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Early Mitigation of Defamation Damages

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While it may not be true that the pen is mightier than the sword, in the defamation world, it is unquestionably the case that the pen (or more appropriately in this digital age, the keystroke) can lead to the award of significant monetary damages. In recent years, defamation claims have resulted in multi-million-dollar verdicts. The cases are not limited to media defendants. Non-media businesses face serious risk. For instance, in 2008, in what was at the time the largest jury verdict in a defamation matter in U.S. history, a Mexican contractor obtained a $188 million verdict against a businessman who was found to have made libelous statements in a U.S./Mexican publication. *See* Rebello, Justin, "Where Are They Now? A Look Back at the Top Verdicts of 2008," *Lawyers Weekly USA* (2010) (referring to *Cantu v. Flanigan*, Case No. 05-3580 (E.D.N.Y.)), which was appealed and affirmed in part and remanded in part, but the full verdict was eventually affirmed at 705 F. Supp. 2d 220 (E.D.N.Y. 2010)).

Defamation damages are notoriously difficult to quantify, which increases the risk and uncertainty in defending defamation claims. "Risk" and "uncertainty" are two words no business wants to hear from its general counsel's office. Adding to the pressure is the fact that there are some very important tactical decisions that the potential defendant needs to make before the plaintiff files the complaint. Do you retract the allegedly offending statement? Do you stay silent? Do you respond with a clarification? Do you remind the plaintiff of the duty to mitigate damages? There is no easy answer to any of these questions, but all require the same thing: an early comprehensive assessment of the strengths and weaknesses of the pending defamation claim, including the potential exposure.

Defamation and Non-Media Defendants

Under the Restatement, a plaintiff asserting a claim for defamation must establish "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *See* Restatement (Second) of Torts § 558. A public-figure plaintiff has the additional burden of proving actual malice—that is, that the defendant published the statement with knowledge of its falsity or with reckless disregard as to its truth. The Restatement states that the same standard of fault—whether it be negligence or actual malice (depending on the plaintiff)—should apply to media and non-media defendants alike. *See id.* at § 580A, cmt. h, 580B, cmt. The degree to which the Restatement standards have been applied varies to some degree from state to state.

Typically, there are three main categories of available damages: (1) general damages for harm to reputation; (2) special damages; and (3) punitive damages (only a handful of states do not allow punitive damages). Generally, the plaintiff must show actual damage to receive general and special damages, and must show willful and malicious injury to the plaintiff's reputation to obtain

punitive damages. *See id.* at § 620–23; *see also* 1-6 Business Torts 6.02, Commercial Defamation (2012).

There are no defined rules as to the damages the jury may award. One reason for this ill-defined contour is the fact that it is difficult to quantify damage to one's reputation. The amorphous nature of defamation damages can lead to wildly unpredictable results—sometimes benefiting the plaintiff and sometimes the defendant.

Further, non-media defendants can face significant liability. Here are a few examples of typical defamation claims brought against non-media defendants:

- a company (or its employee) allegedly makes false and disparaging comments about the quality of its competitor's products or the competitor's behavior
- a former-employee sues because his or her former employer tells a potential employer of misconduct or poor performance
- a company or its employee makes comments about its own product, which raises negative implications about a competitor's product
- an employee makes derogatory comments about another employee to someone inside or outside the company.

An Early Defense—To Retract or Not?

A smart plaintiff will ask for a retraction. It puts the defendant in a bind. In litigation, a plaintiff will argue that the retraction is an admission of falsity, and, depending on the facts and circumstances, may be successful. On the other hand, in some states, choosing not to retract can be considered evidence of actual malice if the statement is then known to be false, may open the door for a possible punitive-damages award, and certainly could be used by the plaintiff to paint the defendant in a worse light. Indeed, how you handle the retraction issue could be a multi-million-dollar decision for the defendant.

That is why it is so important to learn as much as possible, as early as possible, about the truth of the alleged offending statement. Conduct a thorough investigation—interview key people and review the underlying documents. If you determine that the statement is absolutely false, then a retraction would likely make sense. If the statement is absolutely true, then, business considerations aside, a retraction is inappropriate.

