section of the newspaper and is clearly ancillary to the auto dealership’s primary business of selling and leasing automobiles. Sannes v. Jeff Wyler Chevrolet, Inc., No. C-1-97-930, 1999 WL 33313134, at *2-3 (S.D. Ohio Mar. 31, 1999). But see Parker, at 2002 WL 215530 *4 (holding that the defendant did not engage in offering financing assistance ancillary to some other primary purpose).
not a credit repair organization.\textsuperscript{116} Further, a true statement made about credit by an auto dealership did not render it a credit repair organization.\textsuperscript{117}

Since courts have roundly rejected the numerous attempts to bring auto dealerships under CROA, congressional action on this issue does not seem necessary. If Congress were to amend CROA, it would not cause any harm to add auto dealerships as an express exception.

\textbf{II.F. Attorneys}

In addition to credit and debt related companies and auto dealerships being involved in CROA litigation, attorneys have also been found to fall under CROA’s regulations. These cases have revolved around an attorney acting to repair a consumer’s credit.

The court in \textit{Iosello v. Lexington Law Firm} held that CROA applies to lawyers as well as any other persons who act in the manner of a credit repair organization unless specifically exempt from CROA. The court listed the express exemptions that CROA provides under section 1679a(3)(B) and then noted that attorneys were not included on this list.\textsuperscript{118} Similarly, the court in \textit{Rannis v. Fair Credit Lawyers} held that even though the defendant was acting within his capacity as an attorney, CROA applied to him because the nature of his services were focused on improving the plaintiff’s credit rating.\textsuperscript{119} However, in an odd case, an attorney who had never been licensed in Ohio and had been disbarred in another state was held to only have engaged in the unauthorized practice of law but was not a credit repair organization when he wrote letters on his client’s behalf to credit reporting agencies.\textsuperscript{120}

Attorneys are treated as any other person under CROA. There is no express exemption for attorneys like there is for nonprofits, creditors, and banks.\textsuperscript{121} Thus, in examining whether an attorney can be liable under CROA, the fact that the defendant is an attorney is irrelevant and the only analysis that is necessary is the standard “person” affiliated with a credit repair organization analysis discussed in Part II.A. This is the proper rule and does not need to be altered by Congress.

\textbf{III. What CROA Requires and Prohibits}

CROA both imposes requirements on credit repair organizations to do specific things as well as prohibits them from certain actions. It created a detailed disclosure process which credit repair organizations must comply with to avoid violating CROA. Additionally, CROA expressly forbids other activities that “no person” can do. As shown earlier, it is not yet clear how substantial a person’s relationship with a credit repair organization needs to be in order for him to be bound by CROA.\textsuperscript{122} Because of the difficulty in complying with the requirements detailed

\begin{itemize}
\item \textsuperscript{117} Wojcik v. Courtesy Auto Sales, Inc., No. 8:01CV506, 2002 WL 31663298, at *8-9 (D. Neb. Nov. 25, 2002) (holding that the defendant’s representations that a consumer could build a good credit record by making timely payments did not make it a credit repair organization because this was merely a statement of a true fact about credit and not any form of credit repair).
\item \textsuperscript{118} \textit{Iosello}, 2003 WL 21920237 at *6.
\item \textsuperscript{119} \textit{Rannis v. Fair Credit Lawyers}, Inc., 489 F. Supp. 2d 1110, 1113-14 (C.D. Cal. 2007).
\item \textsuperscript{120} \textit{Disciplinary Counsel v. Brown}, 905 N.E.2d 163, 168 (2009) (rejecting the defendant’s claim that he was acting as a credit repair organization instead of an attorney because he had not abided by CROA’s written contract and statement requirements nor had he registered with the state as a credit-services organization).
\item \textsuperscript{121} \textit{See supra} Part II.C.
\item \textsuperscript{122} \textit{See supra} Part II.A.
\end{itemize}
below, many defendants admit that they failed to comply with CROA and instead argue that they are not a credit repair organization altogether.\textsuperscript{123}

**III.A. What CROA Requires of Credit Repair Organizations**

CROA does not make it illegal to be a credit repair organization. What it does require is that credit repair organizations disclose certain information to consumers.\textsuperscript{124} Failure to comply with these requirements is a violation of CROA which a credit repair organization can be liable for even if they have conducted no fraudulent activity.\textsuperscript{125}

**III.A.1. Written Contract and Three Day Cooling-Off Period**

Section 1679d(a) imposes two threshold requirements on credit repair organizations before they are allowed to perform credit repair services for a consumer. First, no services may be performed until a written and dated contract has been signed by the consumer.\textsuperscript{126} Second, no services may be performed until three business days have passed from the date the contract was signed.\textsuperscript{127} The purpose of these requirements is to provide consumers with a contract stipulating what they are getting into and time to reflect on whether or not they want to go forward with the credit repair services. These two requirements are conjunctive and both must be satisfied before credit repair services can begin.\textsuperscript{128}

CROA specifies certain terms and conditions that must be included in this written contract. First, the terms and conditions of payment must be explained, including the total amount of all payments to be made by the consumer to the credit repair organization or to any other person.\textsuperscript{129} A second contract stipulation is a full and detailed description of the services to be performed, including all guarantees of performance, the estimated date on which all services will be complete, and an estimate of the length of time necessary to perform such services.\textsuperscript{130} Third, the credit repair organization’s name and principal business address must appear on the contract.\textsuperscript{131} Lastly, a “conspicuous statement” regarding the consumer’s right to cancel the contract must be in bold face type and in immediate proximity to the space reserved for the consumer’s signature on the contract.\textsuperscript{132} If any of these items are not included in the contract, the contract is not effective for purposes of section 1679d(a). If a credit repair organization performs services under a deficient contract, it has violated CROA.\textsuperscript{133}

\textsuperscript{123} See supra note 28.
\textsuperscript{125} See Rannis, 489 F.Supp.2d at 1118.
\textsuperscript{130} 15 U.S.C. § 1679d(b)(2).
\textsuperscript{131} 15 U.S.C. § 1679d(b)(3).
\textsuperscript{132} The statement must read: “You may cancel this contract without penalty or obligation at any time before midnight of the 3rd business day after the date on which you signed the contract. See the attached notice of cancellation form for an explanation of this right.” 15 U.S.C. § 1679d(b)(4). The right to actually cancel the credit repair contract comes from 15 U.S.C. § 1679e.
\textsuperscript{133} 15 U.S.C. § 1679d(b).
These requirements are rather straightforward and have not resulted in any significant confusion in the case law. As such, no alterations would seem necessary.

