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# Businesses can register scandalous trademarks

The Lanham Act, a federal law that prohibits scandalous and immoral trademarks is unconstitutional, according to a ruling by the U.S. Supreme Court.

Registering a trademark has its benefits. Someone who owns a registered trademark can use it in commerce and enforce it. Registering a trademark provides "constructive notice of the registrant's claim of ownership," thereby protecting the owner against certain defenses if a patent infringement action arises.

With a registered trademark, the owner has constructive rights to the registered mark throughout the U.S., no matter where they do business.

The case at hand involved Erik Brunetti, who wanted to register a trademark for the brand name FUCT for a clothing line.

Brunetti argued that the mark was an acronym for "Friends U Can't Trust," and should be read as separate letters: F-U-C-T. He tried to register the trademark with the U.S. Patent and Trademark Office (USPTO). But the examining attorney and the Trademark Trial and Appeal Board said the mark was "vulgar." The board also said that the trademark had "decidedly negative sexual connotations."

The U.S. Supreme Court disagreed. It upheld its own precedent from two years ago, saying that the Lanham Act's prohibition on the registration of marks deemed "immoral" or "scandalous" essentially amounted to government discrimination against speech based on the "viewpoint" of the speech.

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The court explained that federal law favors trademarks that meet standards of moral decency but disfavors trademarks that do not. By allowing the USPTO to choose whether a certain mark will be offensive and then registering only marks it determines are not, the act allows the government to give statutory benefits and protection to some private speech, but not to others, exclusively on the basis of subjective viewpoint, the court found.

As a result, the court said the provision of the act that prohibits registration of "immoral or scandalous" marks violates the First

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## Supreme Court ruling likely to restrict public access to business records

The U.S. Supreme Court has issued a ruling that is likely to make it harder for the public to access confidential business records.

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The court ruled on a longtime exemption under the federal Freedom of Information Act (FOIA), known as Exemption 4, which allows the government to withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."

While federal law doesn't define the term "confidential," courts have regularly said it applied to information that is typically kept private and information for which the recipient has provided some promise that it will be kept private.

In 1974, a federal appeals court in D.C. held that information should not be considered "confidential" unless its disclosure would lead to "substantial competitive harm" to the business. The case was *National Parks & Conservation Assn. v. Morton.*

Since then, some courts have been hesitant to apply the "substantial competitive harm" standard. The D.C. Circuit weighed in again, saying that the more expanded test should be limited to documents that are *required* to be provided to the federal government, while documents that are *voluntarily* provided should be held to a lesser standard.

In its decision, the Supreme Court found that the D.C. Circuit's ruling in the *National Parks* case was incorrect. It found that the wording of Exemption 4 under the FOIA does not require showing harm to a business.

Rather, the court said, that information is confidential under the FOIA when "commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy."

The current case involved a FOIA request from The Argus Leader newspaper in Sioux Falls, South Dakota.

The paper sought information about the federal Supplemental Nutrition Assistance Program (SNAP) program.

The Food Marketing Institute, a trade group for food marketers, retailers and wholesalers, argued that the information should not be disclosed. The institute argued that disclosing the information would expose "confidential" information that it provided to the government about the group's participation in SNAP.

The court said that because the institute typically keeps such information private and provided it to the government under an assurance that it would remain so, the records should not be disclosed, even if disclosure would cause no "competitive harm" to the Food Marketing Institute.

Given that both conditions were met in this case, the court said there was no need to determine whether both conditions must be met in order for information to be labeled "confidential."

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## DOL makes it easier for small businesses to offer 401(k) plans

A new final rule from the Labor Department makes it easier for small businesses to join together to offer their workers 401(k) plans.

The rule goes into effect on Sept. 30.

As a result of the new rule, smaller companies can now leverage the bigger scale of a combined group of businesses to negotiate lower fees on their 401(k) plans.

Under the rule, companies in different industries, for example marketing firms and landscaping companies, can create a joint retirement plan as long as they are based in the same state or metropolitan area. Similar companies, such as two real estate firms, located in different areas of the country can also band together and create a plan.

However, companies in two different industries that are located in two different regions may not form a plan together under the rule.

Currently, multi-employer plans such as these can be created only when employers have a common owner or are both members of the same industry group.

