

Disinformation Litigation Lessons From Media Co. Losses

By **Matthew Ferraro, Sharon Kelleher Hogue and Louis Tompros** (April 5, 2023)

In 2022 and early 2023, voting machine companies and the parents of school shooting victims won a string of court rulings against the media companies and personalities that had allegedly spread defamatory, viral lies about them.

While many of these cases are ongoing, potential litigants on either side should take note. The rulings show the growing strength of certain lawsuits brought to vindicate businesses and individuals allegedly injured by false statements broadcasted on television and spread through social media.

In these kinds of suits — what we call counter disinformation litigation — plaintiffs bring civil claims, usually asserting state law causes of action, such as defamation or deceptive trade practice, against those who allegedly propagated widespread injurious falsehoods about private parties.[1]

Civil Legal Developments

The recent court decisions illuminate several important legal developments that litigants in counter disinformation litigation and similar disputes should understand.

Actual Malice

Plaintiffs can support a claim of actual malice — the high bar public persons must show to prevail on claims of defamation — by adequately alleging that the defendant had reason to suspect that what it was broadcasting was false.

A defendant may have such reason to be suspicious because the defendant continues to broadcast statements when there is no credible evidence to support them and the claims are so inherently improbable that only a reckless person would believe them.

Fair Report Privilege

The fair report privilege is an affirmative defense that protects the author of an allegedly defamatory statement if the statement is a fair and accurate report of a qualified government source.

It does not protect a defendant whose statements go beyond the information contained in a government source, like a publicly available affidavit.

Neutral Reportage Privilege

The neutral reportage privilege is an affirmative defense that protects a journalist who



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reports newsworthy events accurately and dispassionately.

It does not protect a defendant whose statement amounts to an endorsement or approval of a false theory, especially where the defendant was on alert to the falsity of that statement.

Vicarious Liability for Parent Companies

Parent companies may be held vicariously liable for statements made by a subsidiary company if individuals within the parent company are closely involved in what is published by the subsidiary.

Anti-SLAPP Statutes

State anti-strategic litigation against public participation statutes may shield defendants from liability, but not where the plaintiffs' claims have substantial basis in the law — i.e., where plaintiffs have adequately alleged that the defendants, with actual malice, published unprivileged, factually false statements that caused damages.

Fleeting Mentions of Denials

Media personalities that go to great lengths to repeat allegedly defamatory false statements and only occasionally mention the plaintiffs' denials may not escape liability.

Damages

Recent damage awards totaling north of \$1.4 billion against prominent conspiracy theorist Alex Jones and his website Infowars show that fact finders may award eye-popping amounts to plaintiffs who suffer unique harms from the unrelenting recitation of falsehoods.

2020 Election Cases and the Motion to Dismiss Phase

Voting software companies U.S. Dominion Inc. and Smartmatic U.S. Corp. filed lawsuits against a number of media companies and individuals related to their perpetuation of the lie that the voting software companies rigged the 2020 presidential election.[2]

The plaintiffs allege that false statements about their software's mishandling of ballots or stealing votes cost the companies hundreds of thousands of dollars in additional security and expenses, millions of dollars in lost profits, and billions of dollars in decimated enterprise and reputational value. Multiple courts have denied motions to dismiss these cases, fleshing out important legal principles in this field.

Dominion v. Byrne

In *Dominion v. Byrne*, Dominion sued Patrick Byrne, the founder and former CEO of Overstock.com Inc., for defamation per se, alleging that Byrne made 18 defamatory statements, either during interviews or in blog posts.[3]

For example, Dominion alleged that in November 2020, Byrne fallaciously stated that Dominion — a U.S.-organized company founded in Canada — "was developed in Venezuela, by Hugo Chavez for him to rig his elections," and also alleged that in February 2021 Byrne published a blog post falsely claiming that Dominion paid for a "shredding truck" to shred 3,000 pounds of ballots.[4]

