

The Rise of Counter-Disinformation Litigation and What It Means for Business

The prevalence of disinformation can impact all kinds of businesses by affecting corporate brands, sales, partnerships, employee and customer retention, physical security, and even stockholder activism, write Matthew F. Ferraro, Sharon Kelleher Hogue and Louis W. Tompros.

By Matthew F. Ferraro, Sharon Kelleher Hogue and Louis W. Tompros

In the past year, viral lies and conspiracies have saturated our public discourse, with concrete results. The scale and speed with which falsehoods have spread about everything from the outcome of the 2020 election to the Jan. 6 attack to COVID-19 vaccines, and much else, have led to real-world consequences for companies and people—ruined reputations, lost business value, security expenses, and death threats, to name a few. The prevalence of disinformation can impact all kinds of businesses by affecting corporate brands, sales, partnerships, employee and customer retention, physical security, and even stockholder activism.

Partly in response to the spread of false narratives, 2021 witnessed a new trend: the proliferation of counter-disinformation litigation. While many of these suits are still in the early stages, plaintiffs have seen notable (and surprising) successes thus far, suggesting the emergence of a specialized, potent tool to combat phony and harmful narratives. Both victims of false narratives and potential defendants should pay heed to these novel developments.

Counter-disinformation litigations are civil suits brought by victims of viral lies, both businesses and individuals, against those who propagate



Cifotart/stock.adobe.com

them. There is no general cause of action under American law for “disinformation,” but several suits that have moved beyond the pleadings stage have been brought under state law for claims like defamation and deceptive trade practices. Notably, in the past year, courts have held that some of these suits have adequately alleged that the complained-of speech was false, not protected by the First Amendment because the defendants acted with “actual malice”—acting either with knowledge that their statements were false or with reckless disregard for the truth—and resulted in damages. These and similar lawsuits may help victims of viral false narratives recover

some of the damages wrought by disinformation and increase the costs of promiscuously spreading lies.

The most notable recent counter-disinformation litigations revolve around the widely peddled false narrative that the 2020 presidential election was rigged.

First, the voting software companies Dominion Voting Systems and Smartmatic filed multiple actions against propagators of conspiracy theories that their voting systems manipulated ballots to favor President Joe Biden. Dominion has filed at least eight actions in Delaware Superior Court and the U.S. District Court for the District of Columbia seeking billions of dollars in damages, alleging various organizations and individuals defamed it and its products, including Fox Corp. and Fox News Network, Newsmax, One America News (OAN), Overstock.com founder Patrick Byrne, MyPillow CEO Mike Lindell, Trump attorneys Rudy Giuliani and Sidney Powell, and related individuals. Dominion claims that these lies have harmed the company, its employees and customers. In its suit against Fox News, Dominion alleges it has spent upwards of \$600,000 on additional security for its employees and \$700,000 countering the disinformation and lost about \$600 million of business and \$1 billion worth of “enterprise value.”

Dominion won a major victory in August 2021 when the U.S. District Court for the District of Columbia denied in full motions to dismiss its lawsuits against Powell, Giuliani and Lindell, allowing the case to proceed to fact discovery.

In an important decision for future litigants, the court rejected the argument that “political speech” or out-of-court statements by an attorney could not be the basis of a defamation claim. The court concluded that Dominion’s factual allegations were sufficient to support a claim of actual malice.

In Lindell’s case, the court held that he may have acted with actual malice in part because he broadcast “inherently improbable” narratives about Dominion’s machines “stealing elections” to tout his MyPillow products commercially. Future litigants may argue that this ruling means defamation plaintiffs can show actual malice based almost entirely on the objective unreasonableness of the claims so long as there is some improper motive for advancing those fictions, like financial gain.

Finally, the court held that the plaintiffs pleaded damages with adequate specificity to proceed with the case—including private security costs for employees, additional anticipated expenses, and the loss of future contracts.

In a separate case in Delaware Superior Court, Dominion sued Fox News, claiming it intentionally provided a platform for on-air guests to propagate false narratives about it. Fox News argued that its reporting was impartial and that even defamatory statements were newsworthy and protected by the “neutral reportage defense.” The court rejected Fox’s defense that it was merely reporting President Donald Trump’s and his votaries’ allegations. The court held that Dominion plausibly alleged that Fox’s coverage was “not accurate or dispassionate,” particularly after Dominion provided the network with evidence to debunk the claims, which Fox personnel failed to report. Instead, Fox “may have failed to report the issue truthfully or dispassionately by skewing questioning and approving responses in a way that fit or promoted a narrative in which Dominion committed election fraud.”

Similar suits have been filed by Smartmatic against Fox Corp., several Fox hosts and Trump’s lawyers in New York state court, against Newsmax in Delaware state court, OAN in Washington,

D.C. federal court and Lindell in federal court in Minnesota. Smartmatic alleges, as stated in its suit against Fox, that the disinformation campaign “irreparably tarnished the Smartmatic brand,” costing it hundreds of millions of dollars in lost business and billions of dollars in reputational damage. Fox has filed a motion to dismiss, which is pending.

Second, two election workers have filed lawsuits against the website Gateway Pundit in Missouri state court and against Giuliani and OAN in federal court in Washington, D.C., claiming that the defendants defamed them by publishing articles and making wild allegations that they were involved in election fraud, “devastating their personal and professional reputations,” and forcing them to flee their homes for their lives. These cases are ongoing.

Third, on the opposite end of the 2020-election-conspiracy spectrum, various pro-Trump lawyers filed suits alleging conspiracy theories that the election was stolen from the former president. These cases have uniformly failed on the merits and in many instances led courts to levy sanctions against the attorneys who brought frivolous and vexatious suits.

For instance, in December 2020, two attorneys filed a class action on behalf of 160 million American voters that alleged that there was a ploy, orchestrated by Dominion, social media companies, and elected officials, to steal the presidential election. In April 2021, the case was dismissed, and, in August 2021, the court ordered the attorneys to pay legal fees to the defendants—including Dominion—for violating their professional ethical obligations by filing a lawsuit based on unsubstantiated conspiracy theories. In

a similar case brought by Trump lawyers including Powell and Lin Woods that sought to overturn the Michigan election, a federal court ordered the plaintiff attorneys to participate in continued legal education and pay fees and costs for “proffering claims not backed by law” and “based on nothing more than belief, conjecture, and speculation.”

Counter-disinformation litigation has borne fruit outside of the election context, too. For years, Infowars’ Alex Jones maintained that the 2012 Sandy Hook school shooting was a hoax. Parents of some of the slain children sued Jones in 2018 in separate actions in Texas and Connecticut. After years of litigation—and following Jones’ admission in court papers in October 2020 that he no longer believes the massacre was staged—in September 2021 and November 2021, Texas and Connecticut courts, respectively, issued default judgments against Jones for persistent discovery abuses, bad faith, and public threats, which had previously resulted in a sanctions order in the Connecticut case. Juries will now decide the extent of the damages.

Looking forward, the experience of the recent past illustrates how civil suits may act to heighten the cost of spreading deceptions. The First Amendment protects opinion and often precludes liability even for false speech, but neither corporations nor average citizens are defenseless against damaging falsehoods pushed by provocateurs who leverage attention and outrage to enrich themselves.

Matthew F. Ferraro is a counsel, **Sharon Kelleher Hogue** is an associate, and **Louis W. Tompros** is a partner at WilmerHale.