False Competitor Reviews: John Doe Lawsuits & False Advertising Claims

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Whitney C. Gibson

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There is no denying that online reviews are important for businesses. After all, customers regularly search them out and are increasingly relying them.

According to a 2014 survey of 2,104 consumers, SEO expert BrightLocal found that 88 percent of the respondents had read online reviews for local businesses and 88 percent of the consumers also indicated they trust reviews as much as personal recommendations.

But this level of trust is unjustified.

Various studies have shown that a significant percentage of online reviews are fake, meaning these reviews often do not indicate legitimate feedback from actual customers. In fact, a 2013 Business Insider article reported 20 percent of Yelp reviews are fake.

In some cases, businesses may plant false negative reviews about legitimate competitors in order to drive customers away from those target businesses. And due to the anonymity afforded on the internet, competitors frequently get away with this illegal marketing tactic.

Fake negative reviews are not the only concern, however. Some businesses post false positive reviews about themselves to create a positive online presence. This process, often referred to as "astroturfing," has become a business itself. For example, a quick search on the website Fiverr.com reveals numerous people offering to write reviews or rate another's product for $5.

There are many people online offering online review writing services, meaning that if a competitor wants to have false positive or false negative online reviews published, there are plenty of options – including outsourcing these efforts.

'John Doe' lawsuits

Unfortunately, the nature of false reviews – generally published anonymously or pseudonymously – can make it difficult for a business to prove it is a victim of a false-review attack by a competitor.

However, there is a legitimate litigation tactic that can uncover such proof and hold a competitor response for fake reviews: a “John Doe” lawsuit. This approach may provide a business the opportunity to gather evidence connecting a false review to a competitor.

More specifically, John Doe litigation allows plaintiff businesses to serve subpoenas on the websites (or their parent companies) on which false reviews have been published. If a business can identify the poster of a fake review, the business can amend its complaint to name the person as the defendant.

False advertising claims

When a competitor poses as a customer and unlawfully submits a review of a business, this not only may constitute defamation but it can also give rise to a false advertising claim under the federal Lanham Act and state law.

It is important to note that false advertising claims can have some advantages over defamation claims. Perhaps the most significant is the statute of limitations: The limitations period for defamation in most states is one or two years, yet the Lanham Act – which is the source of federal false advertising law – provides no statute of limitations.

Many courts look to state law for the limitations period, and most state limitations periods for false advertising are at least three years. Further, many states apply the discovery rule, which essentially means the limitations period will only commence after the plaintiff knew or should have known about the claim. Given the longer limitations period and use of the discovery rule, as a practical matter a false advertising claim is less likely to be timed barred.

Another advantage is that false advertising includes statements that may not be defamatory. In other words, literally true statements can be the basis of a false advertising claim if they mislead or confuse consumers.

Considering that many websites are not receptive to subpoenas if, in their judgment, the reviews at issue are not defamatory on their face, a false advertising claim may be helpful in showing a good faith basis for the website to produce identifying information.

Thus, in the current internet landscape featuring countless anonymous false online reviews, businesses should recognize that: 1) they can file John Doe lawsuits; and 2): there is an alternative to filing defamation actions or, in many instances, a false review may give rise to *both* defamation and false advertising claims.

For more information, contact Whitney Gibson at 855.542.9192 or wcgibson@vorys.com. Read more about the practice at http://www.defamationremovalattorneys.com and follow Whitney on Twitter at @WhitneyCGibson.