III.A.2. Written Disclosure
Credit repair organizations must provide any consumer with a lengthy written statement detailing the consumer’s rights before any contract or agreement between the consumer and the credit repair organization is executed.\(^{134}\) This statement must be provided as a separate document from any written contract or other agreement between the credit repair organization and the consumer or any other written material provided to the consumer.\(^{135}\) The credit repair

\(^{134}\) 15 U.S.C. § 1679c(a). The written disclosure statement reads:

“You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any ‘credit repair’ company or credit repair organization has the right to have accurate, current, and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

“You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance, or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

“You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.

“You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.

“Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However, mistakes may occur.

“You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau.

“If the credit bureau’s reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau, to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you.

“The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact:

“The Public Reference Branch

“Federal Trade Commission

“Washington, D.C. 20580”.

organization must maintain a copy of the statement signed by the consumer acknowledging receipt of the statement for two years after the date on which the statement is signed. This is a sound requirement that does not need any Congressional changes.

### III.A.3. Notification of Cancellation Rights

Credit repair organizations must notify consumers of certain cancellation rights applicable to credit repair contracts. Piggybacking off of section 1679d(a)’s prohibition of credit repair work until the passage of three business days, any consumer may cancel his or her credit repair contract without penalty or obligation by notifying the credit repair organization before midnight of the third business day after the date on which the contract was executed. It is unclear whether Congress intended the three day periods to start at the same time as section 1679e is very specific in that it is measured after the date on which the contract is executed while section 1679d’s period begins on the date the contract is signed. It is ambiguous whether or not 1679d includes the date that the contract is signed in its calculation and at what time the contract becomes effective.

No case has clarified this issue yet, but it is plausible that a consumer could sign a contract on Monday, the credit repair organization could begin rendering services on Thursday, only to have the consumer send in his cancellation notice at 11:59 PM Thursday night. Under these circumstances, the credit repair organization has not violated CROA (since three business days have passed before it began working), but the consumer would not be obligated to pay either (since he cancelled before midnight of the third business day after the contract was executed).

The most practical reading would have the periods run concurrently, but a strong argument can be made that Congress did not intend this since they clearly chose different language in two adjoining sections. It would be beneficial if Congress clarified these two provisions to either clearly be identical, such as one section referring to the time period of the other, or to clearly be different and explain what would happen in the timing conundrum detailed above.

### III.A.4. Payment Only After Services Have Been Performed

No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service, which the credit repair organization has agreed to perform for any consumer, before such service is fully performed. This requirement is designed to protect consumers from paying money up front for services that the company would then not be incentivized to perform since they would have already been paid. Nevertheless, not

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139 15 U.S.C. § 1679e(a) ("Any consumer may cancel any contract with any credit repair organization without penalty or obligation by notifying the credit repair organization of the consumer's intention to do so at any time before midnight of the 3rd business day which begins after the date on which the contract or agreement between the consumer and the credit repair organization is executed or would, but for this subsection, become enforceable against the parties.") (emphasis added).
140 Section 1679c(a)’s required disclosure only adds to the confusion. It states: “You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.” 15 U.S.C. § 1679c(a) (emphasis added).
allowing for any payment until all services have been performed severely restricts the way businesses can provide their services.

One billing structure that has fallen victim to this prohibition is the use of downpayments. The Ninth Circuit has held that a credit repair organization’s requirement of consumers to provide a downpayment for its services at the conclusion of the consumer’s initial consultation constituted advance payment and was a violation of CROA. An attorney who contracted with a debtor to perform credit repair services and then sent letters to his client detailing work that he had completed for the debtor after the debtor had paid a portion of the attorney’s required downpayment also constituted an advanced payment. Since a downpayment is by definition an upfront payment given before services are rendered, they are clearly prohibited by CROA.

While downpayments can be clearly seen as disfavored since they would frustrate the purposes of the cancellation and waiting period rights, the bigger concern is that credit repair organizations are severely restricted in the types of services they can offer because of CROA’s ban on any payment before the services are completed. While it is true that the purpose of CROA was to prevent unscrupulous companies from preying on less financially savvy consumers, requiring credit repair organizations’ payment plans to only charge on full performance restricts the market in an unnecessary way that may in fact cause a disadvantage to these same consumers who CROA was designed to protect. Allowing companies to come up with creative payment structures—such as monthly payments or at certain steps along the repair process—would allay consumers’ fears that they might pay money for services that will never be performed while allowing businesses to collect payment from their customers in a reasonable timeframe for services rendered. Prudence requires one to not just consider the ignorant consumer who may get taken advantage of by an unscrupulous company but also the companies that work with people who have poor financial histories so that they actually receive payment for the services they provide.

