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LDRC LIBELLETTER

Libel
Defense
Resource
Center

April 1997

Dow Jones Moves for JNOV in \$223 Million Libel Case

On April 17, 1997 U.S. District Judge Ewing Werlein heard oral argument on the post-trial motions of Dow Jones & Co., seeking to set aside the \$223 million libel award won by the Money Management Analytical Research Group, Inc., ("MMAR"), a now-defunct securities firm.

(Continued on page 3)

Federal Court Applies Fair Report Privilege to Statements of Israeli Government

In what appears to be the first case in federal court to apply the fair report privilege to the official actions of a foreign government, Judge William H. Yohn, Jr. dismissed a libel suit against the *Boston Globe* and *Jerusalem Post*. *Friedman v. Israel Labour Party et al.*, No. 96-CV-4702, 1997 WL 137181 (E.D. Pa. March 25, 1997).

(Continued on page 9)

U.S. Supreme Court Refuses to Review \$1.058 Million Jury Verdict Against ABC

The United States Supreme Court has denied ABC's petition for review of a \$1.058 million jury verdict in favor of Lundell Manufacturing Co., an Iowa manufacturer of garbage recycling machines. The suit was over a 1992 ABC *World News Tonight* with Peter Jennings report on the controversy surrounding the purchase of one of Lundell's machines by Berrien County, Ga. *Lundell Mfg. Co. v. ABC Inc.*, 98 F.3d 351, 25 Media L. Rep. 1001 (8th Cir. 1996), cert. denied, 65 U.S.L.W. 3710 (No. 96-1342, 04/21/97). See LDRC LibelLetter,

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Communications Decency Act Preempts Negligence Action for Defamatory Postings on America Online

Holding that the Communications Decency Act, 47 U.S.C. § 223 et seq., preempted this state tort action, the United States District Court for the Eastern District of Virginia granted America Online's ("AOL") motion for judgment on the pleadings (Rule 12(c), Fed.R.Civ.P.) on a claim that the service provider was negligent for not removing material posted by a subscriber on a bulletin board which AOL knew or should have known was of a defamatory character. *Zeran v. America Online, Inc.*, No. 96-952-A (E.D.Va. 03/21/97).

(Continued on page 18)

SUPREME COURT UPHOLDS MUST CARRY ON PRO-COMPETITIVE AND PRO-SPEECH GROUNDS

By Nory Miller

The four year battle between the cable and broadcast industries over the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 has ended in a 5-4 decision upholding must carry. These provisions require cable operators to carry the signals of commercial and non-commercial broadcast stations in their areas on a certain percentage of their cable channels. The percentage varies with the size of the cable system. The choice of which broadcast stations to carry, where there are more stations than desig-

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SNEAK ATTACK? -- THE ECONOMIC ESPIONAGE ACT OF 1996

By Stu Pierson

This story is true: Last month, a well established and respected trade publisher that reports on marketing of a major product received a document produced by one of the major manufacturers describing its past analysis and former marketing and budget plans for a particular domestic market. Since it had regularly published information from manufacturers' documents for decades, the publisher issued a report on the memo among a number of other items, including a very favorable piece on the same manufacturer. Shortly after circulation of the report, the general counsel of the manufacturer called the publisher and gravely asserted that "he had violated the Economic Espionage Act." The company then demanded the identity of the publisher's source and return of the memo, in exchange for relieving the publisher from exposure under that statute. After catching its breath, the publisher found the statute, took counsel, and then gracefully declined to satisfy the manufacturer's demand. Predictably, considering the provisions of the statute, no action was then taken against the publisher.

What is the Economic Espionage Act? That misleading title was given to an amendment to the Federal Criminal Code that sailed through the last five months of the 104th Congress, virtually unnoticed. It was signed into law by President Clinton on October 4, 1996, and codified at 18 U.S.C. 1831-1839. Simply described, this new statute is a federal trade secrets act. While its name is taken from the first section, its provisions reach more broadly than theft of intellectual property by foreign powers. Its second section (18 U.S.C. 1832), which was the basis of the general counsel's effort to intimidate the trade publisher, makes stealing, copying and receipt of a trade secret with intent to harm the owner and benefit another, a crime punishable by imprisonment up to 10 years and a fine up to \$5 million. Borrowing from the anti-drug law, the fines and imprison-

ment also may be accompanied by forfeiture of any property used in or produced by a violation (18 U.S.C. 1834). While the mere prospect of such a destructive sanction would empower any threat, there are some significant safeguards built into the statute and one created externally.

The elements of a violation of the domestic trade secret provision, 18 U.S.C. 1832, are:

1. Knowingly
2. a. stealing, or
 - b. copying without authorization, or
 - c. receiving a trade secret with knowledge it has been stolen or converted, or
 - d. attempting or conspiring to do a, b or c.
3. with intent to convert
4. to the economic benefit of someone other than the owner,
5. a trade secret, defined in 18 U.S.C. 1839 as:
 - a. virtually any kind of information,
 - b. which the owner has taken reasonable measures to keep secret, and
 - c. which derives independent economic value from not being generally known and not readily ascertainable through proper means to the public;
6. where the trade secret is related to or included in a specific product in interstate or foreign commerce, and
7. where the offense was committed with intent or knowledge that the action will injure the owner of the trade secret.

In addition to the requirements for an offense appearing on the face of the statute, the Attorney General has required, at the request of the Senate, that, for the first five years, no prosecution will be authorized under the statute without the approval of the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the Criminal Division. Letter from Attor-

ney General Reno to Senator Hatch, October 1, 1996, Congressional Record, October 2, 1996, S 12214. There is no indication of any private right of action to enforce the statutory prohibitions.

The legislative history reveals, not merely unusually quick movement to enactment, but total silence about any intended or potential effect on news media or public commentary. The single congressional hearing, held in May 1996, heard only from business leaders, "security" consultants and the FBI. If there was a strategy to use the statute to influence media coverage of business, it was well hidden from the congressional record. As the structure and content of the statute make clear, the threat against the trade publisher last month was plainly specious, and abusive. The publisher had no intent to injure the manufacturer and no intent to convert the information to the economic benefit of a non-owner; it had no knowledge the information had been stolen or converted; and there was no trade secret, as the information was generally known or readily ascertainable. While the actual threat was virtually nil, it had a very chilling effect.

Should well informed media be seriously concerned about the Economic Espionage Act, since its proscriptive provisions have set such a high hurdle to establish an offense, there is no private right of action, prosecutions will be authorized only at the top of the Justice Department, and any charge must satisfy the standard of proof beyond a reasonable doubt? Well, yes, as there are some other troubling provisions in the law:

It empowers the Attorney General to initiate civil proceedings to obtain an injunction against any violation (18 U.S.C. 1836);

It authorizes federal courts "to enter such orders and take such other action as may be necessary and appropriate to preserve the confidentiality of trade secrets" (18 U.S.C. 1835); and

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THE ECONOMIC ESPIONAGE ACT OF 1996

(Continued from page 2)

It adds violation of the statute to the offenses for which a wiretap warrant for evidence may be obtained (amending 18 U.S.C. 2516(c)).

