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Website Terms of Use May Risk Liability Under California Law

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A recent spate of class action lawsuits brought under California Civil Code Section 1670.8 raises the specter of liability for companies whose online terms of use include provisions that plaintiffs allege limit consumer reviews. Although Section 1670.8 is not new legislation, it has been seldom litigated since going into effect on January 1, 2015. However, several putative classes of plaintiffs have recently taken aim at so-called “non-disparagement” provisions in the terms of use of retailers’ websites, highlighting a potential concern for any business whose terms of use contain such provisions.

HOW DOES SECTION 1670.8 IMPACT WEBSITE OPERATORS?

Broadly, the statute protects California consumers’ rights and ability to leave consumer reviews, whether

negative or positive. The relevant provisions of Section 1670.8(a) state:

- (1) A contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.
- (2) It shall be unlawful to threaten or to seek to enforce a provision made unlawful under this section, or to otherwise penalize a consumer for making any statement protected under this section.

Section 1670.8 provides a carve-out allowing for a company hosting online consumer reviews to remove a review “that is otherwise lawful to remove.”¹ For instance, a hosting service would presumably be within its right to remove a review that contained copyright-infringing content.

According to the statute’s legislative history, the purpose of Section 1670.8(a)(1) is to “make clear that non-disparagement clauses, which are provisions seeking

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to prevent individuals from making critical statements about a business, are unlawful in specified consumer contracts.”² The legislation was inspired by the well-reported story of a couple who purchased a product from a website, left negative comments on a different consumer review website, and then were assessed a penalty of \$3,500 by the online retailer for breaching a non-disparagement clause in its terms of use policy.

Yet courts have had little opportunity to analyze the meaning and effect of Section 1670.8. At least one court found that the statute does not apply when the plaintiff “has not alleged that [the defendant] sold or leased him a good or service.”³ Consequently, the court noted the law does not apply to “free-to-use online services.”⁴ Still, this limitation leaves a large number of website operators potentially subject to the statute, since many websites sell consumer goods or services online.

MEANING AND EFFECT UNSETTLED

Since November 2023, nearly 20 putative class actions attacking alleged non-disparagement provisions under Section 1670.8 have been filed. The instant rash of lawsuits are reminiscent of a wave of lawsuits brought some years back under the New Jersey Truth in Consumer Contract and Warranty Act (TCCWNA), a statute that addresses, restrictive provisions in consumer contracts. In relevant part, the TCCWNA prohibits a seller from offering or entering consumer contracts that contain any term that violates a “clearly established” New Jersey or federal law.⁵ The New Jersey Supreme Court ultimately derailed many would be claims by ruling that consumers could only maintain a lawsuit under the statute if they alleged actual harm from a purportedly unlawful provision in a contract or notice.⁶

At this juncture, how California courts will enforce Section 1670.8 is largely unsettled, leaving open the potential for liability. It is possible that, as in New Jersey, courts will impose standing requirements, as the statute could be read to limit standing to consumers who have entered or been proposed to enter violative contracts, and potentially, to those against whom enforcement has

been sought. However, the statute also provides for civil penalties not to exceed \$2,500 for the first violation, \$5,000 for the second and any subsequent violation, and up to \$10,000 per willful violation. Some plaintiffs have argued that a violation occurs each time a consumer bound by a website’s terms of use, including an alleged non-disparagement provision, accesses that website, regardless of whether the website owner attempts to enforce that provision.⁷ The statute also explicitly states that civil penalties are not the exclusive remedy for violations, which allows plaintiffs to seek other remedies.

WHAT CAN WEBSITE OPERATORS DO?

While plaintiffs’ interpretations of Section 1670.8 appear dubious, until California courts provide clarity, companies selling or leasing consumer goods or services should monitor these cases and consider reviewing their online service’s terms of use to assess any potential risk. Particular care should be taken around terms of use with provisions that could be construed as restricting consumers’ right to speak about the company or the goods and services offered through the applicable online service.

Notes

1. Cal. Civ. Code § 1670.8(e).
2. Aug. 13, 2014 Cal. Assembly Floor Analysis at 2, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB2365#.
3. *Quigley v. Yelp, Inc.*, 2018 WL 7204066, at *2 (N.D. Cal. Jan. 22, 2018).
4. *Id.* at *2-3.
5. N.J.S.A. §§ 56:12-15.
6. *Spade v. Select Comfort Corp.*, 232 N.J. 504, 520-24 (2018) — consumer could not maintain suit under TCCWNA “[i]n the absence of evidence that the consumer suffered adverse consequences as a result of the defendant’s regulatory violation.”
7. *Hagen v. TikTok Inc.*, No.: 23STCV28623 (Cal. Ct. Super. Nov. 29, 2023); *Ahmed v. Cisco Sys.*, No. 30-2023-01364539-CU-MC-CXC (Cal. Ct. Super. Nov. 21, 2023).

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