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Fact and opinion can sometimes create fine line for defamation

Rating a business' performance — for instance, by assigning a letter grade or a number of stars — does not constitute an assertion of fact, even if the rating supposedly is based on an extensive body of factual information.

That is the conclusion reached by two-thirds of an Illinois Appellate Court panel in *Perfect Choice Exteriors LLC v. Better Business Bureau of Central Illinois Inc.*, 2018 IL App 3(d) 150864 (3rd Dist., March 12, 2018).

When a lawsuit is based on a statement made by the defendant, the distinction between an assertion of fact and an expression of opinion can be dispositive. The First Amendment shields the former, not only from defamation claims, but also from other common law and statutory causes of action. The same protection, though, is not available for an assertion of fact, "even when couched within apparent opinion or rhetorical hyperbole."

The statements at issue in *Perfect Choice* were made by the Better Business Bureau of Central Illinois, which assigns and publishes ratings of businesses. BBB gave a D-minus rating to a home improvement company named Perfect Choice Exteriors LLC and told people who asked for information over the phone that Perfect Choice was "not a good company" and they "should not do business with" it.

Perfect Choice sued BBB for defamation, commercial disparagement, tortious interference with contract and violations of the Uniform Deceptive Trade Practices Act.

All of these claims were premised on the allegation that the statements described above were defamatory. Eventually, BBB moved to dismiss the complaint, arguing in part that the statements were expressions of opinion protected by the First Amendment. The trial court agreed with BBB and dismissed the case.

On appeal, before getting to the substance of the dispute, the court had to address whether the First

Amendment even applies to a private defendant's allegedly defamatory statement about a private plaintiff. Citing certain benefits of extending First Amendment protection, the majority decided BBB could raise a First Amendment defense without concluding that the First Amendment should or would apply to every private defendant-private plaintiff action. The dissent did not stake out a contrary position and simply assumed the First Amendment would apply to a nongovernmental, nonmedia party like BBB.

After resolving this preliminary question, the court turned to the issue of whether BBB's statements were expressions of opinion. The majority acknowledged that BBB's ratings were determined pursuant to publicly known criteria that included specific facts, such as the volume of complaints and the number of unresolved complaints.

The majority emphasized, though, that BBB chose what criteria to consider, decided what to do with the information it gathered and plugged everything into a propriety formula that produced the rating. The majority characterized this process as a "subjective assessment based upon subjective criteria and the subjective interpretation of data" that resulted in an "evaluative judgment."

... BBB's statements at issue in the case were too general and subjective to be verifiably false (or true) or to imply any specific fact ...

In short, the majority held that, even if the underlying data constituted objectively verifiable facts, reliance on that data did not make the resulting rating into an assertion of fact.

Having characterized the scope of BBB's statements in this manner, the majority only had to decide whether general statements about a company's quality (i.e., assigning a D-minus grade or saying a company is "not good") are no more than opinions.



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The majority explained that, under the First Amendment, "[u]nsupported, vague and unverifiable expressions of opinion" are not actionable. Specifically, a description of one's job performance that does not imply "the existence of [a] specific statement of objectively verifiable fact" is no more than an opinion that falls within the ambit of the First Amendment.

In the majority's view, BBB's statements at issue in the case were too general and subjective to be verifiably false (or true) or to imply any specific fact about Perfect Choice.

The dissent was troubled by a holding that seemed to let BBB "have its cake and eat it too."

According to the dissent, the majority's rationale permitted BBB to "secure its clientele with assurances that it can provide well-grounded, fact-based assessments" and then, when threatened with litigation, ask the court "to ignore all of its vaunted factual underpinning."

In the dissent's view, BBB's public declarations that its ratings were based on objectively verifiable facts meant the ratings stated or implied "a foundational assertion of fact."

The dissent's opinion also reflects a broader understanding of the level of specificity necessary to constitute an assertion of fact. The dissent said "it is virtually universally understood" that a grade of D-minus connotes a fact about "specific identifiable elements of [one's] performance."

In the case of Perfect Choice, the "kernel of fact" was that Perfect Choice performed so poorly in its business "as to border on complete failure." In the dissent's view, BBB's failure to detail the supposedly defective elements of Perfect Choice's performance was not dispositive.

The 2-1 panel split reflects the difficulty of drawing the fine, case-specific distinctions at issue in *Perfect Choice*. So what are parties to do in this gray area?

Plaintiffs seeking to assert claims similar to those asserted in *Perfect Choice* should focus on the extent to which a defendant publicly discloses the factual information considered in making a statement. Plaintiffs also should attempt to tie a statement to a specific fact about which information is disclosed.

Defendants, on the other hand, should direct the court to the steps in the process leading up to the statement that involved either discretionary and subjective judgment or are proprietary and unknown to others.

Further, defendants should frame a statement at a higher level of generality and fight efforts to attempt to pick through several inputs to associate a statement with just one criteria or aspect of a business. Whether the First Amendment would apply in a case similar to *Perfect Choice* if additional factual information about the rating generation process were publicly disclosed or if the rating assessed only a narrow aspect of one's business remains an open question.

Parties, though, would be well served by constructing arguments informed by the dueling opinions in *Perfect Choice*.

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