Review websites and user-generated content can mean big business as consumers look to peers for suggestions on where to eat, what to buy, and who the best medical professionals are in their area. But in an instant, a negative online review or two can also scare away consumers in droves.

The fear of the impact a negative review could have on business has led to a flurry of defamation lawsuits by plaintiff businesses and individual professionals against review websites like TripAdvisor and individuals who posted content to websites such as Yelp and Angie’s List. These efforts have been overwhelmingly rejected by Courts, resulting in some businesses getting creative with other ways to combat negative online reviews like flooding review sites with fake good reviews or anti-disparagement provisions in company terms of use policies. It is important, however, that businesses and professionals are aware that these “solutions” can raise other legal and business concerns.

Online Reviews as Protected Opinion

In its 1990 landmark decision in Milkovich v. Lorain Journal Co., the U.S. Supreme Court established what constitutes opinion protected under the First Amendment. The Court held statements employing “loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining” an assertion of fact deserve strong protection under the First Amendment. Both reviewers and websites have successfully defended defamation lawsuits under the doctrine of opinion.

Sixth Circuit Finds Online List of Dirtiest Hotels to be Protected Opinion

In one of the most recent decisions involving negative online reviews, the U.S. Court of Appeals for the Sixth Circuit held that placing a hotel at the top of an online list of the “Dirtiest Hotels in America” was protected opinion under the First Amendment and the Tennessee Constitution.

The case, Seaton v. TripAdvisor LLC, arose after online travel website TripAdvisor published its “2011 Dirtiest Hotels” list based on cleanliness ratings provided by the site’s users. Grand Resort Hotel and Convention Center in Pigeon Forge, Tennessee, owned by plaintiff Kenneth Seaton, landed at #1 on the list. Seaton filed suit against the website, alleging that TripAdvisor’s rankings were false because they did not accurately reflect user data. TripAdvisor argued that the list constituted a statement of opinion that could not be proven true or false because the user rankings and the concept of the “dirtiest” hotel were inherently subjective and therefore was protected under the First Amendment. The U.S. District Court for the Eastern District of Tennessee sided with TripAdvisor and granted its motion to dismiss in August 2012. Seaton appealed to the Sixth Circuit.
The Sixth Circuit affirmed the district court’s dismissal of Seaton’s claims under the doctrine of opinion, finding that TripAdvisor’s judgments were inherently subjective and that the list was “rhetorical hyperbole.” The Court held that the list could not “reasonably be interpreted as stating, as an assertion of fact, that Grand Resort is the dirtiest hotel in America.” The Court also compared the list to other online polls and lists like Reader’s Digest’s poll of the “100 Most Trusted People in America” and a website’s list of the “Top Ten Dumb Asses”, suggesting that a top-ten list is not only subjective but inherently frivolous.

The Court also rejected Seaton’s argument that TripAdvisor’s ranking system is flawed because the percentage of negative reviews received by the hotels on the “dirtiest” list did not directly correspond to their final ranking of 1 through 10. Even if the ranking system was flawed, the Court wrote, the defamation claim still failed because TripAdvisor’s method of compiling reviews and surveys was inherently subjective in nature.

Minnesota Supreme Court Rules Online Review of Doctor was Protected Opinion

In McKee v. Laurion, the Minnesota Supreme Court held that statements made by Dennis Laurion on an online doctor review website about neurologist Dr. David McKee were not defamatory statements of fact. Laurion wrote the review after he was displeased with McKee’s examination of Laurion’s father following a stroke. He posted comments about McKee and the examination on two “rate-your-doctor” websites. In one comment, Laurion said that a nurse told him that McKee was a “real tool.” McKee filed suit against Laurion for defamation and interference with business. A Minnesota district court dismissed McKee’s suit, finding that none of the statements were defamatory but rather appeared to be nothing but statements of “shock” of the way he and his family were treated. McKee appealed the decision to the Minnesota Court of Appeals, which reinstated the lawsuit, sending it back to the trial court with instructions that a jury should decide whether six of the statements harmed McKee’s reputation. Laurion appealed the ruling to the Minnesota Supreme Court.

Much of the case focused on the “real tool” portion of the review. McKee argued that Laurion’s statement that the doctor was a “real tool” was not a protected opinion. The Court said, “Referring to someone as ‘a real tool’ falls into the category of pure opinion because the term ‘real tool’ cannot be reasonably interpreted as stating a fact and it cannot be proven true or false.” The court dismissed McKee’s claim for defamation, reversing the Minnesota Court of Appeals and upholding the district court’s ruling.

