CLIENT ALERTS & INSIGHTS

The Apology Video: A Defamation Remedy with More Controversy Than Closure

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Key Takeaways

- Apology videos may offer a highly visible way to address reputational harm where alleged defamation occurred on social media, but their reach and permanence can also amplify the very claims a settlement is intended to put to rest.
- The renewed dispute in *Zuckerbrot v. Gellis Lande* shows why this matters: a carefully negotiated public apology can become a new source of controversy, prolong litigation and undermine the finality the parties sought through settlement.
- Parties considering a public apology as part of a defamation settlement should think beyond the wording itself and address how it may be posted, edited, shared and discussed afterward. Clear guardrails around future use of the apology and public statements can help reduce the risk of reigniting the dispute.

A formal retraction or statement is a typical remedy for a defamation suit. News outlets commonly issue retractions and corrections in settling defamation claims, either before or after litigation. Corporate entities and individuals may be expected to release a public statement-something short and clear to stamp out any remaining controversy and indicate peace between the parties.

A long-winded apology video, on the other hand, is not a typical legal remedy. Yet, with the increased dominance of social media, these videos could become more common.

The apology video has long been a familiar feature amongst YouTube content creators and social media influencers, yet the visibility and potential virality of such a video may be both an asset and a liability in remedying harm from alleged defamation. The recent settlement agreement-and fallout-in *Zuckerbrot v. Gellis Lande*[1], which required the defendant to post a video of herself reading an agreed-upon apology to her Instagram, raises the question of whether an apology video is a desirable outcome of litigation and whether it aids in resolving disputes at all.

A Long-Standing Feud

The dispute between dietitian Tanya Zuckerbrot and fashion influencer Emily Gellis Lande began in 2020. At that time, Gellis started reposting messages she received on Instagram from users who claimed they had followed Zuckerbrot's F-Factor diet or used F-Factor brand products. In the reposted messages, some users alleged they experienced negative side effects, including digestive issues, skin reactions and other health concerns. As Gellis continued to share and comment on these allegations with her social media audience, the controversy surrounding F-Factor grew, ultimately giving rise to a highly publicized dispute between the two women. The feud has been the subject of articles from The New York Times, Business Insider, The New York Post and was even the subject of an episode of the Hulu series The Age of Influence.

The conflict moved from social media to the courtroom in October 2020, when Zuckerbrot sued Gellis in New York County Supreme Court. In her complaint, Zuckerbrot alleged that Gellis had engaged in a sustained "smear campaign" of false and defamatory statements regarding the F-Factor diet, F-Factor products and Zuckerbrot herself.

The complaint asserted seven causes of action, including product disparagement, defamation and civil harassment, and sought substantial monetary damages. Zuckerbrot contended that Gellis' social media posts amplified unverified allegations and damaged the reputation of the F-Factor brand causing significant economic and personal injury. Gellis, in turn, maintained that she was sharing information provided by consumers on matters of public concern.

A Short-Lived Peace

This year, nearly six years after Zuckerbrot filed her lawsuit, the parties appeared to make peace. At a July 2 hearing, the parties informed the judge that they had settled. In contrast to the typical private agreement containing a confidentiality clause, Zuckerbrot's counsel entered the settlement agreement, in full, into the record. The terms of that agreement included a monetary award in which Gellis would pay Zuckerbrot "$500 per month for the next 40 years for a total of $240,000."

In addition, the agreement contained highly specific terms that required Gellis to produce "a video and written apology" using a script attached to the agreement. Gellis would then "pin" the apology to the top of all of her social media accounts for three and a half years, and it would remain in her social media feeds for an additional eighteen months. The agreement expressly allowed Zuckerbrot to post Gellis' apology on her own social media accounts.

Per the agreement, Gellis created a video showing her reading the three-page script word-for-word and pinned the 6-minute video to the top of her Instagram page. It begins: "Hello. My name is Emily Gellis, and I am here today to take full responsibility for the harm I caused to Tanya Zuckerbrot, her company F-Factor, and her family as well as anyone else who was negatively impacted by my actions."

While not agreeing outright to a non-disparagement clause, both parties agreed to respond to any inquiries, including from news media and social media followers, with the statement, "The litigation between [us] has been settled."

The Controversy Reignites

The same day Gellis posted and pinned her apology video, Zuckerbrot posted and pinned her own heavily edited version of Gellis' video. In this 13.5-minute version, Zuckerbrot intercuts old, now-deleted videos of Gellis actively disparaging Zuckerbrot and F-Factor-the inserted clips sharply contrast the content and tone of Gellis' apology.

