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"That's What She Said": Suing for Defamation and Related Claims on Behalf of a Corporation and Its Officers

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Your client is a large corporation. The client's competitor has made negative comments about your client and its CEO, and the client is enraged. The client now seeks your advice.

What claims do the client and its CEO have against the competitor? What remedies are available to each of them? Can the competitor be enjoined from making similar negative comments in the future? These are questions that you will need to answer.

This article includes an introduction to general defamation principles common in most states, but using Illinois as the principal backdrop, and then looks at special rules governing corporate plaintiffs. The article also discusses defamation-oriented variants, some of which are available to corporate plaintiffs but not natural persons. Readers of this article would be well-advised to check the laws of their home states on the issues flagged by this article because there may be differences on critical points.

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Suing on Behalf of the CEO: A Primer on General Defamation Law

The first thing to understand about your hypothetical client's situation is that there are two different plaintiffs—the client itself, which is a corporation, and the client's CEO, who is a natural person. The claims and remedies available to each are different and must be analyzed separately.

This section will briefly canvass defamation law as it applies to natural persons and will also provide a backdrop for the analysis of corporate defamation claims. Defamation law is the subject of multi-volume treatises, of course, so this is merely an introduction that raises some of the key issues.

Generally, to state a cause of action for defamation, a plaintiff must allege (1) that the defendant made a false statement about the plaintiff, (2) that there was unprivileged publication of the

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defamatory statement to a third party with fault by the defendant, and (3) that the publication damaged the plaintiff.[1]

False Statement about the Plaintiff

Opinions generally do not constitute defamation, but an opinion that "implies undisclosed defamatory facts" can be actionable.[2] Moreover, whether a statement is fact or opinion is a question of law to be decided based on:

1. Whether the statement has a precise core of meaning for which a consensus of understanding exists, or conversely, whether the statement is indefinite and ambiguous:

2. Whether the statement is verifiable, that is, capable of being objectively characterized as true or false;

3. Whether the literary context of the statement would influence the average reader's readiness to infer that a particular statement has factual content; and

4. Whether the broader social context or setting in which the statement appears signals a usage as either fact or opinion.[3]

In addition, truth—or more specifically, "substantial truth"—is a defense to defamation.[4]

Fault by the Defendant

The applicable standard of fault depends on whether your CEO client is a private individual or public figure. It is much harder for a public figure to sue for defamation.

Private versus Public Figure

A person may be deemed to be a public figure if he or she receives such fame and notoriety as to become a public figure in all circumstances. Alternatively, a person may become a "limited purpose" public figure by voluntarily injecting himself into a controversy.[5]

General purpose public figures must always establish actual (*New York Times*[6]) malice to prevail in a defamation action.[7] "In order to establish that the alleged defamatory statements were made with actual malice, the plaintiff must prove by clear and convincing evidence that the defendant published defamatory statements with knowledge that the statements were false or with reckless disregard for truth or falsity."[8] Reckless disregard for the truth exists only when the evidence shows that the defendant entertained serious doubts about the truth of the statements.

Limited purpose public figures need establish actual malice only in defamation actions involving controversies in "which they have chosen to accept a leadership role."[9] If the defamation action is unrelated to those controversies, the limited purpose public figure need not prove actual or *New York Times* malice and is instead held to the less stringent private person standard.[10] Illinois law requires that a private plaintiff establish only "negligent" defamation.[11] This is true even if the statement involves a matter of public interest.[12]

Privileges

One other factor in determining the relevant standard of fault is whether any privilege applies to protect the defendant. For example, in Illinois, certain types of statements enjoy "absolute privilege" status, while others are conditionally privileged. Whether an absolute or conditional privilege applies is decided as a matter of law, and the defendant has the burden of establishing the privilege.[13]

Statements that might otherwise be defamatory are protected by an absolute privilege if made during legislative, judicial, or, in some cases, quasi-judicial proceedings.[14] An absolute privilege provides complete immunity from civil action even if the statements are made with malice.[15] Practitioners should also carefully consider new anti-SLAPP statutes, which generally afford an absolute privilege for any defamatory statements communicated while attempting to procure "favorable government action."[16] In addition, a qualified privilege may apply if the occasion for the statement "created some recognized duty or interest to make the communication [statement] so as to make it privileged."[17]

Generally speaking, a conditional privilege may apply when (1) some interest of the person who publishes the defamatory matter is involved, (2) some interest of the person to whom the matter is published or of some other third person is involved, and (3) a recognized interest of the public is concerned.[18] To prove an abuse of (and thus to negate) a qualified privilege, a plaintiff must show "a direct intention to injure another" or a "reckless disregard of the [plaintiff's] rights and of the consequences that may result to him."[19]

The Publication Damaged the Plaintiff

Many states distinguish between two categories of defamation: *per se* and *per quod*. The first is easier to recover for than the second.

