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California Libel Law Enters The Digital Age

Law360, New York (November 5, 2015, 10:35 AM ET) -- On Sept. 28, 2015, the California governor approved and the secretary of state chaptered AB 998, which amends California Civil Code § 48a to make clear the statute applies to weekly and online publications that perform the same news-disseminating function as a daily newspaper.

The California Legislature amended Section 48a to unequivocally declare that the correction statute applies to weekly and online publications performing the same news-disseminating function as a daily newspaper. Effective Jan. 1, 2016, the word "newspaper" in the statute's current iteration is replaced with the phrase "daily or weekly news publication," and that phrase is defined as "a publication, either in print or electronic form, that contains news on matters of public concern and that publishes at least once a week." Moreover, the statute includes express legislative findings, declaring that earlier appellate rulings failed to acknowledge that the policy underlying the correction statute — protecting enterprises engaged in the immediate dissemination of news on matters of public interest — "should extend to online publications and weekly publications, which publish breaking news on deadlines indistinguishable from daily newspapers."



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The amendments to Section 48a represent a legislative recognition of the gap in protection caused by technological developments in news delivery platforms, and an acknowledgement that Californians are just as likely to get their news from the Internet as they are from print newspapers, radio or television. As amended, Section 48a will keep pace with revisions to California's shield law (which long has been interpreted to apply to online publications) and ensure that providers of the news can rely on the correction statute's valuable limitation on damages, whether published on paper or online.[1]

California's correction statute is codified in Civil Code § 48a. In its current iteration, Section 48a reads, in pertinent part:

In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided.

Under the statute, a plaintiff who sues a "newspaper" for libel can recover only special damages,[2] unless the plaintiff timely demands and is denied a correction that complies with the statutory requirements. In other words, a plaintiff may obtain general damages (and where appropriate, punitive damages) for defamatory statements published in a "newspaper" only where the plaintiff demands a correction and the defendant neglects or refuses to publish one. In this way, the correction statute affords "newspapers"

considerable leeway to disseminate news while it is new, without the threat of debilitating liability for publication of untrue statements, whose falsity could not be ascertained in the temporal confines allotted to purveyors of "breaking" news.

Because Section 48a does not define the term "newspaper," courts have struggled to determine which news publications qualify for the correction statute's protection. Two cases have been particularly instructive in defining the scope of Section 48a: *Burnett v. National Enquirer Inc.*[3] and *Condit v. National Enquirer Inc.*[4]

In *Burnett*, comedian Carol Burnett brought a libel claim against the *Enquirer*, arising from a four-sentence report in the weekly publication, purportedly recounting her "boisterous" and "eye-brow-raising" behavior at a restaurant, where she supposedly engaged in a loud argument with Henry Kissinger.[5] Burnett demanded a retraction the same day the article was published, but filed suit because she was not satisfied with the quality of the retraction that the *Enquirer* published.[6] After a jury trial, Burnett was awarded \$300,000 in compensatory damages and \$1.3 million in punitive damages, which the trial court reduced to \$50,000 in compensatory damages and \$750,000 in punitive damages.[7]

The *Enquirer* appealed, arguing it was entitled to the protection of the correction statute.[8] The appellate court affirmed the judgment, explaining that only those publications "who engage in the immediate dissemination of news" are entitled to the correction statute's limitation on damages.[9] The court reasoned that "the Legislature could reasonably conclude that such enterprises cannot always check their sources for accuracy and their stories for inadvertent publication errors." [10]

With respect to the *Enquirer*, the evidence adduced at trial showed that the publication: (1) did not subscribe to the Associated Press, United Press International or Reuters News Service; (2) did not attribute content it published to any wire service; (3) did not provide current coverage of politics, sports, or crime; (4) did not generally reference time in its articles; (5) did not generate stories on a day-to-day basis; and (6) had a lead time of one-three weeks.[11] Under those circumstances, the *Burnett* court found that the trial court had correctly determined the *Enquirer* was not entitled to the correction statute's protection because its publication process permitted sufficient time to verify the accuracy of the stories it published.[12]

Nearly 20 years later, in *Condit*, the *Enquirer* again sought refuge under Section 48a. There, the wife of a former senator brought a defamation action against the *Enquirer* for an article implying she may have played a role in the disappearance of her husband's former intern.[13] The district court concluded that, "[w]hile the evidence show[ed] the 2001 *Enquirer* includes more crime stories than the 1976 *Enquirer* and that the 2001 *Enquirer*'s coverage of politics, sports and crime is more current and its lead time is shorter than the 1976 *Enquirer*, "[t]he record d[id] not evidence the *Enquirer* is under pressure to disseminate news while it is news." [14] The evidence did not show that the 2001 *Enquirer* published news under circumstances where it could not confirm the accuracy and reliability of its information and sources. For that reason, it could not rely on Section 48a to limit the damages to which the plaintiff was entitled.

