Your business client wants you to respond to lies being told by competitors or others. What can you do? This article reviews the various theories under which you might sue on behalf of businesses and their principals.

By Joseph J. Siprut

Your client is a large corporation. The client’s competitor has made negative comments about your client and its CEO, and the client is enraged. The client now seeks your advice.

What claims do the client and its CEO have against the competitor? What remedies are available to each of them? Can the competitor be enjoined from making similar negative comments in the future? These are questions you’ll need to answer.

This article includes an introduction to general Illinois defamation law and then looks at special rules governing corporate plaintiffs. It also discusses defamation-oriented variants, some of which are available to corporate plaintiffs but not natural persons.

Suing on behalf of the CEO: a primer on general defamation law

The first thing to understand about your hypothetical client’s situation is that there are two different plaintiffs: the client itself, which is a corporation, and the client’s CEO, who is a natural person. The claims and remedies available to each are different and must be analyzed separately.

This section will briefly canvass Illinois defamation law as it applies to natural persons, which will also provide a backdrop for the analysis of corporate defamation claims. Defamation law is the subject of multi-volume treatises, of course, so this is merely an introduction that raises some of the key issues.

To state a cause of action for defamation, a plaintiff must allege (1) the defendant made a false statement about the plaintiff, (2) there was unprivileged publication of the defamatory statement to a third party with fault by the

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defendant, and (3) the publication damaged the plaintiff. Each element is discussed below.

**False statement about the plaintiff.** Opinions generally do not constitute defamation, but an opinion that “implies undisclosed defamatory facts” can be actionable. Moreover, whether a statement is fact or opinion is a question of law to be decided based on [a] whether the statement has a precise core of meaning for which a consensus of understanding exists, or conversely, whether the statement is indefinite and ambiguous; [b] whether the statement is verifiable, i.e., capable of being objectively characterized as true or false; [c] whether the literary context of the statement would influence the average reader’s readiness to infer that a particular statement has factual content; and [d] whether the broader social context or setting in which the statement appears signals a usage as either fact or opinion.

In addition, truth – or more specifically, “substantial truth” – is a defense to defamation.

**Unprivileged publication of the defamatory statement to a third party with fault by the defendant.** The applicable standard of “fault” depends on whether your CEO client is a private individual or public figure. It is much harder for a public figure to sue for defamation.

**Private versus public figures.** A person may be deemed to be a public figure if he or she receives such fame and notoriety as to become a public figure in all circumstances. Alternatively, a person may become a “limited purpose” public figure by voluntarily injecting himself into a controversy.

General purpose public figures must always establish actual (“New York Times”)

Though common law defamation actions can be brought by corporations, they are deemed to have no personal reputation and to be incapable of sustaining emotional injury.

made with actual malice, the plaintiff must prove by clear and convincing evidence that the defendant published defamatory statements with knowledge that the statements were false or with reckless disregard for truth or falsity.\(^\text{9}\) Reckless disregard for the truth exists only where the evidence shows that the defendant entertained serious doubts about the truth of the statements.\(^\text{7}\)

Limited purpose public figures need only establish actual malice in defamation actions involving controversies in “which they have chosen to accept a leadership role.”\(^\text{10}\) If the defamation action is unrelated to those controversies, the limited purpose public figure need not prove actual or New York Times malice, and is instead held to the less stringent private person standard.\(^\text{11}\) Illinois law requires only that a private plaintiff establish “negligent” defamation. This is true even if the statement involves a matter of public interest.\(^\text{12}\)

Privileges. One other factor in determining the relevant standard of fault is whether any privilege applies to protect the defendant. In Illinois, certain types of statements enjoy “absolute privilege” status, while others are conditionally privileged. Whether an absolute or conditional privilege applies is decided as a matter of law, and the defendant has the burden of establishing the privilege.\(^\text{13}\)

