

Legal Update

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PRODUCTS VERSUS PEOPLE: NEGATIVE ADVERTISING AND ONLINE REVIEWS

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A vexing problem for businesses whose products are criticized online has become more challenging. A federal appellate court recently held that a manufacturer did not defame a competitor with comparative advertising, reasoning “trade libel” should require more proof than defamation of persons (and perhaps corporations) but allowing that each state could differ.

The United States Court of Appeals for the Seventh Circuit explained that the manufacturer’s statements should be privileged from liability when they do not include specific, verifiably false statements about the competitor or its products. “In competition,” the court stated, “a bruised (corporate) ego should be dealt with by hiring an advertising agency, not by hiring a lawyer.”

The statements at issue were contained in product reviews of Next Technologies’ standing desks written by a competitor, Beyond the Office Door. The case is called [*Next Technologies Inc. v. Beyond the Office Door, LLC*](#).

While the lower court had dismissed the case by applying First Amendment protections, the appellate court declined to treat products the same as people and reasoned that competitors need leeway for comparative advertising. Instead of Constitutional protection for “trade libel,” the appellate court decided each state could make its own rules. It then dismissed on the grounds that manufacturers must prove “a statement that the speaker knows to be false or makes with reckless disregard of its truth or falsity.” In cases involving individuals, public figures (*e.g.*, politicians and celebrities) are required to make a similar showing, but other plaintiffs are not.

Although the appellate court was interpreting Wisconsin law, its skepticism of product disparagement claims may be predictive of its approach to similar issues under Illinois law. Several Illinois courts have expressed doubt as to whether a lawsuit for product disparagement is viable in the State and few, if any, defamation cases in commercial contexts have succeeded. In some situations, competitors may have other remedies available to them under unfair competition laws including the federal Lanham Act.

FVLD successfully defended a media client in what might be the seminal Illinois case involving defamation among competitors – *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Ltd.* The Supreme Court of Illinois analyzed that case as a traditional defamation case (and dismissed the case) but might have approached it differently if it involved solely criticism of competing products as opposed to personal attacks directed at the competitor’s principals.

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In addition to the legal hurdles a corporate plaintiff must overcome to state a defamation claim arising from a negative review, businesses should consider the potential that such litigation might backfire and call attention to the criticism (or lead to more criticism).

Practical Considerations When Dealing With OnLine Reviews

The issue of dealing with negative, or even false, reviews becomes even more complex when the reviews are online. The likelihood of holding an online platform – such as Twitter, Facebook, YouTube, or Instagram – liable is limited due to the protections offered under Section 230 of the Communications Decency Act. While there has been discussion recently about limiting or removing these protections, the likelihood of legislation being passed is very unclear.

Businesses can take legal action against actual reviewers if the reviews are defamatory or otherwise unlawful but most criticism is shielded from liability. Moreover, litigation often will not make economic sense because the reviewers (unless they are competitors posing as customers) are generally individuals who may not be able to pay a judgment. When the reviewers are anonymous, the process of identifying them can add significant additional expense (and courts often decline to “unmask” them).

Further, responding in the online world can do more damage as cease and desist letters, responses thereto, and even common legal filings can be posted to create more unwanted attention. Relatedly, the time for an effective response online is limited due to the constantly changing focus of social media – if you are not prepared, you may be better off not responding (despite the harm that may have been done to your business) because your response might just refocus attention on the issue. Some tips for businesses include:

- **Don't** have employees, family members, or friends pretend to be clients and post good reviews as that can run afoul of Federal Trade Commission rules and other state statutes;
- **Do** create a program or easy method to encourage actual clients to leave good reviews, such as a link on an electronically mailed invoice;
- **Don't** stoop to the other side's level and make false accusations;
- **Do** make positive and truthful statements about your business and its products and services;
- **Don't** respond online immediately in reaction to the problematic post; and
- **Do** have a policy about who can respond to bad reviews or posts, and the process for doing so.

Conclusion

Negative reviews and false comparisons can threaten a company's bottom line by driving away long-standing as well as potential customers. Businesses should work with legal counsel and other professionals to plan for, and properly respond to, such issues. While litigation may be attractive in the immediate aftermath of a post, it is not always the best option, especially in the online world. Having a purposeful – rather than simply reactive – approach to your brand reputation and how you protect it can solidify your company's reputation to withstand the tornadoes that can come with occasional viral posts.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Peter T. Berk at 312.701.6870 or pberk@fvldlaw.com, Seth A. Stern at 312.701.6837 or sstern@fvldlaw.com, or your regular FVLD contact.

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