Suppose a credit repair organization has a service that lasts for two years. It is unreasonable to prevent the company from receiving any payments until those two years have passed, especially if the company is a startup trying to make ends meet in its first few years of operation. A company with no revenue for two years will likely have a tough time staying in business. Its customers—who were legally having their credit repaired—would be left without a service provider and with a credit history that remains unrepaired. Thus, CROA’s current payment structure encourages a system of quick credit repair programs because that is the only way a credit repair organization can collect the revenue needed to keep it in business. A possible solution would be to have a program with multiple “end points” and then have the consumer enroll in the next program to continue improving his or her credit. However it is likely that this would be seen as one continuous service since credit repair is not a service that necessarily has a definitive end point and the intermediate payments at each step would be deemed advance

142 Gill, 265 F.3d at 956.
143 Rannis, 489 F. Supp. 2d at 1117.
144 Merriam-Webster defines “downpayment” as: a part of the full price paid at the time of purchase or delivery with the balance to be paid later. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/downpayment.
145 A New Jersey district court has held that CROA’s complete ban on any payment before all services have been rendered does not impinge on the First Amendment rights of credit repair organizations. See In re National Credit Management Group, 21 F. Supp. 2d at 459-60.
146 Id. at 431 (defendant’s services were part of a two-year program).
payments in violation of CROA. Any change of billing procedures other than a lump sum payment at the end of services will require an alteration of CROA.

Further complicating this prohibition is the issue of guarantees. A credit repair organization that provided an initial verification and correction of a consumer’s credit information along with a two year guarantee that the consumer’s credit information would be rereverified until inaccurate and obsolete information was removed would seem to be the type of service which society should be encouraging. Not only is this type of service helping consumers remove incorrect information, it is also making a promise to consumers that they will get what they are paying for, namely having inaccurate and obsolete information removed from their credit history. Nevertheless, the court in Cornerstone Wealth held that the defendant’s services did not end until its two year guarantee had expired. Because of this, the defendant’s receipt of payment before that time was a violation of CROA. This was despite the fact that the defendant’s service contract stated that its services were finished once the initial set of verification requests was completed. If there was ever a situation where a credit repair organization did everything right only to be tripped up by CROA being applied inconsistently with its purpose of protecting consumers from unscrupulous companies, this was it.

To recap, a credit repair organization cannot charge for its services until they are completed. The prohibition of downpayments makes sense as it reinforces the cooling off and cancellation rights that CROA grants consumers. However, CROA’s purposes are not furthered by the effective prohibition of long term programs or warranties. The best solution would be for Congress to change CROA to at least exclude warranties from the determination of when services are finalized and to preferably allow for more reasonable forms of payment other than a lump sum bill at the very end of the service.

### III.B. What CROA Prohibits Persons From Doing

In addition to the aforementioned affirmative requirements imposed on credit repair organizations, CROA also places prohibitions on persons with regards to their conduct with credit reporting agencies and creditors as well as on actions between persons and consumers.

#### III.B.1. Prohibition of Untrue or Misleading Statements

In general, no person may make any statement, or advise a consumer to make any statement, which is untrue or misleading, or which upon the exercise of reasonable care should be known to be untrue or misleading, with respect to any consumer’s creditworthiness, credit standing, or credit capacity to: any consumer reporting agency, any person who has extended credit to the consumer, or any person to whom the consumer has applied or is applying for an extension of credit. Essentially, a person cannot commit fraud or advise someone to commit fraud with regards to his or her credit.

Further, no person may make any statement, or advise any consumer to make any statement, the intended effect of which is to alter the consumer’s identification to prevent the display of the consumer’s credit record, history or rating for the purpose of concealing adverse

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148 Id. at 7.
149 Id. at 6-7.
150 See also Polacek, 413 F. Supp. 2d at 541 (holding that upfront payments that the defendant claimed were contributions to a nonprofit could not let it escape CROA since the payments passed through for-profit entities and services were rendered in exchange for the contributions).
information that is accurate and not obsolete to: any consumer reporting agency, any person who has extended credit to the consumer, or any person to whom the consumer has applied or is applying for an extension of credit.\(^\text{152}\) This provision is targeted at credit repair organizations whose method of “improving” their customers’ credit scores is by flooding credit reporting agencies with false credit report dispute letters (“disputing” accurate and not obsolete negative information). The hope of organizations using this method of “repair” is that one of their dispute letters will go unanswered and force the consumer reporting company to remove the negative information from the consumer’s credit report.\(^\text{153}\)

Additionally, CROA imposes two requirements on persons regarding their contact with consumers. First, no person may make or use any untrue or misleading representation of the services of the credit repair organization.\(^\text{154}\) Second, CROA forbids any person from engaging, directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization.\(^\text{155}\) While these two requirements may seem similar on the surface, one court has held that these provisions were intended to target different behavior and that the inclusion of “fraud” in one section but not the other implies that Congress intended to create two different standards for pleading and proof.\(^\text{156}\)

The issue of a person making an untrue or misleading statement has come up in a variety of contexts. The most common of which are with regards to a consumer’s creditworthiness,\(^\text{157}\) altering information about a consumer’s identity,\(^\text{158}\) and the promotion of credit repair services.\(^\text{159}\) For the most part, this section has not been the source of divergent case law.

### III.B.2. Prohibition of Fraud or Deception

One of the major targets of CROA is the prevention of fraud. A defendant can violate CROA without committing fraud.\(^\text{160}\) In fact, since CROA was designed to regulate credit repair services and not forbid them, all providers of credit repair services are subject to CROA, not just those that engage in fraudulent activities.\(^\text{161}\) That said, many CROA cases have focused on violations of section 1679b(a)(4)’s prohibition of engaging in a fraud or deception, although the focus of those cases usually was on whether the defendant was actually bound by CROA or not.\(^\text{162}\)


\(^{153}\) See supra note 6.

\(^{154}\) 15 U.S.C. § 1679b(a)(3). A company which falsely represents its services can be a credit repair organization under 1679a(3)(A) and then liable for making an untrue representation under 1679b(a)(3).


\(^{156}\) See Helms, 436 F. Supp. 2d at 1236-37.


\(^{160}\) See Rannis, 489 F. Supp. 2d 1110, 1117-18. The defendant’s violation of CROA also caused it to violate California’s Unfair Competition Law (Cal. Bus. & Prof. Code § 17200). Id. at 1118-19.

\(^{161}\) See Helms, 436 F. Supp. 2d at 1229-30.