In April 2022, the U.S. District Court for the District of Columbia denied Byrne's motion to dismiss, finding that Dominion adequately alleged actual malice because Byrne's statements were improbable.[5] The court also rejected Byrne's arguments under the fair report privilege.[6]

Although Byrne had hyperlinked one of his allegedly defamatory blog posts to an affidavit supposedly providing evidence to support Byrne's claims of foreign interference from Venezuela in the U.S. election, the court held that "Byrne's own assertions preceding the hyperlink remain[ed] actionable" because the linked-to affidavit did not support his more outlandish claims.[7]

Dominion v. Fox

In *Dominion v. Fox Corp. and Fox Broadcasting Co.*, Dominion sued Fox Corp. and its subsidiaries Fox Broadcasting and Fox News for defamation.

Dominion claimed that Fox News intentionally provided a platform for on-air guests to propagate false narratives about it related to the 2020 U.S. presidential election.

Dominion sought to extend liability for the same statements to Fox Corp. and Fox Broadcasting. In June 2022, the Delaware Superior Court denied Fox Corp.'s motion to dismiss but granted Fox Broadcasting's motion to dismiss.[8]

In denying Fox Corp.'s motion, the court explained that Dominion had adequately alleged that Fox Corp. could be liable for defamatory statements made on its subsidiary network, Fox News.[9]

The court explained that under applicable New York law, "all who take part in the procurement, composition and publication of a libel are responsible in law and equally so." [10]

The court held that Dominion adequately pleaded facts permitting a reasonable inference that Fox Corp. "participated in the creation and publication of Fox News' defamatory statements." [11]

Dominion made a number of specific allegations about the close relationship between Fox Corp. and Fox News, including that Fox News was Fox Corp.'s main profit vehicle and that Fox Corporation executives exercised a high degree of control over Fox News' daily operations.

These allegations sufficed at the pleading stage. In particular, the court pointed to Dominion's allegations that

- Rupert and Lachlan Murdoch, whom Fox News identified as members of its executive staff or executive leadership, were closely involved in decisions relating to Fox News' 2020 presidential election coverage;
- Fox Corp. executives believed Fox News would benefit if it endorsed former president Trump's election-fraud narrative and suffer if it did not; and
- Fox Corp. executives pressured Fox News executives to air false claims about Dominion and rewarded Fox News when it aired such claims and punished those who did not.[12]

When ruling for Dominion, the court further thoroughly analyzed the intricacies of the actual-malice standard. Dominion adequately alleged that:

- Despite being put on notice of the falsity of their statements, the defendants continued to make them;[13]
- Fox Corp. acted through the Murdochs, who could have knowledge of the falsity of the statements, even if Fox Corp. cannot itself have such knowledge; and
- The Murdochs acted with actual malice when they permitted Fox News to circulate an election fraud narrative about Dominion, despite not personally believing the claims and reportedly going so far as telling Trump that he lost and urging others not to endorse his conspiracies.[14]

By contrast, the court granted Fox Broadcasting's motion to dismiss, holding that Dominion did not adequately plead that Fox Broadcasting acted with actual malice because it offered no factual support for its allegations.[15]

In early 2023, Dominion and Fox News filed competing motions for summary judgment based on factual revelations made in discovery. Dominion argued that a "mountain of direct evidence demonstrates actual malice" including text messages and deposition testimony from Fox News anchors and executives, including Rupert Murdoch.[16]

Fox News argues in its motion for summary judgment that the statements fall within the protections of the First Amendment because Fox ensured the public's access to what newsmakers were claiming.[17]

On March 31, the Delaware Superior Court denied Fox's motion for summary judgment, and granted in part and denied in part Dominion's motion for summary judgment.[18]

The court granted Dominion's motion on the essential element, among others, of falsity, finding that Dominion established that it is "crystal clear" that the challenged statements are false.[19]

At trial, set to start April 17, Dominion will be required to prove actual malice — i.e., that the Fox defendants published the false information "with knowledge that it was false or with reckless disregard of whether it was false or not." [20]

Dominion v. Newsmax

In a separate lawsuit filed in August 2021, Dominion sued Newsmax Media Inc. in Delaware Superior Court over Newsmax's allegedly defamatory claims about Dominion. Newsmax moved to dismiss, asserting, in part, the neutral reportage privilege.

