

Unmasking “John Doe” Defendants: The Case For Caution in Creating New Legal Standards

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I. Introduction

The rise of the Internet has created the opportunity for individuals inexpensively to publish their views on various issues to a wide audience. While this new avenue for expression is usually used for legitimate ends, it is also frequently used by individuals to disseminate defamatory or otherwise actionable statements under cover of anonymity. As a result, there has been in recent years a great deal of litigation brought by victims of such anonymous statements against the individuals responsible for those statements. A common theme in these so-called “John Doe cases” is that the plaintiff seeks to learn through discovery the identity of the anonymous defendant – without which the plaintiff is effectively precluded from serving process or asserting its rights.

This category of cases has attracted enormous public attention in both general interest and legal publications, substantial litigation resources from public-interest groups such as Public Citizen and the American Civil Liberties Union, and considerable academic, journalistic, and governmental interest.¹ When these suits first became common in the late 1990s, internet service providers routinely identified defendants in response even to non-judicial subpoenas, often without giving the defendant an opportu-

nity to oppose the discovery; even when courts received an opposition, the discovery was almost always granted, usually with little in the way of reasoned analysis. In the past approximately two years, however, opposition has mounted on First Amendment grounds and there has been a substantial shift to the other extreme, with courts erecting walls against disclosure, often in derogation of other core rights.

While John Doe cases have thus suddenly become relatively common and have attracted considerable public interest, there has to date been little analysis at the appellate level of the appropriate legal standards to be applied. The first appellate court seriously to attempt to conduct such an analysis was the New Jersey Appellate Division, which on July 11, 2001, issued its decision in Dendrite International, Inc. v. John Doe,² along with a companion decision in Immunomedics, Inc. v. Jean Doe.³ These decisions, which are likely to provide the starting point for much future John Doe analysis, are discussed in the following section.

II. Dendrite and Immunomedics

In Dendrite, the plaintiff sought to identify four fictitious name defendants based on their postings on the Yahoo! bulletin board devoted to the company. The trial court allowed discovery to proceed as to two of the defendants, both former employees whose postings either themselves violated the standard Dendrite employment contract or, in some instances, constituted admissions of off-line breaches. The court denied discovery as to two others, one of whom, “John Doe No. 3,” was the subject of the appeal. Dendrite’s claim against John Doe No. 3 was based on several defamatory messages, including false allegations of accounting misconduct and that the CEO had tried to shop the company and been turned down. John Doe No. 3 admitted financial motives for his postings, including trading in Dendrite’s stock and a concern that Dendrite’s stock performance would affect his or her own employer. The Dendrite appeal was argued together with Immunomedics, in which the defendant, a former employee whose postings were alleged to breach her employment agreement, appealed a decision allowing discovery of her identity. Both the denial of discovery in Dendrite and the granting of discovery in Immunomedics were affirmed on appeal.

The Dendrite court established “guidelines” for trial courts deciding John Doe applications.⁴ These guidelines impose four requirements before a court should permit discovery of the identity of the John Doe defendant:

First, the court should require notice to the defendant and an opportunity to be heard;

Second, the court should require the plaintiff to set forth the exact statements that are the basis of its claim;

Third, the court should receive evidence and determine not only whether the complaint would survive a motion to dismiss but whether plaintiff has submitted sufficient prima facie evidence to support its claim;

Fourth, assuming plaintiff has presented a prima facie claim, “the court must balance the defendant’s First Amendment right of anonymous speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.”⁵

While the first two requirements are hardly controversial, the latter two present very troubling limitations on the rights of plaintiffs to pursue claims against defendants who have acted anonymously

on the internet. As a practical matter, these decisions accord the trial court extremely broad discretion to allow or deny the requested discovery. The third factor, the ability to produce evidence in support of plaintiff's claim, will often depend dispositively on the identity of the defendant, meaning that meritorious claims may systematically fail this test. For example, where the poster is revealed to be a competitor, further discovery may be focused on the competitor's efforts to lure customers or employees away from the plaintiff. Where stock manipulation is suspected, the defendant's trading records will be essential to proving damages. Moreover, as proving damages may involve complicated (and expensive) expert testimony concerning matters such as the effect of postings on stock prices, plaintiff has a strong interest in knowing whether the defendant has the financial means to satisfy a judgment before investing the resources in gathering such evidence.