So, it is plainly within the authorization of the statute for the government to obtain an injunction, protective order, or wiretap *ex parte*, in a proceeding where there would be no countervailing argument that the facts cannot support such judicial action. If it were so motivated, the Justice Department could carry on an extensive, secret investigation without any requirement to satisfy fundamental constitutional requirements. The provision of such power hardly seems wise.

Although there may be a low probability the Attorney General would be so irresponsible as to seek a prior restraint or other action against the media under this statute, use of it by private business as a basis to threaten or seek to enjoin publication of information claimed to be a "trade secret" is now demonstrably more likely. One need only imagine the added force that citation of this statute would have had in *CBS Inc. v. Davis*, *Food Lion* and *Business Week* cases. Time will tell whether aggressive corporations will add the Economic Espionage Act to the regular arsenal of weapons they turn to in efforts to identify confidential sources and control public commentary.

Stu Pierson is with the firm Levine Pierson Sullivan & Koch, L.L.P. in Washington, D.C.

Dow Jones Moves for JNOV in \$223 Million Libel Case

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Five Sentences Found False and Defamatory

A seven member jury awarded the record verdict last month finding that five sentences in a October 1993 *Wall Street Journal* article, written by Laura Jereski, about the firm were false and defamatory. The article described MMAR as a retailer of investments in complicated mortgage-backed bonds which had allowed the firm to grow rapidly by trading in securities that Wall Street bond houses preferred to avoid. Based upon interviews with former employees and others and the public record the article alleged that MMAR was under investigation by federal and state regulators for its dealings with its largest client, the Louisiana State Employees' Retirement System ("LASERS"), and that MMAR's principals acted recklessly with their clients' money and led extravagant lifestyles as they entertained clients and themselves.

The firm went out of business less than a month later, two days after it was sued by LASERS. But the day before the statute of limitations lapsed the following year, it laid blame at the door of the *Journal* and filed suit for libel. Ultimately, MMAR alleged 19 statements in the article had libeled it, and sought damages at trial only for the loss of value of its business; it expressly did not seek compensation for damage to its reputation. Of those 19 statements, 10 were thrown out by the judge before trial in response to a Dow Jones motion for summary judgement; 8 on the basis of substantial truth as a matter of law, 1 as a statement of opinion, and 1 as not defamatory.

After a two-week trial, the jury was given eight alleged defamatory statements to consider. (One statement was not sent to the jury.) The jury found that five of the eight gave rise to liability.

Among the statements found defamatory by the jury was the report in the article that the National Association of Securities Dealers ("NASD") had filed a notice of pending action against MMAR based on a complaint by LASERS. Although the NASD had filed a complaint in October 1993 alleging fraud against MMAR, that complaint did not arise out transactions with LASERS, but instead with another client. An NASD sub-

committee had recommended that MMAR be sued over its dealings with LASERS, but that complaint was not filed until January 1994.

Further, the jury accepted MMAR's argument that a statement in the article which related that MMAR kept its own capital small, and therefore needed a client like LASERS with a large inventory to trade, was false because the article did not explain that MMAR said it had chosen not to hold inventory because it did not want to be biased in recommending securities to its clients.

In addition, the jury also agreed with MMAR's contention that it had been defamed by allegations that it hid losses by mispricing certain securities. MMAR had argued that because the securities it dealt in were so "exotic," there were few places where investors could go to have them valued. With even the New York bank that served as custodian of the bonds for the Louisiana pension fund relying on MMAR to value the bonds, MMAR testified that it had done the best job it could in valuing the securities.

Sources Hurt The *Journal* On The Stand

Sources also hurt the *Journal* on two occasions. First, the *Journal's* assertion that MMAR had run up \$2 million in limousine bills was damaged when former employee Raphael Grinburg, the source for the allegation, stated that the bill had not been MMAR's but another brokerage firm's, which was largely owned by MMAR's two principals.

The damage done to the *Journal* was exacerbated when a supervisor at a St. Petersburg, Fla., brokerage firm that served as a clearinghouse for MMAR's trades denied that he had told Jereski that MMAR's salesmen had exceeded the guidelines on commissions.

Jurors Say Award Intended As A Message

Following the verdict, jurors were quoted as saying that they intended the award to punish the paper for "betraying a trust." According to the *Houston Chronicle*, juror Mike Johnson said that the jury found all eight statements presented to them were false, but only five were found to be false and defamatory. Stating that the jurors found that the *Journal* "lied on purpose," Johnson noted that

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Dow Jones Moves for JNOV in \$223 Million Libel Case

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the award was intended to make a point. "It was designed to get attention — from Dow Jones and other media," he said.

Juror Judy Wahlberg, was quoted as saying that the jurors were mindful of the chilling effect that a large punitive award might have on the media's pursuit of important investigative stories. "I think investigative journalism is a definite plus. It's something we need in our society," Wahlberg stated.

Another juror stated that based upon the evidence presented at trial that put Dow Jones's worth at \$2 to \$3 billion, the jury calculated that awarding 10 percent of the conservative estimate of the company's value would serve as a warning, but would not financially devastate Dow Jones.

LASERS Suit Against MMAR And an NASD Proceeding

While MMAR contended that it was the *Journal* article that put it out of business, Dow Jones has argued that it was the lawsuit filed by LASERS that came two days before MMAR closed down that provided that real reason for the firm's failure. That lawsuit is still pending.

In November of 1995, NASD's regional disciplinary committee ordered that MMAR pay LASERS \$14.5 million in fines and reimbursement for defrauding the pension system by overcharging when it sold the system derivatives and underpaying when it bought them back.

Less than a year later, in October 1996, the NASD national business conduct committee reversed the order, ruling that it could not find that MMAR overcharged for the securities because neither the NASD nor the Securities and Exchange Commission had provided sufficient guidance regarding fees for what was, at the time, a relatively new type of security.

Dow Jones's JNOV Motion

In its brief on the motion for judgment as a matter of law, Dow Jones argued that the award should be set aside because the verdict was simply not sup-

ported by the evidence. Dow Jones contended that the statements which the jury found to be false and defamatory were in fact substantially true. In addition, Dow Jones argued that MMAR was a limited purpose public figure and did not establish actual malice with convincing clarity.