The fact that the 2001 *Enquirer* maintained a website did not change this result. The *Condit* court opined that, "[e]xistence of a website does not necessarily increase the pressure for more rapid dissemination without information and source investigation or accuracy confirmation." [15] Prophetically, notwithstanding its determination that the *Enquirer* did not qualify for Section 48a's protection, the court noted that "[w]eekly publications that strive to disseminate 'news while it is new' ... may qualify for protection under section 48a despite [their] weekly cycle." [16]

Fortunately, the Legislature's amendments to Section 48a remove any doubt and ensure that California's powerful correction statute is now available to online and weekly

publications that perform the same news-disseminating function as daily newspapers.

The amendments to California's correction statute will place online news publications on equal footing with the print and broadcast news outlets that have benefited from the statute's protections for years. When the amendments become effective in 2016, a plaintiff seeking monetary damages based on allegedly defamatory content published in a qualifying online news publication will be precluded from recovering general damages and/or punitive damages, unless the plaintiff serves on the publisher of the online news publication a correction demand that complies with Section 48a(1).

A valid correction demand must: (1) be in writing; (2) be served on the publisher,[17] at the place of publication; (3) specify with particularity the statements claimed to be defamatory; (4) demand that the allegedly defamatory statements be corrected; and (5) be served within 20 days after the plaintiff learns of the allegedly defamatory statements. [18]

To ensure that they are well positioned to enjoy Section 48a's immunity from general and punitive damages, online news publications should consider taking steps now to familiarize their editorial staff with the statute, including its procedural requirements. Of particular importance, an online news publication that receives a correction demand must publish a correction within three weeks of its receipt of the demand. This leaves a very short window within which to investigate the allegedly defamatory statement(s) and, if necessary, to publish a correction that conforms to Section 48a(3).[19] For this reason, it is advisable that online news publications have in place a clear correction policy, which lays out the steps editorial personnel should follow upon receipt of a correction demand, and which emphasizes that time is of the essence. Online news publications also should ensure that the person(s) designated to investigate the allegedly defamatory statement(s) in a correction demand are appropriately trained, and that they have access to a lawyer who can help to analyze potentially actionable statements, quantify risk, and draft compliant corrections, when necessary.

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[1] The amendment to Section 48a responded to a challenge issued by a California Court of Appeal in *Thieriot v. The Wrapnews Inc.*, 2014 Cal. App. Unpub. LEXIS 2690 (Cal. Ct. App. April 15, 2014). There, the appellate court held that California's correction statute did not apply to allegedly defamatory statements published on a website. The court explained that, "[b]y its plain language, [the correction statute] applies only when the defamatory material is published in a 'newspaper' or a 'radio broadcast.'" *Id.* at *38. "At the time the statute was enacted in 1931, or amended in 1945, a 'newspaper' was understood to mean a publication that was printed on inexpensive paper, often daily." *Id.* "Had the Legislature intended the statute to apply to defamatory material published on an online website," the court reasoned, "it could have amended the statute to say so, or add[ed] a statute to include such websites within the definition of 'newspaper[.]'" *Id.* at *39.

[2] "Special damages" are defined as "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other[.]" Cal. Civ. Code § 48a(4)(b).

[3] 144 Cal. App. 3d 991 (1983).

[4] 248 F. Supp. 2d 945 (E.D. Cal. 2002).

[5] Burnett, 144 Cal. App. 3d at 997.

[6] See id.

[7] See id.

[8] See id.

[9] Id. at 1004.

[10] Id.

[11] Burnett, 144 Cal. App. 3d at 999-1000.

[12] See id. at 1005.

[13] Condit, 248 F. Supp. 2d at 949.

[14] Id. at 958.

[15] Id. at 959.

[16] Id. at 962.

[17] In the case of "newspapers," the California Supreme Court has interpreted "publisher" in this context to include a person designated by the publisher to receive correction demands or a person employed at the newspaper (other than the publisher or the publisher's designee), provided the publisher receives actual knowledge of the demand within the 20-day time period. See *Freedom Newspapers, Inc. v. Superior Court*, 4 Cal. 4th 652, 658 (1992).

[18] See Cal. Civ. Code § 48a(1).

[19] Section 48a(3) mandates that a correction be published in substantially as conspicuous a matter as the allegedly defamatory article.

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