MLRC Media Law Conference
Sept. 29-Oct. 1, 2021
Lansdowne Resort Hotel, Leesburg, VA

PLENARY 5 Oct. 1st 12:00 – 1:30pm

The Dominion and Smartmatic Defamation Cases.
With: Floyd Abrams, Cahill Gordon; Lee Levine; Tom Clare, Clare Locke; Professor Mary-Rose Papandrea, UNC Law School. Moderator: Dave Heller, MLRC.

In the Dominion and Smartmatic defamation cases over election disinformation, how will the defenses of republication, neutral reportage, fair report & actual malice apply?

Are statements about false election fraud claims fully protected by the First Amendment?

How much leeway should the media have to report false statements that are newsworthy?

Should the neutral report privilege apply to false statements about election fraud?

Are true statements about false allegations substantially true?

Does the fair report privilege cover statements about election fraud?

If defendants believe the allegations of fraud, can actual malice be proven?

What are the consequences if plaintiffs win these suits?

**N.Y. SUP.: SMARTMATIC V. FOX NEWS, LOU DOBBS, MARIA BARTIROMO, JEANINE PIRRO, RUDOLPH GIULIANI, and SIDNEY POWELL**

 **(filed February 2021)**

Complaint

<https://www.courthousenews.com/wp-content/uploads/2021/02/SMARTMATIC-fox.pdf>

Defendants’ Disinformation Campaign Against Smartmatic

* Mr. Giuliani and Ms. Powell created a story about Smartmatic.
* Fox Defendants joined the conspiracy to defame and disparage Smartmatic and its election technology and software.
* Defendants engaged in a widespread disinformation campaign against Smartmatic and its election technology and software.
* Defendants used multiple platforms to spread disinformation
* Defendants presented their statements about Smartmatic as facts, not opinions

 **Defendants’ False Statements** and Implications About Smartmatic

* Defendants falsely stated and implied that Smartmatic’s election technology and software were widely used in the 2020 U.S. election
* Defendants falsely stated and implied that Dominion used Smartmatic’s election technology and software during the 2020 U.S. election
* Defendants falsely stated and implied that Smartmatic fixed, rigged, and stole the 2020 U.S. election for Joe Biden and Kamala Harris
* Defendants falsely stated and implied that Smartmatic sent votes to foreign countries for tabulation during the 2020 U.S. election
* Defendants falsely stated and implied that Smartmatic’s election technology and software were compromised or hacked during the 2020 U.S. election
* Defendants falsely stated and implied that Smartmatic was previously banned from providing election technology and software in the United States
* Defendants falsely stated and implied that Smartmatic is a Venezuelan company founded and funded by corrupt dictators from socialist and communist countries
* Defendants falsely stated and implied that Smartmatic’s election technology and software were designed to fix, rig, and steal elections

 **Defendants Acted with Actual Malice** and Ill Will Towards Smartmatic

* Defendants had no support for their statements and implications regarding
* Smartmatic.
* Defendants did not have sources to prove something that did not happen
* Fox Defendants eventually admitted they had no basis for their statements and implications about Smartmatic.
* Fox News knew its anchors and guests lacked a basis for their statements and implications about Smartmatic.
* Defendants purposefully avoided learning the truth about Smartmatic and its election technology and software.
* Defendants had access to information showing their statements and implications about Smartmatic and its technology and software were factually inaccurate
* Defendants knew Smartmatic’s election technology and software were not widely used in the 2020 U.S. election (and were not used in contested states).
* Defendants knew Smartmatic’s election technology and software were not used to fix, rig, or steal the 2020 U.S. election

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**Fox News Motion to Dismiss**

<https://s3.documentcloud.org/documents/20475431/fox-news-moves-to-dismiss-smartmatic-complaint.pdf>

“If the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement.” While that doctrine is sometimes described as a common-law one, it is firmly rooted in the First Amendment, as “[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.” (Edwards v. Natl. Audubon Socy., Inc., 556 F2d 113, 120 [2d Cir 1977].) Indeed, while the neutral-report doctrine is often described as a “privilege,” properly speaking, such coverage is not merely “privileged”; it is not defamatory at all, because a reasonable viewer would understand that the publication is not presenting information that it has determined to be true, but rather is fulfilling its journalistic duty to “present[] newsworthy allegations made by others.” (Croce v. N.Y. Times Co., 930 F3d 787, 793 [6th Cir 2019].)