Per Se *and* Per Quod

A statement is defamatory *per se* if it imputes (1) the commission of a criminal defense, (2) infection with

a communicable disease, (3) an inability to perform or a want of integrity in the discharge of duties of office or employment, (4) a lack of ability in the plaintiff's trade, profession, or business, or (5) adultery or fornication.[20]

If a defamatory statement is actionable *per se,* the plaintiff need not plead or prove actual damage to her reputation to recover. Statements that fall within these actionable *per se* categories are deemed to be so obviously and materially harmful to the plaintiff that malice is implied and injury to reputation is presumed.[21]

Even if a statement falls into one of the *per se* categories, however, it will not be found actionable *per se* if it is reasonably capable of an "innocent construction.

If the *per se* defamatory statement relates to a matter of "public concern," however, then damages cannot be presumed absent a showing of actual malice.[22] If a defamatory statement does not fall within one of the limited categories of statements that are actionable *per se*, then the claim should be pleaded *per quod*. A defamation *per quod* claim is appropriate when the defamatory character of the statement is not apparent on its face and extrinsic circumstances are necessary to demonstrate the defamatory meaning.[23]

To pursue a *per quod* action in such circumstances, a plaintiff must plead and prove extrinsic facts to explain the defamatory meaning of the statement. A *per quod* action is also appropriate, however, when a statement is defamatory on its face but does not fall within one of the limited *per se* categories. In those cases, the plaintiff need not plead extrinsic facts because the defamatory character of the statement is (theoretically) apparent on its face.

To recover for defamation *per quod*, the plaintiff must plead and prove actual damage to reputation and pecuniary loss resulting from the defamatory statement (special damages).

The Innocent Construction Rule

Even if a statement falls into one of the *per se* categories, however, it will not be found actionable *per se* if it is reasonably capable of an "innocent construction." The innocent construction rule requires courts to consider a written or oral statement in context, giving the words, and their implications, their natural and obvious meaning. "If, so construed, a statement 'may reasonably be innocently interpreted, *or* reasonably be interpreted as referring to someone other than the plaintiff, it cannot be actionable *per se*.'"[24]

Whether a statement is reasonably susceptible to an innocent interpretation is a question of law. In Illinois, the innocent construction rule applies only to *per se* actions, for which damages are presumed.[25]

Be sure to consider the statute of limitations, too, an issue beyond the scope of this article.[26]

Interference with Contract and Other Claims

Practitioners should also consider what claims other than defamation may be available to their clients. As is always true, the same conduct may give rise to several different torts.

Although analyzing the full spectrum of potential claims is beyond the scope of this article, practitioners should consider whether a defamatory statement might also constitute interference with contract, interference with prospective economic advantage, statutory or common law unfair competition, statutory or common law deceptive practices, false light invasion of privacy, trademark infringement, or breach of contract.

Injunctive Relief

Your client's CEO may want to know whether the competitor can be enjoined from making similar defamatory statements. Here again, be sure to carefully analyze the law of your home state. As one recent federal court in Illinois put the point: "[T]he Supreme Court has held that 'prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.'"[27] That case, however, involved an attempt to restrain a lobbying campaign voicing opposition to proposed legislation, a far cry from the usual business context.

In any event, aside from the First Amendment issues inherent in any attempt to enjoin speech, the plaintiff must satisfy the usual requirements for a preliminary injunction. The plaintiff must demonstrate that he (1) possesses a clearly ascertainable right in need of protection, (2) will suffer irreparable injury without an injunction, (3) has no adequate legal remedy, and (4) is likely to succeed on the merits. In addition, the plaintiff must generally establish that the need for temporary relief outweighs any potential injury that the defendant might suffer from the issuance of an injunction.[28]

Defamation Claims on Behalf of the Corporation

Determining what claims your corporate client may bring on its own (as opposed to the CEO's) behalf requires additional analysis. In general, common law

SIZING UP A DEFAMATION CLAIM

Here is a summary of issues you should consider when advising your client's CEO about the potential strength of his or her defamation claim.

