ANTI-DISPARAGEMENT CLAUSES AND CONSUMER TESTIMONIALS

Fall NAAG Consumer Protection Conference
St. Petersburg, FL
October 23, 2017, 4:30-5:30 p.m.

IMPORTANT NOTE: PLEASE NOTE THAT THIS DISCUSSION AND WRITTEN INFORMATION ARE NOT INTENDED AS LEGAL ADVICE, BUT ARE INTENDED FOR EDUCATIONAL PURPOSES ONLY. LEGAL ADVICE CAN ONLY COME FROM A QUALIFIED, LICENSED ATTORNEY WHO IS FAMILIAR WITH ALL THE RELEVANT FACTS AND CIRCUMSTANCES OF A PARTICULAR SITUATION AND THE APPLICABLE LAW. PARTICIPANTS SHOULD RETAIN AND SEEK THE ADVICE OF THEIR OWN QUALIFIED, LICENSED ATTORNEY IN HANDLING LEGAL MATTERS.

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SOCIAL MEDIA RATINGS/REVIEWS

• Strength of Word-of-Mouth or “Buzz” Marketing

• Trust in “Ordinary Consumer” Opinions/Beliefs, Not Ads

• Personal Connection and Rise of Social Media across Multiple Platforms/Devices

Positive Reviews/Ratings = Improved Revenues
Negative Reviews/Ratings = Decreased Revenues

$take$ are High for Businesses/Professionals
TWO SIDES OF THE COIN

• Businesses Trying to Prevent or Restrict Negative Reviews by Consumers

  • Broad Nondisparagement Clauses
    • Waiver on making any negative remarks, comments, ridicule, criticisms, including protected opinion speech or true statements

  • Copyright Assignment – Lee
    • Customer assigns © to online reviews to business
    • Copyright infringement - DMCA take down notices

• Mutual Privacy Clauses – Medical and Dental Providers
  • Maintaining privacy of relationship
  • Non-disclosure of info for marketing purposes
    • Existing professional ethics and legal duties
TWO SIDES OF THE COIN

• Businesses Trying to Prevent or Restrict Negative Reviews by Consumers

• General Confidentiality/Approval Clauses
  • Requires business consent before posting any remarks

• Trademark Protection as Basis to Stop Postings
  • Infringement threats without recognition of nominative fair use

• Liquidated Damages – KlearGear; Lee
  • Billing customer until review removed
  • Reporting non-payers to collection/credit agencies
CALIFORNIA’S LAW

- Broadly invalidates any contract clause that requires “waiving consumer’s right to make any statement”
- Includes nondisparagement and confidentiality clauses
- Permits civil fines through AG, district or city attorney enforcement
- Allows consumers to bring private causes of action
- Recognizes rights of review sites to reject and/or delete postings that are not protected, legal speech

• Other States Enacting Similar Laws – Illinois, Maryland
OVERVIEW OF CONSUMER REVIEW FREEDOM ACT OF 2016

• Protects variety of “covered” communications in adhesive consumer contracts for goods/services

• Expressly invalidates copyright assignment provisions

• Explicitly voids any penalty or fee clause for covered communications

• Allows State AGs/consumer protection agencies to investigate/bring CRFA actions with notice to FTC, absent pending FTC probe

• Does not pre-empt authorized state officials from initiating or continuing any proceeding in state courts for violations of any state civil or criminal laws

• Respects site’s monitoring and removal of postings that are illegal and/or legal but violate site’s community standards
TWO SIDES OF THE COIN

- Businesses Pretending to be Consumers to Influence Ratings
  - Positive reviews for self/negative reviews for competition
  - Rise of pay-per-post bloggers/influencers and use of “bots”
- FTC Endorsement Guides (2009)
  - Applies to “Influencers”, Sponsors, and Ad Agencies
- Testimonial Must Be:
  - Honest Beliefs/Opinions,
  - Bona Fide Users of Product or Services, and
  - Clear, Conspicuous Disclosures of “Material Connections”
    - Compensation not reasonably expected by consumers?
    - Benefits not available to the general public?
FTC ENDORSEMENT GUIDES - 2009

• DUTIES OF SPONSOR/AD AGENCY

• FTC requires advertisers and their marketing firms:
  • 1) Adopt disclosure policy that complies with Guides;
  • 2) Make sure people who work for or with them are trained and know what Guides mandate; and
  • 3) Monitor what these parties are communicating on the sponsor’s behalf, including disclosure obligations.

  • Otherwise, sponsor and marketing firm may be held liable for deceptive advertising