III.B.3. CROA’s Fraud Standard
There have been two different standards which courts have used to determine CROA fraud. Both are much more demanding on defendants than the typical reasonable person standard of many other statutes. The focus of these courts has been on section 1679b(a)(3)’s prohibition of “untrue or misleading representation of the services of the credit repair organization.”163

The first, employed by the Helms court, is the “least sophisticated consumer” standard.164 In analyzing the term “misleading,” the Helms court compared CROA to the Fair Debt Collection Practices Act165 since both acts aim to protect the public.166 This public includes “the ignorant, the unthinking and the credulous.”167 The court denied in part the plaintiff’s motion for summary judgment and left it to the finder of fact to determine whether the defendant’s advertisements were misleading under this framing of the least sophisticated consumer.168

In conducting similar analysis of whether a statement was “misleading,” the White v. Financial Credit Corp. concluded that the standard should be the “unsophisticated consumer.” Unlike in Helms, the White court granted the defendant’s motion for summary judgment and held that the defendant’s letters, which told consumers that settling their debt would improve their credit histories, were not misleading to the unsophisticated debtor.169 The unsophisticated consumer standard was also used to determine class certification in Bigalke v. Credittrust Corp., without much discussion.170

It is clear that CROA fraud is to be judged at a standard far below the reasonable consumer. The “unsophisticated consumer” standard is slightly more defendant friendly than the “least sophisticated consumer” standard under which summary judgment for a defendant is nearly impossible.171 Whatever the original intent, it would be best for Congress to clearly define what the standard for CROA fraud should be so that future cases are not analyzed under two standards with far different requirements.

IV. Derivative CROA Issues
A variety of derivative issues have been created by CROA. These include problems regarding damages, waiver of rights, and the viability of CROA class action claims. These are issues that are applicable to all laws have to deal with, but Congress was silent on most of them with regards to CROA. Due to this silence and the relative dearth of CROA cases, not enough guidance has been provided yet on these issues to see where they stand.

IV.A. Damages
The Credit Repair Organizations Act is a civil statute. It has no criminal provisions since its goal is to protect consumers from unscrupulous credit repair organizations, not criminalize

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164 Helms, 436 F. Supp. 2d at 1236.
166 Id. at 1235-36.
167 Id. at 1236.
168 Id. at 1237.
171 A third standard that seems more complementary to the first two rather than an independent standard is the “overall net impression” standard where the entirety of the defendant’s representations are to be considered. See Gill, 265 F.3d at 956; Slack, 390 F. Supp. 2d at 913.
credit repair. As such, the end goal of CROA—besides getting credit repair organizations to behave more ethically—is to provide damages to consumers who are harmed. Section 1679g provides for three separate categories of damages: actual damages, punitive damages, and attorney’s fees and costs.

IV.A.1. Actual Damages

Section 1679g(a)(1) is the actual damages provision of CROA. It makes any person who fails to comply with CROA, with respect to another person, liable for actual damages amounting to the greater of either the amount of any actual damage sustained by such person as a result of the failure to comply or any amount paid by the person to the credit repair organization.

In Hillis, the court held that “actual damages” amounted to a statutory penalty. Because of this, the plaintiff did not have to prove that he suffered economic harm resulting from the defendant’s noncompliance with CROA. In so holding, the court stated that CROA sets a fixed amount of damages equal to the amount paid to the credit repair organization regardless of the wrongness of the credit repair organization’s conduct. Likewise, the court in Asmar v. Benchmark Literacy Group held that the proper amount of damages was the amount paid by the plaintiff to the defendant when the defendant violated CROA by precharging its customers for credit repair services. This is a perfectly reasonable reading of the statute since a consumer, at minimum, was harmed by the amount that was paid to the credit repair organization and should be entitled to at least that much in damages.

In an enforcement case, the FTC was able to prove that the proper amount for the defendant to pay as restitution for violating CROA was the amount the defendant’s customers had paid for credit repair services despite the fact that no actual damages were proven. However, it is uncertain whether compensation for things like mental suffering is encompassed in actual damages under CROA. Congress has provided no guidance on this issue but because every other aspect of CROA is about finances and credit, damages for mental suffering seem to be beyond its scope.

A plaintiff’s actual damages must arise “as a result of” the defendant’s CROA violations. This requirement has been interpreted rather broadly. In Parker v. 1-800 Bar None, the defendant was a car dealership which, as part of its financing program, told the plaintiff to give the defendant a check for the purchase price of the car even though the defendant knew that the plaintiff did not have the funds to cover the check. Having the plaintiff write a bad check undermined the defendant’s alleged representation that it could improve the plaintiff’s credit and

175 Hillis, 237 F.R.D. at 506-07.
176 Id.
177 Id.
179 Gill, 265 F.3d at 958.
181 Mental suffering damages have constituted actual damages in similar statutes. See id. at *3-4 (noting that mental suffering damages are allowed under the Equal Credit Opportunity Act and the Illinois Consumer Fraud Act).
183 Parker, 2002 WL 215530 at *1.
would constitute a CROA violation. The plaintiff subsequently spent $200 repairing the car after purchasing it through the process the defendant suggested. When the plaintiff realized that the defendant’s actions put her credit in further peril, she returned the car. The court held that for the purposes of defeating the defendant’s motion to dismiss, the $200 the plaintiff spent on repairing her car occurred “as a result of” the defendant’s CROA violation since the plaintiff would not have spent money repairing the car if she had never purchased the car in the first place.

Unlike many other aspects of CROA, actual damages do not appear to be much of an issue. Whether mental suffering is counted as actual damages could be addressed by Congress, but is not as pressing of a concern as other issues since it has only come up in one case and was given short shrift. The “as a result of” requirement is best left to the courts to determine on a case-by-case basis rather than for Congress to try and make it more specific than it already is.