In June 2022, Judge Eric Davis — the same Delaware Superior Court judge overseeing the Dominion v. Fox case — denied the motion as premature.[21]

Moreover, the court found that, even if the defense applied, it was reasonably conceivable that Newsmax's reporting was neither accurate nor dispassionate.[22]

First, where a party is alerted to the falsity of that lie and does not correct it, such reporting

is not accurate.

The court found that Dominion's allegations that Newsmax endorsed the false election fraud claim, rather than merely reporting on others' recitation of it, and continued reporting on the claim even after Dominion sent Newsmax a memorandum refuting the statements, sufficed for purposes of overcoming the motion to dismiss.

Newsmax did not "use the information Dominion provided to correct its guests or to reorient its viewers" but instead "pressed [its] view that considerable evidence supported Dominion's involvement in an illegal election fraud conspiracy." [23]

Second, where a party refuses to report contrary evidence and endorses a false narrative by "skewing questioning and approving responses in a way that fit[s] or promote[s] a narrative," such reporting is not dispassionate.

The court concluded this was the case with Newsmax's reporting, as alleged by Dominion, because Newsmax "possessed countervailing evidence" from the U.S. Department of Justice, election experts and Dominion, which suggested that "Newsmax knew the allegations were probably false," but continued propagating the lie. [24]

Smartmatic v. Fox

In February 2021, Smartmatic filed a defamation suit in New York Supreme Court against Fox Corp., Fox News, Fox News anchors Lou Dobbs, Maria Bartiromo and Jeanine Pirro, and attorneys Rudy Giuliani and Sydney Powell, alleging that they engaged in a conspiracy to spread disinformation about Smartmatic related to the 2020 election.

The defendants filed various motions to dismiss, arguing, in part, that the complaint failed to state a cause of action pursuant to New York's anti-SLAPP statute.

New York's anti-SLAPP statute requires plaintiffs bringing an action involving their public petition and participation to satisfy the actual malice standard.

The trial court denied Fox News and Fox Corp.'s motion to dismiss, [25] finding that:

- Smartmatic adequately alleged actual malice by asserting that the defendants had reason to suspect that what they were broadcasting was false, because there was no credible evidence of fraud in the election, but the defendants continued to broadcast those claims, regardless; [26] and
- They could not escape liability simply because anchors on Fox News occasionally mentioned that Smartmatic denied their claims of election fraud. [27]

The trial court also denied Fox anchors Bartiromo's and Dobbs' motions to dismiss, finding that Smartmatic adequately alleged actual malice as to those defendants as well.

Smartmatic adequately alleged that the anchors did not cite sources for their false claims — including, for instance, that there was a "massive cyber-attack orchestrated with the help of Dominion, [Smartmatic], and foreign adversaries" — which were "so inherently improbable that only a reckless person would have put them in circulation." [28]

By contrast, the trial court granted Fox anchor Pirro's motion to dismiss because the alleged

defamatory statement was merely that Dominion was founded in Venezuela with Cuban money and with the assistance of Smartmatic software, but Pirro did not specify that Smartmatic's software was used to alter the election results.[29]

The trial court's decision on Pirro was partially overturned by the New York appeals court in February in a unanimous opinion finding that Smartmatic adequately alleged that Pirro and the other defendants "effectively endorsed and participated in the statements with reckless disregard for, or serious doubts about" whether there was any evidence to support the statements.[30]

Smartmatic v. Lindell

In September 2022, the U.S. District Court for the District of Minnesota denied a motion to dismiss a complaint in *Smartmatic v. Lindell and My Pillow Inc.* that lodged similar allegations regarding false narratives and the 2020 presidential election against the MyPillow CEO Michael Lindell.[31]

There, the court found Smartmatic alleged facts sufficient to suggest that Lindell knew or should have known that his statements were false and acted with actual malice in promoting the challenged statements.[32] Smartmatic cited "publicly available information [that] contradicted Lindell's statements and those made" by guests in a Lindell docuseries.

