Is It Defamation or Trade Libel?

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Picture this: You are the owner of a company and a former customer writes a review online saying that the product your company sells is defective, your company is a scam, and you are a crook with a criminal record. None of this is true. Do you have a cause of action for defamation? Trade libel? Both?

There is often confusion as to whether a particular false publication constitutes defamation or trade libel, particularly when the publication relates in any manner to a business or a business owner, officer, director, or employee. While there are some obvious similarities between the two torts, there are also some major differences under New Jersey law.

First, defamation requires that the publication be "of and concerning" the plaintiff, while trade libel requires that the publication be "concerning plaintiff's business, property or product." Thus, in the example above, the statement that the business owner is a "crook with a criminal record" sounds in defamation, while the statements alleging that the "product…is defective" and the "company is a scam" sound in trade libel.

Second, trade libel always requires proof of actual malice (*i.e.*, that the statement was made with knowledge of falsity or a high degree of awareness of probable falsity), while defamation does not. Under New Jersey law, the level of fault required in defamation cases brought by private plaintiffs on matters of private concern is mere negligence, while the level of fault required in cases involving public official or public figure plaintiffs, or private plaintiffs involved in matters of public concern, is actual malice.

Third, with regard to damages, defamation generally requires proof of damage to reputation. Trade libel, however, requires proof of "special damages," *i.e.*, pecuniary loss that has been realized or liquidated, such as lost sales or the loss of prospective contracts with customers.

Finally, the statute of limitations for defamation is one year, but for trade libel it is six years.

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While the torts of defamation and trade libel are both aimed at redressing derogatory, false speech, understanding the key differences between them will help would-be litigants know the appropriate cause of action to file and, alternatively, how to defend against such claims.

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