The new rule opens the door for local entities, such as chambers of commerce, to sponsor retirement plans for companies in their networks.

The Trump administration supports the rule as a way to make it possible for more employees of small businesses to obtain retirement benefits.

# Businesses can register scandalous trademarks

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Amendment.

What is the impact of the decision on businesses?

Before the ruling, the use of immoral or scandalous marks in commerce was possible. Now, owners of such marks can seek the additional protections of a registered federal trademark, and it makes the process easier and less expensive.

Keep in mind that applications for profane trademarks can still be rejected on other grounds, and that slogans, terms and phrases that are used to convey ordinary or familiar concepts do not function as trademarks and cannot be registered.

While the ruling might make it seem that there will suddenly be a rush of immoral and scandalous trademarks, it's too early to tell. There are only so many trademarks that can be registered before the USPTO will start to refuse new ones due to the "likelihood of confusion" with existing registrations.

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Regardless, businesses need to carefully evaluate the public relations implications of using a brand name that would be considered immoral or scandalous.

# When you need a collection agency

It's a real drain on a business when you can't get clients to pay.

It's ideal when you can take matters into your own hands and see results, but when you've tried everything else, sometimes you need to hire a collection agency.

A collection agency is helpful if you haven't been able to successfully contact the debtor on your own, if several debts have been difficult to collect or if a debt is too big to collect in small claims court.

Typically, collection agencies require businesses to turn over each debtor's name and information, then try to collect the debt. If an agency is successful, it pays the money to the business, minus a fee, which usually ranges from 25 to 45 percent.

In some cases, a collection agency will negotiate with the client to obtain some amount of payment, even if it is not the total amount owed.

**Next steps if the agency fails to collect**

If the agency doesn't collect, you can always try again to collect a debt yourself, because you still own it.

If neither you nor the agency can locate the debtor, you might have to let it go.

If you have located the debtor, but still haven't collected, one option is to sue in small claims court, but be aware that it's tough to win.

You can also hire an attorney to collect a specific debt.

**Collection rules**

It's important to remember that debt collectors are subject to the rules of the federal Fair Debt Collection Practices Act.

According to the Consumer Financial Protection Bureau, if clients are individuals, debt collectors may not: harass or abuse them, conceal the collector's identity, lie or employ unfair practices, call before eight a.m. or after nine p.m., call at work or fail to comply with a written request to stop contacting debtor.

If clients are businesses, there are fewer specific limitations on what debt collectors can do to collect debts, though they are similarly barred from illegal practices such as fraud and threats.

**Tips for finding, choosing an agency**

Find a reputable agency in your area through word of mouth, or do an online search. Before engaging, interview the agency to ensure a good fit with your business and to check for strong ethics.

Read online reviews, check the Better Business Bureau and view the agency's rating by Consumer Affairs. If you want to research further, you can contact the attorney general in your state to see if any lawsuits have been filed against them. You can also contact the Consumer Financial Protection Bureau to see if any complaints have been filed against them.

Ask for details on the script they use when contacting a debtor, and for information on how they contact and track debtors.

**We welcome your referrals.**
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## Preventing suits over website accessibility

Suits claiming that business websites and/or mobile apps aren't fully accessible to people with disabilities are increasing rapidly.

In 2019, a quarter of such suits were brought against companies that had already been sued under the same cause of action. The suits were brought under the federal Americans with Disabilities Act.

The key to protecting your business from such lawsuits is to ensure that your website complies with Web Content Accessibility Guidelines 2.0.

In a recent case in federal court in New York, a legally blind consumer sued Kroger, claiming that the grocery chain's website wasn't accessible to the blind or visually impaired.

Kroger argued that the suit should be dismissed, claiming that after it was filed the company made all the necessary adjustments to its website to make it accessible.

The court decided that the efforts made the consumer's lawsuit moot. It commended Kroger's commitment to tracking future technological advancements that would allow it to continue to make the site accessible.

The court also said the suit should be dismissed because it was filed in New York, where Kroger has no retail presence and doesn't sell anything through its website.

In prior rulings, the same court rejected arguments that a consumer's suit was moot, saying the company hadn't conducted complete remediation efforts, or hadn't fully document them.

These rulings demonstrate the importance of complying with website accessibility guidelines and documenting those efforts.

Consult a business attorney to ensure you are fully compliant.