Other Online Review Cases Raise Prior Restraint Concerns; Show Potential Exposure for Plaintiff Liability under Anti-SLAPP Statutes

Two other recent online review defamation cases involving former disgruntled consumers highlight the risk of raising free speech concerns beyond that of protected opinion and illustrate that filing a weak claim could expose a business to liability in states that have strong anti-SLAPP statutes. In Perez v. Dietz Development LLC, the Virginia Supreme Court vacated a trial court’s preliminary injunction against a homeowner who had posted negative reviews of a contractor on AngiesList and Yelp. Contractor Christopher Dietz
filed a defamation lawsuit against former client and homeowner, Jane Perez, after she posted a number of reviews accusing Dietz of damaging her home, stealing her jewelry, and employing deceitful billing practices. A Virginia Circuit Court issued a preliminary injunction requiring that Perez delete the critical posts, with the exception of the comments specifically related to Dietz’s work on her home.

After the ruling, the Public Citizen Litigation Group and the American Civil Liberties Union (ACLU) of Virginia joined Perez’s legal team and appealed the order to the Virginia Supreme Court, asserting that the injunction amounted to an unconstitutional prior restraint, in violation of the First Amendment. In a brief order vacating the injunction the Court said that the injunction “was not justified and the respondents have an adequate remedy at law.”

In *Rahbar v. Batoon*, the California Supreme Court refused to revive a dentist’s lawsuit against a patient who had posted a critical online review on Yelp.com. The patient, Jennifer Batoon, wrote “DON’T GO HERE, MOST PAINFUL DENTIST EVER,” and voiced her displeasure with her dentist’s billing practices, communication skills, and treatment choices. The dentist, Gelareh Rahbar, sued Batoon in San Francisco Superior Court for defamation and invasion of privacy.

Batoon moved to strike the claims under California’s anti-SLAPP statute, which provides “a cause of action against a person arising from any act of that person in the furtherance of the person’s right of petition or free speech … in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” The trial court granted Batoon’s motion and awarded the defendant $43,035 in attorney fees.

Rahbar did not appeal the decision, but filed a second lawsuit against Batoon. Again, the patient filed an anti-SLAPP motion, and the court again ruled she was entitled to fees. Both the California Court of Appeals and the California Supreme Court upheld the trial court’s awards.

**Importance of Online Reviews Push Businesses and Professionals to get Creative**

Although there has been an uptick in defamation cases filed in reaction to negative online reviews, Yelp, for example, reports that 80% of its online reviews are three to five stars out of five. Likewise, TripAdvisor reports that 75% of its reviews are “very good” or excellent.” But a Harvard study showed that a one star increase in rating on Yelp yields a 5-9% increase in revenue for a company, suggesting that online reviews are increasingly important to a company’s reputation and financial success. If one of the first reviews consumers stumble upon is critical of a business, or even more harshly negative, a *Forbes* article on the trend in lawsuits said this can result in a company’s revenue dropping as much as 70%.

With statistics like that, it is no surprise that companies and professionals are looking to fight back against negative posts online. But so far, litigation has not been wildly successful for frustrated plaintiffs. Professor Eric Goldman, an associate professor at Santa Clara University School of Law in California, who tracks Internet-based review defamation cases, said of the 28 defamation lawsuits filed against health care providers, 16 were dismissed, six settled, and the remainder are pending. In six of the cases Goldman followed, the defendants who posted the reviews were

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34 Id.
37 Id. at *2.
38 Id.
40 Id.
42 Id.
43 Komperda, *Courts confront online reviews, RCFP: The News Media and the Law* (Fall 2012).
able to utilize state anti-SLAPP statutes to dispose of the lawsuits early.44

Businesses and professionals generally choose to go after the individual generator of the content because review websites receive strong protection under § 230 of the Communications Decency Act which shields most websites from liability for user-generated content.45 But with the growing trend of unsuccessful suits, some professionals and businesses have attempted to get creative in the fight against negative reviews.

Dentist Stacy Makhnevich attempted to use forms from a company called Medical Justice to make patients agree to assign the copyright on any online reviews they might write over to the doctor or dentist.46 After patient, Robert Lee, posted a critical review, Makhnevich sent him an invoice for $100/day, claimed $85,000 in damages, and asked for $25,000 in general damages for fraud.47 Lee responded by filing a class action lawsuit.48 Makhnevich also requested that Yelp take down the review with a Digital Millennium Copyright Act notice (DMCA), but the company refused to do so.49 In allowing the class action to go forward against the dentist, the U.S. District Court for the Southern District of New York called Makhnevich’s actions against her patients “ridiculous.”50 The case is ongoing.

Recently, a web retailer garnered backlash from consumers after it tried adding an anti-disparagement provision to its terms of use and sought to enforce it.51 KlearGear.com threatened to impose a $3,500 fine if customer Jen Palmer did not take down the critical remarks she had posted about the company on Ripoffreport.com.52 After Palmer did not pay the fine, KlearGear reported her as delinquent to credit agencies, which one news station reported, has made it difficult for Palmer and her husband to get financing for a car and to fix their furnace.53

The anti-disparagement provision stated in part: “In an effort to ensure fair and honest public feedback, and to prevent the publishing of libelous content in any form, your acceptance of this sales contract prohibits you from taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees.”54

News of KlearGear’s attempt to enforce this provision quickly received a negative reaction amongst the blogging community and led to the company deleting its Twitter and Facebook accounts.55 The company reportedly also removed its anti-disparagement provision from its terms of use.56 But KlearGear is not the only company that has adopted such a provision.