In those circumstances where the statement is (1) ambiguously false or (2) you are just not sure if it is false, the decision is much more difficult. Here, it is important to know what law will apply and what the law provides. States generally reward the defendant who retracts, but they do so in various degrees. Some hold that a proper retraction will completely protect the defendant from punitive damages (but may limit such protection to newspaper defendants), while others treat it as simply a mitigating factor. *See, e.g.*, W. E. Shipley, "Validity, Construction, and Application of Statute Limiting Damages Recoverable for Defamation," 13 A.L.R. 2d 277 (2008) (noting retraction statutes that bar completely or partially punitive damages); *see also Rogers v. Florence Printing Co.*, 106 S.E.2d 258, 263 (S.C. 1958) ("[r]etraction of a libel is matter to be considered in mitigation, but does not bar punitive damages in the absence of a statute so providing."). If you are in one of those states that does not allow a retraction to act as a complete bar to punitive damages, and your investigation shows you can put forward a plausible theory as to the truth of a particular statement, then a retraction may not be the proper strategy. Knowing your state law will help you decide between preserving your truth defense (by not retracting) and possibly eliminating the risk of punitive damages (by retracting).

Preserving a truth defense and also protecting against punitive damages do not have to be mutually exclusive options. There are two approaches that can keep both on the table. First, when sending the retraction request, most plaintiffs provide no more evidence of falsity other than to say "I did not do what you say I did" or some variation on this theme. If you don't know whether the plaintiff is right, ask. Send a letter to the plaintiff, asking for support of the statement. Such a response preserves your truth defense (because you have not admitted to any falsity), while making it harder for the plaintiff to argue that you are acting in bad faith. Further, it puts the pressure back on the plaintiff to provide evidence (and to mitigate damages—we'll get to that shortly). If the plaintiff does provide evidence, particularly evidence that you otherwise could not have obtained, then that will make your decision much easier. If the plaintiff does not provide evidence, then your decision not to retract will look more reasonable should the statement ultimately be proven false in litigation.

Second, a plaintiff sometimes latches onto an interpretation of a statement that was not what the writer intended but could make the statement false. Although the writer intended a different meaning that in fact is true, consider a clarification. Clarify the meaning of the statement and put forth your theory of the truth

of the statement. A proper clarification will preserve a truth defense while also demonstrating good faith, thereby reducing the case for punitive damages.

If you decide to publish a retraction or clarification, there will be other considerations, including where and to whom to publish, and whether to include an apology. Media organizations (because they every day correct the record) for policy reasons often have a routinized approach to deal with these issues, from which they generally will not deviate. *See generally* editions of the *New York Times*, the *Washington Post*, and the *Philadelphia Inquirer*. Businesses have greater flexibility. For example, if there is an error, can you offer a more full-throated retraction (and apology) with broader distribution as part of a settlement package? Even if you can't use it for settlement, if you find substantial error, consider whether you should correct not just in the medium where you made the error, such as a letter to editor or website correction, but more. A relatively obscure retraction on your website might be of little use in defending a case if you believe there has been a lot of chatter about the offending statement. And, if the misstatement has gone viral on the web, you need to think about whether there are others you want to contact to urge them to correct.

As for an apology, if you have clear error and there is no truth defense, an apology makes sense. We all understand making a mistake. We all make them every day; we also generally apologize and expect that of others.

If you don't believe that an error was made (unless business relations demand otherwise), still reply to a retraction demand and do it respectfully. Remember, if this goes to trial, the response will be looked at closely by six to twelve jurors, and you don't want to be embarrassed by what you said two years earlier. If the first draft you write in response to a demand for retraction is full of spitfire, you might want to wait a day or give it to someone else to read first before sending.

