

Facts, Damn Facts, and Statistics

Howard M. Wasserman

Professor of Law, FIU College of Law

Neither Florida Coastal School of Law nor its owner, InfiLaw, has threatened to sue The Times for defamation over its October 24 op-ed.¹ Any such lawsuit would be futile in the face of stringent First Amendment protections against defamation liability.

Public-figure plaintiffs--those who "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention"--face a high burden to prevail on defamation claims. By thrusting themselves into public controversies, public figures--including business entities such as corporations and educational institutions--have invited attention, comment, and criticism.

There is intense controversy over legal education--its content, cost, benefits, admission standards, and social, political, and economic value. The Times piece discussed core aspects of that debate--whether there are too many law schools enrolling too many students and whether availability of government-subsidized loans to finance students at those schools enables over-enrollment. Ongoing controversy over the business activities of Donald Trump's Trump University rendered it a limited public figure.² Similarly, public controversy exists over the very educational practices that Coastal and InfiLaw aggressively engage in, advertise, and market; they have thrust themselves to the forefront of the debate over those practices, making them (and likely every law school) public figures for purposes of the controversy and debate over legal education.

Fairly read as a whole and in context, The Times piece stated that Coastal admitted a class of law students comprised of large numbers of students who were statistically less likely to pass the Bar Exam and large numbers graduating with higher-than-average debt, resulting in "most" of its graduates "leaving law school with a degree they can't use, bought with a debt they can't repay." The piece labeled this a "scam," with Coastal one of many schools (profit and not-for-profit) "vacuuming up hordes of young people, charging them outrageously high tuition and, after many of the students fail to become lawyers, sticking taxpayers with the tab for their loan defaults."

As public figures, Coastal and InfiLaw can prevail on a defamation claim only by proving by "clear and convincing evidence" that The Times' statements were false and were made with "actual malice," meaning The Times knew they were false or recklessly disregarded their truth in making them. They thus would encounter three insuperable hurdles in trying to prove that these statements were false, much less knowingly false.

First, the First Amendment permits rhetorical hyperbole, exaggeration, and vigorous epithets to make a point. A court is unlikely to read the word "scam" as a literal accusation of a fraudulent scheme, particularly in the context of an opinion piece. Like a description of hardline public negotiations as "blackmail,"³ The Times should be seen as using "scam" to criticize a distasteful, but not necessarily unlawful, educational model. Similarly, the reference to "most" of Coastal's graduates in a newspaper article becomes a rhetorical synonym for "a lot" or "many," not a verifiable statistical conclusion of more than half.

Second, courts should not impose liability for speech that criticizes a large group simply because the plaintiff belongs to that group. The op-ed did single out Coastal's practices as an illustrative example and some statements were specifically about it. But the point about scams and defaults swept more broadly--it criticized all for-profit law schools (Coastal is one of six in the United States) and the majority of American law

¹ http://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?_r=0

² *Makaeff v. Trump University, LLC*, 715 F. 3d 254 (9th Cir. 2013),

https://scholar.google.com/scholar_case?case=3007884613426739840&hl=en&as_sdt=6&as_vis=1&oi=scholar

³ *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6 (1970), <http://caselaw.findlaw.com/us-supreme-court/398/6.html>

schools, all of which engaged in similar behavior. In other words, The Times stated that law schools writ large, not Coastal alone, were engaged in a “scam” that stuck the taxpayers with the bill for defaulted loans.

Third, Michael Simkovic’s statistical analysis⁴--showing that Coastal’s default rate is lower than many other law schools and lower than the average undergraduate institutions--is vital to the policy debate over subsidized law-school loans. But it is irrelevant to the legal analysis of The Times’ broad-reaching statements. That some defaults cause more harm or that public benefits of legal education justify the costs does not render false the suggestion that law-school-loan defaults are a bad thing.

Indeed, that the case turns on statistics and normative policy questions of acceptable default levels and which defaults impose greater public costs shows precisely why any defamation claim must fail. Predictions of law-school success, bar passage, default rates, and the public costs and benefits of legal education--based on statistics and sophisticated classification of data--are arguably not “facts.” And even if facts, they are very different kinds of facts “from the bigness of Cyrano’s nose,”⁵ the real-world description with which defamation is concerned. A court is unlikely to find a newspaper story false--much less knowingly false--because of disagreement, dispute, or even inaccuracy in its statistical analyses or conclusions.

⁴ <http://leiterlawschool.typepad.com/leiter/2015/10/new-york-times-editorial-board-is-wrong-law-student-loans-are-safe-and-profitable-for-the-government.html>

⁵ LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 646 (1965).