“There’s a number of businesses around the country that are starting to put this language in their agreements; where they say ‘if you post anything detrimental there’s a cost to be paid,’” Phil Catlett, President of the Better Business Bureau of West Michigan. “Whether it’s legal or not is a different issue.”57 Based on the case law in this area and strong free speech doctrine, it is unlikely that these provisions would be upheld if challenged in court on First Amendment grounds.

Because options to control what consumers say often look grim, some businesses have turned to hiring individuals to write positive reviews online, even if the “customer” did not actually use the service or eat at the

44 Id.
45 47 U.S.C. § 230 (“No provider or use of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”)
46 Lee v. Makhnevich, 2013 WL 1234829, at *1 (March 27, 2013). The provision stated: “In consideration for treatment ... Patient agrees to refrain from directly or indirectly publishing ... commentary upon Dentist and his practice, expertise and/or treatment If Patient does prepare commentary for publication about Dentist, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Dentist for any written, pictorial, and/or electronic commentary.... This agreement shall be operative and effective at the time of creation (prior to publication) of the commentary.... In addition, Patient will not denigrate, defame, disparage, or cast aspersions upon the Dentist; and ... will use all reasonable efforts to prevent any member of their immediate family or acquaintance from engaging in any such activity.”
47 Id. at *2.
48 Id. at *1.
49 Id. at *2.
50 Id. at *3.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
restaurant.58 Other companies have tried to incentivize customers to write good reviews by offering free products to consumers.59 But these deceptive reviews have drawn attention from governmental agencies in both state and federal governments. Phony reviews singing a company’s or product’s praises may run afoul to Federal Trade Commission (“FTC”) rules and other state regulations.

This year, the FTC released an updated version of its .comDisclosures guide for digital advertising, originally published in 2000.60 The guide contains some new information for bloggers and social media users and mirrors the endorsement guides put out by the FTC in 2009.61 The guides explain that the FTC has the power to fine both bloggers and companies for not disclosing an arrangement where the company pays the blogger for a review, positive mention, or sponsored post. An arrangement exists if a customer (1) receives a free product to review it; (2) links to the company’s or product’s website for a commission; (3) receives money, product or services for posting about a product; and (4) reviews a product or service that comes from an advertiser on the blogger’s own website. The FTC does not require disclosure if the consumer uses a coupon for a more expensive brand than he or she would normally buy and then writes about it or if the consumer reviews products from a “swag” bag or giveaway bag that they received at a conference.62

The new FTC guide also described a more specific definition of “disclosure,” which requires the disclosure to be contained within the individual post itself, rather than a general disclosure somewhere on a website or social media profile. Under the rules even a Tweet promoting a blog post or review should likely include some kind of disclosure such as “#sponsored” or “#paid ad.” In addition, even if these requirements are satisfied a company could still be fined if a paid blogger or review’s content contains misleading or unsubstantiated representations. This puts companies at risk for liability if the consumer wrote about a product he or she never tried, the consumer was paid to try it and thought it was terrible, but wrote a positive review anyway, or the consumer made claims about the product that cannot be substantiated.

Beyond federal regulations, New York regulators announced the most comprehensive crackdown on deceptive reviews online to date in September of 2013.63 According to The New York Times, agreements were reached with 19 companies to pay a total of $350,000 in penalties for creating fake reviews or for purchasing them.64 Among the companies signing the agreements were a charter bus operator, a teeth-whitening service, a laser-hair removal chain, and an adult entertainment club.65 Several reputation-enhancement firms that are paid to write fraudulent reviews on websites like Google, Yelp, Citysearch, and Yahoo also signed agreements with the state regulators.66

“What we’ve found is even worse than old fashioned false advertising,” New York Attorney General Eric T. Schneiderman said. “When you look at a billboard, you can tell it’s a paid advertisement – but on Yelp or Citysearch, you can assume you’re reading authentic consumer opinions, making this practice even more deceiving.”67

The investigation focused on New York-based businesses, but it will likely have a broader impact, the Times said.68 “This shows that fake reviews are a legitimate target of law enforcement,” Aaron Schur, senior litigation counsel for Yelp said.69 Yelp works to screen false reviews and recently sued a California law firm for writing fake reviews of itself – demonstrating even the legal profession is not immune from getting caught up in the quest for a positive reputation online.70

59 Id.
60 FTC Report, .comDisclosures: How to Make Effective Disclosures in Digital Advertising (March 2013).
64 Id.
65 Id.
66 Id.
68 Id.
69 Id.