

Fewer Remedies In Calif. For Targets Of Defamatory Reviews

By **Pooja Nair** (July 13, 2018, 4:41 PM EDT)

On July 2, 2018, the California Supreme Court ruled in a 4-3 decision in *Dawn L. Hassell et al. v. Ava Bird* that Yelp could not be ordered to remove negative reviews that were found to be defamatory. Three justices in the majority found that the Communications Decency Act of 1996 immunized Yelp from any form of liability for user-generated online content, including being subject to a court order for injunctive relief. However, a fourth justice made the same decision on narrower due process grounds, leaving significant uncertainty as to the extent of immunity under the CDA.



Pooja Nair

Section 230(c)(1) of the CDA provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Section 230(e)(3), meanwhile, relates in relevant part, “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” During the argument in the case, plaintiff’s counsel acknowledged that they had deliberately not named Yelp as a party to the case in order to avoid questions under Section 230.

The reviews at issue were multiple one-star reviews of The Hassell Law Group in San Francisco posted by the same dissatisfied former client. The law firm sued the former client for defamation, but did not name Yelp as a defendant in the lawsuit. The law firm won its defamation case on default judgment.

After the default judgment was entered, the superior court ordered both the former client and Yelp to take down the reviews. Yelp was ordered to remove all the reviews within seven days of the order. Because Yelp was not initially a defendant in the case, it filed a motion asking the court to vacate the order on due process grounds, but the court denied the motion and left the injunction order intact.

Yelp then appealed the order as a nonparty to the lawsuit, arguing that being forced to remove the review violated Yelp’s immunity under the CDA, the company’s due process rights, and the First Amendment. The appellate court agreed with the lower court decision and left the order in place.

After losing at the appeals court, Yelp appealed to the California Supreme Court. Twelve groups, including the ACLU and Google, submitted amicus briefs in support of Yelp’s position. These groups argued the law firm’s position was that the reviews in question had already been found to be false and defamatory based on the default judgment, and requiring Yelp to remove them from the website was

the only way for the business to have an appropriate remedy for the harm it suffered from the defamation.

The decision was a plurality decision authored by Chief Justice Tani Cantil-Sakauye with two justices concurring. The plurality opinion found that Yelp was undoubtedly a “provider or user of an interactive computer service” within the meaning of Section 230(c)(1), and was thus entitled to a broad immunity, including immunity from being subject to the order to take down the bad reviews at issue. The court found that if Yelp had been originally named as a defendant, it could have sought and received Section 230 immunity, and that the plaintiff could not create a loophole by failing to name Yelp as a defendant and then obtaining an order against it as a nonparty.

Justice Leondra Kruger concurred in the judgment, but based her decision entirely on due process grounds, focusing on Yelp’s status as a nonparty. She found that Yelp was entitled to “its own day in court” before it could be compelled to remove content from its website. Justice Kruger expressed “no view on how section 230 might apply to a different request for injunctive relief based on different justifications.”

The three dissenting justices, in two separate opinions, harshly criticized the expansion of Section 230 immunity in the plurality opinion. The dissenting justices warned that individuals who had been defamed by online reviews would have no meaningful remedy to take down false or misleading information. In this case, the reviews at issue had already been found by the trial court to be defamatory, and yet the defamed company had no way to force Yelp to take down the content because of the broad finding of Section 230 immunity. The dissenters also warned of the need to balance the value of free expression and a relatively unregulated internet against the harms arising from damaging words or private images that people are not lawfully free to disseminate.

The case has wide implications for the restaurant and hospitality industries, which are directly affected by online consumer reviews. Internet reviews have a significant impact in the restaurant field. A Harvard Business School Working Paper found that both positive and negative reviews had a causal effect on customers’ decisions to choose certain restaurants over others.[1] While businesses can still sue individuals over their reviews based on the tort of defamation, they may face an expensive losing battle even if they win the lawsuit. Businesses affected by online reviews may ask individual platforms to take down those reviews, but they have no guarantees that even false or inaccurate reviews will be removed. For example, Yelp asks businesses to report false or derogatory reviews, but warns that they do not “typically take sides in factual disputes and generally allow Yelpers to stand behind their reviews.”[2]

If the plurality opinion’s broad interpretation of Section 230 immunity is followed, the targets of defamatory reviews will have very limited remedies to remove content published on websites. However, the fractured nature of the holding means that the case law on Section 230 immunity is not fully settled. The broad interpretation of Section 230 immunity was only subscribed to by three justices because Justice Kruger’s swing vote concurrence was decided on due process grounds and not based on Section 230. While the Hassell decision is a victory for internet platforms and websites, the scope of immunity under Section 230 has not been fully drawn out, and future litigation in this field will force California courts, websites and businesses affected by online speech to grapple further with these issues.

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[1] Michael Luca, Reviews, Reputation, and Revenue: The Case of Yelp.com." Harvard Business School Working Paper, No. 12-016, September 2011, available at https://www.hbs.edu/faculty/Publication%20Files/12-016_a7e4a5a2-03f9-490d-b093-8f951238dba2.pdf.

[2] Yelp Support Center, Legal Questions, "Will Yelp remove a false or defamatory review?" available at support.com/article/Will-Yelp-remove-a-false-or-defamatory-review?l=en_US">https://www.yelp-support.com/article/Will-Yelp-remove-a-false-or-defamatory-review?l=en_US