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Judge Recommends Lanham Act Litigant “Shake it Off”

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Judge Joshua D. Wolson of the U.S. District Court for the Eastern District of Pennsylvania recently dismissed a Lanham Act suit that challenged critical comments on a blog (not this one!). The case was brought by plaintiff Crash Proof Retirement, a retirement investment adviser who was the subject of the criticism. The defendant author of the blog post was a former stockbroker.

In dismissing the suit, the court determined that “arms’-length criticism made without any economic motivation does not constitute commercial speech just because it might impact someone’s business or livelihood,” and cannot be the basis for a Lanham Act claim. Quoting “the immortal words of [pop singer] Taylor Swift,” Judge Wolson wrote: “although ‘haters gonna hate, hate, hate…’, sometimes you just have to ‘shake it off.’” *Crash Proof Retirement, LLC v. Paul M. Price*, Case No. 2:20-cv-05906-JDW (E.D. Pa. Apr. 13, 2021).

The blog post at issue criticized plaintiff’s investment services. As the court found, the author went so far as to insinuate the plaintiff’s business is a scam. After discussing misgivings about Crash Proof Retirement’s strategy, the post described a low-risk alternative strategy. Plaintiff brought suit under the Lanham Act, claiming the author of the blog post made false or misleading statements about Crash Proof while advertising and promoting an alternative investment strategy.

The court however, held that plaintiff’s legal theory was not crash proof, since the blog post did not constitute “commercial speech” under the Lanham Act. In deciding whether speech is commercial, courts consider three factors: (1) whether the speech is an advertisement; (2) whether it refers to a specific product or service; and (3) whether the speaker has an economic motivation.

Here, the court found only the second of the three factors was satisfied. Even though the post referred to plaintiff's specific product or service, it did not advertise or promote any product. Nor was there any indication the author had an economic motivation. The post critiqued plaintiff's services and described an alternate investment strategy, not associated with any particular product or competitor. The court held that the mere mention of a specific product or service could not overcome the absence of any advertising content or economic motivation, and did not make the writing commercial speech.

The court was likewise unmoved by the argument that the blog post presented an idea that would compete with plaintiff's, noting "[t]he mere fact that the parties may compete in the marketplace of ideas is not sufficient to invoke the Lanham Act." The court observed that the Lanham Act is not intended to stifle criticism of goods or services by one who is not engaged in marketing or promoting a competing product.

Judge Wolson's opinion serves as a reminder that Taylor Swift gives good legal advice, and that while negative press may cause a business some harm, this does not, by itself, entitle one to relief under the Lanham Act.

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