The fourth Dendrite factor is even more troubling. In effect, the court acknowledges that, even if plaintiff has alleged a viable legal claim against the defendant – and supported that claim with admissible evidence – the court may still exercise discretion to stop the case in its tracks. This is an exceedingly broad level of authority to grant to a single, trial-level judge, and is inconsistent with the spirit of such rights as due process and the right to trial by jury that generally animate judicial decision-making at the pre-trial stage.

This broad assumption of judicial power over whether a claim will proceed is particularly troubling because it is substantially insulated from appellate review. Dendrite makes clear that it will not revisit such a determination unless the court below abused its discretion – a high standard that virtually assures inconsistent results. Indeed, Dendrite and Immunomedics involved just such an inconsistency. The court, while holding that Dendrite had properly plead a claim for defamation based on the challenged postings, affirmed the decision to deny discovery because it found Dendrite lacked sufficient proof of damages (normally not required pre-discovery and for which the discovery of John Doe's identity was essential). In contrast, the same court affirmed the decision to grant Immunomedics discovery, even though Immunomedics had likewise offered no proof of damages.⁶

The basis of the Dendrite decision – and most of the opposition to discovery in John Doe cases – is the “well-established First Amendment right to speak anonymously”.⁷ While the First Amendment right to speak anonymously is well-established, it is nowhere near as broad as the more general right to speak freely. To the contrary, the right to speak anonymously is narrowly delineated and tied to particular circumstances, circumstances that are not relevant in the vast majority of John Doe cases. In particular, the right to speak anonymously has been recognized in the context of broad-based prior restraints on categories of anonymous speech (e.g., leaflets, petitions), and even then has been limited where necessary for important government interest (e.g., regulation of elections). The Supreme Court has never interpreted the right as precluding discovery of the identity of a particular individual accused of illegal or actionable speech; indeed, the Court has recognized that common-law claims such as defamation are an essential balance to the right to speak anonymously. See Point V below.

In tension with First Amendment concerns, the broad discretion accorded trial judges by Dendrite and Immunomedics creates a dangerous limitation on the due process rights of plaintiffs to seek redress for injuries. We risk transforming our elaborate judicial system – with the time-tested due process rights it affords – into an unregulated judicial “gut check” as to the importance of a particular plaintiff's claim. When a plaintiff is denied discovery of the identity of a John Doe defendant, that decision as a practical matter is likely to have the same effect as a final judgment for the defendant. If the plaintiff cannot serve the defendant with process, it will be effectively precluded from all relief. Though the application for discovery is not a motion to dismiss, it has a similar effect because the court

rules on the merits of the case – despite the fact that the plaintiff faces a higher burden and is deprived of the ordinary protections of the discovery process – and because the plaintiff cannot proceed with its claim if the discovery is denied. In some ways, the decision to deny discovery may even be more draconian than a dismissal. In particular, an ordinary motion to dismiss can dispose of all claims against a party and result in a final judgment appealable as of right under a standard of *de novo* review; in contrast, the discovery motion is decided under a similar (indeed, heightened) standard and has a similar result, yet in most states it is not appealable as of right and, at least under *Dendrite*, would face a higher, abuse of discretion, standard on appeal.

III. The Opportunity for Mischief in Anonymous Speech on the Internet

While the Internet is a powerful tool for enabling low-cost communication between large numbers of widely-dispersed individuals sharing common interests, it is also commonly used for illegal or improper purposes. There are numerous reports of individuals posting false information about companies on the Internet in an effort to affect their business relationships and performance and their stock price, sometimes for the purpose of profiting through stock manipulation.⁸ Likewise, the anonymity of Internet bulletin boards provide an obvious opportunity for abuse by competitors. For example, in a well-publicized case, multiple defamatory and damaging messages on a Yahoo! message board about Callaway Golf were later determined through discovery to have been posted by the CEO of a competitor.

