
JOURNAL OF EMERGING ISSUES IN LITIGATION

Tom Hagy
Editor-in-Chief

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The Age of Disparagement: How Social Media Has Refueled the Smear

Charlie Kingdollar*

Abstract: In a time when there are hundreds of millions of blog and social media posts and comments each month, and billions of text messages sent daily, we are all just a press of the thumb or a mouse-click away from trashing someone or being trashed ourselves. In this article the author details the enormous potential risk facing individuals, organizations, and the insurance industry, as a result of this ubiquitous and largely unchecked form of sharing our thoughts.

Welcome to life in the Social Media Age. Facebook, Twitter, LinkedIn, blogs, and vlogs (video blogs) only scratch the surface as to the number and variety of internet social media websites. Wikipedia currently lists 198 active social media websites. Of those listed, only 13 rather obscure ones, existed over 20 years ago—the oldest began operations in 1996. For the purposes of this article, I have included texting under the umbrella of social media. Users of these websites come from all over the world, but I will only consider the exposures these websites bring to U.S. users and their personal lines insurers.

When I first wrote about the increasing personal lines exposures of online defamation and disparagement (about 15 years ago), one measure discussed was how many U.S. households had computers. This figure has largely become irrelevant with popularity of mobile technology like smartphones and tablets.

While I doubt anyone at this point really needs to be convinced of the popularity of social media, here are some statistics to highlight its prevalence.

In 2019, more than 269 million Americans used a smartphone¹—including 95 percent of U.S. teens.² That same year, more than 181 million Americans used a tablet.³ According to Statista, “... The United States has one of the highest social network penetration

rates in the world. In 2019, over 246 million Americans were using social networks to post pictures, ‘like’ and comment on content by others, or send private messages. With over 70 percent of the U.S. population holding a social media account, these platforms and services have become some of the most popular online activities of the past decades.”⁴

According to the Pew Research Center, some 28 percent of American adults admit to being online almost constantly. This jumps to 39 percent among adults ages 18 to 29. Among all adults, another 45 percent admit to going online several times per day, and 81 percent of American adults go online daily.⁵

For teens, the percentage of those online are even higher. By 2018, 45 percent of U.S. teens ages 13 through 17 were almost constantly online, and 71 percent use multiple social media platforms.⁶

Social Media Use

In 2020, 223 million Americans used Facebook⁷; 73 percent of U.S. adults and 51 percent of U.S. teens ages 13 to 17 currently use the platform.⁸ As of September 19, 2020, there were 48.35 million active monthly Twitter users in the United States and roughly 42 percent of these use the platform each day.⁹

There are some 31.7 million bloggers currently in the United States.¹⁰ Globally, 70 million blog posts just on WordPress each month and 77 million comments each month. That is 840 million WordPress posts annually and another 924 million comments on these posts annually.¹¹ WordPress is only the second most popular blogging platform. Tumblr hosts 440 million blogs. According to hostingtribunal.com, there are something north of 500 million blogs.¹²

By 2017, according to the Center for Information Technology Accommodation (CITA), 6 billion text messages were sent daily in the United States, more than 180 billion monthly, and some 2.27 trillion are sent annually.¹³

While just scratching the surface, you can see how “published” most Americans, including children, have become. By the way, according to the *Merriam-Webster’s* dictionary, “publish” is defined as:

1. a. to make generally known, b. to make public announcement of,
2. a. to disseminate to the public, b. to produce or release for distribution, c. to issue the work of (an author).

A new development regarding exposure is the fairly recently paid position of “social influencer.” Social influencers are generally young and have likely developed a sizable following online. They are paid to use, review, or promote products on their vlogs. Some fear that social influencers who were paid to use and/or promote e-cigarettes and vaping products may be named as defendants in e-cigarette/vaping litigation.

Insurance Coverage

During the past 20 years, insurers providing homeowners and/or personal umbrella coverage have focused most of their efforts with regard to product change on making the coverage easier for insureds to purchase. For instance, many insurers have created shorter coverage applications, and the vast majority no longer require renewal applications for homeowners policies.

Some may assume that exposures facing these carriers have not materially changed much over the past 20 years. But today, the exposure created by defamation (libel) and disparagement via social media has increased dramatically. The sheer number of websites, individual posts to these websites, the number of potential occurrences within a single year and over multiple years can be mind boggling.