Core First Amendment protections are also reflected in doctrines that protect the press when reporting on judicial proceedings, as “the public has the right to be informed as to what occurs in its courts,” (Estes v. Texas, 381 US 532, 541-542 [1965]), regardless of the accuracy of the underlying allegations, (Freeze Right Refrig. & Air Conditioning Servs., Inc. v. City of New York, 101 AD2d 175, 181-182 [1st Dept 1984]). The fair-report doctrine is “broad.” (Cholowsky v. Civiletti, 69 AD3d 110, 114 [2d Dept 2009]; Larreal v. Telemundo of Fla., 2020 WL 5750099, \*8 [SD Fla Sept. 25, 2020, No. 19-22613].) It does not confine the press to reporting the precise contents of legal documents; it covers reports on attorney remarks too. (Larreal, 2020 WL 5750099, \*7; Lacher v. Engel, 33 AD3d 10, 17 [1st Dept 2006]; Jamason v. Palm Beach Newspapers, Inc., 450 So 2d 1130, 1132 [Fla Dist Ct App 1984].) And a report need not be “technically precise,” (Rasmussen v. Collier County Publ. Co., 946 So 2d 567, 570 [Fla Dist Ct App 2006]); the press is free to use “colorful language” or coverage phrased to grab attention, (Folta v. N.Y. Times Co., 2019 WL 1486776, \*4 [ND Fla Feb. 27, 2019, No. 1:17cv246]; see Holy Spirit Assn. for the Unification of World Christianity v. N.Y. Times Co., 49 NY2d 63, 68 [1979] (“language used” should “not be dissected and analyzed with a lexicographer’s precision”))

Those core First Amendment principles present an insurmountable obstacle to Smartmatic’s claims. The statements challenged here—the overwhelming majority of which were made by guests appearing on Fox shows—all concerned a matter of profound public importance: the legitimacy of the 2020 election. In the election’s aftermath, the President and his allies repeatedly claimed the election had been affected by fraud. Regardless of their accuracy, those claims “directly implicate[d] matters of public concern,” (Page v. Oath Inc., 2018 WL 1474620, \*2 [SD NY Mar. 26, 2018, No. 17 Civ. 6990])—as evidenced by the fact that virtually every news outlet in the nation (if not the world) consistently covered them. Those claims took on even greater importance—and the press acquired even greater First Amendment protection in covering them— once the President promised to (and, indeed, did) challenge the election results in court. Simply put, the public has an undeniable right to know, and the press has an undeniable right to cover, both the fact that the sitting President has refused to accept the outcome of a presidential election, and the grounds on which the President and his allies are planning to challenge that election, regardless of the strength of those claims.

To fulfill its commitment to keeping viewers informed of what the President was alleging, Fox went straight to the source, inviting the President’s own lawyers and surrogates on air to explain their allegations to viewers themselves. To be sure, those allegations faced skepticism in many quarters. But that made the allegations—and questions about whether they would or could be substantiated—no less newsworthy. Smartmatic concedes that Fox itself provided skeptical reporting and reported courtroom failures and other developments that undermined the allegations’ credibility as this fast-breaking story continued to unfold. (NYSCEF.Doc.No.1, Compl. ¶¶234, 237, 240, 244, 249, 251.) But the public had a right to know, and Fox had a right to cover, that the President and his allies were accusing Smartmatic (and others) of manipulating the election results, regardless of the ultimate truth or accuracy of those allegations. Indeed, to many, the fact that the President and his surrogates were making those allegations was every bit as newsworthy (if not more so) if they could not substantiate them. The First Amendment protects the freedom of the press when it is covering public officials and other newsmakers whether they are lying or telling the truth about such matters. And giving them a forum to make even groundless claims is part and parcel of the “uninhibited, robust, and wide-open” debate on matters of public concern that ultimately unearths the truth. (N.Y. Times, 376 US at 270.)

Smartmatic’s claims against Fox thus fail at the threshold, for Smartmatic fails to identify any statements that could form the basis of a defamation claim against Fox. Smartmatic does not (and cannot) allege that Fox was running exposés in which it purported to have independently uncovered election manipulation or fraud by Smartmatic. Virtually all the challenged statements occurred during interviews in which Fox hosts were providing a forum for the President’s advocates to inform the public of the allegations they intended to press. The hosts did not introduce Giuliani and Powell by announcing that Fox had discovered election fraud and was bringing on independent experts to explain its discoveries. They made crystal clear they invited Giuliani and Powell onto their shows because they were the best source of information about the content of their own unquestionably newsworthy allegations of voting fraud and the evidence they had to substantiate those allegations. And the questions Fox hosts posed elicited their claimed evidence. A reasonable viewer would readily have understood that the information Fox was imparting was the fact that the President, Giuliani, and Powell were making certain allegations—not that those allegations were necessarily true. The bulk of Smartmatic’s allegations thus fail for the simple reason that Fox said nothing defamatory.

