

TRAVEL LAW: LIABILITY FOR UNFAVORABLE TRAVEL

REVIEWS: THE TRIPADVISOR.COM CASE

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I have been writing about travel law for 38 years including my annually updated law books, *Travel Law*, Law Journal Press and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw, and over 300 legal articles many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml. This article discusses the potential liability of Internet websites such as TripAdvisor.com that may post unfavorable travel reviews of hotels and other suppliers.

Traditional Sources Of Information

There was a time not long ago when consumers interested in

taking a vacation would consult their local retail travel agent and/or purchase a guide book featuring a particular destination and its hotels, restaurants and local sites of interest. The information provided the curious traveler may or may not have been accurate and was often self serving. As I noted in *Travel Law* "Hotel ratings are virtually meaningless. Nevertheless travelers rely upon these self-descriptions as if they were accurate evaluations of the true nature of the hotel. (In addition) Most countries have their own independent rating system for hotels (making it impossible to compare hotels as between countries)". Further, whether superlatives such as "first class", "special", "luxurious" and "best in the world" have any practical or legal meaning depends upon whether a court finds them to be "actionable" [See e.g., *Vallery v. Bermuda Star Line, Inc.* (terms such as "first class", "beautiful" and "exquisite" regarding cruiseship were misleading and deceptive and "transcended the bounds of a statement of opinion and reached the level of false representations and pretenses when the brochure assigned qualities in the stateroom in issue which it did not possess")] or mere "puffing" [See e.g., *Viches v. MLT, Inc.* (brochure promising "worry free" vacation is "mere puffing" and no guarantee of no harm); *Simon v. Cunard Line Limited* (QEII described as "greatest ship in the world" is mere puffing and not actionable)].

The Online Revolution

The Internet has not only added a host of Online Travel Sellers stimulating the development of new marketing models [e.g., Priceline, Travelzoo, Hotwire, Tingo, Guestmob and Site59's 'last-minute-air-plus-land-packages'] but an ever increasing number of specialized travel websites such as Farecast.com, Farecompare.com, Google.com, Kayak.com, Hipmonk.com, Vayable.com, TheSuitest.com, and Tripshare.com which help the traveler obtain accurate information, do comparison shopping and obtain the best price. And lastly, traveler generated reviews are now posted on Internet websites. As noted in the New York Times [Christiansen, *Travel Trends and the Year Ahead*, January 7, 2014] "A study conducted by eMarketer suggested that nearly two-thirds of all travelers today research online before they book. Even 10 years ago that was probably in the single digits".

TripAdvisor.Com

As stated by the Court in *Seaton v. TripAdvisor, LLC*, 2012 WL 3637394 (E.D. Tenn. 2012), *aff'd* 728 F. 3d 592 (6th Cir. 2013) "TripAdvisor, LLC...does business throughout the United States and worldwide by means of an internet website located at

www.TripAdvisor.com (and provides) travel research information, including reviews, reports, opinions, surveys...regarding hotels, resorts, restaurants and other similar businesses of interest to persons traveling or making travel plans worldwide. (TripAdvisor) advertises that it adheres to certain rules and regulations of fairness in its ratings and reports concerning the hotels and restaurants it surveys. Its website proclaims that...TripAdvisor provides the world's 'most trusted travel advice'...Visitors to TripAdvisor's website use its forums to exchange information relating to travel issues. TripAdvisor users are further encouraged to post comments and reviews and to answer surveys regarding hotels, resorts, restaurants and other such places of interest".

The Dirtiest Hotels List

"TripAdvisor also creates and publishes on its website various lists, reports and rankings (including) the 'Dirtiest Hotels' list created, published and distributed annually by TripAdvisor from 2006 to 2011 (and features) a list of ten hotels, ranked from one through ten with number 'one' designated as the 'dirtiest hotel'. When compiling its 'Dirtiest Hotels' list, TripAdvisor relies solely on customer reviews; it does not inquire about, investigate or consider any hotels except those

receiving comments or reviews on the TripAdvisor website" (*id.*)

The 2010 Dirtiest Hotels List

In 2010 the New York Times noted the language used in TripAdvisor reviews in describing some British hotels including "Cradle of Filth: The Worst, Worst, Worst Hotel in the World", "Slept in my clothes" and "Made me think of my own grave". "Those are just a few excerpts from reader-generated reviews of various hotels in Britain, culled from the '2010 Dirtiest Hotels' list published recently by TripAdvisor.com... TripAdvisor says it has reviews from more than 450,000 hotels around the world" [Sharkey, A List No Hotel Wants To Be On, New York Times, Business Section (February 8, 2010)].

2011 Dirtiest Hotels List

It is not surprising that a hotel receiving an unfavorable review would sue TripAdvisor alleging defamation. Such was the case after TripAdvisor published its "'2011 Dirtiest Hotels' list report[ing] that (Hotel X) was 'the dirtiest hotel in America'... The survey was published via TripAdvisor's website and several media entities... The list incorporated a photograph and a quote from TripAdvisor users about each of the ten hotels, as well as a

link to hotel's page on TripAdvisor's website. The user quote for (Hotel X) was 'There was dirt at least ½" thick in the bathtub which was filled with lots of dark hair'. The photograph for (Hotel X) was a ripped bedspread" (*Id.*).

The Lawsuit

The "sole proprietor" of Hotel X brought suit in Tennessee Circuit Court and the action was removed to the United States District Court, Eastern District of Tennessee. The original complaint alleged that TripAdvisor was "liable for 'maliciously and wrongfully contriving, designing and intending to cause respected customers to lose confidence in (Hotel X) (and causing) great injury and irreparable damage to and to destroy (Hotel X's) business and reputation by false and misleading means...(hotel X) further alleges that (TripAdvisor) 'defam[ed] the (Hotel X's) business with unsubstantiated rumors and grossly distorted ratings and misleading statements to be used by consumers'...' used a rating system which is flawed and inconsistent and distorts actual performance and perspective'... and 'acted recklessly and with disregard to (Hotel X's) right to carry out its business...'" (*Id.*).

The Decision: Rhetorical Hyperbole

In reviewing the *Seaton* trial court's dismissal of Hotel X's complaint, the 6th Circuit Court of Appeals (728 F.3d 592 (2013)) noted that "In the present case, *Seaton's* claim for defamation turns on whether TripAdvisor's '2011 Dirtiest Hotels' list is capable of being understood as defamatory. Although the (U.S.) Supreme Court has refused to give blanket First Amendment protection for opinions, its precedents make clear that the First Amendment does protect 'statements that cannot be interpreted as stating actual facts about an individual'". In agreeing with the trial court the Court of Appeals held that "Seaton failed to state a plausible claim for defamation because TripAdvisor's '2011 Dirtiest Hotels' list cannot reasonably be interpreted as stating, as an assertion of fact, that (Hotel X) is the dirtiest hotel in America. We reach this conclusion for two reasons. First, TripAdvisor's use of 'dirtiest' amounts to rhetorical hyperbole. Second, the general tenor to the '2011 Dirtiest Hotels' list undermines any impression that TripAdvisor was seriously maintaining that (Hotel X) is, in fact, the dirtiest hotel in America. For these reasons, TripAdvisor's placement of (Hotel X) on the '2011 Dirtiest Hotels' list constitutes nonactionable opinion".

Conclusion

It's a brave new world of available travel information on the Internet and traveler reviews are, clearly, here to stay.