Many homeowners’ policies do not provide coverage for “personal injury,” which includes coverage for the offenses of defamation and disparagement; therefore, any allegations would not be covered. That said, many carriers will add coverage, usually granting full limits, for very little additional premium.

Personal umbrella policies, which sit atop homeowners’ policies often provide coverage for personal injury. Personal umbrella policies will drop down over the homeowners’ deductible to provide coverage for defamation and disparagement should there be defense costs or a claims payment necessary. Again, under personal umbrella most carriers either charge very little or no additional premium.

After all, historically (i.e., pre-2000), there are not many losses arising from defamation and disparagement. Back then: (1) only a very small percentage of people were “published,” and (2) most times, items published were examined by an editor to prevent allegations of things like defamation and disparagement being levied against the publication. Today, most of us are published—but

without the benefit of an editor's eye and only our own filter deciding what we publish.

Personal injury coverage is often triggered on a per-offense basis. "Offense," however, is not usually a defined term, leaving it to the courts to determine what it means in the context of posted comments. If an insured posts a defamatory comment about the same person, company or product once a month for a year, could that be 12 offenses and expose multiple sets of limits? How many occurrences will it be deemed if the insured posts disparaging comments in a blog and a week later in a tweet, and subsequently in a text, then on a review website? Are insurers comfortable leaving that decision up to courts in 50 jurisdictions?

I have found no reliable information regarding how many posts, tweets, texts, etc., might be libelous. But just for the sake of trying to get our arms around this, let's say that only one-tenth of 1 percent may be actionable. That would equal well over 840,000 libelous blog posts annually as well as at least another 940,000 comments made by third parties onto those blogs. In addition, there would be 2,270,000,000 texts that would also be libelous each year—and that is just blogs and texts. Think one-tenth of 1 percent is unlikely? Cut the figures in half. The exposure is still incredible.

Litigation: Personal

Litigation filed against individuals who have posted material online has often been settled out of court with the terms and conditions remaining confidential. I think it is safe to say that many of these settlements were either settled in favor of the defendants or likely involved payments to the plaintiffs of under \$50,000 (not including defense costs). That said, some suits alleging online defamation and/or disparagement have begun to hit the courts with some resulting in significant verdicts and settlements. A few examples:

- In 2016, "a federal court jury in Nevada delivered a unanimous verdict awarding \$38.3 million to a business owner in his successful claim for internet defamation and false light invasion of privacy. The plaintiff was the victim of 'a four year internet disparagement campaign.' The defendant anonymously created a website, www.bradley-cohen.com,

on which they: 1) asserted that [the plaintiff] was ‘the next Bernard Madoff’ of real estate ...; 2) accused [the plaintiff] of running a Ponzi scheme (also described as a “scam” and a “shell game”), committing fraud and looting company assets, all at the expense of investors, who, the website alleged, were losing tens of millions of dollars while [the plaintiff] lived a life of glamour and luxury; 3) asserted that [the plaintiff] was taking millions from tenants and suing tenants based on unfounded accusations and greed ...; 4) cautioned others not to lease from [the plaintiff] or his companies; 5) asserted that [the plaintiff] had a history of convictions for serious crimes including fraud and racketeering; and 6) published articles about a convicted Pennsylvania criminal” with a name similar to that of the man they were defaming.¹⁴

- In 2006, a Florida woman who ran a service offering information and resources to parents of young people with behavioral problems won an \$11.3 million award from a Florida jury over online defamation. The plaintiff sued after she was attacked on an internet website dealing with services for troubled teens. She was labeled as a “crook,” “con artist,” and “fraud.”¹⁵
- A 33-year-old female underwent elective breast augmentation and botulinum toxin injections. Unsatisfied with the result, she took to social media to post negative reviews about the surgeon. She said he ignored her complaints about “major complications,” and suggested that other patients not visit this surgeon for cosmetic surgery. He was unskilled and incompetent, she wrote. The surgeon found the reviews on Yelp and sued for defamation, claiming he did not neglect the patient and had asked her to follow up once swelling had subsided. He claimed the defamation damaged his practice. The jury sided with the doctor, awarding him more than \$300,000 in damages.¹⁶
- A remark on Facebook falsely implied that a woman became intoxicated and caused the death of her child. The subsequent lawsuit filed in Buncombe County Superior Court in North Carolina concluded in a \$500,000 consent judgment, evenly splitting the amount between actual and punitive damages.¹⁷

