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BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

Business Prepared

Dealing with a Bad Online Review

Popular public review websites like "Yelp!," "Ripoff Report," and "Angie's List" give consumers the opportunity to share their personal experience with the general public. Unfortunately, if you own a business, it is inevitable that your company will be faced with a negative online review. Trying to combat negative online reviews can be difficult, time consuming, and costly. But, in this day and age of social media justice, doing so is critical to your overall success.

To push back, some businesses have started to include non-disparagement clauses in consumer contracts. For example, several years ago, a Utah couple purchased $20 worth of goods from popular internet retailer Kleargear.com.

Their order was never delivered and the couple published a negative online review. When Kleargear.com learned of this, it fined the couple $3,500 for violating a non-disparagement clause hidden on the website's terms of sale agreement. The couple did not pay this amount and Kleargear.com turned their alleged $3,500 fine over to a collections agency, eventually damaging the couple's credit score.

The couple, with the help of Public Citizen Litigation Group, initiated litigation against Kleargear.com in Utah. See John Palmer, et al v. Kleargear.com, et al., United States District Court for the District of Utah Northern Division (Case No. 1:13-cv-00175) (Dkt. 2).

In May of this year, the court issued a default judgment against Kleargear.com and recently ordered Kleargear.com to pay $306,000 in damages.

This incident, and several others across the country, gave rise to new law in California. Dubbed the "Yelp Bill," California Assembly Bill 2365 prohibits businesses from enforcing non-disparagement clauses in their consumer contracts to prevent consumers from publicly sharing their experiences with a particular business.

Business owners can face penalties of $2,500 for a first violation and $5,500 for each violation thereafter. See California Civil Code, Section 1670.8(c). Fines of up to $10,000 can be levied against a business owner who engages in a "willful, intentional, or reckless violation" of this law. See California Civil Code, Section 670.8(d). This bill will go into effect in California in 2015.

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Know Your Online Rights

A Business' Rights on Yelp

It has become an increasingly common problem for business owners. Despite generally providing customers with an excellent product or service, a single negative review posted on Yelp or Angie's List can deter customers and cause devastating losses. When a negative review is published about a business on Yelp or a similar site, the business may, under certain circumstances, have the legal right to force the removal of the negative review and may even have the right to compensation for the lost sales it caused.

There are generally two situations in which a business may potentially compel the removal of a negative review and seek compensation for its resulting losses. First, in today's business environment, businesses commonly publish negative reviews about their competitors, falsely posing like unhappy customers in order to drive business away from their competitors. In such a circumstance, the victim of the negative review may have a claim against its competitor for false advertising and unfair competition pursuant to Section 17500 of the Business & Professions Code, as well as a potential claim for trade libel.

These claims not only afford the victim the right to compel the removal of the review, but the victim may also have the right to compensation for losses it can show the negative and false review caused.

A recent BKCG client found itself in this exact situation, and BKCG was able to quickly force the competitor to remove its false and damaging negative review.

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Business Prepared

Dealing with a Bad Online Review

The fact remains that reviews, even if completely baseless, impact all businesses. Business owners can and should monitor public review websites to protect their reputation and increase their business. A key step is responding to negative feedback in a positive way. Here are five steps for handling a negative online review:

1. Wait to respond. Small problems look much bigger when they hit close to home. Let time pass and, in the meantime, consider the proper way to respond. As a business owner you have the power to change a negative online review with a positive response.

2. Do some homework. Investigate the reviewer's experience. Speak with your employees. Doing this will make you a proactive, solution driven business owner.

3. Respond professionally. When you do respond to an online review- be it negative or positive- remember to be courteous and professional. When appropriate, offer to solve the problem. Some websites give you the option to respond privately or publicly. A private message is just like sending a personal e-mail. A public message will be visible to the public. Consider the appropriate avenue for your response.

4. Be consistent. It is important to consistently read and respond to online reviews. This shows that you value your customer's opinion, are committed to customer service, and focused on bettering your business.