Statements that otherwise might be defamatory are protected by an absolute privilege if made during legislative, judicial, or, in some cases, “quasi-judicial” proceedings.\(^\text{14}\) An absolute privilege provides complete immunity from civil action even if the statements are made with malice.\(^\text{15}\) Practitioners should also carefully consider Illinois’ new “anti-SLAPP” statute, which appears to afford a new, absolute privilege for any defamatory statements communicated while attempting to procure “favorable government action.” As commentators have pointed out, this standard is extremely broad – notably broader than the anti-SLAPP statutes of other states.\(^\text{16}\)

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1. Vickers v Abbott Labs, 308 Ill App 3d 393, 400, 719 NE2d 1101, 1107 (1st D 1999). Distinctions between libel and slander have been abolished in Illinois, so this article uses the term “defamation” to refer to libel and slander jointly. See, for example, O’Donnell v Field Enterprises, 145 Ill App 3d 1032, 491 NE2d 1212 (1st D 1986).
2. O’Donnell at 1040, 491 NE2d at 1218.
3. This multi-factor test was developed by the District of Columbia Court of Appeals in Oldman v Exxon, 750 F2d 970, 984-85 (DC Cir 1984), and cited with approval by the Illinois Supreme Court in Mittelman v Wintrust, 135 Ill 2d 220, 243-44, 532 NE2d 973, 984 (1998).
4. American Intl Hospital v Chicago Tribune Co, 136 Ill App 3d 1019, 483 NE2d 965. See also Ill Const art I, § 4 (“In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.”).
9. Id.
10. Kessler at 180, 181, 620 NE2d at 1255.
11. Id.
12. Troman v Wood, 62 Ill 2d 184, 198, 340 NE2d 292, 299 (1975) (“[I]n a suit brought by a private individual to recover damages for a defamatory publication whose substantial danger to reputation is apparent, recovery may be had upon proof that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief. We hold further that negligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest.”); Rosner v Field Enterprises, Inc, 205 Ill App 3d 769, 764, 562 NE2d 326 (1st D 1990).
13. Troman at 198, 340 NE2d at 299 Accord Imperial Apparel, Ltd v Cosmos’ Designer Direct, Inc, 227 Ill 2d 381, 385, 552 NE2d 1011, 1020 (2008) (“In contrast to a plaintiff’s status, the content of the challenged speech, specifically, whether it addresses a matter of public concern, does not determine the standard of liability”); Rosner v Field Enterprises, Inc, 205 Ill App 3d 769, 564 NE2d 131 (1st D 1990).
14. However, the second district recently wrote that “because the statements at issue are a matter of public concern, punitive damages may not be imposed absent a showing of actual malice.” Green v Rogers, 384 Ill App 3d 946, 963, 895 NE2d 647, 664 (2d D 2008).
16. Id.
17. Illinois’ statute – titled the “Citizen Participation Act” (CPA) – applies to: [Any motion to dismiss of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party’s rights of petition, speech, association, or to otherwise participate in government. Acts in furtherance of the constitutional right to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome. ] 755 ILCS 110/15. It is beyond the scope of this article to analyze the scope and implications of the CPA. For a recent and thorough analysis of this statute, see Eric M. Madar and Terrence J. Sheahan, Illinois’ New Anti-SLAPP Statute, 96 Ill Bar J 620 (Dec 2008). For additional analysis, see Mark J. Sobczak, Slapped in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act, 28 NIU L Rev 559 (Summer 2008); Deborah L. Berman and Wade A. Thomson, Illinois’ Anti-SLAPP Statutes: A Potentially Powerful New Weapon for Media Defendants, 26 Comm Lawyer 13 (March 2009).
In addition, a qualified privilege may apply if the occasion for the statement “created some recognized duty or interest to make the communication [statement] is involved, and (c) a recognized interest of the public is concerned. To prove an abuse of (and thus to negate) a qualified privilege, a plaintiff must show “a direct intention to injure another,” or a “reckless disregard of the [plaintiff’s] rights and of the consequences that may result to him.”22

The publication damaged the plaintiff. Illinois distinguishes between two categories of defamation: per se and per quod. The first is easier to recover for than the second.