- A woman posted false and malicious allegations on the website Topix.com against a man she barely knew. The posts by the defendant stated the plaintiff was a drug addict, criminal, and pedophile, among other things. The man sued for defamation. At trial, asked why she posted the comments, the woman said: “I can tell a pervert.” A Union County, Georgia, jury returned a \$404,000 verdict.¹⁸
- In April 2012, a Texas couple who had filed a defamation lawsuit against anonymous posters on an internet website won a \$13.8 million jury verdict. Online commenters had accused them of being sexual deviants, molesters, and drug dealers. The suit, heard in the District Court of Tarrant County, Texas, had named six parties, including three individuals, as defendants. It also named the business Apache Truck & Van Parts in Kennedale, Texas, and two of its employees as defendants, alleging computers used at the business were used to post some of the comments.¹⁹
- Fashion designer Dawn Simorangkir sued musician Courtney Love for allegedly defaming her in a Twitter rant and in posts on other forums. Love ultimately paid \$430,000 to settle the case.²⁰
- In Massachusetts, a car dealership fired an employee for alleged inappropriate interactions with employees and customers. The employee was undergoing treatment for cancer. Her brother initiated a social media campaign against the dealership, whose owner sued for defamation. He was granted a \$1.5 million attachment of the defendant’s assets.²¹

Defense costs in these cases can be significant. Even in cases that have ultimately settled for relatively small amounts, defense costs have run into the tens of thousands dollars.

By 2018, online defamation and disparagement verdicts and settlements adjudicated against individuals who posted the comments totaled in excess of \$110 million. Obviously, this is an underestimation given the number of cases that are settled before trial.

It is also difficult to say how much online defamation and disparagement verdicts and settlements have cost insurers and reinsurers because defendants may not have had coverage under their homeowners’ policy and may not have purchased personal umbrella coverage.

Litigation: Commercial

While the focus of this article has been on social media exposures and the potential impact on personal lines, it is important to remember that commercial general liability (CGL) and commercial umbrella policies also provide coverage for personal injury, including defamation and disparagement. Coverage is also triggered by the undefined term of “offense.” These policies do have the protection of annual aggregate limits, but carriers may still be exposed to limits stacking over multiple policy years.

Businesses, large and small, have blogs, vlogs, post on social media, communicate via texts, and have the additional exposures of internal and external emails. Lawsuits can arise from disparaging comments posted online about a competitor’s company, product, or services as well as defamatory comments electronically delivered about current and former employees. A few examples of verdicts against commercial entities include:

- In California, just before a 27-year employee was terminated, the company president sent an email to hundreds of other employees stating that he was “no longer with the company.” A follow-up email went out 41 minutes later, detailing improprieties—such as embezzlement—that the company was investigating, but did not mention the employee’s name. He sued for defamation and was awarded \$4.9 million.²²
- In a suit filed against Catholic Healthcare West and Mercy General Hospital, alleging wrongful termination, defamation, and sexual harassment, the plaintiff, a Cardiac Surgery Physician’s Assistant, sued her former employer and won a \$167 million verdict. The plaintiff alleged she was defamed by, among other things, internal emails containing false facts concerning her work performance and professional abilities. As part of this huge verdict, the jury awarded the plaintiff \$24,750,000 for defamation.²³
- Also in California, an article was posted to an “online independent news” site that allegedly stated that a hazardous waste contractor was involved in illegal activity. The waste contractor sued the website’s co-owners for libel and was awarded \$1.1 million.²⁴

While I have included only a few examples of the verdicts handed down, I have to say that as litigious as we are here in the United States, I am surprised there has not been an avalanche of lawsuits over internet statements. That could change at any time. New websites are always being created, while existing sites may experience popularity ebbs and flows in popularity, and new ways to utilize the internet may bring additional ways for everyone to publish their commentary on everything—adding to the defamation and disparagement exposures already present and being litigated. Up next—“deepfakes,” in which the image of a person is placed into an existing photo or video, making it look, for example, like they said or did something they simply did not. As for the property and casualty insurance industry, this remains an exposure that can impact both commercial and personal lines, but does it remain an exposure that is largely unaddressed?

Notes

* Charlie Kingdollar recently retired after 40 years with General Reinsurance Corp., where he was Vice President and Emerging Issues Officer. He is widely considered to be among the best resources for new liability risks, even a “prescient and gifted industry futurist.” He can be followed on LinkedIn.

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