5. Provide a handshake. It is very easy to sit in the comfort of your own home and pummel a business with virtual strikes. However, it takes real guts to invite the customer back, shake their hand, and change their experience.

Ultimately, some situations cannot be resolved at home and require the assistance of experienced professionals. Our firm has a successful history of representing small-business owners in all aspects of litigation. When in doubt as to how to best protect your business from negative reviews, consider contacting our firm.

At first blush, public review websites seem to give reviewers the upper-hand. But, as a business owner, you have the freedom to choose your response and craft a positive outcome for your business.

For additional information, questions or comments about this article please contact Carmen Miranda at: cmiranda@bkcglaw.com or at 949.975.7500 to discuss this matter further.

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Know Your Online Rights

A Business' Rights on Yelp

A victim of a negative review may also have the right to compel the removal of a review and recover compensation if the reviewer included demonstrably false statements of fact in the review.

For example, if a reviewer never patronized the business for which it provided a negative review or if the customer makes factual assertions that are provably false, then the business may have a claim for trade libel or defamation against the author and may have the right to compel the review's removal.

Although a business owner could potentially force the removal of a negative review if it fits within one of the circumstances referenced above, a business owner generally has no legal recourse when a legitimate customer, i.e., a consumer who actually used the product or service, posts a negative review that expressed either truthful facts concerning the customer's experience or expressed negative statements of opinion, such as the service was "poor," "expensive," or the consumer was "dissatisfied".

The First Amendment protects customers' rights to express truthful statements of fact and their opinions.

In addition, regardless of the falsity of the negative review, section 230 of the Communications Decency Act generally exempts companies like Yelp from liability for negative reviews published on their website by its users, even when the reviews are clearly false and the website was put on notice of that falsity.

If your business has been damaged by a negative online review, you should consult with your attorney to determine your rights.

For additional information, questions or comments about this article please contact Joshua Waldman at: jwaldman@bkcglaw.com or at 949.975.7500 to discuss this matter further.

Take Control of Your Insurer's Duty to Provide Independent Counsel

It is imperative that any business carry a Commercial General Liability ("CGL") policy to protect it against liabilities posed by lawsuits and other legal claims. Although the CGL insurer has the right and duty to defend the insured against legal actions covered by the policy, the insured is often strictly limited in its ability to select counsel of its choice.

This is because standard "right and duty to defend" clauses allow the insurer to assign to the insured counsel of the *insurer's* choice, which benefits the insurer who often negotiates discounted rates with select attorneys. Because insurance counsel has a duty to protect both the insured and the insurer, conflicts often arise and the ability to choose independent counsel, or "Cumis counsel", is of paramount importance to the insured. Accordingly, you should always carefully examine the specific terms of your CGL policy and take pre-loss measures to ensure your right to select independent counsel.

The concept of "Cumis counsel" was first introduced in the landmark California decision entitled, San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc. (1984) 162 Cal.App.3d 358. The Court found that attorneys retained by an insurer to defend an action against the insured "have an obligation to explain to the insured and the insurer the full implications of the joint representation in situations where the insurer has reserved its right to deny coverage."

The Court also confirmed that "where there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based on possible noncoverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured."

Thus, "Cumis counsel" is the general term used to describe an attorney employed by the insured and paid for by the insurer, when there is a conflict of interest between the insurer and the insured. Since the decision in Cumis, however, the concept of a "conflict of interest" has been refined and limited to the extent that there must be an actual conflict between the insured and insurer, and not merely a potential or theoretical conflict based upon a mere reservation of rights.

After the Cumis decision, the Legislature also responded with the enactment of Civil Code section 2860, which provides that a conflict does not arise simply because there is a reservation of rights by the insurer or a dispute regarding coverage. A conflict may exist, on the other hand, "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer."

Put simply, since the Cumis decision, it is increasingly difficult in California for the insured to establish a conflict of interest sufficient to require the insurer to provide independent counsel. As a result, it is incumbent upon the insured to examine its policy and negotiate pre-loss terms with its insurer to provide more flexibility on choice of counsel issues, if desired or necessary.