These sources included

individual states' election reports and audits, media reports, the websites of election technology companies, the testimony and public statements of election officials and election security experts, election monitoring organizations' reports, and litigation brought by Smartmatic against other alleged defamers in February 2021.[33]

Notably, the court found Smartmatic adequately alleged that "Lindell made and promoted his defamatory statements for his own profit." [34] On several occasions, "Lindell told audiences to purchase MyPillow products after making claims of election fraud and supplying audiences with MyPillow promotional codes related to Lindell's election-hacking theories." [35]

The court rejected the argument that Smartmatic did not sufficiently plead that MyPillow could be vicariously liable for Lindell's statements.[36]

The court noted that Lindell "intentionally promoted MyPillow while allegedly defaming Smartmatic in media and other public appearances," that "Lindell associated his defamatory statements with the MyPillow brand" and that "MyPillow did not distance itself from Lindell's statements." [37]

Fact discovery is ongoing in this suit through June 30.

Freeman and Moss v. Giuliani

In December 2021, Ruby Freeman and Wandrea Moss filed suit against One America News Network and Giuliani in the U.S. District Court for the District of Columbia for defamation, intentional infliction of emotion distress, civil conspiracy, and aiding and abetting related to OAN and Giuliani's false statements regarding Freeman's and Moss' conduct as poll observers in Georgia during the 2020 presidential election.[38]

In October 2022, the court denied Giuliani's motion to dismiss, rejecting, among other things, Giuliani's argument that because he did not mention the plaintiffs by name, his allegedly defamatory statements did not concern them.[39]

The court found that the plaintiffs adequately alleged that Giuliani's statements concerned them because:

- He mentioned them by first name in his "strategic plan," which was a document Giuliani created and circulated "to expos[e] the alleged voter fraud schemes in Georgia";
- The other allegedly defamatory statements were all connected to the plan such that "a reasonable listener could connect the dots and conclude" that the statements related to the plaintiffs; and
- Even though the other statements did not mention Freeman and Moss by name, they "at least plausibly refer[red] to plaintiffs by description." [40]

Moreover, the court rejected Giuliani's argument that his statements were protected opinion because the statements were accusations of criminal activity, which can be proven as true or false in court.[41]

In May 2022, the claims against OAN were dismissed as a result of a confidential settlement between OAN and the plaintiffs. Following the dismissal, OAN released a short video — which has since been removed from its website — stating that there was no election fraud in Georgia.[42]

Alex Jones Cases and Damages

Recent stunning successes at the damages phase involving the conspiracy theorist Alex Jones and his website Infowars demonstrate how there may be serious consequences for serial and wanton defamation.

Parents of some of the children killed in the Sandy Hook school shooting brought two suits against Jones, who owns Infowars and has asserted that the shooting was a hoax. Following default judgments, juries in the two cases awarded damages last year totaling nearly \$1.5 billion.[43]

In addition to the damages owed by Jones, his attorney, Norm Pattis, was sanctioned for improperly sharing protected records of the families during the litigation and was suspended from practicing law in Connecticut for six months.[44]

Jones filed for bankruptcy and the families have asked the court to remove Jones and Infowars from bankruptcy proceedings, which are underway.[45]

Looking Ahead

While many of these cases continue through the legal system, their impact on the law is already significant, elucidating both the breadth of the First Amendment's protections and its limits.

Companies and individuals should pay heed as both communication technologies and the law around counter disinformation litigation continues to evolve.

