Abstract

Kyu Ho Youm and Douglas A. Anderson, *Media Countersuits in Libel Law: A Statutory and Judicial Framework,* 17 HASTINGS COMM. AND ENT. L.J. 386 (1995).

In the past decade, American media has increasingly resorted to counterclaims as a defense against what it considers to be meritless libel actions. In this study, the authors explore the reasons that media organizations countersue, the statutory and judicial framework for countersuits, and the implications of media countersuits for American libel law. The authors observe that libel law has historically conflicted with the freedom of the press. However, a surge in libel lawsuits against the media since the early 1980s has brought this conflict under renewed scrutiny.

American libel law serves many objectives. Primarily, it protects the "relational interest" of an individual from unwarranted injury. It also serves as a compensation system against economic loss or emotional distress from defamation as well as a civilized forum that promotes human dignity. Moreover, libel law deters the publication of false and injurious speech and opens up the media's editorial processes to public scrutiny.

However, the authors argue that many libel cases against media organizations since the early 1980s have not served any relational or societal goals. According to one estimate, 60-65 percent of all libel suits are "nuisance" cases, *i.e.*, meritless cases that have no plausible hope of prevailing under current legal standards. Moreover, the total number of all libel cases against media organizations has grown over the past decade. The authors suggest that the high costs of such libel suits and the fear of future suits spurred the media organizations to protect themselves. Furthermore, the American media perceived the increase in meritless libel suits as an attack on its First Amendment rights; in particular, it was concerned that such suits threatened the freedom of investigative journalism and the independence of the editorial process.

Thus, the authors contend, the American media took advantage of the passage of federal and state laws, as well as a growing body of

case law, to defend itself aggressively against frivolous lawsuits in the 1980s. Countersuits in libel cases, though money and time intensive, were viewed as the most potent defense against present and future intrusions into the media's First Amendment rights.

First, the authors survey the procedural rules and statutes, both federal and state, that provided the framework for media countersuits. One basis for a countersuit was § 1983,[1] which forced the media-plaintiff to prove that the defendant knew or reasonably should have known that his or her conduct would violate the media-plaintiff's First Amendment right of freedom of the press. However, § 1983 was limited almost entirely to countersuits against state or local officials.

The most common avenue for media countersuits was a motion under the 1983 version of Rule 11 of the Federal Rules of Civil Procedure.[2] Rule 11 imposed an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it was signed. The purpose of the rule was to discourage frivolous or dilatory litigation, and until 1993, a court would impose mandatory sanctions for a Rule 11 violation. Such sanctions included the other party's reasonable costs and attorney's fees that resulted from the frivolous filing. The 1993 version of Rule 11 has been adopted by several states, with few modifications: Maine and Rhode Island, for example, have borrowed almost verbatim from the older version.

In addition to Rule 11 sanctions, media organizations also used state rules authorizing the award of attorney's fees for unmerited litigation tactics. In Mississippi and Alabama, the Litigation Accountability Acts provide for attorney's fees if an action is without substantial justification, if there is delay or harassment, or if an attorney expands the proceedings by other improper conduct. In Arizona, the award of reasonable attorney's fees in frivolous actions is mandated. Other states, such as Washington and South Carolina, permit counterclaims for attorney's fees and costs for malicious prosecution.

Secondly, the authors explore the growth of case law between 1980 and 1994 that tended to favor media organizations in countersuits

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1 42 U.S.C. § 1983 (1988).

2 FED. R. CIV. P. 11 (amended 1993).

against plaintiffs who brought frivolous actions. Perhaps the most authoritative and celebrated of the successful media countersuit cases was *Nemeroff v. Abelson*.[3] The authors cite fifty-one cases, thirty-five of which resulted in victories for media organizations. The majority of media countersuit cases have been decided since 1986.

In closing, the authors explore the implications media countersuits carry for American libel law. The authors argue that the courts have become increasingly intolerant of plaintiffs whose main goal is not to redress a wrong, but to harass or annoy libel defendants. The case law that has developed since 1980, they suggest, has set useful boundaries for determining if and when media defendants may fight back with a reasonable chance of success. First, a countersuit will most likely prevail when a libel action is filed, notwithstanding the plaintiff's knowledge that the statement at issue is true and thus nonactionable. Second, a media organization has a high chance of winning a countersuit against parties that make a libel claim arising out of privileged statements from judicial or legislative proceedings. Third, a media organization has a particularly high probability of success in a countersuit even when the statute of limitations has already run on the libel suit. Lastly, the media may successfully invoke Rule 11 or similar state statutes when the plaintiff's attorney fails to make a reasonable inquiry about the status of his client relating to the requirement of actual malice. Thus, although media countersuits in libel cases were not infallible, they did serve as a useful weapon against frivolous claims between 1980 and 1994.

However, the authors note that the recent amendment of Rule 11, which went into effect on December 1, 1993, may weaken the incentive for media organizations to countersue in libel cases. As previously noted, Rule 11 was the most common basis for media countersuits. But under the new amendment, sanctions are no longer mandatory—now they are discretionary. Furthermore, the revised rule contains a three-week "safe harbor" provision, in which motions for sanctions cannot be filed unless the opposing party fails to withdraw or correct the challenged pleading within twenty-one days.

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[3] 469 F. Supp. 630 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 620 F.2d 339 (2d Cir. 1980), *aff'd*, 704 F.2d 652 (2d Cir. 1983).

The authors contend that this provision may encourage libel plaintiffs to file meritless and harassing motions, as they can do so without fear of punishment. Moreover, the new rule may reduce the likelihood that media organizations will challenge frivolous libel claims at all, since it limits the imposition of sanctions to "unusual circumstances."

In addition, the authors note that there are downsides to the growing number of successful media countersuits. At least one commentator fears that the aggressive use of countersuits will exacerbate the public's perception that the media is already too powerful and independent. Lastly, the authors suggest that while media organizations are more willing than ever to fight back against frivolous libel suits, a victorious countersuit may not be worth the time, money, and energy, since the fees they recover are often only a fraction of their actual cost. Thus, the recent rise of media countersuits may be of mixed value to the media as a whole. Though countersuits may be both legally and psychologically gratifying to media defendants, the authors caution that there are significant structural, administrative and public image costs even when countersuits are successful.

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