**IV.A.2. Punitive Damages**

Besides the aforementioned actual damages that plaintiffs are entitled to under section 1679g(a)(1), punitive damages may also be available under section 1679g(a)(2). To determine if punitive damages are warranted, courts are to consider: (1) the frequency and persistence of noncompliance by the credit repair organization; (2) the nature of the noncompliance; and (3) the extent to which such noncompliance was intentional. Looking at these factors, the behavior most deserving of punitive damages would be knowingly violating CROA on a recurring basis. Committing fraud would presumably be more likely to incur punitive damages than a procedural violation since it would by definition be intentional (although a defendant could certainly intentionally violate a procedural rule) and likely viewed as more serious in nature than, for example, only waiting two days to begin services rather than three.

Since many defendants admit to not complying with CROA and rely on the sole defense of arguing that they are not a credit repair organization, it will be interesting to see how courts interpret this as a knowing violation of CROA. On the one hand, a defendant in this position “knew” it was not complying with CROA. On the other hand, if a defendant honestly believed that it was not a credit repair organization and that CROA did not apply to it, the defendant did not “know” that it had to comply with CROA and any violation would not be a “knowing” violation. Reading CROA as a whole would indicate that a defendant would have to know that it was a credit repair organization and know it was not complying with CROA to knowingly violate the act.

In Asmar v. Benchmark Literacy Group, the court awarded punitive damages to the plaintiff. The defendant in Asmar violated CROA by precharging the plaintiff and hundreds of other consumers before its services were completed. The court held that the award of $1,587, which amounted to approximately a 3 to 1 ratio compared to actual damages, was appropriate. Interestingly, the defendant did not oppose the plaintiff’s request for this amount of punitives, perhaps because it was satisfied with such a low ratio and amount.

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184 Id. at *6.
185 Id.
186 Id. at *6-7.
188 See supra note 28.
189 Asmar, 2007 WL 925623 at *1.
190 Id.
The court in *Pena v. Freedom Mortg. Team* held that punitive damages are not merely ancillary to actual damages but are in fact an independent basis for relief.\(^{191}\) In *Pena*, the defendant mortgage broker overstated the plaintiffs’ educational background, assets, and gross income on a loan application which allowed the plaintiffs to qualify for a higher loan amount than they would have been able to obtain otherwise.\(^{192}\) This misleading statement of the plaintiffs’ creditworthiness could be a violation of CROA.\(^{193}\) The defendant contended that the plaintiffs’ punitive damages claim could not survive after the plaintiffs rescinded the loan since the plaintiffs then had no actual damages.\(^{194}\) The court rejected this argument holding that punitive damages under CROA are an independent basis for recovery.\(^{195}\)

The reasoning of the *Pena* court was repeated in *Parker*. Since section 1679g(a)(2) provides for punitive damages in such “additional amount as the court may allow,” punitive damages were held to be independent of actual damages.\(^{196}\) The *Parker* court rejected the defendant’s argument that the presence of the term “additional” meant that punitive damages could only be awarded when actual damages were also found.\(^{197}\)

As will be discussed in Part VI.B, CROA has a nonwaiver provision\(^{198}\) that prevents parties from waiving the rights created by CROA. As such, a plaintiff cannot waive the availability of punitive damages.\(^{199}\)

The availability of punitive damages when there are no actual damages is a curious development. One could argue that it allows for the public to act as private attorneys general in punishing wrongful defendants. But the fact that the FTC and state attorneys general can prosecute CROA claims as well seems to undermine this argument. As much as Congress was concerned about unscrupulous companies taking advantage of consumers, under *Pena* and *Parker*, an unscrupulous plaintiff could bring a claim asking for punitive damages even if no damages were suffered. It is difficult to believe that this is what Congress intended, but if it was, it should be explicitly stated so that all parties can operate on known terms.

### IV.A.3. Attorney’s Fees and Costs

Whereas section 1679g(a)(1) outlines actual damages and section 1679g(a)(2) guides punitive damages, section 1679g(a)(3) accounts for attorney’s fees and costs for CROA claims.

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192 Id. at *1.
193 Id. at *6.
194 Id. at *2.
195 Id. at *4.
197 Id. As CROA courts have done in determining other provisions of the act, the court reviewed similar statutes—in this case the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p., and the Equal Credit Opportunity Act, § 15 U.S.C. § 1691e(b) (1991)—to come to its conclusion on how CROA should be interpreted.
Section 1679g(a)(3) provides that when a suit for actual or punitive damages is successful, the defendant shall be liable for reasonable attorney’s fees and costs. A reasonable attorney’s fee is one that is adequate to attract competent counsel but is not so excessive so as to result in a windfall for the attorney.

The fact that CROA authorizes attorney’s fees awards for cases that involve even very small amounts of money helps keep individual actions feasible. From a plaintiff’s viewpoint, this situation is preferable since it affords plaintiffs with small claims the opportunity to obtain adequate representation. However, CROA’s consumer protection focus is lost when attorney’s fees amount to a much larger recovery for the attorney than for the plaintiff. Of course, defendants do not like attorney’s fees provisions since these provisions significantly increase the price of a settlement as well as the cost of losing in court.

When the availability of attorney’s fees is viewed in conjunction with the previously mentioned possibility of punitive damages without actual damages, the opportunity is open for a plaintiff and his attorney to make a substantial amount of money without the plaintiff ever having suffered any actual harm. Congress obviously desired for CROA plaintiffs’ attorneys to be able to collect fees, so the best way to avoid this problem would be to clarify the punitive damages issue as stated above.

IV.B. Contractual Waiver of Rights

As with any law that imposes restrictions and requirements, parties have tried to use contracts to get around CROA’s provisions. Since CROA’s requirements are pretty ironclad, prospective defendants have instead tried to limit how and where they can be sued for violating CROA. The main tools in this endeavor have been arbitration clauses and forum selection clauses. These clauses have run up against section 1679f which makes a consumer’s waiver of any CROA protection void and unenforceable, the attempt to obtain a waiver an independent violation of CROA, and a contract with a waiver void and unenforceable.

