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New Hampshire Suit Challenges Mortgage Blogger's Use of Anonymous Sources

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The New Hampshire Supreme Court heard oral arguments Wednesday in a lawsuit that calls into question the legal protections available to independent Web sites that cover news.

The case involves mortgage lender Implode-Explode, a Las Vegas-based site launched in 2007 that publishes stories about the meltdown of the mortgage industry. The court did not make a final decision on the case Wednesday, but one of its options could be to send the case back to the lower court for further review and litigation on specific points of law.

The dispute began in November 2008 when The Mortgage Specialists Inc (MSI) won a temporary injunction requesting that a confidential document, "2007 Loan Chart," be removed from Implode-Explode's site, [ml-implode.com](#). MSI also requested the identity of the source and of a commenter, "Brianbattersby," who they allege made defamatory comments about the company and its president.

Implode-Explode removed both the loan chart and the comments, but refused to either provide the identity of their anonymous sources or promise to refrain from posting the document again in the future. Unsatisfied, MSI pressed for a permanent injunction against the site and won the case in a New Hampshire Superior Court in March 2008.

Aside from those facts, nearly everything else about the case remains in dispute. During their extended 15-minute presentations before the court, the two lawyers called on precedents from [Dendrite International v. Does](#) and [The New York Times v. United States](#) to argue their claims of anonymous sources and confidential

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documents, and what constitutes a real journalist.

Mortgage blogger an "online journalist"?

Jeremy Eggleton of the Orr & Reno, the firm representing Implode Explode, spoke first, calling the injunction a case of prior restraint and a violation of the "basic principals of the First Amendment," that, "tramples on the rights" of his client to speak freely.

Alexander Walker of Devine Millimet & Branch, speaking for MSI, dismissed the First Amendment concerns as a red herring in the case. "This is not the Pentagon Papers," he said. "They [Implode Explode] are not journalists."

While Implode's corporate motto is "All the news that's fit to aggregate," both parties agreed ml-implode.com was not *The New York Times*. The question was, where could or should the court draw that line, and to what legal effect?

Associate Justice Carol Ann Conboy pressed the point with Eggleton, questioning, "Can anyone who posts a blog be considered a reporter," for the purposes of claiming protection of anonymous sources?

Eggleton answered yes, within limits: "The test is whether the person has an intention to gather, analyze and disseminate." And that, "is a reasonable standard and Implode Explode meets that standard."

Aaron Krowne's name was not raised during the oral arguments, but according to a July 2008 story in *The New York Times*, his company's efforts have not gone unnoticed among those in the lending industry:

"With its tongue-in-cheek tone and running lists of the 'imploded' and the merely 'ailing,' the Implode-O-Meter has become a sort of Gawker of the subprime world. At a recent Mortgage Bankers Association conference, a speaker addressed what has become a hot topic among lenders: how to keep your company's name off the site.

" 'No one wants to be number 266,' said Jim Reichbach, a vice chairman and leader of Deloitte's banking and securities team. 'This is a death toll that is equivalent to the casualty ticker of the

Vietnam War."

MSI caught Implode's attention following a 2008 investigation by banking regulators in Massachusetts and New Hampshire for alleged violations of banking law.

Some of these alleged violations include:

- "Represented photocopied customer signatures as originals;
- Removed a signature from a loan file;
- Altered broker fee agreements after the consumer signed the documents;
- Failed to keep customer application files under lock as required by the Gramm–Leach–Bliley Act;
- Fraudulently issued a 40–year adjustable rate mortgage with a balloon payment at the end of 30 years to a customer who had applied for a fixed–rate, 30–year mortgage."

As a result of the investigations, MSI was fined \$725,000 and required to open its old loan files for further review by state regulators.

MSI claims paperwork provided to the New Hampshire Banking Department during this investigation was improperly leaked to Implode.

According to [Sam Bayard](#), a fellow at the Berkman Center for Internet & Society at Harvard, and assistant director of the Citizen Media Law Project, the potential impact of any decision is the shortage of case law dealing with these issues in an online context. "As we are moving online and our journalism is going online," he said, "this could have a big impact."

If the court rules against Implode, Bayard also cited the precedent–setting *New York Times v. United States* as an example of the concern. In today's environment, *The New York Times* would post the Pentagon Papers Web–first. If MSI's claim is upheld, he said, it would be as if "two days later the government came along and filed an injunction" and then the papers were removed as if they never existed.