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## Courts Balance First Amendment Interests In Lawsuits Aimed At Stopping "Cybersmear"

By Peter J. Pizzi

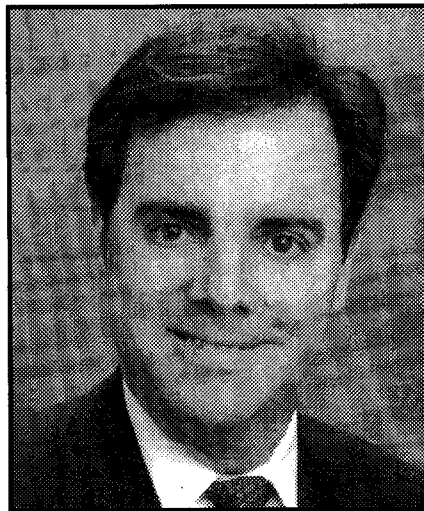


**Connell Foley LLP**  
Attorneys at Law

Since the Internet began its exponential growth in the mid-1990s, very few publicly-held corporations have escaped encounters with "cybersmear" — the anonymous posting of actionable messages on Internet websites. Financial web sites such as Yahoo Finance, Motley Fool, and CNBC, as well as those operated by AOL, MSN and other ISPs, have given the public innumerable fora in which to vent their anger at corporations and the people who lead them, using pseudonyms or "screen-names" to mask the poster's true identity. In the same fashion, current and former employees frequent websites such as [www.vault.com](http://www.vault.com) to vent gripes about working conditions at public and private companies, sometimes disclosing proprietary or non-public information in the process.

In response to this phenomenon, corporations have used civil discovery rules to "unmask" anonymous posters and then seek damages or an injunction to stop future postings. Recently, New Jersey's Appellate Division became the first appellate court in the country to establish comprehensive procedures applicable to "identity discovery." That court's deci-

*Peter J. Pizzi is a Partner in Connell Foley LLP and can be reached at (973) 533-4221 or by e-mail at [ppizzi@connellfoley.com](mailto:ppizzi@connellfoley.com). A longer version of this article appeared in the July 23, 2001, issue of The New Jersey Law Journal.*



**Peter J. Pizzi**

sions in *Dendrite International, Inc. v. John Doe No. 3*, N.J. Super. (App. Div. 2001) and *Immunomedics, Inc. v. Jean Doe, a/k/a/ "moonshine\_fr,"* N.J. Super. (App. Div. 2001) attempt to balance a plaintiff's right to protect itself from cybersmear against the First Amendment rights of the poster to remain anonymous. The *Dendrite* decision raises the proof threshold in order to obtain identity discovery in situations where the poster is merely a member of the public (as opposed to a current or former employee) and the claim is based upon common law defamation or similar tort theories. By contrast, the *Immunomedics* decision applies to cases involving former employees and enables companies to rely upon standard employee secrecy agreements to

obtain identity discovery.

Cybersmear proliferates today because of three defining qualities of the Internet itself. First, the Internet is ubiquitous. Information posted on the Internet may be accessed from everywhere in the world instantaneously. Second, the Internet creates the illusion of anonymity. Just as users browse websites without having to reveal their identities, visitors to chat rooms post messages anonymously or, at least, pseudonymously, in a myriad of Internet sites. Most Internet chat sites only require the user to create a pseudonym or, in the lexicon made popular by America OnLine, a "screen name." This anonymity is illusory, however, because every Internet message or mouse click leaves a digital trace that can be followed to the source computer. Third, the Internet is indelible. Message boards retain a historic record of posted messages; most have online archives of messages that are instantly searchable. Thus, a defamatory posting remains accessible by any one of hundreds of Internet search engines months and years after its original date of posting.

Corporations trying to put a stop to cybersmear find that a few court rules can be called upon to provide a remedy. First, in most state courts, as in federal courts, suits can be filed against a fictitiously-named defendant if the true identity is unknown. Once a complaint is filed, the plaintiff corporation serves a subpoena directed to AOL, Motley Fool, Yahoo, or other ISPs or web portals seeking any identifying information about the pseudonym under which the postings were made

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and the "IP" information for each message, which serves to identify the particular computer or network from which the message emanated.

Through the *Dendrite* and *Immunomedics* decisions announced July 11, 2001, New Jersey clarified the procedures applicable to cybersmear suits. The facts in *Dendrite* began in the spring of 2000, when Dendrite International, Inc., which produces software for the pharmaceutical industry, found itself afflicted by anonymous postings on the "DRTE" Yahoo Finance Board. The postings of "John Doe No. 3" stated that the corporation's Chairman was "shopping" the company and that he had used various techniques to improve year-end financial results. Dendrite sued the posters in Morris County, under various "John Doe" fictitious names, and alleged claims of misappropriation of trade secrets, breach of contract and fiduciary duty, and defamation. The lower court granted relief as to certain of the "John Doe" posters, but denied discovery directed to "John Doe No. 3."

