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Lanham Act Injunction Floored Where Social Media Criticisms Were Not “Commercial Advertising”

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A judge in the Western District of Wisconsin recently denied a motion for a preliminary injunction that sought to prevent a customer from criticizing the plaintiff’s products over social media. *Buckeye Int’l v. Schmidt Custom Floors*, 2018 WL 1960115 (W.D. Wis. Apr. 26, 2018). Plaintiff Buckeye sells floor finishing products, and defendant Schmidt is a flooring installer and refinisher. Schmidt purchased Gym Bond, Buckeye’s floor finishing product, to facilitate the bonding of a clear topcoat to finished hardwood sports courts. When the topcoat peeled off, Buckeye blamed Schmidt and refused to pay for repairs and refinishing. Schmidt then complained about Gym Bond and Buckeye on social media, which caused Buckeye to sue Schmidt for false advertising under the Lanham Act and seek a preliminary injunction barring Schmidt’s social media postings about Buckeye and its product.

At its core, the decision is a correct, although in arriving at that decision, the court made some dubious characterizations of law along the way. In denying Buckeye’s motion, Judge Peterson first ruled that Schmidt’s statements were not made “in commercial advertising or promotion” as required by 15 U.S.C. § 1125(a)(1)(B) because that term does not encompass “individualized person-to-person communication.” That is not quite correct. Whether a communication meets the “commercial advertising” test depends in large part on whether the communication is intended to reach a meaningful segment of the relevant market. Although it may be unusual for person-to-person communications to satisfy this test, such communications sometimes are sufficient, and thus there is no bright line rule, as the court supposed, that individual communications are not advertising. econd, social media postings such as Schmidt’s are not individualized person-to-person communications. To the contrary, statements on social media, such as Facebook postings and tweets, are often intended to reach large audiences. The practice of companies using social media to advertise has become ubiquitous in today’s society, as the FTC and NAD have often recognized.

In addition, the court predicated its denial of a preliminary injunction on the fact that Schmidt and Buckeye were not competitors. At first glance, that proposition too would seem incorrect, because the Supreme Court recognized in *Lexmark Int'l v. Static Control Components*, 134 S. Ct. 1377 (2014), that Lanham Act standing is not strictly limited to competitors. However, what the court seemed to be getting at is that Schmidt's public criticisms of Buckeye were not akin to a comparative advertisement in which one company disparages another's products to promote its own. Instead, Schmidt was simply a customer of Buckeye which was pointing out its dissatisfaction with the product it purchased and at the same time defending its own reputation from Buckeye's attacks. In short, the court correctly held that Schmidt was not attempting to persuade potential customers to choose its own services over those of Buckeye. As the court explained, while the Lanham Act prohibits unfair competition, "it does not insulate commercial entities from criticism."

The court's decision in *Buckeye* reminds us that the Lanham Act is not a tool for enjoining criticism in social media where the speech is not commercial in nature, even if it may be harmful to the plaintiff's business. This decision is consistent with an Eleventh Circuit decision we covered last year, in which the court held that blog articles criticizing the prescribing practices of a medical clinic did not constitute advertising under the Lanham Act because the blog articles were primarily educational, not commercial.

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