IV.B.1. Arbitration Clauses

The main way that businesses have tried to lessen the sting of CROA and the possible damages that may result from a negative holding has been to include arbitration clauses in the consumer’s initial contract with the business. Unfortunately for corporate planning purposes, like many of the issues already discussed, courts have come to different determinations as to the validity of these clauses. However, it appears that there is a growing consensus towards enforcing arbitration clauses in CROA disputes.

The main focus of the validity of arbitration clauses is section 1679c(a)’s language of a consumer’s “right to sue.” In Alexander v. U.S. Credit Management, the court held that any

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201 15 U.S.C. § 1679g(a)(3); see Asmar, 2007 WL 925623 at *4 (holding that an attorney’s fees of $60,000 for 300 hours at a $200 hourly rate, as well as costs of $3,940.51, were reasonable).
203 See Hillis, 237 F.R.D. at 507.
206 “The text of CROA makes no mention of arbitration.” Picard, 564 F.3d at 1255.
provision by which a consumer waives his or her CROA rights or protections is void and unenforceable.\textsuperscript{208} The Alexander court interpreted “right to sue” to mean that a consumer has the right to institute a lawsuit in a court of law.\textsuperscript{209} Consequently, waiver of this right to sue by agreeing to an arbitration clause is a void and unenforceable waiver of a consumer’s right to sue pursuant to section 1679f(a).\textsuperscript{210}

Finding the reasoning of the Alexander court sound, the court in Greenwood v. Compucredit Corp. also held that arbitration clauses are unenforceable under CROA. The Greenwood court reached this conclusion despite acknowledging the strong federal policy favoring arbitration and that similar statutory claims have been found arbitrable.\textsuperscript{211} However, since CROA’s plain language prohibits waiving any right of the consumer\textsuperscript{212} and one of those rights is the right to sue a credit repair organization,\textsuperscript{213} the court stated that Congress clearly intended CROA claims to be nonarbitrable.\textsuperscript{214}

The reasoning of the Alexander and Greenwood courts seems strong on the surface. However, the majority of district courts\textsuperscript{215} and the two circuit courts that have confronted the issue have held that arbitration clauses are enforceable under CROA. In Gay v. CreditInform, the Third Circuit affirmed the district court’s order compelling arbitration. The Third Circuit stated that while nothing in CROA specified that claims must be brought in a court, even if the “right to sue” implied the availability of a judicial forum, prospective defendants are still allowed to invoke available defenses such as the right to invoke a contractual arbitration provision.\textsuperscript{216} Contrary to the Greenwood court, the Gay court found CROA to be similar to the Securities Act\textsuperscript{217} and the Exchange Act\textsuperscript{218} which do not prohibit arbitration clauses.\textsuperscript{219} The Gay court also rejected the plaintiff’s argument that the presence of the terms “court” and “class action” in section 1679g created a right to sue in a court.\textsuperscript{220} Because the Federal Arbitration Act\textsuperscript{221} has created such a strong federal preference for arbitration and due to the lack of Congressional intent to preclude arbitration from CROA, the Third Circuit concluded that arbitration agreements are enforceable under CROA.\textsuperscript{222}

The Eleventh Circuit agreed with the Third Circuit’s reasoning in Picard v. Credit Solutions. The Eleventh Circuit reiterated the strong federal policy in favor of arbitration and

\begin{thebibliography}{99}
\item \textsuperscript{208} Alexander, 384 F. Supp. 2d at 1012.
\item \textsuperscript{209} Id. at 1011 (“The court notes that the statute does not provide a right to ‘some form of dispute resolution,’ but instead specifies a ‘right to sue.’ The act of suing in a court of law is distinctly different from arbitration.”).
\item \textsuperscript{210} Id. at 1012 (noting that the right to sue was one of the four enumerated rights created by 1679c and any waiver of such rights was void).
\item \textsuperscript{211} Greenwood v. Compucredit Corp., 617 F. Supp. 2d 980, 987 (N.D. Cal. 2009).
\item \textsuperscript{212} 15 U.S.C. § 1679f(a).
\item \textsuperscript{213} 15 U.S.C. § 1679c.
\item \textsuperscript{214} Greenwood, 617 F. Supp. 2d at 988.
\item \textsuperscript{216} Gay v. CreditInform, 511 F.3d 369, 377 n.4 (3d Cir. 2007).
\item \textsuperscript{217} Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1933).
\item \textsuperscript{219} Gay, 511 F.3d at 385.
\item \textsuperscript{220} Id. at 376.
\item \textsuperscript{221} Federal Arbitration Act, 9 U.S.C. § 1-16.
\item \textsuperscript{222} Gay, 511 F.3d at 395.
\end{thebibliography}
declared that absent Congressional intent to preclude arbitration, parties who agree to arbitrate disputes pursuant to a federal statute should be allowed to do so.223 The Picard court acknowledged that CROA’s nonwaiver provision arguably uses broader language than the Securities Act224 and the Exchange Act,225 but still held that CROA did not create a right to sue only in a judicial forum.226

With the Third and Eleventh circuits reaching the same holding on allowing CROA claims to be arbitrable, it appears that this trend will continue. Congress could avoid a great deal of future disputes over this issue though and codify the holdings of Gay and Picard to make it clear that arbitration clauses are indeed enforceable. If it did so, it is likely that all credit repair organizations would quickly include arbitration clauses in their contracts.

Even if arbitration clauses are made clearly enforceable by Congress and subsequently become commonplace in credit repair contracts, plaintiffs can still try to avoid arbitration by arguing that the contract they agreed to is void as a whole such as not containing the required disclosures discussed in Part III.A. If a contract was void as a whole, this would make the contract’s arbitration clause void as well. Surprisingly, only one court has dealt with this issue and rejected a defendant’s motion to dismiss based on section 1679f(c)’s provision which voids contracts that do not comply with CROA.227 If a contract violated CROA, such as by precharging fees228 or not providing required disclosures,229 it seems that the literal reading of section 1679f(c) would make an arbitration clause accompanying these violations unenforceable because the entire contract would be void. If so, it is plausible that 1679f(c) would prevent arbitration clauses from being enforced whenever a claim relates to the requirements discussed in Part III.A.