Dow Jones also pointed out that the evidence did not establish that MMAR suffered damage as a result of any of the statements the jury found to be false and defamatory. Instead, MMAR's counsel and witnesses repeatedly blamed "the article," and not any specific statements for its downfall. Thus, the motion contended that because the article contained many other defamatory statements about MMAR, including some that the judge had already found to be true as a matter of law, MMAR would be recovering damages based upon the publication of truthful speech if it recovered damages that were not tied to a specific statement. Dow Jones argued this was especially the case as MMAR made no claim for damage to its reputation, but sought only damages for the loss of value of its business.

In addition, Dow Jones, citing the sworn statements of MMAR's chief executive and a post-publication letter to the NASD by MMAR's general counsel, argued that the lawsuit filed against the firm by the LASERS two days before MMAR went out of business was the real reason for the firm's failure.

Further, Dow Jones argued that the punitive damage award of \$200 million was contrary to Texas law both because the plaintiff failed to satisfy Texas' doctrine of respondeat superior and because MMAR failed to prove fraud, gross negligence or malice. Under Texas law an award of punitive damages based on respondeat superior can only stand upon proof that: "(a) the corporation authorized the doing and manner of the act; (b) the employee was unfit and the corporation was reckless in hiring her; (c) the employee was a manager acting in the scope of employment; or (d) the corporation or a manager ratified the tortious act." *Motion for Judgment as a Matter*

of Law, p. 7. Given these requirements, Dow Jones argued that the employees who edited the article, and were not managers, believed the article to be true; that there was no proof that Dow Jones was reckless in hiring Jereski; and that MMAR failed to submit any proof that "Dow Jones or its managers authorized the publication of false statements knowing them to be false, while being aware that they were probably false, or while having reason to believe they were false." *Motion*, p. 8.

Dow Jones also contended that the punitive damage award violated Texas law by not being based upon a finding of fraud, gross negligence or malice. Citing Tex. Civ. Prac. & Rem. Code 41.001 (6), Dow Jones argued that MMAR failed to show that Jereski "intended to cause injury to the firm, that she believed any of the five statements would, with 'reasonable probability, result in human death, great bodily harm, or property damage,' or that she acted with 'conscious indifference' to any legally cognizable rights of the plaintiff." *Motion*, p. 11 (citations omitted).

Finally, Dow Jones contended that the award was in violation of the United States Constitution as there was no proof of actual malice concerning the alleged defamatory statements. The award was also said to violate the Constitution's fair notice requirement. Noting that in *BMW v. Gore*, 116 S.Ct. 1589 (1996), the United States Supreme Court articulated three "guideposts" to aid courts in determining the proper size of a punitive award: "(1) 'the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to 'the actual harm inflicted on the plaintiff; and (3) 'the civil or criminal penalties that could be imposed for comparable misconduct,'" Dow Jones argued that application of the guideposts, "alone and in combination, demonstrates that the \$200 million verdict is a patent violation of the Constitution." *Motion*, p. 18.

Dow Jones is being represented by DCS member firm George, Donaldson & Ford, L.L.P. of Austin, Texas.

Tortious Interference And Deceptive Trade Practice Claims Against CBS Dismissed Judge Rules That Defamation Rules Apply

Stating that "it is only fair, and indeed Minnesota law requires, that [the plaintiff]'s tortious interference claim be governed by the 'special rules' applicable to defamation cases," Judge Denny Chin, of the United States District Court for the Southern District of New York, has dismissed claims against CBS alleging tortious interference with prospective business advantage and violations of the Minnesota Uniform Deceptive Trade Practices Acts (the "MDTPA"). *Aequitron Medical, Inc. v. CBS, Inc.*, No. 93 Civ. 950 (S.D.N.Y. March 25, 1997).

In commending this decision to LDRC members, we note that in applying those libel rules, Judge Chin dealt with a set of alleged errors in the news report that are hardly unique to this broadcast. He found for CBS on each one.

A Faulty Simulation?

The claims, the only two remaining from a four count complaint which had originally also alleged defamation and trade libel, were brought by Aequitron Medical, Inc., a Minnesota manufacturer of infant heart rate and respiration monitors against CBS for a 1989 *CBS This Morning* news segment which reported that the monitors allegedly picked up extraneous electrical impulses and confused them with the infant's heartbeat, a potentially life-threatening defect.

In addition to describing the ongoing investigations, lawsuits and congressional hearings surrounding the infant monitors, the segment featured an interview with Dr. Joseph Dyro, an expert in biomedical engineering, and a laboratory test, performed by Dyro, of Aequitron's monitor. During the test, in which the monitor was attached to a plastic doll, the monitor failed to emit any signals warning that there was no heartbeat. Dyro explained on the air that the monitor was detecting very small electrical signals that caused it not to sound an alarm.

The monitor was, in fact, hooked up to the doll through an electrical device designed to simulate the electrical impulses of the human body, the effect of which was hotly disputed between

Dyro and Aequitron. Aequitron argued that the test that was set up by Dyro was flawed and that CBS deceived the audience by not revealing the presence of the electrical device which it asserted caused the monitor to malfunction.

In addition, Aequitron also alleged that CBS interfered with its business advantage by (1) improperly using the deposition testimony of Robert Samec, Aequitron's vice-president; (2) falsely stating that Aequitron had refused CBS's request for an interview; (3) falsely stating that experts had criticized the monitors; and (4) falsely stating that the monitors were designed to end the problem of sudden infant death syndrome ("SIDS").

In January 1993, the United States District Court for the District of Minnesota granted CBS's motion to dismiss Aequitron's trade libel and defamation claims for lack of personal jurisdiction, and transferred the remaining claims to the Southern District of New York. CBS then moved to dismiss the claims on statute of limitations grounds but Judge Sotomayer, who was originally assigned to the case, denied the motion, holding that Minnesota's two year statute of limitations should apply to the remaining claims.

Following reassignment to Judge Chin in November 1994, CBS moved for summary judgment while Aequitron moved to compel discovery. CBS's motion was denied with leave to renew after the completion of discovery. With discovery completed, CBS renewed its motion for summary judgment.

Tortious Interference: Defamation Rules Apply

Judge Chin first noted that the "tortious interference with prospective business relationship claim raise[d] two issues: First, whether, as CBS contend[ed], the 'special rules of defamation' apply to a tortious interference claim that is based on allegedly defamatory conduct; and, second, if so, whether Aequitron has presented sufficient evidence to raise a genuine issue fact as to whether CBS acted with actual malice" *Slip op.*

at 8.

Citing the Supreme Court of Minnesota in *Wild v. Rarig*, 234 N.W.2d 775 (Minn. 1975), *cert. denied*, 424 U.S. 902 (1976), Judge Chin held that in cases alleging tortious interference stemming out of defamation, the matter should be governed by the special rules that have developed in defamation law:

In the present case, Aequitron's tortious interference claim is based upon the same allegedly defamatory conduct that formed the basis for its defamation claim. Although the defamation claim has been dismissed, Aequitron nonetheless has been permitted to pursue its claim on the merits -- based on the allegedly defamatory conduct -- through the tortious interference claim. In these circumstances, it is only fair, and indeed Minnesota law requires, that Aequitron's tortious interference claim be governed by the "special rules" applicable to defamation cases.

