

SmileDirectClub: Dissatisfied Customers Asked to Sign Release Before Getting Refund; Restrictions on Complaints and Reviews in Release Could Run Afoul of State and Federal Laws

One customer chose SmileDirectClub's (SDC) teeth-straightening system because he works in television, and takes his appearance seriously. Another works full-time and liked the idea of being able to avoid office appointments. Both customers, who spoke with *The Capitol Forum* on condition of anonymity, claim that they trusted the SDC dentists—who the company says provide remote oversight—and went ahead with the treatment. The first customer had four teeth break off nine months into the treatment. The second ended up with a misaligned bite.

SDC offers a direct-to-consumer teeth-straightening system that allows users to skip orthodontic visits. Prospective customers can go to a SmileShop to have digital photos and 3-D images taken of their teeth, which are then sent to a licensed dentist to review. Prospective customers who are unable to visit a SmileShop are sent an impression [kit](#) and a "Smile Spreader" to help shoot photos of their teeth.

Both customers said that after using SDC they learned they had conditions that should have disqualified them from getting SDC's teeth aligners. SDC even directed one of the customers to the customer's initial SmileShop photos to point out problems that should have prevented the customer from getting SDC's aligners, according to emails the customer shared with *The Capitol Forum*.

Customers who are dissatisfied with their experience and want a refund are asked to sign a release preventing them from filing negative complaints on social media or with regulators and to withdraw any previously filed complaints. This practice could run afoul of Section 5 of the FTC Act and state laws, according to FTC staff and legal experts.

SDC has begun the IPO process, according to [Axios](#).

Consumers, dental boards and orthodontists raise concerns about SDC. Some consumers who have used the SDC product have complaints about problems with [customer service](#); [ill-fitting](#), [missing](#) or [faulty](#) aligners; [ruined](#) bite; [extreme tooth pain](#); or [loosened teeth](#).

SDC is also involved in several lawsuits with state dental boards and orthodontists, both as a plaintiff and a defendant.

SDC sued the Georgia Dental Board in federal court May of 2018 alleging that the Board violated the Sherman act by restricting the ability of non-dentists to provide nonclinical administrative

support services, according to a [release](#) from the American Dental Education Association. The Board promulgated a rule that requires the direct oversight of a licensed dentist for digital mouth scanning for fabrication of aligners. SmileShops have no dentists on site.

In the Superior Court of New Jersey, an orthodontist and the New Jersey Dental Association filed a lawsuit in January against SDC and three affiliated dentists alleging that they were engaging in the unlawful practice of dentistry by reviewing 3-D scans, digital photos and teeth impressions for SDC without conducting clinical exams or reviewing x-rays of consumers looking to purchase aligners through SDC. Arthur Meisel, the executive director and attorney for the plaintiffs declined to comment citing ongoing litigation.

The Board of Dental Examiners of Alabama sent a cease-and-desist letter to a dentist and SDC after SDC opened a location in Alabama. In the letter, the board alleged that the dentist, who was located out of state, and SDC were violating various sections of Alabama law by having scans performed by unlicensed individuals and not under the direct supervision of a licensed dentist, according to an American Association of Orthodontists (AAO) [press release](#).

SDC and the dentist sued the Board of Dental Examiners of Alabama alleging that the Board and its members were in violation of the Sherman act. In an amicus brief filed in the Alabama litigation, the AAO said that it “has serious concerns about the dangers and injuries that some individuals have claimed to experience in conjunction with SDC treatment.”

The AAO noted that as of December 18, 2018, the BBB page on SDC had 592 customer complaints regarding SDC, and that the “comments and complaints include individuals who claim to have experienced potential loss of teeth, increased gaps and spaces, ill-formed bite resulting in the inability to effectively chew food, gum issues, overbite where one did not exist prior to treatment, as well as issues such as allegedly sending individuals the wrong aligners.”

The BBB complaints against the company totaled 901 as of June 19, 2019.

Customers also complain about release. In addition to BBB complaints about the harm that SDC’s offering caused to certain patients, a *Capitol Forum* review of other platforms revealed complaints about SDC’s refund policy.

