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No Scrubs Permitted: Eleventh Circuit Affirms Blog Post Is Not Advertising Actionable Under Lanham Act

Article By:

Alexander Kaplan

Evelyn Pang

In an interesting recent opinion, the Eleventh Circuit held that a doctor's blog post criticizing another doctor and his clinical practice could not form the basis of a Lanham Act claim because the blog posts were not commercial advertising or promotion. This case thus involves a rare circumstance in which a communication did not qualify as "commercial speech" under the Lanham Act even though it was disseminated on a website that generated revenue from ads or subscriptions. The case is *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935 (11th Cir. 2017).

Dr. Edward Tobinick, a medical doctor who practices dermatology and internal medicine in California and Florida, sued Dr. Steven Novella, a neurologist based in Connecticut. Dr. Tobinick uses the drug Etanercept to treat strokes and Alzheimer's disease, even though the drug has not been approved by the FDA for this purpose. Dr. Novella is an executive editor of the Science-Based Medicine ("SBM") blog, which examines issues related to science and medicine and is operated by the New England Skeptical Society, a non-profit entity.

In May 2013, Dr. Novella published an article on the SBM blog criticizing Dr. Tobinick's clinic, asserting that it had the typical characteristics of "quack clinics" or "dubious health clinics" and questioning the plausibility of the evidence supporting Dr. Tobinick's allegedly effective off-label use of Etanercept. Dr. Novella also quoted a portion of a Los Angeles Times article which reported that Dr. Tobinick's claims about the efficacy of his treatments led to an investigation by the Medical Board of California. The Board had placed Dr. Tobinick on probation for unprofessional conduct and mandated that he take classes in prescribing practices and ethics. Dr. Tobinick sued, claiming that the blog posts were false advertising directed at Dr. Tobinick's clinical practices in violation of § 43(a) of the Lanham Act. Thereafter, Dr. Novella published a second blog post titled "Another Lawsuit to Suppress Legitimate Criticism – This Time SBM," reiterating his original criticisms of Dr. Tobinick and setting forth details about the Medical Board's investigation. Dr. Tobinick then amended his complaint to add allegations related to the second blog post.

In October 2015, a district judge in the Southern District of Florida held that Dr. Novella's blog posts did not constitute advertising under the Lanham Act because they were not acts of commercial speech or promotion, and granted summary judgment in favor of Dr. Novella. The Eleventh Circuit

affirmed, holding that in order to be the subject of a false advertising claim, the statements at issue must be in the context of proposing a commercial transaction that includes, among other things, commercial speech. The court pointed out that the “core notion” of commercial speech extends to speech that proposes a commercial transaction, and looked to three non-dispositive factors to guide its determination: (1) whether the material was “conceded to be advertisements,” (2) whether it contained a “reference to a specific product”; and (3) whether the speaker “has an economic motivation” for distributing the material.

The court held that Dr. Novella’s articles did not propose a commercial transaction, and thus did not fall within the core notion of commercial speech. In fact, the articles instead resembled *non* -commercial speech, since they had a primarily educational purpose. Moreover, the articles were not conceded to be advertisements, did not reference the author’s own practice except briefly for context, and did not demonstrate economic motivations sufficient to transform them into commercial speech.

On the last point, the court noted that placement of the articles next to revenue-generating ads or on a subscription-based website did not establish economic motivation for the informative articles. Even if Dr. Novella received some profit from his publications, the articles themselves did not become commercial speech simply because extraneous advertisements and subscription links may generate revenue. A contrary holding would imply that newspaper editorials and scholarly publications on any website that generates advertising revenue may be commercial speech. While the court’s treatment of what constitutes advertising could be a tough pill for Dr. Tobinick to swallow, it may be just what the doctor ordered.

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