IV.B.2. Forum Selection Clauses

Unlike arbitration clauses, forum selection clauses have been the subject of much less litigation. It is rather surprising given the wide discrepancy of opinions discussed in this paper that prospective defendants would not attempt to forum shop to put themselves in the best possible situation for their particular businesses. Of course, since the law is so unsettled, it is understandable that potential defendants would be hesitant about selecting a specific forum when no forum has yet to develop a complete set of known rules. This makes choosing the forum with the most favorable case law difficult. The one case which addressed the validity of a forum selection clause held that it was indeed valid and enforceable.230

The support for the validity of forum selection clauses is strong. Forum selection clauses avoid the difficult issues of arbitration clauses since forum selection clauses merely limit the location to which a plaintiff may bring his case and do not limit the ability to file a cause of action in a court of law.231 Also, arguments of Congressional intent to prohibit forum selection clauses are difficult to make since Congress expressly invalidated them in the Fair Debt

223 Picard, 564 F.3d at 1255.
224 Securities Act, §§ 77a-77aa.
225 Securities Exchange Act, §§ 78a-78oo.
226 Picard, 564 F.3d at 1255.
231 See id. at 156.
Collection Practices Act but chose not to do so in CROA. Naturally though, an express approval of forum selection clauses would be a better argument for their acceptance than the mere fact that they were not invalidated.

**IV.B.3. Arbitration Clauses’ Affect on Class Actions**

In addition to the use of arbitration and forum selection clauses to protect themselves from litigation risks, credit repair organizations have implemented class action waivers to prevent potential plaintiffs from having the ability to bring a class action suit against them. Although it is obvious that Congress intended to allow for class actions under CROA since section 1679g explicitly references class actions, defendants have had success avoiding class action suits via contractual waivers.

In the lone appellate decision on the matter, *Gay v. CreditInform*, the Third Circuit affirmed the district court’s decision that the plaintiff’s claim should be handled individually in arbitration rather than through a class action. The court clarified that CROA’s reference to class actions did not create a right to litigate on a class action basis but simply explained how a class action case would be handled under CROA. The Third Circuit felt that this was a reasonable decision since CROA allows the FTC and state officials to enforce its provisions via section 1679h(c). This administrative enforcement provides a reasonable substitute for the remedies available in a class action suit. It should be noted that the outright waiver of the right to pursue a class action was held to be permissible.

Clarifying the validity of arbitration clauses as discussed in Part IV.B.1. would go a long way in determining the affect of arbitration clauses on class action cases.

**IV.C. Class Certification of CROA Class Actions**

Class actions under CROA are procedurally the same as any other class actions. In order for a plaintiff to certify a class, it must be shown that the class possesses numerosity, typicality, commonality, and that a class action is superior to other forms of handling the case.

One way that plaintiffs have satisfied the commonality and typicality requirements has been by showing that the putative class members all received substantially similar letters which violated CROA. Alternatively, if a plaintiff can show that the defendant had a standard practice during the relevant time period of mailing form letters which violated CROA, typicality and commonality can be satisfied. However, if a plaintiff is unable to show that the putative class members entered into contracts which contain CROA violations, class certification may be

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233 See Barnes, 397 B.R. at 156 n.4.
234 See Bigalke, 2001 WL 1098047 at *5.
235 Gay, 511 F.3d at 381-82.
236 Id.
237 Id. at 382-83.
238 Id. at 382.
239 Arnold, 2002 WL 1941547 at *9. (holding that the waiver of class action litigation is not an impermissible waiver of CROA’s protections under section 1679f(a) and noting that section 1679g’s reference to class actions was with regards to the calculation of punitive damages and did not create a substantive right to class actions.).
240 See FED. R. CIV. P. 23(a).
241 See Bigalke, 2001 WL 1098047 at *4.
denied. Also, class certification has been denied when a plaintiff was unable to show that the putative members had similar experiences with the defendant’s website.

While one court granted class certification even though the possibility of recovery could be de minimus on the grounds that the class could be later decertified if only a de minimus recovery was possible, other courts have found that class actions are undesirable. In Helms v. Consuemrinfo.com, the court rejected class certification on the grounds that this could lead to damages that were grossly disproportionate with the defendant’s conduct. The defendant had, at most, violated the technical requirements of CROA’s complex statutory scheme and the class action damages could be devastating and largely disproportionate with the culpability of the defendant’s conduct. Similarly, the court in Hillis v. Equifax Consumer Services rejected a motion for class certification partly on the grounds that the plaintiff was suing for statutory damages for unintentional acts where the defendant’s potential liability would be enormous and out of proportion to any harm suffered by the plaintiff.

Congress clearly planned on the possibility of class action CROA claims. The outcomes of such actions should be left to courts to determine based on the facts of each case before them. If potential defendants begin using (the apparently enforceable) class action waivers in droves, CROA class actions may become a very infrequent occurrence. Even if class action suits continue to occur, class certification of CROA claims is one of the few areas where the system is working just fine and in no need of adjustment.

V. Recommendations For Improving CROA

Although there are trends in each of the major areas involving CROA interpretation, there is still much confusion since few cases have reached the appellate level and those that have had varied and dissonant holdings. The major credit related legislation currently being proposed, the Consumer Financial Protection Agency Act, does not mention credit repair or CROA. This is unfortunate since it shows how out of sight and out of mind CROA has become to Congress. It would be much better for consumers and businesses if Congress was proactive and fixed CROA now rather than waiting until its deficient nature becomes out of control and a mess to clean up.