1. Is the statement at issue a "fact" or simply an opinion?
   - Even a statement of opinion can be defamatory if it implies "the existence of undisclosed facts."
2. Is the statement true or "substantially true?"
   - If yes, truth is a defense to defamation.
3. Is the plaintiff a private individual or a public figure?
   - If the plaintiff is a public figure, he or she must establish malice to recover.
   - If the plaintiff is a private individual, does the plaintiff qualify as a "limited purpose public figure?"
     - If so, and the defamatory statement relates to a matter in which the plaintiff has voluntarily assumed a "leadership role," the plaintiff will have to establish malice to recover.
   - If the plaintiff is a private individual and not a limited purpose public figure, the negligence standard applies, subject to the additional exceptions identified below.
4. Is the statement protected by an absolute privilege?
   - If so, then the plaintiff cannot recover, even with a showing of malice.
5. Is the statement protected by a qualified privilege?
   - If so, has the privilege been abused?
     - If the privilege has not been abused, then the plaintiff cannot recover.
6. Does the statement constitute defamation *per se*?
   - If so, does the statement involve a matter of public interest?
     - If yes, the plaintiff needs to establish malice.
   - If so, is the statement susceptible to an innocent construction
     - If yes, then like any other statement constituting defamation *per quod*, special damages must be established.
   - If not, then malice is implied and damages are presumed.

defamation actions can be brought by a corporation.[29] The law deems corporations to have no personal reputation, however, and to be incapable of sustaining emotional injury.[30] Accordingly, a corporate plaintiff generally is limited to claims based on injury to its business or financial reputation.

Unlike natural plaintiffs, there are only three types of *per se* defamation for corporations: (1) statements imputing the commission of a criminal offense, (2) statements imputing inability to perform or want of integrity in the discharge of duties of office or employment, and (3) statements prejudicing the plaintiff in its profession or trade.[31]

Even a statement that fits into one of the *per se* categories is not defamatory *per se*, however, if it is susceptible to an innocent, non-defamatory construction. The same considerations relating to the standard of fault and any absolute or conditional privilege apply to corporations as they do to natural persons.[32]

Deceptive Trade Practices Acts

Consider whether to bring a cause of action for commercial disparagement on behalf of the corporation as opposed to (or in addition to) common law defamation. To state a cause of action for common law commercial disparagement, a plaintiff must show that the "defendant

made false and demeaning statements regarding the quality of another's goods and services."[33]

DTPA Basics

Consider whether your state's Deceptive Trade Practices Act (DTPA) applies and, if so, whether it supplants any common law causes of action. Under the Illinois DTPA, "A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person . . . disparages the goods, services, or business of another by false or misleading representation of fact."[34]

To state a cause of action for common law commercial disparagement, a plaintiff must show that the "defendant made false and demeaning statements regarding the quality of another's goods and services."

If there is confusion in your state concerning whether common law claims are still viable, the better practice for pleading purposes would be to include both the common law and statutory claims for disparagement.

Injunctive Relief

One advantage to asserting claims for defamatory statements under a DTPA is that many state statutes will specifically authorize injunctive relief.[35] The case law in this area is scant in many states, however. Research conducted for this article did not reveal any cases in Illinois, for example, authorizing injunctions under the DTPA to enjoin future disparagement. In *Allcare, Inc. v. Bork*, the first district denied the plaintiff's request for an injunction under the DTPA to prevent future disparaging statements because:

> [P]laintiff's complaint does not allege, beyond the two allegedly defamatory statements of defendants Bork and Krause and the stricken allegations of conspiracy, a long standing and persistent pattern by defendants of defaming plaintiff or of disparaging its products or services. In fact, plaintiff does not allege any facts from which such conduct or the threat of future defamations or disparagements may reasonably be assumed. As such, plaintiff's complaint fails to demonstrate a need for injunctive relief.[36]

Allcare refers to *Streif v. Bovinette*,[37] which dealt with a common law disparagement claim, not a DTPA claim. In that case, as *Allcare* points out, the allegations related to "defendant's repeated complaints, allegedly over a three-year period, to various governmental agencies of violations of State and Federal statutes and regulations by the plaintiff's bus company."[38] In *Streif*, the court specifically noted that "in the proper circumstances equity has recognized the need to enjoin unfair competitive practices which employ disparagement." The court struck down the trial court's injunction, however, because it was overbroad.[39]

The key takeaway point for practitioners is that, in order to justify injunctive relief, the plaintiff must establish *repeated* defamatory and disparaging communications by the defendant, which creates a real threat of future disparagements.

Conclusion

When counseling corporate clients on defamation claims, practitioners should distinguish claims that may be brought on behalf of the corporation itself from those available to individual officers. The remedies available to a corporation may be more limited than those available to a natural person, but some claims can be brought by a corporation but not a natural person.

