

**Levitt v. Yelp! Inc.****United States Court of Appeals for the Ninth Circuit**

Four plaintiffs filed a suit alleging that the review site Yelp exerted undue pressure on them, which amounted to extortion, to purchase advertising. The Ninth Circuit determined however that Yelp's business practices are just 'hard bargaining.'

For years, Yelp has faced criticism and lawsuits over the authenticity of reviews on its site. Some businesses have complained that because Yelp does not verify whether reviews are written by actual customers, it's easy for individuals with bad intentions to post fake, negative reviews. Some businesses have also alleged that Yelp pressures them into buying advertising packages by manipulating their reviews. In September, the Court of Appeals for the Ninth Circuit held that, even if this is true, Yelp's actions don't amount to extortion.

Some commentators have worried that the court's decision gives Yelp and other review sites a broad licence to manipulate reviews. Businesses who feel that they've been treated unfairly by review sites will certainly find a lot not to like in the decision. It's important to remember, though, that the decision was limited to the narrow question of whether the plaintiffs had proven that Yelp's conduct amounted to extortion under California law. The court held that they hadn't. But there are still some limits as to what review sites can do.

**Background on Yelp**

As most readers know, Yelp runs a website on which registered users can review businesses and rate them on a scale of one to five stars. Yelp assigns each business an overall star rating, based on these reviews. Not all reviews appear on a business' Yelp page, however. In addition to the reviews that Yelp removes because they violate the company's policies, Yelp also employs filtering software that prevents some reviews from showing up at all. Yelp states that the software is designed to protect against fake reviews, that the process 'is entirely automated to avoid human bias,' and that 'it

affects both positive and negative reviews.'

Businesses cannot opt out of being listed on Yelp or being reviewed by users. Businesses do, however, have the option of purchasing advertising packages that cost between \$300 and \$1,200 per month. A business that advertises on Yelp has certain benefits that aren't available to non-advertisers. For example, advertisers can have ads appear on various places on the site, they can prevent competitor's ads from appearing on their pages, and they can promote favourite reviews to the top of their pages. According to the plaintiffs, Yelp also works with advertisers to make negative reviews go away.

**The plaintiffs' allegations**

In *Levitt v. Yelp! Inc.*, four plaintiffs filed a suit against the review site, alleging that Yelp exerted undue pressure on them to purchase advertising, and that the pressure amounted to extortion. Each plaintiff's allegations are similar:

- The owner of a furniture restoration business alleged that a Yelp sales representative invited the business to advertise with Yelp. According to the owner, two days after he declined the offer, several positive reviews disappeared from his page, leaving his business with a lower overall rating.

- An animal hospital alleged it had received various calls from Yelp sales representatives urging the hospital to purchase an advertising package. Among other things, the representatives stated that Yelp would 'hide negative reviews' or 'place them lower' on the page, if the hospital advertised on Yelp. According to the hospital, a week after it rejected this pitch, negative reviews started to appear on the site.

- Yelp sales representatives allegedly told an automobile body

shop that '[Yelp] work[s] with your reviews if you advertise with us.' Within minutes of declining an offer to advertise on Yelp, a one-star review was moved to the top of the business' page. Moreover, the shop alleged that Yelp itself posted 'false reviews' on its page 'as a threat to induce [the shop] to advertise.'

- Shortly after a dentist declined to purchase an advertising package, she noticed that Yelp had removed various positive reviews, causing her overall rating to drop. 'Out of fear of further manipulations,' the dentist signed an advertising agreement. Shortly after that, some of the positive ratings reappeared, and her rating improved. Several months later, the dentist declined an offer to increase her advertising purchase, and her overall rating started to decline. And after she cancelled her agreement, the rating declined even further.

Yelp denied these allegations, and it's important to note that the court did not decide whether the allegations were true. Instead, the court focused on the narrow question of whether the alleged conduct - even if true - constituted extortion.