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[1] Matthew F. Ferraro, Sharon Kelleher Hogue and Louis W. Tompros, The Rise of Counter-Disinformation Litigation and What It Means for Business, Corporate Counsel (Feb. 8, 2022), available at <https://www.wilmerhale.com/en/insights/publications/20220210-in-corporate-counsel-matthew-ferraro-sharon-kelleher-hogue-and-louis-tompros-discuss-disinformation-litigations-rise>.

[2] The defendants in these suits include: Fox Corporation, Fox News, Fox anchors Lou Dobbs, Maria Bartiromo, and Jeanine Pirro, Newsmax, One America News (OAN), former President Trump's lawyers Rudy Giuliani and Sidney Powell, Overstock founder Patrick Byrne, MyPillow CEO Michael Lindell, and others.

[3] Mem. Op., Dominion Voting Systems v. Byrne, No. 1:21-cv-02131 (D.D.C. Apr. 20, 2022) at 3, available at <https://casetext.com/case/us-dominion-inc-v-byrne>.

[4] Id.

[5] Id. at 11.

[6] Id. at 12.

[7] Id. at 13.

[8] Upon Defs.' Mot. to Dismiss, US Dominion, Inc., et al. v. Fox Corp. & Fox Broadcasting Co., C.A. N21C-11-082 EMD CCLD (Del. Super. Ct. June 21, 2022) at 1, available at <https://cases.justia.com/delaware/superior-court/2022-n21c-11-082-emd-cclid.pdf?ts=1655827300>.

[9] Id. at 10-11, 14-17.

[10] Id. at 15 (quoting Treppel v. Biovail Corp., 2005 WL 2086339, at *3 (S.D.N.Y. Aug. 30, 2005)).

[11] Id.

[12] Id. at 15-16.

[13] Id. at 18-20.

[14] Id.

[15] Id. at 21-23.

[16] Dominion's Br. in Supp. of Mot. for Summ. J., US Dominion, Inc., et al. v. Fox Corp. & Fox Broadcasting Co., C.A. N21C-11-082 EMD CCLD (Del. Super. Ct. Feb. 16, 2023) at 3-4, available at <https://int.nyt.com/data/documenttools/redacted-documents-in-dominion-fox-news-case/dca5e3880422426f/full.pdf>. In his deposition, Rupert Murdoch, the Chair of Fox Corporation, testified that hosts on Fox News "endorsed" the false narrative that the 2020 election was stolen from former President Trump even though he "thought everything was on the up-and-up." Dominion's Combined Opp. to Fox News Network, LLC's and Fox Corp.'s Rule 56 Mots. for Summ. J., US Dominion, Inc. v. Fox Corp., N21C-11-082 EMD CCLD (Del. Super. Ct. Feb. 27, 2023) at 4, 13, available at <https://int.nyt.com/data/documenttools/dominion-opp-brief/823d0af7d1f7174b/full.pdf>.

[17] Def. Fox News Network, LLC's Br. In Supp. of Mot. for Summ. J., US Dominion Inc. v. Fox Corp., C. A. N21C-11-082 EMD CCLD (Del. Super. Ct. Feb. 16, 2023) at 2, available at https://drive.google.com/file/d/1naomVCTmD1tCKqsj6R6xFa0ZqKvkNS_W/view (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[18] Upon Def. Fox News Network, LLC's Rule 56 Motion for Summary Judgment, Def. Fox Corp.'s Rule 56 Motion for Summary Judgment, Dominion's Mot. for Summ. J. on the Liability of Fox News Network, LLC and Fox Corporation, US Dominion Inc. v. Fox Corp., C. A. N21C-11-082 EMD CCLD (Del. Super. Ct. Mar. 31, 2023), available at <https://s3.documentcloud.org/documents/23737031/civil-opinion-n21c-03-257-emd-2.pdf>.

[19] Id. at 43.

[20] Id. at 49.

[21] Upon Def.'s Mot. to Dismiss, US Dominion, et al. v. Newsmax Media, Inc., No. N21C-08-063 EMD (Del. Super. Ct. June 16, 2022) at 50-61, available at <https://assets.law360news.com/1503000/1503835/2022%2006%2016%20order%20denying%20mtd.pdf>.

