

Six Things Businesses Should Consider Before Filing Internet Defamation Claims

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CLIENT ALERT | 11.19.2014

Even the best businesses cannot always keep every customer, employee, business partner, or other party happy at all times. Unfortunately, in this day and age, many of these disgruntled parties will choose to take their complaints public by posting disparaging information or content about a company online, which can cause significant damage.

Such behavior has resulted in a rise in internet defamation cases, but not every instance of potential internet defamation should result in a lawsuit. Nevertheless, a business and its legal advisors should think through several key issues before potentially filing an internet defamation lawsuit.

Accordingly, businesses should consider the following items before filing such claims:

1. *The online criticism must come from someone with an ulterior motive:* Legitimate customer complaints based on opinion are not actionable, not to mention they tend to cause little damage. However, when someone has posted false information with an intent to harm the business, this is likely actionable if the relevant statute of limitations has not elapsed. Disgruntled parties with ulterior motives may include competitors, ex-business partners, ex-spouses, and former employees.
2. *'Interactive' websites are immune from liability:* Pursuant to Section 230 of the Communications Decency Act, most interactive websites (e.g. consumer comment sites and open forums) are immune from liability for content created by a third party user, unless someone from the website actively edits the content. Since this law does not permit a defamed party to pursue the website legally, it is necessary to identify the anonymous posters – perhaps through use of subpoenas or even by hiring cyber investigators. Once the author of a harmful post or posts is identified, the harmed business can name him or her as a defendant in a lawsuit.

3. *Damages may, (but may not) need to be proven:* A defamation plaintiff must suffer actual, identifiable harm as a result of the defamatory publication. Many states recognize what is known as defamation per se, where damages are presumed, but this requires that the defamation fall into certain categories that are considered defamatory “on their face” (such as charging the party with committing a crime or injuring them in their business or profession). This is significant not only in terms of ultimately winning a case, but it may be necessary to prove damages up front. Many states have laws to protect public rights of free speech from a disfavored type of lawsuit, called a strategic lawsuit against public participation (SLAPP). So-called “anti-SLAPP statutes” are intended to prevent companies from silencing their critics by burdening them with the cost of a legal defense. Failure to prove actual damages is the most common reason that plaintiffs do not survive anti-SLAPP motions under such statutes.
4. *Harmed parties must act quickly:*As alluded to above, all states impose statutes of limitations, essentially time limits in which a plaintiff must bring a libel or slander claim. Most states have one- or two-year statutes of limitation, while some allow for three years (Tennessee actually has a six-month statute of limitations for slander claims only). Thus, the abbreviated time period can cause various problems if a defamed party does not act quickly. In internet defamation cases, it is difficult to compel websites or search engines to remove content after the statute of limitations expires. Additionally, the longer a party waits to take action, the less likely it is that the internet service provider will still possess relevant data. Moreover, many internet defamation victims do not initially engage legal counsel and, upon hiring an attorney, the statute of limitations may have expired.
5. *Determine where a lawsuit can be filed:*Oftentimes, internet defamation victims and the actual defamers reside in different states, or a harmed company may be conducting business (and, thus, suffering harm) in multiple states. If a lawsuit is an option, an attorney should evaluate the venue choices available to the business in consideration of the facts of the case and how particular states might handle defamation, and then determine if a potential venue is more advantageous than another.
6. *Determine if there may be an easier method to stop an attack and remove the defamation:* Since each internet defamation case is fact-specific, attorneys should consider whether there may be alternative methods of solving their clients' problems outside of filing a claim for internet defamation. For instance, many defamed businesses simply want the harmful content removed, and many websites are willing to remove statements that violate their terms of service. In other instances, approaching the person who posted the statements through a demand letter (or by other means), and convincing him/her or negotiating with him/her to remove the damaging content can be effective.

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