In its opinion on July 11, 2001, the Appellate Division observed initially that rights afforded by the First Amendment remain protected even when engaged in anonymously and that trial courts facing such requests for identity discovery must balance the plaintiff's right to protect its reputation and proprietary interests against the poster's First Amendment right to maintain his or her anonymity. In terms of procedure, the Appellate Division held that an order granting leave to pursue discovery that would breach a poster's anonymity may not be entered until after the plaintiff has "undertake[n] efforts" to notify the anonymous poster of the application. The plaintiff must at the very least post a notice of the application on the Internet forum used by the poster. Thus, the corporation troubled by a message on its Yahoo Finance board must post a notice on that very board disclosing that suit has been started to discover the identity of the prior poster on that Board. In addition, the plaintiff must prove a prima facie right to recovery and provide "sufficient" evidence to support each element of its claim. This is basically the kind of proofs required to defeat a motion for summary judgment. Last, the Appellate Division ruled that, even if the court concludes that the plaintiff's case passes muster under these criteria, the court must

then balance the First Amendment right of anonymity of the poster against the strength of the prima facie case presented and the need for the discovery.

The appellate tribunal then ruled that the lower court had correctly denied Dendrite's request to unmask "John Doe No. 3," whose postings stated that the corporation's chairman was "shopping" the company and had changed the company's revenue recognition practice in order to bolster its financial results. The Court conceded that the claims would survive a motion to dismiss but still affirmed the lower court's conclusion that Dendrite had not proved these statements caused the company harm, which is an element of any defamation claim.

The corporate plaintiff in *Immunomedics* fared much better. In that case, the anonymous poster, who went by the Internet handle "Moonshine," claimed to be a "worried employee" of the company. Her Yahoo postings disclosed that the company was out of stock in a key product in Europe and was about to fire the manager in that region. Immunomedics sued Moonshine, alleging breach of contract and served a subpoena upon Yahoo, apparently without first applying for leave. Consistent with its practice, Yahoo emailed Moonshine to alert her to the Morris County suit and Moonshine, proceeding anonymously, moved to quash the subpoena.

Immunomedics conceded that the statements were true but asserted that Moonshine had violated the company's confidentiality agreement and "several provisions" of the company's employee handbook. On the record before her on Moonshine's motion to quash, the trial judge had nothing to contradict the allegation that Moonshine was bound by the confidentiality agreement and therefore denied Moonshine's motion to quash. Moonshine's appeal of that order became a companion case to *Dendrite*.

The Appellate Division affirmed, holding that the motion judge properly balanced Moonshine's First Amendment interest in remaining anonymous against the company's right to protect confidential business information from disclosure, holding that "individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment."

*Dendrite* and *Immunomedics* raise some interesting issues involving the interplay between the law of defamation, the First Amendment, and traditional rules of civil procedure. Under *Dendrite*, in order for the plaintiff to serve discovery to uncover the defendant's identity, it is not enough that the complaint state a proper cause of action for defamation. Instead, that plaintiff must first submit proofs to make out a prima facie case, which is essentially the threshold needed to survive a motion for summary judgment. Ordinarily, the viability of a complaint — and the test for whether discovery may proceed — is judged under the motion to dismiss standard, a threshold far more easily satisfied than that applied on a motion for summary judgment. To survive a motion to dismiss, the complaint need only hint at a viable cause of action; the plaintiff is not required to *prove* that cause of action as well.

The appellate panel in *Dendrite* felt free to depart from the motion to dismiss standard and instead looked to federal court cases such as *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), which likened pre-service discovery to a search warrant and suggested that a showing akin to probable cause should be made. The Court in *Dendrite* justified the more rigorous burden imposed upon the plaintiff by pointing to the First Amendment implications of exposing the true identity of anonymous posters in Internet chat rooms.

Like many courts addressing issues spawned by the Internet, the panel in *Dendrite* was proceeding in uncharted territory. For that reason, it felt free to jettison traditional criteria applied to test the legal sufficiency of a defamation complaint and develop a new rubric that aims to balance the plaintiff's interests against the First Amendment interests of the anonymous Internet poster. Currently, the intermediate appellate court in Pennsylvania is considering the appeal of the anonymous poster in *Melvin v. Doe*. In *Melvin*, as in *Dendrite*, the Court required the defendant, a public official, to prove that she could make out a prima facie case of defamation and could prove actual harm in order to unmask the anonymous defendant. Courts in other states are inevitably going to confront these issues in a variety of contexts and perhaps will balance the competing interests in a different fashion than the appellate panel in *Dendrite*.