

Legal Update

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ILLINOIS CRACKS DOWN ON EFFORTS TO “GAG” ONLINE REVIEWERS

By Seth A. Stern

A recent amendment to the Illinois Consumer Fraud and Deceptive Business Practices Act prohibits businesses from requiring consumers to sign agreements waiving their rights to make public comments about the seller or its products or services. The amendment becomes effective January 1, 2018,

The popularity of such “gag” clauses has increased since the rise of online review services and social media platforms, although courts have rarely, if ever, enforced them. The clauses are also prohibited by a federal law enacted in 2016 but, unlike the federal law, the Illinois law allows consumers to bring a private right of action against companies that violate the law.

Businesses that believe they have been harmed by false online reviews or social media comments can still sue the author of the comments for defamation. That said, obtaining a court order to unmask often-anonymous online commenters in order to pursue a defamation claim can be difficult and expensive – not to mention the cost of actually prosecuting a defamation claim.

Even if a company ultimately prevails in a defamation claim against an online “troll”, the defendant will rarely be able to pay a judgment in excess of the company’s legal costs. While the media platform on which the defamatory content was posted (*e.g.*, Yelp, Twitter, etc.) generally has more in the bank than the individual author, the federal Communications Decency Act, in most cases, shields such platforms from liability for content their users post.

In addition, companies that prosecute lawsuits against disgruntled customers are often perceived as “bullies” for going after “the little guy.” Similarly, responding to and disputing online critics in review forums can sometimes call further attention to their criticism and encourage additional negative reviews. That said, companies concerned with isolated online criticisms can employ reputational management strategies to improve their online image and “bury” negative reviews.

Proactive companies can develop policies and programs to legally limit negative reviews. For example, they can implement policies to handle disgruntled customers’ and employees’ concerns before they get to a keyboard. They can do this by being purposeful and aware of potential consequences when responding to negative reviews online. They can also create programs designed to curate more positive reviews from satisfied customers so that negative reviews appear minor by comparison. Companies should keep in mind Federal Trade Commission regulations restricting them compensating endorsers (including by providing free products) without proper disclosure.

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