Slip op. at 12, citing, *Wild*, 234, N.W.2d at 793.

Consequently, because Minnesota law also requires that the actual malice standard apply when a corporate plaintiff sues a media defendant over a matter of legitimate public interest, Judge Chin held that Aequitron would need to prove by clear and convincing evidence that CBS acted with actual malice. *Slip op.* at 13.

Electrical Device Did Not Create False Statement of Fact

Turning to each of the claims, Judge Chin first dismissed Aequitron's argument that the use of the electrical device in Dr. Dyro's tests constituted a false statement of fact. While noting that the use of the device was not explained to the television viewer, Judge Chin found that its use did not invalidate the test but, rather was an attempt to test the respiration and heart beat alarms by simulating

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Claims Against CBS Dismissed

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the electrical load of a non-breathing baby.

In the alternative, Judge Chin ruled that even assuming that the tests were distorted and the statements broadcast regarding the monitor were, as a result, false, Aequitron failed to present evidence from which a reasonable jury could conclude that CBS knew or should have known that the test was distorted.

Additional Statements Substantially True or Not Made With Actual Malice

In addition, Judge Chin dismissed Aequitron's allegations that CBS presented two excerpts from the deposition testimony of Aequitron vice-president, Robert Samec, in a defamatory manner by taking them out of context. Stating that the "common law of libel 'overlooks minor inaccuracies and concentrates upon substantial truth,'" Judge Chin found that "the editing of the deposition testimony did not create a 'false' statement." *Slip op.* at 28-29, quoting, *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2433 (1991). Moreover, the court continued, even assuming falsity, the statements were not made with actual malice.

Aequitron also alleged that CBS defamed the company by stating that it had refused an interview when, in fact, Aequitron was willing to do a live interview but refused to be interviewed on tape. Rejecting Aequitron's argument, Judge Chin wrote that "[w]hile it would have been more precise for CBS to have stated that, although Aequitron declined to be interviewed on tape, it did offer to be interviewed live, it is 'substantially true' that Aequitron 'refused [CBS's] request for an interview,' as CBS's request was for an interview not 'live,' but on tape." *Slip op.* at 30.

The court also rejected Aequitron's claim that CBS's statement that "most of the experts" it talked to said the monitor "can give someone a

false sense of security," was false. While Judge Chin noted that only one of the three experts — Dr. Dyro — had made the comment, and that the reference to "most" was "an exaggeration," he nevertheless ruled that the statement was not made with actual malice. *Slip op.* at 31.

Finally, Aequitron claimed that CBS was misleading its viewers by stating that the monitors "were designed to end the problem of Sudden Infant Death Syndrome." Aequitron argued that its monitors were only intended to end the likelihood of SIDS for those babies eligible to receive the monitor by prescription and not the substantial number of healthy babies who die from SIDS each year. Again the court rejected the plaintiff's argument holding that the statement was either substantially true or not made with actual malice. *Slip op.* at 32.

MDTPA Claim Dismissed

Turning to the claim brought under the Minnesota Deceptive Trade Practices Act, Judge Chin stated that the statute "applies to broadcasters, however, 'only if [they] have either knowledge of the deceptive trade practice or a financial interest in the goods or services being deceptively offered for sale.'" *Slip op.* at 33, quoting, Minn. Stat. §325D.46 subd. 1a. Noting that Aequitron did not allege that CBS had a financial interest in the goods, Judge Chin pointed to his conclusions on the lack of actual malice in order to conclude that "Aequitron has failed to demonstrate the existence of a genuine issue of material fact as to whether CBS knew of any 'deceptive trade practice.'" *Slip op.* at 34.

Whether Aequitron will appeal the decision is uncertain as the company was acquired by California-based Nellcor Puritan Bennett for \$61 million earlier this year.

CBS, Inc. was represented by Susanna Lowy of CBS in New York and John Borger of Faegre & Benson in Minneapolis, MN.

North Dakota Passes Agricultural Disparagement Act

On March 27, 1997 North Dakota Governor Edward T. Schafer signed into law H.B. 1176, providing for civil liability for defamation of agricultural producers or products. North Dakota becomes the twelfth state to enact an agricultural disparagement law, also known as "veggie libel laws" or "banana bills." The statute covers not only "any plant or animal, or the product of a plant or animal, grown, raised, distributed or sold for a commercial purpose," but also "any agricultural practices used in the production of such products."

In addition to providing for liability for any person who "willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding an agricultural producer or an agricultural product," the law also permits courts to grant injunctive relief and allows plaintiffs to recover "up to three times the actual damages proven" when the defendant has disseminated the defamatory statement "maliciously."

The law also places no limits on the potential size of a plaintiff class stating that "if a false and defamatory statement is disseminated referring to an entire group or class of agricultural producers or products, a cause of action arises in favor of each producer of the group or the class and any association representing an agricultural producer, regardless of the size of the group or class."

Last month LDRC reported that four states have been considering the adoption of agricultural disparagement laws; Maryland, Massachusetts, Nebraska and Wyoming. It now appears that the efforts in at least three of the states have stalled.

In Maryland, after passing through the Senate, 33-7, on its third reading, Senate Bill 34 was given an unfavorable report by the House Judiciary Committee on April 7, 1997.

In Nebraska, L.B. 175, introduced on January 10, was indefinitely postponed on February 4, 1997.

In Wyoming, H.B. 127, introduced on January 14, was indefinitely postponed on March 1, 1997 after being sent to the House Committee on Agriculture, Public Lands and Water Resources.

In Massachusetts, S.B. 937 is currently before the Committee for the Judiciary with a hearing scheduled for June 11, 1997.

Texas Court of Appeals Bars Recovery For Report on Investigation into Allegations of Teacher Misconduct

Stating that "First Amendment considerations aside, common sense does not dictate any conclusion other than the one we reach today," the Fourteenth Court of Appeals for the State of Texas has held that the media cannot be held liable for accurately reporting allegations which are the subject of official investigation. *Felder v. KTRK Television*, No. 14-96-00319-CV (Tex. Ct. App. April 10, 1997).

The decision reversed a trial court denial of summary judgment in a suit brought by Houston teacher, Bettye Felder, against the Houston television station for a January 1994 report which disclosed that Felder had been reassigned from her middle school teaching position pending an investigation into allegations that she had physically threatened and verbally abused some of her students.

The Investigation into Teacher Conduct

The investigation came as the result of parental complaints about the way Felder was treating their children. One parent alleged that Felder had threatened to shoot her son, while another parent complained that Felder had threatened to "body-slam" her daughter and had choked her son. The final incident leading up to the investigation was the allegation that Felder had threatened a disruptive student with a pair of scissors when she asked him to leave the room. After this last incident Felder was reassigned and never returned to the school.