Per se and per quod. A statement is defamatory per se if it imputes (a) the commission of a criminal defense, (b) infection with a communicable disease, (c) an inability to perform or a want of integrity in the discharge of duties of office or employment, (d) a lack of ability in the plaintiff’s trade, profession, or business, or (e) adultery or fornication.21

If a defamatory statement is actionable per se, the plaintiff need not plead or prove actual damage to her reputation to recover. Statements that fall within these actionable per se categories are deemed to be so obviously and materially harmful to the plaintiff that malice is implied and injury to reputation is presumed.22 However, if the per se defamatory statement relates to a matter of “public concern,” then damages cannot be presumed absent a showing of actual malice.23

If a defamatory statement does not fall within one of the limited categories of statements that are actionable per se, then the claim should be pled per quod. A defamation per quod claim is appropriate where the defamatory character of the statement is not apparent on its face and extrinsic circumstances are necessary to demonstrate the defamatory meaning.24

To pursue a per quod action in such circumstances, a plaintiff must plead and prove extrinsic facts to explain the defamatory meaning of the statement. A per quod action is also appropriate, however, where a statement is defamatory on its face, but does not fall within one of the limited per se categories. In those cases, the plaintiff need not plead extrinsic facts, because the defamatory character of the statement is (theoretically) apparent on its face.25

To recover for defamation per quod, the plaintiff must plead and prove actual damage to her reputation and pecuniary loss resulting from the defamatory state-
The “innocent construction” rule. However, even if a statement falls into one of the per se categories, it will not be found actionable per se if it is reasonably capable of an “innocent construction.” The innocent construction rule requires courts to consider a written or oral statement in context, giving the words, and their implications, their natural and obvious meaning. “If, so construed, a statement ‘may reasonably be innocently interpreted, or reasonably be interpreted as referring to someone other than the plaintiff, it cannot be actionable per se.” 27

Whether a statement is reasonably susceptible to an innocent interpretation is a question of law. 28 Illinois’ innocent construction rule applies only to per se actions, for which damages are presumed. 29

Be sure to consider the statute of limitations, too, an issue beyond the scope of this article. 30 See the sidebar for a basic defamation checklist.

Interference with contract and other claims

Practitioners should also consider what claims other than defamation may be available to their clients. As is always true, the same conduct may give rise to several different torts.

Although analyzing the full spectrum of potential claims is beyond the scope of this article, practitioners should consider whether a defamatory statement might also constitute interference with contract, interference with prospective economic advantage, statutory or common law unfair competition, statutory or common law deceptive practices, false light invasion of privacy, trademark infringement, or breach of contract.

Injunctive relief

Your client’s CEO may want to know whether the competitor can be enjoined from making similar defamatory statements. As one recent federal court put the point: “[T]he Supreme Court has held that ‘prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.’” 31 However, that case involved an attempt to restrain a lobbying campaign voicing opposition to proposed legislation—a far cry from the usual business context.

26. Id.
27. Id at 90, 672 NE2d at 1215, quoting Chapski v Copley Press, 92 Ill 2d 344, 352, 442 NE2d 195, 199 (1983) (emphasis added). See also Bryson at 84, 672 NE2d at 1215 (“Only reasonable innocent constructions will remove an allegedly defamatory statement from the per se category.”) (emphasis in original).
28. Id.
29. Mittelman at 233, 552 NE2d at 979 (citations omitted). For a recent analysis of the innocent construction rule, see Helen Gunnarsson, Lawpulse, “Innocent construction” libel rule – still standing but battered, 95 Ill Bar J 121 (2007).
30. Note that the statute of limitations for defamation claims is one year. 735 ILCS 5/13-201 (defamation actions must be “commenced within one year next after the cause of action accrued”). The discovery rule also applies to defamation claims. The cause of action accrues when the plaintiff “knew or should have known” of the defamatory statement. See, for example, Tom Olesker’s Exciting World of Fashion, Inc v Dun & Bradstreet, Inc, 61 Ill 2d 129, 334 NE2d 160 (1975).
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Illinois law is very sparse on this issue. Research conducted for this article revealed no Illinois cases granting injunctions based on a common law defamation claim. In one Illinois case involving an attempt to stop picketing, the court rejected the defendants’ First Amendment assertions and affirmed the issuance of a preliminary injunction, holding that due to the defendants’ picketing, irreparable and substantial damage was being inflicted upon the plaintiffs by the loss of customers, loss of potential customers, and loss of goodwill. However, the underlying claim was for tortious interference with business expectancy, not defamation.32