**The court's analysis**

The plaintiffs generally alleged that the following conduct amounted to extortion: (1) Yelp allegedly manipulated user reviews in an effort to induce companies to buy advertising; and (2) Yelp allegedly created its own negative reviews to induce companies to buy advertising. The court ultimately concluded that: (1) Yelp's manipulation of user reviews, assuming it occurred, did not constitute extortion; and (2) the business owners did not plead sufficient facts to make out a plausible claim that Yelp had authored negative reviews of their businesses.

The court explained that extortion by threatening economic harm is ‘an exceedingly narrow concept’ and that ‘[u]nless a person has a pre-existing right to be free of the threatened economic harm, threatening economic harm to induce a person to pay for a legitimate service is not extortion.’ So even if Yelp did try to pressure the business owners into buying advertising by deciding which reviews to post and how to present them, that would not violate the laws against extortion. In the words of the court, Yelp’s actions are just ‘hard bargaining.’

One of the cases the court cited is particularly instructive. In that case, a group of tenants sued the owner of a mobile-home park, claiming the owner used extortionate tactics to induce them to sign leases. Those tactics included alleged threats that non-signers would be subject to future rent increases and would have to pay their own utility bills. In the decision, the court noted that the owner had the right to increase rent and require tenants to pay for their utilities. Because the owner had the right to do that, it also had the right to threaten to do that. Therefore, the alleged threats do not constitute extortion. So if you have the right to do something, you can also threaten to do it.

The analysis was similar in this case. The court held that the plaintiffs had ‘no pre-existing right’ to have positive reviews appear on Yelp’s website, to have negative reviews removed, or to have reviews appear in a particular order. Instead, Yelp is free to choose what reviews appear on its site and the order in which those reviews appear. Because Yelp is free to do that, it is also free to threaten to do that, depending on whether or not a company decides to advertise on the site. Although the outcome of the case may not be palatable to

some, the court noted that a ‘less stringent standard would transform a variety of legally acceptable business dealings into extortion.’

As for the claim that Yelp authored negative user reviews, the court concluded that the business owners did not provide sufficient facts in support. Although some of the reviews cited by the plaintiffs may have been suspicious and potentially not written by real consumers, there was no evidence that Yelp had written them. The court noted that the reviews could have been written by a ‘competitor, or a disgruntled customer hiding behind an alias, or an angry neighbor, just to give a few possibilities.’ Because of this, the court held that the claim should be dismissed.

### Free reign?

Does that mean that Yelp and similar sites can do whatever they want? Not quite. The court wrote: ‘We emphasize that we are not holding that no cause of action exists that would cover conduct such as that alleged, if adequately pled.’ For example, the court noted that one of the plaintiffs had a contractual relationship with Yelp at one time and wondered whether some of Yelp’s activities may have breached that contract. If so, the court wrote that those claims should be pursued through state law theories of contract - not allegations of extortion.

Advertising laws could also come into play. For example, the Federal Trade Commission (‘FTC’) sent a letter to search engine companies last year to address how paid search results are presented. The FTC took the position that consumers should be able to easily distinguish natural results from those that have been influenced by a payment, and that the failure to clearly make that distinction could

be deceptive. It’s easy to see how that rationale could apply to a review site. If a consumer is entitled to know which search results have been influenced by a payment, the consumer is also probably entitled to know which reviews (or aggregate scores) have been influenced by a payment.

Earlier this year, the FTC also revealed to The Wall Street Journal that it had received over 2,000 complaints against Yelp since 2008. Although it’s impossible to tell whether the FTC is investigating any of the allegations in the complaints, we do know that Yelp is still facing other lawsuits about its business practices. The Ninth Circuit’s determination that Yelp’s business practices are just ‘hard bargaining’ is another victory in a series of wins for review sites. But other courts and regulators may still have more to say about those practices.

---

**Gonzalo E. Mon** Partner  
Kelley Drye & Warren, Washington DC  
gmon@kelleydrye.com

---