On the morning of January 6, 1994 KTRK reporter Minerva Perez learned of the allegations against Felder and began to prepare a report on the investigation which was subsequently broadcast that night. The report included taped segments

with two of the parents of students who were allegedly threatened by Felder, as well as an interview with Houston Independent School District ("HISD") spokesman Jaime De La Isla during which he stated that the administration intended to reassign Felder pending the outcome of the investigation. Perez was prevented from obtaining a phone number for Felder by school officials following HISD policy not to give out information on personnel.

"[W]e are convinced that when, as in this case, the report is merely that allegations were made and they were under investigation, McIlvain only requires proof that allegations were in fact made and under investigation in order to prove substantial truth."

The next day, however, KTRK broadcast a follow-up report which included an interview with the President of the Houston Federation of Teachers, Gayle Fallon, who stated her belief that it was Felder who was being threatened by her students and not the other way around.

In March 1994, HISD issued a report on the alleged incidents, documenting that Felder had an inordinate amount of discipline problems with her students, but the report only confirmed the incident in which Felder threatened to body-slam a student, which was not specifically mentioned in KTRK report.

Denial of Summary Judgment Appealed

Felder filed suit against KTRK in October 1994, asserting causes of action for libel and slander, false light invasion of privacy,

negligence and intentional infliction of emotional distress. In March of the following year, Felder's tutoring service, the Houston Resource Learning Center, intervened alleging claims of business disparagement, injurious falsehood, and tortious interference with a business relationship based on the broadcast.

Following a February 1996 denial of summary judgment, KTRK utilized Texas' interlocutory appeal statute and brought the case before

the Fourteenth Court of Appeals. Although KTRK cited fourteen points of error in the trial court's denial of summary judgment, the appellate court based its decision reversing the trial court on only one — substantial truth.

The appellate court rejected Felder's argument that *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990), a Texas Supreme Court decision which granted summary judgment against a claim that was based upon a report of an investigation, required "not only the fact of an investigation be true, but also that the allegations under investigation be proven true." Rather, the court stated that while the Supreme Court in *McIlvain* did compare some of the investigation's findings with the alleged defamatory broadcast, it was not necessary for the defendant to be able to prove the allegations underlying the investigation were also true.

In the words of the court:

"[W]e are convinced that when, as in this case, the report is merely that allegations were made and they were under investigation, McIlvain only requires proof that allegations were in fact made and under investigation in order

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Texas Court of Appeals Bars Recovery In Suit

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to prove substantial truth. Otherwise, the media would be subject to potential liability every time it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation. Furthermore, when would an allegation be proven true or untrue for purposes of defamation? After an investigation? After a court trial? After an appeal? Undoubtedly, the volume of litigation and concomitant chilling effect on the media under such circumstances would be incalculable. First Amendment considerations aside, common sense does not dictate any conclusion other than the one we reach today.

Slip op. at 11.

The court then held that "the truth of the facts asserted in [the broadcast was] conclusively established by uncontroverted summary judgment proof." *Slip op.* at 12.

Turning to the other claims brought by Felder and her tutoring service, the appellate court agreed with KTRK, holding that they were "indistinguishable from Felder's defamation claim and must therefore fail." *Slip op.* at 14.

KTRK was represented by N. David Bleisch of DCS member firm Jackson & Waker in Houston, TX.

AMERICA'S MOST WANTED Report and Reenactment Upheld On Summary Judgment

Fair Report and Substantial Truth Among The Arguments

by Donald L. Zachary

A Tennessee judge has granted summary judgment for Fox Television in a suit arising out of the broadcast of a story focusing on the plaintiff's flight from justice on Fox's *America's Most Wanted*. The judge adopted defendant's arguments that its broadcasts were, among other things, privileged as reports of public record and official actions and proceedings. The complaint was filed against Fox Broadcasting Company in April 1994 alleging libel and various violations of the U.S. Constitution. The plaintiff, Mohamed Ali, was a physician in Johnson City, Tennessee who, at the time he instituted the suit, was under indictment for rape and attempted bribery of a patient and attempted bribery of the patient's husband. *Ali v. Moore, et al*, No. 15924 (Washington Cty., Tenn. 8/22/96).

The basis of Ali's libel action were two broadcasts of Fox's show *America's Most Wanted*. The programs were aired after Ali was indicted but before he was convicted. In fact, at the time Fox first aired a report concerning Ali, he had fled to Egypt to avoid prosecution. As a result of Fox's broadcast, Ali was located and brought back to Tennessee for trial.

Fox did a second episode of *America's Most Wanted* in which it detailed the charges against Ali, his flight to Egypt and his return. At the time of the second broadcast, Ali had not yet been tried for the rape and bribery. In his complaint, Ali said that the actor portraying him was shown committing these acts, thus ef-

fectively depicting Ali as guilty.

At issue in the case was whether Fox was privileged to broadcast the information and whether the defense of truth applied where the defendant's information was subsequently proved to be accurate as demonstrated by a criminal conviction on the charges.

In its motion for summary judgment Fox argued that the broadcasts were privileged communications in that they publicized matters of public interest, matters of public record and official actions and proceedings. Fox also asserted that the broadcasts were aired in the discharge of a public duty, bringing a fugitive accused rapist to justice. In addition, Fox raised the defense of truth because the alleged false statements concerned crimes with which Ali had since been convicted, thus affirming that the statements were true beyond a reasonable doubt. Finally, Fox asserted that Ali was a limited purpose public figure and that the absence of actual malice by Fox precluded a finding of libel against Fox.

The law court before whom Fox filed its motion for summary judgment agreed with Fox, holding that Fox had not libeled Ali and dismissed the complaint. The judge did not write an opinion, but rather simply cited the grounds stated in the memorandum as the basis for its ruling.

Fox was represented by Donald L. Zachary, Joseph E. Welborn, II and Sue E. McClure of DCS member firm Bass, Berry and Sims of Nashville, Tennessee.

Federal Court Applies Fair Report Privilege

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The suit was based on coverage of a press release issued by a spokesperson for the Israeli Interior Minister on December 20, 1995, shortly after the assassination of Israeli Prime Minister Yitzhak Rabin. Acting in conjunction with the Minister of Justice and the Minister of Public Security, Interior Minister Chaim Ramon announced that seven individuals, among them the plaintiff Howard Friedman, would be denied entry into Israel. *Id.* at 3.