Anonymous speech over the Internet that constitutes libel, defamation, or other violations of the law is not entitled to protection from the First Amendment. The general right to speak anonymously on the Internet is substantially different from the asserted right to remain anonymous when anonymity is being used as a shield protecting tortious or illegal conduct. The rapidity with which false information, trade secrets, and the like can be spread over the Internet creates a serious hazard, a hazard which must be weighed in determining the proper judicial approach to these situations.

IV. The Adequacy of Existing Procedural Rules

Though couched in the rhetoric of the Internet, First Amendment, and privacy, John Doe discovery requests actually call for the application of relatively mundane rules of civil procedure. While the applicable rules vary from state to state, most states routinely permit the filing of complaints against fictitious name defendants (*i.e.*, John Does) and allow plaintiffs to engage in discovery to identify such defendants by name. Such cases need not arise in the context of the Internet or even in areas involving actionable speech or claims of First Amendment protection. For example, such suits are often used to identify a manufacturer of a defective product or product component, or to identify government officials charged with civil rights violations.

Once a complaint has been filed against a John Doe, the plaintiff is permitted to utilize the various – and ordinary – discovery devices available to pursue his or her case in order to identify and locate the John Doe defendant. Indeed, prior to the present wave of Internet cases, courts often ordered disclosure of information about the identities of fictitious name defendants, even when there were claims of alleged privilege.⁹

Existing procedural rules already provide sufficient protection for defendants who wish to maintain confidentiality. While some rules vary from state to state, the following procedures are in place in most or all jurisdictions and provide ample protection:

As an absolute prerequisite to discovery, the plaintiff's complaint must be able to survive a motion to dismiss – *i.e.*, assuming all the facts alleged in the complaint are true, the plaintiff must have an actionable claim against the John Doe defendant. When the claim is based on defamation, most states require the plaintiff to allege the specific words constituting the defamation, meaning that if the message is not defamatory, the case and the discovery cannot proceed. In any event, since the text of the challenged communication is unlikely to be disputed, summary judgment gives the defendant a remedy to avoid discovery where plaintiff simply cannot state an actionable claim.

Courts have broad discretion to fashion appropriate protective orders. They may, for example, require that the defendant's identity not be disclosed beyond a certain group of individuals, or that non-judicial action, such as termination of employment, not be taken. They may then review such restrictions after discovery. For example, if the defendant is a low-level employee of the plaintiff, the court may determine that it is appropriate to enjoin termination of the employee unless plaintiff prevails on the merits; in contrast, if the defendant is a company's general counsel and has breached professional obligations through his or her postings, the court may decide that no further protection is warranted. While the court's discretion in principle extends to denying the discovery entirely, prior jurisprudence is virtually bare of cases (and certainly of well-regarded cases) where courts have used their discretion to preclude discovery of information essential to a plaintiff's case.¹⁰

Numerous sanctions exist for abuse of the legal process. Fabrication of a false claim to obtain discovery would expose both the plaintiff and its lawyer to the risk of judicial sanctions and, in the case of the lawyer, professional discipline. Likewise, most states provide a civil remedy for abuse of process. While these sanctions will probably only come into play in the most egregious cases, that is a balance that is common in all kinds of modern litigation. Litigation is, by its nature, expensive and unpleasant for defendants, and it is an everyday occurrence that defendants must provide relevant discovery that they would prefer not to provide for reasons of cost, embarrassment, or otherwise, even in cases upon which they may ultimately prevail. There is no compelling reason to provide a broader protection in this one category of cases.