To be sure, not every statement Smartmatic challenges was made by Giuliani or Powell. But to the extent hosts themselves described the allegations that the President, Giuliani, and Powell were making, they did so in the context of asking guests to comment on them. That of course cannot be grounds for defamation, as the press could not cover a public controversy if it could be sued just for repeating a third party’s potentially defamatory allegations when asking others to react to, comment on, or prove or disprove them. If that were enough to allow a defamation claim to go forward, Smartmatic could sue virtually every news outlet in the nation. Beyond that, Smartmatic simply points to instances in which hosts offered the kind of colorful commentary they can be expected to provide when conducting an interview. Some (but by no means all) of those comments were encouraging, while others expressed considerable doubt that the allegations could be proven. But the line between protected speech and actionable defamation cannot turn on whether a commentator expresses doubt versus hope that a guest can prove her newsworthy claims. In fact, sometimes the most damning statements are elicited by an interviewer who is egging the interviewee on, either sincerely or as part of her craft. Either way, whether the interviewer is guileful or gullible, she is protected by the First Amendment; the liability for defamation (if any) lies with the interviewee. Nor does it make any difference that Giuliani, Powell, and other guests and hosts were discussing their allegations generally or colloquially and not necessarily quoting their pleadings verbatim. Newsworthy statements or allegations need not be conveyed with technical precision. So long as the “ordinary reader” (or, here, viewer) would conclude the press was covering the content (or anticipated content) of newsworthy allegations or official proceedings, (Fridman v. BuzzFeed, Inc., 172 AD3d 441, 442 [1st Dept 2019]), the press has “no duty to further investigate or verify” those allegations, (Folta, 2019 WL 1486776, \*4; see Gillings v. N.Y. Post, 166 AD3d 584, 586 [2d Dept 2018] (fair-report doctrine applies unless context makes it impossible for ordinary viewer to determine whether defendant was reporting on official proceeding)). What Fox provided viewers was a “substantially correct account” of the claims the President and his surrogates were pressing. (Larreal, 2020 WL 5750099, \*8.)13 Just as the press could not be held liable for interviewing a prosecutor about a newsworthy prosecution if the charges ultimately turn out to be bogus, nor can it be held liable for interviewing the lawyers challenging a presidential election at the President’s behest, even if those allegations ultimately prove unsubstantiated.

In short, Fox’s coverage of this “newsworthy controversy,” (Lasky v. Am. Broadcasting

Companies, Inc., 631 F Supp 962, 971 [SD NY 1986]), was exactly the kind of expression that the press must be “afforded the freedom to” provide without fear of liability, (Edwards, 556 F2d at 120). “If the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement.” (DeLuca, 109 Misc 2d at 345-346.) That holds equally true whether the press is reporting newsworthy statements or allegations made elsewhere, or allowing a newsmaker to explain the allegations herself. Either way, the press is not required to “suppress newsworthy statements merely because it has serious

doubts regarding their truth.” (Edwards, 556 F2d at 120.) After all, when “[w]hat is newsworthy about ... accusations is that they were made,” (id.), that is every bit as newsworthy (if not sometimes more so) if they prove unsubstantiated. Smartmatic’s effort to impose billions of dollars of liability on Fox for keeping the public informed of the unquestionably newsworthy claims of unquestionably newsworthy figures strikes at the very heart of—and is squarely foreclosed by – the First Amendment

Brief in Opposition
<https://www.medialaw.org/images/medialawdaily/04.13.21smartmatic.pdf>

**DEL. SUPER.: US DOMINION INC. v. FOX NEWS (filed March 2021)**
Complaint

<https://hamiltonps.app.box.com/s/j42odhy4cxf1xjuw324o72zmx7v7oyn8/file/791755207455>

**D.D.C.: US DOMINION, INC. v. GIULIANI, 1:21-cv-00213 (filed January 2021)**

Complaint

<https://storage.courtlistener.com/recap/gov.uscourts.dcd.226485/gov.uscourts.dcd.226485.1.0_5.pdf>

List of Exhibits

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DOCKET

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Giuliani Motion to Dismiss

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Brief in Opposition
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OPINION DENYING MOTION TO DISMISS (Giuliani, Powell & MyPillow)

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Giuliani Answer

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Related Cases:

US DOMINION INC., v. POWELL

Complaint

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                US DOMINION INC., v. MYPILLOW

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**D.D.C./ DEL. SUPER.:  DOMINION v. OAN; DOMINION v. NEWSMAX; DOMINION v. BYRNE (filed August 2021)**

Complaints & Exhibits

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