The official statement went on to indicate that the decision was based on the awareness that the persons named "either have a criminal background which might endanger public peace or are liable to endanger state security." Additionally the press release stated that four of the named individuals, including the plaintiff, "are associated with planning illegal activities in Israel." *Id.*

On December 21, 1995, the *Boston Globe* published an article entitled *Israel, In Crackdown, Bars Entry to 7 US Jews as Security Risks*, and on December 30, 1995, the International Edition of the *Jerusalem Post* published an article entitled *7 US Extremists Denied Entry*. Both articles reiterated Mr. Ramon's allegations that the barred individuals had a criminal past and were considered security risks and that four of them, including plaintiff, had planned illegal activities in Israel. *Id.* at 5.

After the announcement, the plaintiff granted an interview in which he declared "I'm very, very proud to be banned . . . I agree with their decision to ban me . . . I would be nothing but trouble to them . . ." He also indicated that he was "very, very, happy to hear that Rabin was assassinated and even happier to learn an Israeli Jew did it." *Id.* (quoting *Jewish Exponent*, Dec. 29, 1995).

Friedman's agreement with the government's action and pride at having been banned did not prevent him from bringing a defamation claim against the

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Tennessee Court of Appeals Affirms Decision Holding School Teacher to be a Public Official

Holding a public school teacher to be a public official, the Tennessee Court of Appeals has affirmed a trial court dismissal of a libel claim filed against the Times Printing Company for an article which allegedly implied that the plaintiff had a criminal record. *Campbell v. Times Printing Co.*, C.A. No. 03A01-9611-CV-00364 (Tenn. Ct. App. 03/20/97).

Noting that the issue had not yet been addressed in Tennessee and that a nationwide split of authority existed, the Tennessee Court of Appeals extended the state's expansive view of public officials to include public school teachers. In its decision the appellate court cited earlier Tennessee decisions which held the public official category to include a county purchasing agent, a junior social workers, a county environmentalist for the State Department of Health, a corrections officer, and a high school principal.

Quoting from one of these earlier decisions, the court wrote, "[a]ny position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family, is a public office within the meaning of the constitutional privilege." *Slip op.* at 6, quoting *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978).

The court continued to note that in *Junior-Spence v. Keenan*, 1990 WL 17241 (Tenn. Ct. App., 02/28/90), the reasoning

of Verran was applied to a high school principal. In that case the court wrote, "[a]lthough there are no Tennessee cases involving principals or teachers, the reasoning of the Verran case applies to Dr. Samella Junior-Spence who was, to the students and parents she dealt with, an authority figure and a government representative. Moreover, her actions affect the taxpayers in Tennessee." In the view of the court, the reasoning in Junior-Spence "applied equally to a public school teacher." *Slip op.* at 7.

Turning to the complaint, the court noted that the sole allegation attempting to allege actual malice was:

Defendants published the above mentioned defamatory statements with reckless disregard for the truth of the information published, and/or negligently, by failing to check original arrest and court records and Tennessee Code Annotated.

Stating that the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974), held that "mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth," the Tennessee court concluded that the "[p]laintiff's complaints fail to allege any facts which would tend to show that the publishers of the statements alleged to be false, had any knowledge of probable falsity." *Slip op.* at 8.

Federal Court Applies Fair Report Privilege Finds Jurisdiction Over Boston Globe Based on 25 Copies

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Israeli Labour Party, all three government ministers, Minister Ramon's spokesperson, *The Boston Globe*, *The Jerusalem Post*, and John Does 1-15.

Court Denies *Boston Globe's* Motion to Dismiss on Personal Jurisdiction

Judge Yohn began by considering — and rejecting — the *Globe's* motion to dismiss based on lack of personal jurisdiction.

Under Pennsylvania law, the extent of jurisdiction exercisable over non-resident defendants is coextensive with the due process clause of the U.S. Constitution. Although there were less than 25 Pennsylvania subscriptions to the *Globe*, the court found sufficient contacts with the forum to support the exercise of jurisdiction. *Id.* at 9-15.

Judge Yohn ruled that the the minimum contacts test was satisfied because the *Globe* had purposefully availed itself of the forum state, knowing that the plaintiff lived in Pennsylvania and thus having good reason to expect that a substantial impact of the allegedly defamatory article would be felt in Pennsylvania. In reaching this determination the court relied in part on the recently reported case of *Gordy v. The Daily News*, 95 F.3d 829 (9th Cir. 1996), in which jurisdiction over the *New York Daily News* was upheld in a suit brought by a resident on the basis of distribution of between 13 and 18 copies in the state. See LDRC LibelLetter, September 1996, at 1.

Basis of the Fair Report Privilege

The Jerusalem Post, which had a more substantial circulation in Pennsylvania, relied principally upon its motion for summary judgment asserting the fair report privilege. This required the court to consider the novel question of whether the privilege extends to reports based on the official actions of foreign governments.

According to Judge Yohn, this

issue had been addressed previously by only one other federal court, with the Fourth Circuit, in a divided opinion, declining to apply the privilege to a press release of two South Korean intelligence agencies. *Id.* at 18 n.14 (citing *Lee v. Doing-A Ilbo*, 849 F.2d 876 (4th Cir. 1988)). By contrast, Judge Yohn concluded that "recognition of a qualified fair report privilege strikes the most appropriate balance between the need to protect an individual's reputation and the American public's need to have knowledge of the acts of a foreign government." *Id.* at 19.

The court found that neither Pennsylvania state law nor the *Restatement (Second) of Torts* provided much guidance as to the extent of the privilege. *Id.* at 19-22.

Judge Yohn then considered the policy arguments traditionally advanced in support of the fair report privilege. The first, and most frequently articulated, is the public interest rationale, based on the public interest in the information reported and further divisible into a supervisory interest and an informational interest.

The supervisory interest is associated with the societal benefit, in terms of effective self-government, derived from public oversight of governmental action. The court found the classic formulation of this prong in an early opinion of Justice Holmes, which had applied the fair report privilege to the account of a courtroom proceeding:

It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Id. at 23 (quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884)).

The informational interest, which springs from the societal benefit of a well-informed public, distinguishes between a "legitimate and proper interest" and one that is due to "idle curiosity or a desire for gossip." *Id.* at 24 (quoting *Webb v. Times Publishing Co.*, 2 Q.B. 535 (1960)).

A second rationale for the fair report privilege, the "agency rationale," posits that since the public saw or could have seen the matter being described, the reporter is simply acting as an agent for the public.

Fair Report in the International Arena

Judge Yohn found all these rationales implicated in the case at bar. The supervisory rationale was premised on the unique historical relationship between the United States and Israel, which Judge Yohn analogized to the relationship between the individual states of the United States:

The effect of this transnational supervision is arguably similar to the effect of the supervision that citizens in one state exert over citizens of a different state, and the publication of a different state's official reports in a second state is protected by the fair report privilege.

Id. at 26.