In addition, one advantage to bringing claims under your state's Deceptive Trade Practices Act in particular is that the DTPA may specifically authorize injunctive relief. This may be particularly helpful when attempting to enjoin defamatory speech by a business competitor.

Notes

1. Vickers v. Abbott Labs, 308 Ill. App. 3d 393, 400, 719 N.E. 2d 1101, 1107 (1st D. 1999). Distinctions between libel and slander have been abolished in many states, including Illinois, so this article uses the term "defamation" to refer to libel and slander jointly. *See*, for example, O'Donnell v. Field Enterprises, 145 Ill. App. 3d 1032, 491 N.E. 2d 1212 (1st D. 1986).
2. *O'Donnell*, 145 Ill. App. 3d at 1040, 491 N.E. 2d at 1218.
3. The District of Columbia Court of Appeals developed this multifactor test in Ollman v. Evans, 750 F.2d 970, 984-985 (D.C. Cir. 1984), and cited with approval by the Illinois Supreme Court in Mittelman v. Witous, 135 Ill. 2d 220, 243-244, 552 N.E. 2d 973, 984 (1989).
4. American Int'l. Hospital v. Chicago Tribune Co., 136 Ill. App. 3d 1019, 483 N.E. 2d 965. *See also* Ill. Const. art. I, § 4 ("In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.").
5. Kessler v. Zekman, 250 Ill. App. 3d 172, 180, 620 N.E. 2d 1249, 1254-1255 (1st D. 1993).
6. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
7. *Kessler*, 620 N.E. 2d at 1251, 1255.

8. Pease v. Int'l Union of Operating Engineers, 208 Ill. App. 3d 863, 872, 567 N.E. 2d 614, 620 (2d D. 1991).
9. *Kessler,* 620 N.E. 2d at 1255.
10. *Id*.
11. Troman v. Wood, 62 Ill. 2d 184, 198, 340 N.E. 2d 292, 299 (1975) ("[I]n a suit brought by a private individual to recover actual damages for a defamatory publication whose substantial danger to reputation is apparent, recovery may be had upon proof that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief. We hold further that negligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest."); Edwards v. Paddock Publications, Inc., 327 Ill. App. 3d 553, 763 N.E. 2d 328 (1st D. 2001).
12. *Troman*, N.E. 2d at 299. *Accord* Imperial Apparel, Ltd v. Cosmos' Designer Direct, Inc., 227 Ill. 2d 381, 395, 882 N.E. 2d 1011, 1020 (2008) ("In contrast to a plaintiff's status, the content of the challenged speech, specifically, whether it addresses a matter of public concern, does not determine the standard of liability."); Rosner v. Field Enterprises, Inc., 205 Ill. App. 3d 769, 564 N.E. 2d 131 (1st D. 1990). The Second District recently wrote, however, that "because the statements at issue are a matter of public concern, punitive damages may not be imposed absent a showing of actual malice." Green v. Rogers, 384 Ill. App. 3d 946, 963, 895 N.E. 2d 647, 664 (2d D. 2008).
13. Zych v. Tucker, 363 Ill. App. 3d 831, 844 N.E.2d 1004 (1st D 2006).
14. *Id*. Practitioners should note that whether a proceeding qualifies as "quasi-judicial" is itself a complex issue, for which case law should be consulted.
15. *Id*. Illinois has a particularly broad anti-SLAPP statute.
16. Illinois's statute, entitled the Citizen Participation Act (CPA), applies to:

    > [A]ny motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving part in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government. Acts in furtherance of the constitutional right to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome. 735 ILCS 110/15.