Topics for pre-loss negotiations of a CGL policy can include pre-approval of preferred counsel, an agreed-upon maximum on hourly attorney fees, or a choice of counsel provision without regard to conflicts of interest that may require the insured to pay the difference between insurance counsel and preferred counsel. In either case, prior to finalizing the terms of a CGL policy, the advice of competent counsel can help you avoid certain CGL pitfalls and create a policy to suit your particular business needs.

For additional information, questions or comments about this article please contact Amber Sanchez at: asanchez@bkcglaw.com or at 949.975.7500 to discuss this matter further.

Hidden Terms in Standard Forms

If your business involves the routine exchange of invoices, purchase orders and other "standard" forms, you run the risk that the party you are doing business with may argue that you are obligated to satisfy contract terms to which you never specifically agreed.

Similarly, if you insert important terms and provisions in your own invoices or forms, the law may prevent their enforceability under certain circumstances. Provisions of California's Commercial Code which apply to "merchants" (or individuals and businesses providing goods and services) affect whether additional or different terms contained in standard forms exchanged between contracting businesses become binding on the parties.

Routinely, large and small businesses exchange forms containing "boiler-plate" provisions which attempt to limit their own liabilities or create new obligations for the other contracting party. Commercial Code Section 2207 was drafted to accommodate modern commercial relationships between merchants which ordinarily involve the exchange of multiple forms (not just a single contract) and which often include "new" or "different" terms to those set forth in the other contracting party's forms. Steiner v. Mobile Oil Corp. (1977) 20 Cal.3d 90, 98-9. Section 2207 rejected the common law's "mirror image" rule which held that if a party's acceptance of an offer to contract varied any of the offered terms, the acceptance was invalid and no contract was formed. To that end, Section 2207 allows additional and different terms contained in standard forms exchanged between merchants (such as invoices) to become binding on the parties in limited circumstances depending upon the materiality of the terms.

Generally, Section 2207(2)(b) prohibits a party from enforcing terms it has unilaterally tried to add to the parties agreement if that additional term "materially alters" the agreement. Whether a term is "material" generally involves analyzing the impact it has on the rights and liabilities of the parties. For example, Courts have found that an added term limiting the availability of otherwise recoverable damages in a contract dispute was "material." On the other hand, Courts have found an added term that required a party to file a lawsuit within a certain amount of time was not material.

In short, if your business involves the exchange of standard forms with another party, it makes sense to sit down with your attorney and discuss the potential impact of the boiler-plate terms contained in these forms on your relationship with the other party.

For additional information, questions or comments about this article please contact Rosamund Lockwood at: rlockwood@bkcglaw.com or at 949.975.7500 to discuss this matter further.

Carmen Miranda

ADDITIONS:

Carmen Miranda recently joined BKCG as a litigation associate. Prior to joining the Firm, Carmen enjoyed four years as an associate at Girardi & Keese in Los Angeles, gaining valuable experience in trials, arbitrations, mediations, depositions, and all types of law and motion practice.

Carmen attended law school at Southwestern University School of Law, graduating with distinction from the trial advocacy honors program.

She obtained her undergraduate degree in International Relations and Spanish from University of Southern California. In between college and law school, Carmen worked for a member of the United States House of Representatives. Carmen is currently assisting Alton Burkhalter with an upcoming Intellectual Property trial, as well as researching and drafting pleadings for a multi-million dollar civil lawsuit against Credit Suisse in Florida. Carmen is also defending a UCL claim in federal court. Carmen can be reached at cmiranda@bkcglaw.com or by phone at (949) 975.7500.

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Burkhalter Kessler Clement & George LLP (BKCG) advises and protects businesses and high net worth individuals through experienced litigation and transactional lawyers. Core practice areas include: Business litigation in state and federal courts, as well as FINRA, AAA and JAMS arbitration and mediation; Corporate, transactional and employment law documentation; and Estate Planning and Probate services through the Firm's State Bar certified Estate Planning Specialist.

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