Judge Yohn also pointed to the role international pressure can play in influencing the actions of foreign governments: "as the success of many international human rights groups and the United Nations demonstrates, indirect supervision, i.e., public pressure, can play a large role in the affairs of foreign governments." *Id.*

The informational rationale applied because information concerning the actions of an American citizen "who is

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allegedly planning 'illegal activities in Israel' is of legitimate and significant interest to the American public." Finally the agency rationale was present insofar as most people chose to rely on the international press to report the information contained in the press release, despite the fact that the release was itself available.

Fair Report Essential to Coverage of International Events

In addition to the traditional policy rationales supporting the fair report privilege present in the case at bar, Judge Yohn reasoned that the privilege was essential to ensure that news organizations could report on international affairs "without subjecting themselves to intolerable defamation liability." *Id.* at 27. Without such assurance the public would be denied access to important information:

"[A media party] may not have the financial or logistical wherewithal to confirm the accuracy of the information in the report. Or, at the very least, it may not be able [to confirm the accuracy of the report] with the speed necessary to make the publication of the report meaningful to its readership. In the heat of the moment, faced with the prospect of potentially devastating lawsuits on the one hand and the difficulty of confirming a story's accuracy on the other, the media party may not find much comfort in the fact that, if the case goes to trial, the plaintiff may not be able to prove falsity. On balance, media defendants, especially the smaller ones which are targeted to specific audiences, may all too often decide not to publish. As a result, certain segments of the American public . . . will be deprived of access to information of great importance to them."

Id. (quoting *Lee v. Doing-A Ilbo*, 849

F.2d 876, 883-84 (4th Cir. 1988) (Kaufman, J., dissenting)).

Qualifying and Applying the Privilege

Judge Yohn then identified and rebutted some potential concerns with the extension of the fair report privilege to the actions of foreign governments. The most serious concern, cited by the majority in *Lee*, was the danger that a qualified fair report privilege would be transformed into a blanket privilege because "[t]he mere fact the report was officially issued by a foreign government would give that report an imprimatur of 'public interest' and would 'almost always be of great importance to some individual or some group in a heterogeneous society such as our own.'" *Id.* at 28 (quoting *Lee*, 849 F.2d at 879).

Judge Yohn concluded that the *Lee* majority had exaggerated this danger, observing that courts were frequently called upon to determine when information is of interest to the public, particularly in the area of defamation law, where distinguishing between matters of public and private concern is a constitutional requirement. *Id.* at 29 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)).

Another potential difficulty arising from extension of the fair report privilege to the official acts of foreign governments is the fact that proceedings in other countries may not be conducted in as fair and reliable a manner as they are in the United States. Such concerns did not apply, however, to official actions taken by Israel, given its democratic and open government.

Finally, Judge Yohn saw little danger that a lack of uniformity among courts considering the issue would lead to unpredictable results and an explosion of litigation, expressing confidence that there would "evolve over time a pattern which will guide courts in resolving the most difficult decisions." *Id.* at 29-30.

Having determined that the fair report privilege should apply to the press release, the court went on to consider whether the privilege had been abused. Under Pennsylvania law, the privilege is lost if the report is not fair and accurate or if the publisher is motivated solely by common law malice. *Id.* at 30-31.

Judge Yohn found no genuine issue of material fact that the articles were published solely to harm the defendant. Both defendants offered affidavits stating that their purpose in covering the press release was to document a news story rather than to injure the plaintiff, noting that numerous other press organizations had covered the press release and that the coverage had not singled out the plaintiff but had reported on all seven individuals who had been banned. By contrast, Friedman provided no evidence that anyone involved in the coverage either knew him or had reason to harm him. *Id.* at 30-31.

Finally, the court compared the defendants' stories with the original press release, concluding that the coverage had been both fair and accurate. That is, the only references to the plaintiff in either of the publications not present in the original press release was that he had been a member of the Jewish Defense League and had been involved in extreme right-wing activity. Both these statements, held the court, were true and well-documented. *Id.* at 31-32.

No Wire Service Defense In Penn?

In a final footnote, the court rejected the *Boston Globe's* argument that its article was protected by the wire service defense. The *Reuters'* article that the *Globe* relied on was not in the court record. But the court states, without citation or discussion, that the wire service defense "is currently unavailable under Pennsylvania law."

The Jerusalem Post was represented by Lankenau Kovner Kurtz & Outten, LLP in New York City and the *Boston Globe* was represented by Bingham, Dana & Gould in Boston, MA.

Maine Jury Rejects Media Libel Suit

By John Lucy

On March 20, 1997, a Maine State Court jury rejected a libel claim by two building contractors against Diversified Communications over a consumer affairs report broadcast on WABI-TV, a Bangor Maine television station, in May, 1993. By a six to two vote, the jury decided that WABI did not negligently publish a false and defamatory statement of fact about the plaintiff contractors. *Dumond, et al. v. Diversified Communications*, No. CV 94-328 (Penobscot County, 3/20/97).

The WABI consumer report focused upon the experiences of one homeowner who was dissatisfied with a number of conditions in his new home. The report passed along advice from the Maine Real Estate Commission to persons considering building a new home about what they could do to research their contractors and protect their expectations.

At trial, the plaintiffs conceded that the facts in the report were accurate, but claimed that it was misleading because it suggested that they were responsible for all of the problems. They claimed that they had never been contacted directly prior to the broadcast, and that it was, overall, defam-

atory and false. WABI defended its report as accurate, balanced, and broadcast only after numerous unsuccessful efforts to interview the contractors. The report did state that, according to the wife of one of the contractors just prior to the broadcast, the contractors claimed to have done everything they could to make the homeowner happy. It also reported that the real estate agent who sold the property had refused comment because he had "been hassled buy a lawyer" and did not want to talk about it.

The trial judge refused to recognize a conditional privilege for the broadcast, holding that it did not involve a significant enough public interest value, and the case was submitted on both negligence and actual malice standards of fault. Post-trial juror interviews suggested that the broadcast was generally found to have been true, but that the dissenting jurors felt that the media, in general, often does not treat people fairly and that the public should be able to expect a higher standard of care than the law requires. Appeal appears unlikely.

John Lucy is with the firm Richardson, Whitman, Large & Badger in Bangor, ME.

U.S. Supreme Court Refuses to Review *Lundell Mfg. Co. v. ABC*

(Continued from page 1)

November 1996 at p. 1. The award had \$900,00 for injury to reputation and \$158,000 for lost profits.

In the report, ABC reporter Rebecca Chase explained that Berrien County residents were angered after the county government, without voter approval, purchased a garbage-recycling machine from Lundell. While the machine was supposed to pay for itself through user fees and the sale of its products, the county discovered that it was unable to sell the by-products at a price sufficient to cover the machine's operating expenses and the machine was shut down. ABC's report detailed the controversy and went on to state that "taxpayers are angry that they are stuck with a three million dollar debt for this garbage recycling machine that they never approved and *does not work*." (Emphasis added).