If Congress were to look to amend CROA, the first and easiest amendment would be to clarify whether a “person” has to be involved with a credit repair organization or not to be subjected to CROA. Second, including credit repair products along with credit repair services would avoid any future issue of a court made products exception to CROA emerging in the future. The nonprofit and bank exemptions should remain untouched as they are the most stable part of CROA, although the Baker dilemma should be addressed to deny the exception to companies who structure themselves solely to skirt CROA.

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245 White, 2000 WL 816783 at *2.
246 Helms, 236 F.R.D. at 568.
247 Id. at 569.
248 See Picard, 564 F.3d 1249; Gay, 511 F.3d 36; Zimmerman, 409 F.3d 473; Gill, 265 F.3d 944.
249 See supra note 20.
250 See supra Part II.A.
251 As seen in supra Part II.B. (discussing In re National Credit Management Group, 21 F. Supp. 2d at 457-58).
252 See supra Part II.C.
Credit counseling\textsuperscript{253} and credit monitoring\textsuperscript{254} services should be statutorily defined. It is to be expected that future court battles will be waged over whether a credit service was repair, counseling, or monitoring, but having a codified definition to base these determinations off of would be advantageous. Likewise, debt collection agencies which have nothing to do with credit repair should be given an express exemption from CROA so that there is no question whether they are liable or not.\textsuperscript{255} However, it seems perfectly reasonable for debt management companies who offer services that could be considered credit repair to be bound to comply with CROA, so there is no need to amend CROA with regards to these companies.\textsuperscript{256} Auto dealerships have consistently been held to not be bound by CROA, so an exception for them is probably unnecessary, but it would cause no harm to create an exception for them.\textsuperscript{257} Attorneys should be under the same rules as any other person and CROA has been properly applied in this regard.\textsuperscript{258}

CROA’s written contract\textsuperscript{259} and written disclosure\textsuperscript{260} requirements are both great means of protecting and informing consumers. Nor is there any problem with CROA’s prohibition of untrue statements\textsuperscript{261} and fraud.\textsuperscript{262} The three shortcomings of CROA as a regulatory scheme are its ambiguous definitions of the cooling off and cancellation time periods,\textsuperscript{263} its restriction of not allowing payment until all services have been performed,\textsuperscript{264} and its undefined fraud standard.\textsuperscript{265} The timing issue could be easily solved by homogenizing the cancellation rights section with that of the cooling off period so as to avoid any problematic timing issues.\textsuperscript{266} The restriction on receiving payments is a well intentioned rule, but it has the consequence of severely limiting the types and structures of credit repair services that a company can offer. A prohibition on upfront payments (which is congruent with the cooling off period and cancellation rights) and a structure allowing for monthly billing while services are still being performed would encourage credit repair businesses to think long term about their customers rather than trying to get them served as quickly as possible so that fees can be collected.\textsuperscript{267} In order to allow businesses to operate under reasonable legal rules, CROA’s fraud standard should be codified as the “unsophisticated consumer” standard\textsuperscript{268} rather than the nearly impossible to overcome “least sophisticated consumer” standard.\textsuperscript{269} The unsophisticated consumer standard still adequately protects consumers from unscrupulous businesses, but also allows well intentioned businesses to not have to satisfy a least sophisticated consumer standard that has such a low threshold that it is difficult to imagine a way for a defendant to overcome it.

\textsuperscript{253} See supra Part II.D.1.
\textsuperscript{254} See supra Part II.D.2.
\textsuperscript{255} See supra Part II.D.3.
\textsuperscript{256} See supra Part II.D.4.
\textsuperscript{257} See supra Part II.E.
\textsuperscript{258} See supra Part II.F.
\textsuperscript{259} See supra Part III.A.1.
\textsuperscript{260} See supra Part III.A.2.
\textsuperscript{261} See supra Part III.B.1.
\textsuperscript{262} See supra Part III.B.2.
\textsuperscript{263} See supra Part III.A.3.
\textsuperscript{264} See supra Part III.A.4.
\textsuperscript{265} See supra Part III.B.3.
\textsuperscript{266} See supra Part III.A.3.
\textsuperscript{267} See supra Part III.A.4.
\textsuperscript{268} See supra Part III.B.3.
\textsuperscript{269} See id.
With regards to the derivative issues of CROA, the solutions to the issues they present really depend on the policy goals behind them. Whether tangential damages such as mental suffering qualify as actual damages could be addressed by Congress, but this is probably best left to the courts to determine on each distinct factual situation.\textsuperscript{270} The fact that punitive damages can apparently be had without actual damages\textsuperscript{271} seems superfluous given the fact that if the consumer was not actually harmed, the FTC or a state attorney general should be pursuing the action rather than an uninjured plaintiff and his fee seeking attorney.\textsuperscript{272} Because of the strong federal policy in favor of arbitration, arbitration clauses should be made clearly enforceable.\textsuperscript{273} Class action certification is a process that works under CROA,\textsuperscript{274} but class action suits could be a dying breed if arbitration clauses are enforceable and arbitration becomes the norm for CROA disputes.\textsuperscript{275}

There are no easy solutions for tying up the loose ends that Congress left when they created CROA. Without a doubt these recommended changes likely will leave other issues unresolved. Nevertheless, considering the problems that have emerged during the thirteen years since CROA was passed in combination with a consumer population whose collective credit has decreased\textsuperscript{276} due to the economic downturn of the last two years, now would be a ripe time for Congress to act and provide courts, businesses, and consumers with guidance on how they want the future of credit repair in America to be conducted. To not do so is to risk allowing the sleeping giant to awaken and run amok when it could have been kept dormant.

\textsuperscript{270} See supra Part IV.A.1.
\textsuperscript{271} See supra Part IV.A.2.
\textsuperscript{272} See supra Part IV.A.3.
\textsuperscript{273} See supra Parts IV.B.1. & IV.B.2.
\textsuperscript{274} See supra Part IV.C.
\textsuperscript{275} See supra Part IV.B.3.
\textsuperscript{276} See supra note 2.