V. Critique of Creating New Rules for Internet Posters

The judicial creation of a different set of procedural rules for this single class of cases is troubling for a variety of reasons:

First, giving excessive discretion to judges compromises core values. Constitutional rights, including the rights of due process and trial by jury, as well as time-tested rules of civil procedure, are intended to assure each litigant his or her "day in court". Appellate courts exist to remedy errors in the process and protect those core values. The creation of a system that allows a judge discretion to (in effect, if not in name) dismiss meritorious claims with little appellate oversight is a substantial infringement on the truth and justice finding functions of the courts.¹¹

Second, the stated rationale for Dendrite – and the only plausible basis for limiting discovery in John Doe cases as a matter of course – is the First Amendment right to speak anonymously, a limited right that is not implicated in most of John Doe cases. For example, in Buckley v. American Constitutional Law Foundation,¹² a case involving "core political speech" where "First Amendment protection ... is at its zenith,"¹³ the Supreme Court held unconstitutional a Colorado statute that required initiative

petition circulators to wear identification badges, but approved a law requiring that the circulators file an identifying affidavit that reveals their name and is a public record. As Justice Ginsberg explained, the affidavit requirement strikes an acceptable balance between the First Amendment right of the circulator to speak without “‘heat of the moment’ harassment” and the legitimate state interest in regulating elections.¹⁴ While suggesting that the affidavits are *less likely* to lead to harassment than identity badges, Buckley accepts the possibility that forced disclosure of a person’s identity as a condition of political speech may result in private retaliation. As a matter of First Amendment law, a company could obtain affidavits as a public record and terminate employees (or vendors) opposing it on a political issue. If such a situation does not run afoul of the First Amendment, it is difficult to discern a legitimate First Amendment problem in precluding a plaintiff that has alleged (or even proved) an actionable claim against a defendant, generally not involving core political speech, from discovering that defendant’s identity, particularly when a protective order may at least reduce the risk of extra-judicial retaliation.

Indeed, the Supreme Court has expressly recognized that common-law defamation actions provide an essential safeguard protecting the public against the risk of abuse inherent in the right to speak anonymously. Unlike blanket prior restrictions on anonymous speech, common-law claims are targeted at actionable speech, rather than speech generally.¹⁵ Obviously, such defamation actions cannot serve their function of deterring and punishing wrongdoing – and thus allowing anonymous speech to be protected when it is not actionable – unless defendants can be identified.

Third, the rush to create new procedural rules because of technological development carries inherent risk. One suspects that the broad information-gathering power of the Internet impelled the Dendrite court to offer defendants broader protection than called for under existing law. The ability to learn a speaker’s identity online may seem more worrisome than the ability to learn it through a trip to a government clerk to obtain a public record, as approved in Buckley, because it is so much easier to obtain the information online. While this is an understandable concern, the rapidity of technological and societal change related to the Internet makes the fashioning of an appropriate judicial response problematic. Even since Dendrite (and perhaps in part because of Dendrite), there has been increasing public awareness of the risk of disclosure of one’s identity when acting anonymously online. For example, the lack of anonymity on the Internet have been the subject of a concerted advertising campaign by a major internet service provider (Earthlink) and of an episode of a popular television series (Law & Order). Thus, defendants now may have greater actual notice than in previous years of the limits of their anonymity when they choose to post on the Internet, and a greater opportunity to “hide their tracks” if they so desire (by, for example, posting from an Internet cafe).¹⁶ Similarly, and perhaps more ominously, information gathering technology is developing rapidly, meaning that it may become increasingly easy to identify John Does without subpoenas; restrictive discovery rules may encourage the use of such technologies, which may present more of a danger to privacy than discovery guided by judicial oversight and regulated by appropriate protective orders.

VI. Conclusion

The casual discovery of the identity of individuals acting anonymously on the Internet is a serious and legitimate First Amendment concern. However, existing procedural rules, designed to deal with a wide variety of cases involving the discovery of evidence defendants would prefer not to have revealed, are sufficient to address that concern while also protecting the legitimate rights of claimants. At a minimum, the rush to create new standards, at odds with prior jurisprudence, carries a substantial and unjustifiable risk of skewing the balance against claimants and allowing anonymity to shield wrongdoing. The courts should proceed cautiously in creating new rules and should, instead, try to address these cases through existing frameworks.