[22] Id.

[23] Id. at 58-59.

[24] Id. at 64.

[25] Smartmatic U.S. Corp. v. Fox Corp. et al., 2022 N.Y. Slip Op. 30732 (N.Y. Sup. Ct. Mar. 8, 2022) at 34-35, available at <https://law.justia.com/cases/new-york/other-courts/2022/2022-ny-slip-op-30732-u.html>.

[26] Id. 34-41.

[27] Id. at 41 (citing *Dempsey v. Time, Inc.*, 43 Misc. 3d 754, 757 (N.Y. Sup. Ct. 1964, aff'd 22 A.D.2d 854 (N.Y. App. Div. 1964) ("the suggestion that a libel be excused because a denial made by the subject thereof is also published, is patently absurd.")).

[28] Id. at 42-45.

[29] Id. at 46.

[30] Smartmatic U.S. Corp. v. Fox Corp., 2023 N.Y. Slip Op. 17049 (N.Y. Sup. Ct. Feb. 14, 2023) at 2-3, available at [https://www.nycourts.gov/courts/ad1/calendar/List_Word/2023/02_Feb/14/PDF/Smartmatic%20v%20Fox%20Corp%20\(2022-01291\).pdf](https://www.nycourts.gov/courts/ad1/calendar/List_Word/2023/02_Feb/14/PDF/Smartmatic%20v%20Fox%20Corp%20(2022-01291).pdf).

[31] Order, Smartmatic v. Lindell & My Pillow, No. 22-cv-0098 (D. Minn. Sept. 19, 2022) at 1, available at <https://www.politico.com/f/?id=00000183-566c-df14-abc3-ff6caa380000>.

[32] Id. at 11-12.

[33] Id. at 10.

[34] Id. at 11.

[35] Id.

[36] Id. at 13-14.

[37] Id. at 14-15.

[38] See generally Compl. Freeman & Moss v. Herring Networks, Inc. et al., No. 1:21-cv-03354 (D.D.C. Dec. 12, 2021) at 71-78, available at <https://www.documentcloud.org/documents/21169574-freeman-and-moss-v-oan-rion-giuliani>.

[39] Mem. Op., Freeman & Moss v. OAN & Giuliani, No. 1:21-cv-03354 (D.D.C. Oct. 31, 2022), at 14-16, available at <https://casetext.com/case/freeman-v-giuliani>.

[40] Id. at 5, 14-17.

[41] Id. at 17.

[42] Omar Abdel-Baqi, OAN Walks Back Voter Fraud Claims as Part of Defamation Settlement, Wall St. J. (May 10, 2022), <https://www.wsj.com/articles/one-america-news-walks-back-voter-fraud-claims-as-part-of-defamation-settlement-11652212946>.

[43] See Brian Stelter, A Jury Finds Infowars Conspiracy Theorist Alex Jones Should Pay \$45.2 Million in Punitive Damages to the Parents of a Sandy Hook Shooting Victim, CNN (Aug. 5, 2022), <https://www.cnn.com/2022/08/05/media/alex-jones-punitive-damages-sandy-hook/index.html>; Elizabeth Williamson, With New Ruling, Sandy Hook Families Win Over \$1.4 Billion From Alex Jones, N.Y. Times (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/us/politics/alex-jones-sandy-hook-damages.html>.

[44] Dave Collins, Alex Jones Lawyer Suspended 6 Months Over Records Release, AP (Jan. 6, 2023), <https://apnews.com/article/legal-proceedings-fraud-crime-connecticut-texas-2c5bca5300b2bda02b60f6181632be6d>.

[45] Daniel Gill & Alex Wolff, Sandy Hook Parents Want Alex Jones Out of Infowars Bankruptcy, Bloomberg Law (Aug. 26, 2022), <https://news.bloomberglaw.com/bankruptcy-law/infowars-parent-should-lose-control-of-bankruptcy-plaintiffs-say>.