Zuckerbrot's caption begins, "Emily Gellis spread false accusations that devastated my company, F-Factor and my life. I've waited six years for her to take responsibility for her actions. I hope sharing my story helps protect others from the same harm."

On October 27, Gellis filed a proposed order to show cause with the court seeking damages and to hold Zuckerbrot in civil contempt for her "willful and continuous" violation of the settlement agreement. In her affirmation in support of the order to show cause, Gellis alleged that Zuckerbrot "likely used the settlement as a means to get [her] Video Apology" and "gave interviews to multiple media outlets, [sic] making statements concerning the settlement that were well beyond that which was agreed to," including calling Gellis a "cyber stalker," and editing the video apology "into a 13 minute hit piece."

In response, Zuckerbrot asserted that the plain text of the agreement created "unilateral obligations applicable only to Gellis" and that the agreed-upon "litigation has been settled" language should apply only when "Zuckerbrot was contacted by the media, not if she was proactive in telling her story." Zuckerbrot said she relied on the "express permission" in the settlement agreement to post the edited video and that "no term of the order directed to [Zuckerbrot] restricted how [she] could present it."

The court agreed with Gellis and found Zuckerbrot violated the settlement agreement in part, but the court directed the parties to brief the issue of whether a settlement agreement read into the court record gives the court authority to hold Zuckerbrot in contempt.

Is an Apology Video Desirable?

As Gellis herself notes in her affirmation, the video apology is an award "Zuckerbrot would not otherwise receive had she elected to proceed through trial and received even a partial verdict in her favor." While not a typical litigation outcome, there are a number of reasons a litigant may want more than a short, clear statement or apology as part of a settlement:

- Because the controversy unfolded on Instagram, the video format seems aptly targeted to the audience the two women have built over the years.
- If nothing else, the video acts as free marketing geared towards curious scrollers. Gellis' apology video could help lead to revenue for F-Factor as Zuckerbrot intends to revive the business after shuttering the brand in 2023.

- The video apology may have a general deterrent effect on social media users who are otherwise incentivized by the algorithm to create controversy by spreading harmful claims. Zuckerbrot has stated that she wouldn't want what she experienced to happen to anyone else. For Zuckerbrot, the deterrence is specific: the public apology ensures that any future statements by Gellis will be held up against the apology video. More broadly, Zuckerbrot's critics may be deterred by the possibility of similar public shaming.
- While hard to quantify, there is undeniably value in being "right" and seeing one's opponent face consequences. For Zuckerbrot, the existence of Gellis' apology video serves as evidence of vindication.

However, in this case specifically, the downsides of the apology video have clearly outweighed the upsides:

- The apology video appears to have increased interest and attracted new attention to the negative statements about Zuckerbrot and F-Factor that led her to sue Gellis in the first place.
- The video format also allows for users to weigh in via the comments section. In this case, Instagram users questioned Gellis' sincerity and made comments that undercut the apology, such as, "it's giving hostage video," "this forced apology makes your previous statements more credible" and "are you at gunpoint?" If the audience doesn't believe the speaker, the message loses value.
- The lack of finality in this case is glaring. A settlement agreement is meant to ensure peace between the parties and help avoid further conflict. Here, regardless of her intent to violate the settlement agreement, Zuckerbrot's actions undermined that peace and will likely undo the settlement agreement itself in addition to opening her up to new liability from Gellis and the court.

Overall, the video apology may have been ineffective as a resolution, but for two influencers working to gain views and social media followers, renewed public interest might be more desirable than finality. The video apology itself got a nod from The New York Times. In an attention economy, a half-hearted apology like this may just be priceless.

Insights

- While retractions and short written statements are typical in settlement agreements, an apology video is not a typical remedy in defamation law. However, apology videos might become more common as litigants seek to address the harm caused by allegedly defamatory statements that originate and spread on social media.
- In this particular case, the video apology has increased public attention to the original dispute and become a source of new controversy between the parties. This demonstrates the risk that can come with making mandatory apology statements part of a settlement.

Benesch stands ready to help clients navigate defamation disputes, settlement strategies and the reputational risks that can extend beyond the courtroom. Contact a member of our Defamation Litigation team to learn more.

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[1] *Tanya Zuckerbrot MS RD v. Emily Gellis Lande*, No. 655110/2020 (N.Y. Sup. Ct., N.Y. Cnty. filed 2020)