GIN & PELOTONIC: AN EXERCISE IN RESTRAINT

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Peloton, a seller of stationary bikes and other exercise equipment, recently released a now-infamous commercial titled "The Gift That Gives Back."

The 30-second ad, which has received over 8 million views as of this blog post, features an already fit wife, portrayed by actress Monica Ruiz (also known as the "Peloton Wife"), who receives a Peloton stationary bike as a surprise Christmas gift from her husband. Peloton Wife appears nervous, as the ad documents her journey to better fitness using the Peloton bike. Although Peloton surely intended for the ad to portray its brand in a positive light, it has received widespread criticism.

Following airing of the ad, Peloton's stock price dropped by over 15% and its market value decreased by more than $1.5 billion. Peloton quickly lost control of its storyline. At the conclusion of the ad, the Peloton Wife states that "I didn't realize how much this would change me." Many of those who found fault with the ad interpreted this statement as Peloton Wife's realization that she is unhappy in her relationship with her husband and speculated that she would likely seek a divorce.

Within days of the release of the Peloton ad, Aviation Gin (yes, a liquor company), released what is considered to be a "sequel" to the Peloton ad titled "The Gift That Doesn't Give Back"—also starring Ms. Ruiz. The Aviation Gin ad shows an exhausted and dazed woman played by Ms. Ruiz, drinking Aviation Gin at a bar with two girlfriends. Her girlfriends toast to "new beginnings," assure her that

she is "safe" with them and comment that she looks "great!"

Although the Aviation Gin ad does not mention Peloton by name, there is little doubt that it is intended to mock the Peloton ad. Whereas the Peloton ad seeks to convince potential customers to purchase a Peloton bike as a gift for a spouse, the Aviation Gin ad does the opposite, showing that the purchase of a Peloton bike could lead to unhappiness and divorce! It is unlikely that Peloton anticipated that Ms. Ruiz would appear in an ad for another company that undermines the message of the Peloton ad so soon after the Peloton ad was released.

One wonders whether Peloton could have stopped Ms. Ruiz from appearing in the Aviation Gin ad if it had been aware of it?

This blog post reviews potential approaches that Peloton could have taken to restrict Ms. Ruiz from appearing in the Aviation Gin ad. As I do not have information regarding the terms of actual agreements between Peloton and Ms. Ruiz, and I do not know which state law would apply to their relationship, the concepts discussed in this blog post are purely academic.

As noted below, this blog post does not constitute legal advice, and is not intended to be a comprehensive review of all relevant legal considerations.

Non-Compete Restriction

Could Peloton have prevented Ms. Ruiz from appearing in the Aviation Gin ad if Ms. Ruiz was subject to a non-compete restriction (also known as a non-competition restriction or covenant not to compete)?

Non-compete restrictions are contractual obligations that can appear as one or more provisions within a broader agreement, such as an employment agreement, or as a separate agreement solely devoted to the subject of non-compete and related restrictions. Non-compete restrictions are designed to limit a party (often an employee or former employee) from engaging in certain competitive activities against another party (often an employer or former employer).

State law governs non-compete restrictions. The laws of each state vary regarding non-compete restrictions. Some states, such as California, deem non-compete restrictions to be against public policy and unenforceable, while other states readily enforce non-compete restrictions. It is therefore important to identify the state law governing a subject non-compete restriction at the earliest possible opportunity.

In Missouri, for example, while non-compete restrictions are disfavored, they will be enforced if they are

- (i) reasonably necessary to protect legitimate employer interests, but only to the extent that the restrictions protect an employer's trade secrets or customer contacts, and
- (ii) reasonable in duration and geographic scope. *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 610 (Mo. 2006).

It is unknown whether Ms. Ruiz agreed to be subject to a non-compete restriction in favor of Peloton, but even if she did, it is unlikely that it would have restrained Ms. Ruiz from working for Aviation Gin. Peloton is an exercise equipment company, whereas Aviation Gin is a liquor company—these two companies are clearly not in any type of direct competition with each other.

It would therefore be difficult for Peloton to assert that it has a legitimate interest with respect to restricting Ms. Ruiz from working for Aviation Gin. If Ms. Ruiz was subject to a non-compete restriction, and the sequel to the Peloton ad was instead created by a direct competitor of Peloton and starred Ms. Ruiz impliedly in the role of Peloton Wife, Peloton would likely be in a better position to enforce a non-compete restriction.

Non-Disparagement Restriction

Could Peloton have prevented Ms. Ruiz from participating in the Aviation Gin ad if Ms. Ruiz was subject to a non-disparagement restriction?

Non-disparagement restrictions are contractual obligations intended to limit communications made by a party (often an employee or former employee) that could be perceived as negative or harmful to the reputation of another party (often an employer or former employer).

If a party violates a non-disparagement restriction, the disparaged party could have a claim against the disparaging party for breach of contract and could seek monetary damages. Non-disparagement restrictions are governed by a combination of state and federal laws. Like non-compete restrictions, the laws of each state vary regarding non-disparagement restrictions.