In sum, a defendant should consider the following steps in response to a retraction demand:

- investigate the truth of the statement immediately
- determine the applicable retraction law, particularly to what degree a retraction will protect you from punitive damages or be used as evidence of actual malice with respect to the original publication
- inform the plaintiff that you are investigating the matter, and ask the plaintiff to provide information
- if a retraction or clarification is appropriate, carefully draft, think about how to distribute, whether to apologize, where and how to distribute, and whether it should be part of a settlement discussion
- if you decide not to retract or clarify, respond, thinking about it being read by jurors years later.

Urging a Plaintiff to Mitigate

A defamation plaintiff must mitigate its damages, like any other victim of a tort. Indeed, the Supreme Court in *Gertz v. Robert Welch* stated that "[t]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." While mitigation can come in many forms, the bottom line is this: A plaintiff must do whatever it reasonably can to protect its own reputation from the alleged damage caused by the offending statement.

Defendants facing other claims, particularly breach-of-contract claims, often aggressively push plaintiffs to identify their mitigation efforts. Surprisingly, it appears the same cannot be said of defamation defendants. There exists a noticeable dearth of case law showing a defendant making a big stink about a plaintiff's lack of mitigation efforts. *See, e.g., Desnick v. American Broadcasting Companies, Inc.*, 1999 US Dist. LEXIS 972 (N.D. Ill. 1999) (noting both parties "short on legal authority pertaining to mitigation of damages in a defamation action"). A possible explanation is that the topic of plaintiff mitigation gives the plaintiff yet one more category of damages to claim. *See, e.g.*, *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1149 (3d Cir. 1990) (finding a plaintiff entitled to "expenditures made in a reasonable effort" to mitigate damages).

Nevertheless, there are several reasons why you should still consider urging the plaintiff to mitigate. First, there is a reason the law requires mitigation: It leads to a more efficient use of resources. The law provides incentives so that resorting to litigation to obtain monetary damages is a last resort. A defamation defendant obviously benefits from this situation. For instance, if a former employee is able to find comparable work at comparable pay notwithstanding an offending statement, then the defamation defendant will not be on the hook for lost wages. If a corporate plaintiff is able to convince its customers to still purchase products notwithstanding the defamation defendant's accusa-

tions of poor quality, then the plaintiff will struggle to establish lost profits as a result of the offending statement. Indeed, there are services on the Internet that will assist individuals to protect their reputations online. By reminding the defamation plaintiff of its duties early, and if the plaintiff is successful in limiting its damages, then you can control the exposure your client faces.

Second, you can gauge early how seriously the plaintiff takes its own case. If the plaintiff takes significant steps—such as hiring a public-relations firm, sending its high-ranking employees to meet with top customers, or publishing its own statement attacking the offending statement—then this information will tell you that the plaintiff takes the issue seriously. Any insight on how your opponent views its own case is valuable when it comes time to determine settlement options and overall case strategy.

Third, if you decide a retraction is appropriate, you may decide to enlist the plaintiff in the crafting of the retraction. This can be an important consideration. After a retraction is released, a plaintiff may well argue that because of the way it was written, the retraction made the situation worse. Convincing the plaintiff to participate in the drafting of the retraction will bypass that potential risk.

Fourth, a plaintiff's failure to mitigate even after receiving a letter from a defendant reminding the plaintiff of that duty can help inform a jury of how the plaintiff viewed the seriousness of the statement. A defendant can tell the jury a compelling story that the plaintiff does not take its own claim seriously enough to do anything about it other than sue and seek money. That can be an important fact at trial.

And even if you believe the statement is true, you should consider, when responding to the retraction-demand letter, reminding the plaintiff of the duty to mitigate. In other words, inform the plaintiff that while you do not believe there is anything to mitigate, if the plaintiff believes it has been damaged, then it has a duty to do so.

Conclusion

In a defamation case, perhaps more so than in other matters, there are important issues that a potential defendant should consider and address before the suit is filed. The decision whether to retract can be a critical and nuanced decision. Further, in the right case, aggressively pushing a plaintiff to mitigate may be important. These pre-litigation decisions can put you in the best position possible to reduce the risk and uncertainty inherent in defamation actions.