In any event, aside from the First Amendment issues inherent to any attempt to enjoin speech, the plaintiff must also satisfy the usual requirements for a preliminary injunction. The plaintiff must demonstrate that he (a) possesses a clearly ascertainable right in need of protection, (b) will suffer irreparable injury without an injunction, (c) has no adequate legal remedy, and (d) is likely to succeed on the merits. In addition, the plaintiff must also generally establish that the need for temporary relief outweighs any potential injury that the defendant might suffer from the issuance of an injunction.33

Defamation claims on behalf of the corporation

Determining what claims your corporate client may bring on its own (as opposed to the CEO’s) behooves adding additional analysis. In general, common law defamation actions can be brought by a corporation.34 However, the law deems corporations to have no personal reputation and to be incapable of sustaining emotional injury.35 Accordingly, a corporate plaintiff generally is limited to claims based on injury to its business or financial reputation.36 Unlike natural plaintiffs, there are only three types of per se defamation for corporations: (1) statements imputing the commission of a criminal offense, (2) statements imputing inability to perform or want of integrity in the discharge of duties of office or employment, and (3) statements prejudicing the plaintiff in its profession or trade.37

However, even a statement that fits into one of the per se categories is not defamation per se if it is susceptible to an innocent, non-defamatory construction. The same considerations relating to the standard of fault and any absolute or conditional privilege apply to corporations as they do to natural persons.38

The Illinois Deceptive Trade Practices Act

Consider whether to bring a cause of action for commercial disparagement on behalf of the corporation as opposed to (or in addition to) common law defamation. To state a cause of action for common law commercial disparagement, a plaintiff must show that the “defendant made false and demeaning statements regarding the quality of another’s goods and services.”39

DTPA basics. There is confusion in Illinois regarding whether this cause of action has been supplanted by the Illinois Deceptive Trade Practices Act (DTPA). The most recent case to address this issue held that the DTPA “codifies the common-law tort of commercial disparagement.”40

But that is the conclusion of a federal court, not an Illinois state court. An earlier Illinois federal case also noted that it is “unclear” whether Illinois recognizes the tort of commercial disparagement, then decided the claims were not “false or misleading” in any event.41 Earlier Illinois state cases have both held on the one hand that commercial disparagement is no longer a viable cause of action in light of the Illinois Act, and on the other hand, that the Act merely “supplemented” Illinois common law and that commercial disparagement remains a viable cause of action.42

Because of the confusion on this issue, the better practice for pleading purposes would be to include both the common law and statutory claims for disparagement.

Under the Illinois DTPA, “A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person...disparages the goods, services, or business of another by false or misleading representation of fact.”43

Injunctive relief. One advantage to asserting claims for disparatory statements under the DTPA is that it specifically authorizes injunctive relief.44 However, the case law in this area is scant. Research conducted for this article did not reveal any cases authorizing injunctions under the DTPA to enjoin future disparagement. In Allcare, Inc v Bork, the first district denied the plaintiff’s request for an injunction under the Act to prevent future disparaging statements because: “[P]laintiff’s complaint does not allege, beyond the two allegedly defamatory statements of defendants Bork and Krause and the stricken allegations of conspiracy, a