In some cases, customers [complained](#) that the general release customers were asked to sign in order to get a refund requires that they waive their right to post reviews about the company, talk about their experience or submit complaints with [regulators](#). On some of the platforms on which customers complained, SDC agents answered the customer’s complaints by stating that a refund would be issued after the customer signed the release.

The American Dental Association, which has adopted a [policy](#) regarding direct-to-consumer dental services, provided the following comment about SDC's general release: "The ADA believes patients should always have the right to report adverse outcomes resulting from healthcare services or products. We understand that the details of a settlement agreement itself can properly be kept confidential, but information about the underlying injury can and should be reported in order to improve the healthcare system."

"Only customers seeking a full refund outside of SDC's 30-day guarantee are presented with the release," SmileDirectClub said in an emailed statement to *The Capitol Forum*. SDC also claimed the release is "negotiable."

"A copy of our refund policy is always available to any customer or potential customer on our website," the company said. "As is the case with most businesses, when customers are provided with a full refund or cease treatment, a release is requested. Given the nature of the services provided, confidentiality is also a typical and proper request."

According to the company's statement and releases reviewed by *The Capitol Forum*, the issuance of refunds are conditioned on the customer's promise to not post "on social media any information or reviews regarding the Transaction" and that the customer "shall take all steps necessary to delete or eliminate any such postings."

The customer seeking a refund also "agrees that he/she has not filed any complaint with any local, state or federal agency or regulator" and if the customer had already filed such a complaint the customer "hereby agrees to withdraw any and all outstanding complaints upon receipt" of the refund.

The FDA, which regulates the sale and monitors the safety of medical devices including orthodontic plastic bracket aligners, would not comment on this issue beyond confirming that the device is legally marketed as prescription only.

SDC's release prohibits customers from mentioning the existence of the agreement or "the facts of the underlying transaction" and entitles SDC to \$10,000 per violation.

Review Law, FTC Act and State Laws

The 2016 Consumer Review Fairness Act (CRFA) prohibits conduct that stifles consumers from filing honest reviews about a product. Several states have also passed versions of the law. In May, the FTC [announced](#) its first actions exclusively focused on enforcing the CRFA. The law has not been applied to situations in which customers seeking refunds have been asked to sign releases with similar terms that are prohibited under the CRFA.

To be sure, the CRFA applies to form contracts, which the [law](#) defines as a contract that is used in the course of selling or leasing a person's or services and is imposed on a person without a meaningful opportunity to negotiate the standardized terms. SDCs general release is not a form contract and SDC claims the release is negotiable.

Still, Clay Calvert, director of the [University of Florida College of Journalism and Communications](#) and the [Marion B. Brechner First Amendment Project](#) believes that the CRFA could apply to SDC's general release. "It shouldn't make a difference based upon the legislative intent behind the CRFA that this is not part of the initial contract."

Calvert continued, "That intent was to allow consumers to speak honestly, freely and fairly on social media websites about the providers of goods and services. Ultimately, it will be up to the FTC to determine whether the CRFA applies in this context."

Eric Goldman, Professor of Law and Co-director of the High Tech Law Institute at Santa Clara University told *The Capitol Forum* in an interview, "That the parties here are unwinding their relationship but are not suing each other suggests that it is still in connection with the sale or lease goods or services. So, there's a statutory ambiguity here."

Anette Beebe, American Bar Association Digital Communications Committee co-chair pointed *The Capitol Forum* to the CRFA's definition of contract. "Notice the CRFA itself doesn't specify the type of contract (i.e., a Terms of Service vs a General Release, etc.)," emailed Beebe.

Goldman indicated that even if the CRFA or state laws modeled after the CRFA don't apply, there are other [mechanisms](#) for enforcement by the FTC, as well as other state laws that restrict the ability of businesses to gag their customers. Those laws were on the books even before the CRFA and state laws were enacted.

David Vladeck, former Director of the FTC's Bureau of Consumer Protection, said, "The FTC has long taken the position that gag orders like that violate the FTC Act."

According to staff at the FTC's Advertising Practices Division, "Even if a consumer contract with a non-disparagement provision is not covered by the CRFA, use of such a provision might injure consumers and be unfair under Section 5 of the FTC Act."