    It is beyond the scope of this article to analyze the scope and implications of the CPA. For a recent and thorough analysis of this statute, *see* Eric M. Madiar and Terrence J. Sheahan, "Illinois' New Anti-SLAPP Statute," 96 *Ill. Bar J.* 620 (Dec 2008). For additional analysis, *see* Mark J. Sobczak, "Slapped in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act," 28 *NIU L. Rev*. 559 (Summer 2008); Debbie L. Berman and Wade A. Thomson, "Illinois' Anti-SLAPP Statute: A Potentially Powerful New Weapon for Media Defendants," 26 *Comm. Lawyer* 13 (Mar. 2009).
17. Kuwik v. Starmark Star Marketing and Admin, Inc., 156 Ill. 2d 16, 27, 619 N.E. 2d 129, 134 (1993).
18. *Id*. The conditional privilege standard set forth by *Kuwik* superceded the prior Illinois standard.
19. *Id*. at 30, 619 N.E. 2d at 136 (further noting that "an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties."). The test for abusing a qualified privilege is thus slightly different than the general malice test.
20. Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 88, 672 N.E. 2d 1207, 1214-1215 (1996).
21. *Id*. The Illinois first district court of appeals recently held that the plaintiff is not entitled to an *irrebuttable* presumption of damages, and that evidence of the plaintiff's reputation may be introduced as part of the damages calculus. Knight v. Chicago Tribune Co., 385 Ill. App. 3d 347, 895 N.E. 2d 1007 (1st D. 2008).
22. Note that Illinois law is not expressly clear on this point. *Mittelman,* 552 N.E. 2d at 980 ("Federal authority would allow presumed damages, even absent a showing of actual malice, where no public figures or matters of public concern are involved."); Mullen v. Solber, 271 Ill. App. 3d 442, 445, 648 N.E. 2d 950, 953 (1st D. 1995) (special damages need not be proven in connection with defamation *per se* "where the defamation involves a purely private matter").
23. *Bryson*, 672 N.E. 2d at 1214.
24. *Bryson,* 672 N.E. 2d at 1215, *quoting* Chapski v. Copley Press, 92 Ill. 2d 344, 352, 442 N.E. 2d 195, 199 (1982) (emphasis added). *See also Bryson*, 672 N.E. 2d at 1215 ("Only *reasonable* innocent constructions will remove an allegedly defamatory statement from the per se category.") (emphasis in original).
25. *Mittelman*, 552 N.E. 2d at 979 (citations omitted). For a recent analysis of the innocent construction rule, *see* Helen Gunnarsson, Lawpulse, "'Innocent Construction' Libel Rule—Still Standing but Battered," 95 *Ill. Bar J.* 121 (2007).
26. Note that the statute of limitations for defamation claims is one year. 735 ILCS 5/13-201 (defamation actions must be "commenced within one year next after the cause of action accrued"). The discovery rule also applies to defamation claims. The cause of action accrues when the plaintiff "knew or should have known" of the defamatory statement. *See*, for example, Tom Olesker's Exciting World of Fashion, Inc v. Dun & Bradstreet, Inc, 61 Ill. 2d 129, 334 N.E. 2d 160 (1975).
27. Ameritech v. Voices for Choices, Inc, 2003 WL 21078026 (N.D. Ill.), *quoting* Nebraska Press Assn v. Stuart, 427 U.S. 539, 559 (1976).
28. Tyler Enterprises of Elwood, Inc v. Shafer, 214 Ill. App. 3d 145, 148, 573 N.E. 2d 863, 865 (3d D. 1991); Wilson v. Wilson, 217 Ill. App. 3d 844, 849, 577 N.E. 2d 1323, 1326-1327 (1st D. 1991).
29. This does not include municipal corporations, however. *See* City of Chicago v Tribune Co., 307 Ill. 595, 139 N.E. 86 (1923).

30. Brown & Williamson Tobacco Corp v. Jacobson, 827 F2d 1119 (7th Cir 1987) (applying Illinois law).
31. Chicago Conservation Center v. Frey, 40 Fed Appox. 251, 255 (7th Cir 2002) (discussing Illinois law).
32. *Bryson*, 672 N.E. 2d 1207 (1996).
33. Barry Harlem Corp v. Kraff, 273 Ill. App. 3d 388, 396, 652 N.E. 2d 1077, 1083 (1st D. 1995).
34. 815 ILCS 510/2(8). *See also* Associated Underwriters of America Agency, Inc. v. McCarthy, 356 Ill. App. 3d 1010, 826 N.E. 2d 1160 (1st D 2005) (defendant engages in a deceptive trade practice when he disparages the services or business of another by a false or misleading representation of fact); M & R Printing Equipment, Inc v. Anatol Equipment Mfg Co., 321 F. Supp. 2d 949 (N.D. Ill. 2004). In *M&R Printing*, the plaintiff's competitor stated to mutual customers that the plaintiff was in bankruptcy. The plaintiff filed suit for disparagement under the Illinois Deceptive Trade Practices Act, and argued the statements were false. The court held: "[T]he statement at issue in this case impugns the quality of M & R's business and services. Stating that M & R is bankrupt directly attacks the quality of M & R's business and indirectly undermines the quality of M & R's services—an insolvent company cannot reliably deliver on-going services. Accordingly, we find that count four properly states a UDTPA claim." *Id*. at 952.
35. 810 ILCS 510/3.
36. *Allcare*, 531 N.E. 2d at 1038.
37. *Streif,* 88 Ill. App. 3d 1079, 411 N.E. 2d 341 (5th D. 1980).
38. *Allcare*, 531 N.E. 2d at 1038.
39. *Streif*, 411 N.E. 2d at 344.