

# **SOCIAL MEDIA DEFAMATION LITIGATION**

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# Overview

1. *Clay v. Colter* (Mass. Super. Ct.)
2. Law of Defamation and Prior Restraints
3. Anti-SLAPP Statutes
4. Communications Decency Act § 230—Online Service Provider Immunity
5. Recent Jury Verdicts and Appeals

# Clay v. Colter

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**LAWYERS WEEKLY** masslawyersweekly.com



**Defamation case exposes social media controversy**

Car dealership at center of alleged smear campaign

By David E. Frank  
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A judge's refusal to issue an injunction in a suit involving a car dealership allegedly defamed by the relatives of an ex-employee demonstrates the struggle for courts that are asked to strike a balance between the First Amendment and social media sites like Facebook and Twitter.

In *Clay Corporation v. Colter, et al.*, the employee's brothers, who claim she was fired because she suffered from brain cancer, launched an aggressive social media campaign that generated more than 50,000 followers and caused plaintiff Clay Nissan to suffer substantial financial harm.

Even though Superior Court Judge Renee P. Dupuis took the unusual step of attaching \$1.5 million of the brothers' real estate holdings and bank accounts after finding the dealership had a substantial likelihood of success on the merits, she declined to issue a preliminary injunction curbing their speech based on the First Amendment's prior restraint doctrine.

Scott Silverman of Newton, who represents the dealership, said the judge's decision to attach the assets vindicates his client. But Dupuis' Continued on page 27

The full text of the ruling in *Clay Corporation v. Colter, et al.* can be ordered at [masslawyersweekly.com](http://masslawyersweekly.com).

- **Facts:** defendants initiated online boycott of company using social media, falsely claiming company fired their sister “because she had cancer”

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# *Clay v. Colter*

- **Defamation**—plaintiff must show:
  - (1) defendant published a defamatory statement about the plaintiff;
  - (2) statement was a materially false statement of fact;
  - (3) defendant acted with fault (negligence concerning private persons or actual malice concerning public officials/figures); and
  - (4) statement caused economic loss, or is actionable without proof of economic loss.
- Statements actionable **without proof of economic loss**:
  - libel;
  - statements charging plaintiff with a crime;
  - statements alleging plaintiff has certain diseases; and
  - statements that may prejudice the plaintiff's profession or business.

# *Clay v. Colter*

- **Intentional interference with advantageous relations**—plaintiff must show:
  - (1) a business relationship or contemplated contract;
  - (2) the defendant's knowledge of such relationship;
  - (3) the defendant's interference with the relationship through improper motive or means; and
  - (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct.
- **Preliminary injunction**—plaintiff must show:
  - (1) a likelihood of success on the merits;
  - (2) irreparable harm will result if the injunction is denied; and
  - (3) the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.

# *Clay v. Colter*

- Court found preliminary injunction standard met, issuing **\$1.5 million attachment**
  - Defendants’ statements had no factual support
  - Defendants’ “far reaching, extremely aggressive social media campaign” “severely and adversely impacted” Clay’s business
  - Court declined to restrain defendants’ speech, given First Amendment concerns

# Prior Restraints

- Injunction prohibiting speech is a prior restraint, which is disfavored under the law. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).
- “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).
- “[E]ven allegedly false and defamatory statements are protected from prior injunctive restraint by the First Amendment.” *Nyer v. Munoz-Mendoza*, 385 Mass. 184, 188 (1982).

# *Clay v. Colter*

- **Appeals Court's ruling**—attachment reduced to \$700,000
- **MA anti-SLAPP statute**—Mass. Gen. Laws ch. 231 § 59H
  - provides “remedy for those citizens targeted by frivolous lawsuits based on their government petitioning activities”
- **Court order on special motion to dismiss**—defendants' conduct not government petitioning activities



# Anti-SLAPP Statutes

- 27 states and D.C. have enacted anti-SLAPP statutes—designed to combat “strategic litigation against public participation” actions
- No federal anti-SLAPP statute
- *Sherrod v. Breitbart* (D.C. Cir., pending)—applicability of anti-SLAPP statute in federal court

# Lawsuits on the Rise

- *Clay v. Colter* is part of larger trend of social media defamation lawsuits
- *Desert Palm Surgical, P.L.C. v. Petta* (Ariz. Super. Ct.)— medical group and its doctors won **\$12 million verdict** based on former patient's false statements about treatment on her website and on MySpace
- *Dietz Development LLC v. Perez* (Va. Cir. Ct.)— construction contractor sought preliminary injunction and \$750,000 in damages due to former customer's defamatory *Yelp* reviews; court granted injunction in part, but order was later reversed

# Bad Yelp Review Results in Lawsuit for Virginia Woman (ABC News, 12/7/12)



# Section 230 of Communications Decency Act

- Section 230 of Communications Decency Act—online service provider immunity
- “No provider or user of an interactive computer service shall be treated as the publisher” of “information provided by another information content provider.” 47 U.S.C. § 230(c).
- *Levitt v. Yelp! Inc.* (N.D. Cal. Oct. 26, 2011)
- *Noriega v. TheHuffingtonPost.com, Inc.* (D.D.C., pending)

# Miss Universe L.P., LLP v. Monnin

- Miss Universe organization won **\$5 million arbitration award** against Miss USA pageant contestant based on false statements she made on Facebook and the *Today Show*
- Contestant claimed that the pageant was “rigged” because another contestant told her that she saw the list of top finalists before judging
- Miss Universe organization’s corporate sponsor later abandoned proposed \$5 million sponsorship

Former Miss Pennsylvania: “I want the truth” (The *Today Show*, 6/8/12)



# *Obsidian Finance Group, LLC v. Cox* (D. Or.)

- Financial advisory firm and its senior principal sued an “investigator blogger” for statements she published online accusing them of corrupt and fraudulent conduct
- Plaintiffs won **\$2.5 million jury verdict**
- Case pending in U.S. Court of Appeals for the Ninth Circuit

# Other Recent Cases

- *mLogica Inc. v. Karan* (Cal. Super. Ct.)
  - Technology company and its top executive brought claims based on false statements about their business practices the defendant made on his blog and by email
  - Plaintiffs obtained **\$1.56 verdict** and an injunction
  - Case pending in California Court of Appeal
- *Lynch v. Christie* (D. Me.)
  - Plaintiff chiropractor sued former patient due to false statements she published on a website and on Facebook claiming that the chiropractor had sexually abused her
  - Court issued **\$100,000 pre-judgment attachment**



# Unmasking Anonymous Defendants

- First Amendment protects the right to anonymity, but does not protect defamatory speech
- Courts take different approaches when plaintiff seeks disclosure of identity from an internet service provider (ISP)
- Balancing test:
  - (1) concrete showing of a prima facie claim of actionable harm;
  - (2) specificity of the discovery request;
  - (3) absence of alternative means to obtain the information;
  - (4) need for the subpoenaed information;
  - (5) party's expectation of privacy.

*London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 164 (D. Mass. 2008).

# Questions

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