The scope of a non-disparagement restriction is subject to a negotiation between the parties and can range from narrow to broad. A narrow non-disparagement restriction may protect little more than what may already be protected by common law, such as claims for defamation, libel or slander.

On the other hand, a broad non-disparagement restriction could protect a party against a vast array of potentially negative communications. For example, a broad non-disparagement restriction could restrict a party from taking any action or making any statement, in public or private, which could embarrass, humiliate or negatively impact the reputation of the other party.

There is some controversy regarding using non-disparagement restrictions to limit disclosure of unlawful or improper activities, particularly in light of the #MeToo Movement. On one hand, non-disparagement restrictions can protect an employer against an employee who maliciously seeks to harm an employer's reputation. On the other hand, non-disparagement restrictions can deter whistleblowers and other individuals who observe unlawful or improper activities from daylighting such activities out of fear of violating non-disparagement restrictions. Importantly, it is possible for a person to violate non-disparagement restrictions by making true statements, so long as such statements fall within the scope of the subject non-disparagement restrictions.

I do not know whether Ms. Ruiz agreed to be subject to a non-disparagement restriction in favor of Peloton. If Ms. Ruiz was subject to a non-disparagement restriction, it is not clear whether her

starring in the Aviation Gin ad would fall within the scope of a non-disparagement restriction.

Applicability of a non-disparagement restriction could revolve around the question: Did the appearance of Mr. Ruiz in the Aviation Gin ad embarrass, humiliate or negatively impact the reputation of Peloton?

Considering the Aviation Gin ad outside the context of the Peloton ad (i.e., assuming that the Peloton ad does not exist), Aviation Gin might argue there was no disparagement of Peloton because the Aviation Gin ad has no connection to Peloton—the Aviation Gin ad does not mention Peloton by name and makes no other statement which could remotely be considered disparaging with respect to Peloton.

However, Peloton might argue the Aviation Gin ad was intended to be viewed in the context of the Peloton ad:

- (i) both ads feature Ms. Ruiz;
- (ii) the names of the ads are similar—Peloton's ad is "The Gift That Gives Back" while Aviation Gin's ad is "The Gift That Doesn't Give Back"; and
- (iii) the dialogue in the Aviation Gin ad plays off the Peloton ad and the many negative impressions of the Peloton ad shared online.

The appearance of Ms. Ruiz in the Aviation Gin ad, already famous (or infamous) from her role as Peloton Wife, seems to solidify the connection between the two ads.

Other Considerations

Non-compete restrictions and non-disparagement restrictions are generally contractual rights, however, under appropriate circumstances, remedies such as defamation, libel or slander can be available under common law. Defamation is any communication, in any form, that damages the reputation, character or good name of another party. Slander and libel are both forms of defamation. Slander pertains to spoken false statements, while libel pertains to written false statements.

These claims are generally governed by state law, and the laws of each state vary on this subject. In Missouri, recent cases have somewhat merged the concepts of libel and slander all within the umbrella of defamation, but there are some distinctions not reviewed in this blog. Importantly, truth is an absolute defense to a defamation claim. As a result, even if a defamatory statement is made in bad faith, so long as it is true, the claim would fail. The truth defense stands in stark contrast to a claim for a violation of a non-disparagement restriction, where truth is not necessarily a valid defense—a person could violate a non-disparagement restriction by making an entirely true statement.

Intellectual Property Considerations

While the focus of this blog post has been on employment-related approaches, there are some intellectual property considerations as well. For example:

1. What intellectual property rights does Peloton have in the storyline that it created and characters (e.g., Peloton Wife) who appeared in its ad?
2. Did Aviation Gin have rights to, in a way, run with the storyline and characters created in the Peloton ad?
3. Did Ms. Ruiz have rights to appear as, or at least give the implication that she was appearing as, Peloton Wife in the Aviation Gin ad?

Despite the immediate loss of market value to Peloton's stock, if the saying "there's no such thing as bad publicity" is true, the Peloton ad, bolstered by the Aviation Gin ad, could be marketing gold, as both ads have received millions of views. It is too early to know how this will all play out (and whether additional sequels or prequels to the ads may be forthcoming), however, it is indisputable that the publicity generated by both ads will significantly increase the brand recognition of Peloton. Increased brand recognition could increase Peloton's sales. Peloton may ultimately benefit from the shortcomings of its own ad, as bolstered by the Aviation Gin ad.

While I do not know the terms of any agreements between Peloton and Ms. Ruiz, this situation highlights the importance of employers thoughtfully considering the unique circumstances of each employee when entering into employment-related agreements. Employers generally prefer using standard employment agreement templates for several reasons. Doing so can save time and money up front, but can also lead to unanticipated issues.

I appreciate the creativity of the Aviation Gin ad. Now I am just waiting for the next sequel to the Peloton ad . . . or the Aviation Gin ad. Perhaps Peloton can figure out a clever way to respond to this viral controversy. Until then…cheers!