

Legal Update

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SOMEONE POSTED A DEFAMATORY REVIEW OF YOUR BUSINESS – NOW WHAT?

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Review sites like Yelp and Angie’s List provide helpful tools for consumers but many business owners have learned that they also can be abused. A customer, who previously might have complained directly to the business or to a few friends, now can post a disparaging one-star review accessible to millions. Worse, a competitor can anonymously pose as a dissatisfied customer to permanently tarnish a business’ reputation. This Legal Update will discuss potential remedies available when a business is subjected to false and disparaging online reviews. This area of the law is still a developing one, where federal statutes governing the internet often trump typical state law remedies.

Is the Review Actionable?

A critical question to consider is whether the disparaging review contains a false statement of fact because courts are likely to protect consumer opinions. If a diner comments that your restaurant served an undercooked burger, that is likely protected. The best approach may be to continue serving quality food so that good reviews will demonstrate the bad one is an outlier or an exception. If the review falsely claims that your restaurant’s burgers caused an outbreak of salmonella, however, your restaurant may have legal remedies.

Still, the road ahead may not be easy. First, a business owner must learn an anonymous reviewer’s identity. Second, one must overcome obstacles designed to ensure that First Amendment free speech rights are protected. In Illinois, for example, courts will adopt any reasonable innocent construction of an allegedly defamatory statement before presuming injury or damages. Otherwise, a business owner may need to demonstrate special damages – *i.e.*, a tangible economic loss directly traceable to the allegedly defamatory statement. Proving a reduction in revenue resulted from a particular bad review, as opposed to other social and economic factors, may be challenging.

Who Can Be Held Liable?

Victims of defamatory online reviews often assume they should pursue the website hosting the review. The federal Communications Decency Act (“CDA”), however, immunizes websites from liability for hosting defamatory content that third parties post. Although websites can forfeit immunity by functioning as a “publisher” of defamatory content, courts have construed the immunity broadly. Sites can retain immunity despite choosing which content to publish, refusing to remove offensive content, giving unlawful content favorable placement, or, in the case of sites like Yelp, choosing which reviews to include when generating the all-important “star” rating.

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Although the law continues to develop, a site generally will retain immunity unless it expressly solicits or prompts posting of unlawful content. It is worth noting, however, that the CDA does not immunize sites against intellectual property claims (such as copyright and trademark infringement), although they enjoy some protection from other statutes, including the Digital Millennium Copyright Act (“DMCA”).

A business owner may have better luck pursuing claims against the individual or entity that posted the review, even if the defendant may lack resources to satisfy a substantial judgment. The author of an online review is not shielded by CDA immunity. Still, business owners seeking to recover damages from anonymous posters face challenges, the most daunting of which may be determining the identity of an anonymous reviewer. Moreover, businesses should consider the potential for public relations backlash when taking action against dissatisfied customers.

Identifying the Poster

Courts have long held that the First Amendment protects the right to comment anonymously. Although plaintiffs in some states may bring suits against “John Doe” defendants and then seek discovery to determine the author’s identity, in Illinois, the plaintiff must state enough facts to show the defamation claim will survive a motion to dismiss before a court will allow discovery regarding an anonymous poster’s identity. Other states have adopted similar requirements.

Removal of Disparaging Comments

Oftentimes, businesses are simply concerned with having false or unfair reviews removed. As discussed, the CDA generally shields websites from liability for their decisions regarding whether to publish or remove defamatory content. Moreover, the First Amendment restricts the ability of courts to order the removal of offensive content, as opposed to awarding money damages.

Nonetheless, websites have an interest in being perceived as reliable. They often provide complaint procedures under their terms of service which provide avenues to request removal of posts that violate the terms. Takedown requests are more likely to be successful when they can allege intellectual property violations. In the case of copyright claims, the DMCA expressly provides a “notice and takedown” procedure. E-personation by competitors posing as customers (which also can be a crime in Illinois) may qualify as an intellectual property violation for purposes of takedown requests.

Conclusion

Businesses seeking to remedy false and disparaging online reviews often face an uphill battle. Before embarking on an expensive path that might prove unproductive, they should consult with counsel to develop a strategy that best avoids the numerous potential pitfalls.

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