

Commercial Defamation Update: California Imposes New Hurdle on Ability to Ascertain Identity of Anonymous Internet Posters

California defamation law continues to evolve as the courts synthesize well-settled legal principles with ever-changing technological realities. On July 21, 2017, California's First District Court of Appeal issued a published opinion in [*ZL Technologies v. Does 1-7*](#) (July 21, 2017) 2017 DJ DAR 6999. In its opinion, the Court amplified existing defamation law as it relates to Internet postings and imposed new hurdles on the ability of parties to ascertain the identities of people who post defamatory statements on the Internet.

It is unlawful for an individual to damage a company by saying or writing something about it that is materially false. However, the courts typically bend over backwards to protect First Amendment rights. Accordingly, they created an exception to defamation for what they call "nonactionable opinion," that is, statements for which no defamation claim may lie because the statements constitute mere expressions of opinion rather than assertions of fact.

It often can be frustratingly difficult, even for lawyers, to distinguish actionable defamation from nonactionable opinion. In part, this is because people tend to pepper their opinions with facts to support or emphasize them. The advent of the Internet has made this analysis even more complex, because now everyone with a cell phone has the ability to immediately share their views, and entire companies and Internet communities have been formed for the singular purpose of facilitating such discourse. In recent years, the California courts have tried to create some ground rules for distinguishing actionable defamation from nonactionable opinion on the Internet. Under those rules, judges are required to assess not only the specific language the internet poster used (the "what"), but also the online forum in which the poster used that language (the "where"). If the poster's language is exaggerated or appears on websites that lend themselves to "rants and raves," rather than considered thought, the California courts tend to view the postings as nonactionable opinion, notwithstanding the fact that it might contain some false facts.

Frequently, even if a company believes it can establish a claim for defamation, its battle to obtain relief has only just begun. One common characteristic of Internet posting is its anonymity.



by Michael F. Donner

Posters sometimes use online monikers and the websites on which they publish their statements actively shield the posters' identities. Hence, while a company might want to sue, it cannot readily do so because the identity of the person to be sued remains unknown. To address this issue, some businesses file lawsuits against "Doe" defendants and then take discovery to ascertain the posters' identities. Discovery like that can be expensive and is not always successful.

In *ZL Technologies*, several anonymous individuals posted allegedly false statements about a company on Glassdoor.com, an employee review website. The company subpoenaed Glassdoor to obtain the posters' e-mail addresses and other identifying information so the company could sue the posters for defamation. Although Glassdoor was insulated from defamation liability under federal law (as a mere forum for postings), it fought the subpoena on behalf of the posters.

The Court of Appeal allowed the company to proceed both with the case and its efforts to ascertain the identities of the anonymous posters. However, it tried to strike a balance between the company's interest in obtaining relief and the posters' interest in remaining anonymous. It held that litigants seeking to subpoena websites to determine the identities of anonymous posters must first (1) give notice of the subpoena to the posters (through the website) so the posters can fight the subpoena; and (2) establish a *prima facie* case of defamation on par with that necessary to defeat an anti-SLAPP motion. California never applied these two tests before in connection with this type of discovery.

In the aftermath of *ZL Technologies*, companies may still subpoena websites to ascertain the identities of anonymous posters who write defamatory things about them. However, before doing so, they must now give the posters a chance to challenge the legal propriety of their subpoenas. They also must marshal their evidence and prepare a nearly dispositive motion on their defamation claim, establishing that the posted statements were factual, actionable, material, false, and damaging. These hurdles will require considerably more time and resources to satisfy.

For more information, please contact:

Michael F. Donner, Partner and San Francisco Market Leader
415-995-5025
mdonner@hansonbridgett.com