34. This does not include municipal corporations, however, City of Chicago v Tribune Co, 307 Ill 595, 139 NE 86 (1923).
36.
40. Fedders Corp v Elite Classics, 268 F Supp 2d 1053, 1064 (SD Ill 2003).
41. First Health Group Corp v United Brokers & United Providers, Inc, 2000 WL 549723 *2 (ND Ill). The court further noted that if Illinois does recognize the tort of commercial disparagement, then: [T]he application of the penumbra of issues surrounding defamation claims is also unclear: whether or not the distinction between per se and per quod applies; whether there is a qualified privilege when the remarks are in furtherance of a public or legal interest; and whether or not the innocent construction rule applies. The concept does live on in any event in the Uniform Deceptive Trade Practices Act in 815 ILCS 510/2(b), but even there, except for a relaxation in proof of special damages, the application of the defamation penumbra remains unclear. (Citations omitted.)
42. See also Prefatory Illinois Notes, Ill Rev Ann Stat 1991 ch 121 1/2, §§ 311 et seq (Act generally compensates, but does not eliminate, common law remedies). Note that at least one Illinois court has held that “defamation and commercial disparagement protect different interests. Defamation protects interests of personality; Commerical disparagement protects property interests. As such, there is a ‘clear line of demarcation’ between the two causes of action.” Allcare, Inc v Bork, 176 Ill App 3d 993, 1000, 531 NE2d 1033, 1038 (1st D 1988). However, that same court also held that a particular statement could theoretically ‘simultaneously constitute defamation and commercial disparagement.

43. 815 ILCS 510/2(b). See also Associated Underwriters of America Agency, Inc v McCarthy, 356 Ill App 3d 1010, 826 NE2d 1160 (1st D 2005) (defendant engages in a deceptive trade practice when he disparages the services or business of another by a false or misleading representation of fact); M & R Printing Equipment, Inc v Anotol Equipment Mfg Co, 321 F Supp 2d 949 (ND Ill 2004). In M & R Printing, the plaintiff’s competitor stated to mutual customers that the plaintiff was in bankruptcy. The plaintiff filed suit for disparagement under the Illinois Deceptive Trade Practices Act, and argued the statements were false. The court held: “[T]he statement at issue in this case impugns the quality of M & R’s services and innocent company cannot reliably deliver on-going services. Accordingly, we find that count four properly states a UDTPA claim.” Id at 932.
44. 810 ILCS 510/3.
long standing and persistent pattern by defendants of defaming plaintiff or of disparaging its products or services. In fact, plaintiff does not allege any facts from which such conduct or the threat of future defamations or disparagements may reasonably be assumed. As such, plaintiff's complaint fails to demonstrate a need for injunctive relief.46

Allcare refers to Streif v Bovinette,46 which dealt with a common law disparagement claim, not a DTPA claim. In that case, as Allcare points out, the allegations related to “defendant’s repeated complaints, allegedly over a three-year period, to various governmental agencies of violations of State and Federal statutes and regulations by the plaintiff’s bus company.” In Streif, the court specifically noted that “in the proper circumstances equity has recognized the need to enjoin unfair competitive practices which employ disparagement.” However, the court struck down the trial court’s injunction because it was overbroad.48

The key takeaway point for practitioners is that in order to justify injunctive relief, the plaintiff must establish repeated defamatory and disparaging communications by the defendant, which creates a real threat of future disparagements.

Conclusion

When counseling corporate clients on defamation claims, practitioners should distinguish claims that may be brought on behalf of the corporation itself from those available to individual officers. The remedies available to a corporation may be more limited than those available to a natural person, but some claims can be brought by a corporation but not a natural person.

In addition, one advantage to bringing claims under the Illinois Deceptive Trade Practices Act in particular is that the Act specifically authorizes injunctive relief. This may be particularly helpful when attempting to enjoin defamatory speech by a business competitor.

45. Allcare at 1001, 531 NE2d at 1038.
46. Streif, 88 Ill App 3d 1079, 411 NE2d 341 (5th D 1980).
47. Allcare at 1001, 531 NE2d at 1038.
48. Streif at 1082, 411 NE2d at 344.