(Footnotes)

- 1 See, e.g., L. Lidsky, "Silencing John Doe: Defamation & Discourse in Cyberspace", 49 Duke L.J. 855 (2000); D. Sobel, "The Process that 'John Doe' is Due: Addressing the Legal Challenge to Internet Anonymity", 5 Va. J. L. & Tech. 3 (2000); Comment, "Cybersmear or Cyber-Slapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation", 25 Seattle U. L. Rev. 213 (2001).
- 2 342 N.J. Super. 134 (2001). The author acted as counsel to Dendrite in this case.
- 3 342 N.J. Super. 160 (2001).
- 4 342 N.J. Super. at 141.
- 5 342 N.J. Super. at 141-42.
- 6 The Immunomedics decision rejected Jean Doe's argument that she should be allowed to disprove plaintiff's claim before discovery of her identity. The court's reasoning in this regard is difficult to reconcile with its decision in Dendrite establishing a special four-part test for discovery of the identity of anonymous internet posters. See Immunomedics, 342 N.J. Super. at 167-68 ("To allow a potential tortfeasor to disprove a plaintiff's case before the plaintiff is even provided the opportunity to learn the defendant's identity, let alone gather any discovery, has no foundation... [Jean Doe] should not be afforded an advantageous position based on the media in which she chose to commit the breach of contract or because she committed that alleged breach anonymously.").
- 7 342 N.J. Super. at 141.
- 8 See, e.g., Blake A. Bell, "Dealing With The 'Cybersmear,' False Internet Rumors Target Companies, Stocks," The New York Law Journal, T3 (Apr. 19, 1999); Mike Garrity, "Cybersmear Becomes the New Internet Scam," Mutual Fund Market News (Nov. 15, 1999); Written Statement of Richard H. Walker, Director of Division of Enforcement of the SEC, "Securities Fraud on the Internet" (April 5, 1999).
- 9 See, e.g., Dry Branch Kaolin Co. v. John Doe, 263 N.J. Super. 325, 330-32 (App. Div. 1993) (plaintiff files defamation suit against John Doe and, despite attorney-client privilege, the court orders John Doe's attorney to disclose the name of John Doe defendant-client); Brien v. Lomazow, 227 N.J. Super. 288, 307-08 (App. Div. 1988) (despite informant privilege, plaintiff-doctor may seek to identify unknown defendant, who previously filed false claim of misconduct, by compelling disclosure from state agency that originally received the defendant's claim).
- 10 Probably the closest courts have come to such action is in a few, mostly older, cases where courts have refused to allow discovery of journalists' anonymous sources. However, those cases (besides involving the special deference given to investigatory journalists) generally involved claims that were either found to be frivolous, e.g., Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974); Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), or that could not survive summary judgment after otherwise full discovery, e.g., Cervantes v. Time, 464 F.2d 986 (8th Cir. 1972) (plaintiff could not prove its case regardless of the identity of the confidential source).
- 11 See, e.g., United States v. Microsoft Corp., 56 F.3d 1448, 1463-64 (D.C. Cir. 1995) ("We are similarly distressed by the district judge's decision to allow the Doe Companies to proceed anonymously.... Such proceedings would ... seriously implicate due process").
- 12 525 U.S. 182 (1999).
- 13 Id. at 186-87.
- 14 See id. at 199.
- 15 See, e.g., McIntyre v. Ohio Elections Commission, 514 U.S. 334, 349-50 & n.13 (1995) (finding unconstitutional a blanket prohibition against anonymous leaflets and noting that legitimate state interests may be advanced through narrower means, including tort claims for defamation).
- 16 Yahoo! and many other internet services have long posted disclaimers advising users of limits on their privacy online.