Lundell sued, alleging that the report falsely implied that the machine did not work mechanically. ABC argued that its broadcast only meant that the machine did not work as promised because it was not financially viable. Following an eight-day trial in May 1994 the jury returned a verdict for Lundell. The district court, however, refused to enter judgment and instead granted ABC's motion for judgment as a matter of law.

The U.S. Court of Appeals for the Eighth Circuit reversed the district court in October 1996 and reinstated the jury verdict. The panel found that the issue of whether the disputed statement referred to the operability of the machine or the economic viability of its operation was one for the jury to determine. Declining to apply independent appellate review to the issue of falsity -- and making it what we believe is the first post-*Hepps* panel to explicitly consider the issue

and so hold -- it found that there was "substantial evidence from which a reasonable jury could conclude that the statement was false and from which a reasonable jury could conclude that the sting of the story was that the Lundell machine was mechanically inoperable." *Lundell*, 25 Media L. Rep. at 1007. Among the evidence cited by the appellate court was the testimony of the reporter that she believed at the time of the broadcast that the machine was inoperable, and ABC's response to Lundell's retraction demand in which ABC stated:

Contrary to your letter, the report does not state that the "system" does not work. What the report does say is that the garbage recycling machine purchased by Berrien County does not work. This is in fact completely true. At the time of our broadcast the Berrien County machine was not functioning. As I am sure you are aware the main shredder broke down and has not been repaired. Indeed the Georgia Department of Natural Resources has acted to close the facility down.

According to the court, the letter, as well as an offer by a machine crew member to "fire up" the machine for ABC's cameras and evidence that ABC never asked the former plant manager if the machine was capable of processing garbage, "amply demonstrate[d] that ABC actually believed that its broadcast stated that the machine was mechanically inoperable." *Id.* at 1008.

In its petition to the Supreme Court, ABC argued that Lundell should have been held to be a public figure, contending that businesses that choose to become part of a public controversy should be considered public figures even if they do not comment publicly.

California Appellate Court Upholds New Trial For \$7.5 Million Libel Verdict

Ross v. Santa Barbara News-Press

By Kelli Sager and
Karen Frederiksen

On March 24, 1997, the California Court of Appeal, Second Appellate District, upheld a Los Angeles trial court order that had overturned a \$7.5 million verdict in a libel action brought against the Santa Barbara News-Press and its former editor and reporter. In a split decision that was ordered not to be published, however, the appellate court refused defendants' request that judgment be entered in their favor. *Ross v. New York Times Co.*, No. B082419 (Cal. Ct. App. March 24, 1997).

The lawsuit, brought by Leonard Ross, a wealthy and prominent Los Angeles businessman, was based on two articles published in the Santa Barbara News-Press in late 1988 and early 1989. At the time of publication, Ross and his wife were the largest individual shareholders in Santa Barbara's largest financial institution, which was the parent company of the largest local savings and loan.

The first article reported that Ross was attempting to increase his ownership interest in the savings and loan from under 10% to almost 25%, a move that required federal and state approval. The article then detailed Ross' business, financial and litigation background, including a detailed description of Ross' one-time partner, Barry Marlin, who went to prison for investor fraud. The second article, published three months later, reported that Ross had withdrawn his application to increase his ownership in the savings & loan, and repeated some of the information contained in the first article about Ross' background.

By the time of trial, Ross' claims had been limited to four specific statements in the articles, and an alleged "implication" that the article falsely implied that he was investigated by the government for the crimes that resulted in Barry Marlin going to prison. The other statements about which Ross had complained were eliminated by the trial judge on the grounds that they were substantially true, a protected fair and true report, and/or not the legal cause of any injury. The implication alleged was crafted on the eve of trial, which the trial judge allowed to be presented to the jury. The "implications" originally set forth in Ross' complaint -- that the articles portrayed him as dishonest and a crook -- were rejected by the trial court as non-actionable opinion.

An Inconsistent Verdict

Following a 3 1/2 week trial, the jury found that none of the specific statements at issue were actionable. Based solely on the alleged "implication," however, the jury awarded Ross \$ 5 million in damages for reputational injury, and \$ 2.5 million in damages for his emotional distress. Ross' special damage claims had been dismissed by the lower court before the trial began.

Defendants promptly moved for JNOV, or in the alternative, for a new trial, on a variety of grounds, including (1) that the jury's verdict was internally inconsistent, since they had found a statement in one of the articles to be true that was virtually identical to the allegedly false "implication"; and (2) that the damages awarded were excessive. The trial judge agreed, and although he denied the JNOV motion, he ordered a new trial on all issues.

Both Sides Appealed

Plaintiff Ross sought to reinstate the jury's original \$7.5 million verdict. Defendants appealed from denial of JNOV, arguing judgement was proper for several reasons.

First, defendants sought judgment in their favor on the ground that Ross's correction demand was inadequate. Although the demand was lengthy and detailed, it did not include any reference to the single "implication" sent to the jury. Instead, it provided a laundry-list of other items Ross wanted corrected, including three other purported "implications." Under California's correction statute, which is set forth in California Civil Code § 48a, failure to adequately demand a correct limits a libel plaintiff to recovery of special damages. Because the trial court had already ruled that Ross could not recover specials, the defendants argued that the action should have been dismissed.

The Court of Appeal disagreed, holding that the retraction demand was adequate to put the newspaper on notice about Ross' belief that the implication sent to the jury was defamatory. The court based its decision on the fact that the retraction letter included (1) a reference to the first statement in the article -- i.e., that Ross' "complicated financial affairs have been investigated by several law enforcement agencies" (a statement the lower court found before trial to be substantially true); and (2) general complaints about the "portrayal of Mr. Ross as . . . being knowingly involved in illegal activities." Reference to these two items, the Court of Appeal held, was sufficient to have notified the newspaper to investigate and, if appropriate, ultimately correct a third item, namely the implication sent to the jury.

Second, defendants argued that the evidence introduced at trial proved that the implication that Ross was investigated by the government for the crimes that resulted in his former business partner Marlin going to prison was substantially true. In part, defendants argued that this issue should be decided in their favor because Ross had admitted that he was investigated by federal law enforcement agencies for extortion, pistol-whipping and kidnapping. Furthermore, it was not disputed that Ross and Marlin had both been sued by hundreds of investors in civil actions for fraud. Ross, however, contended that the implication was false because he had ended his association with Marlin before Marlin was investigated and successfully prosecuted by federal agencies for investor fraud. In denying defendants'

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California Appellate Court Upholds New Trial For \$7.5 Million Libel Verdict

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JNOV request, the Court of Appeal did not address the evidence presented at trial, which was outlined in defendants' JNOV motions. Instead, it declined to follow

United States Supreme Court authority requiring *de novo* review, and perfunctorily held that it was "without sufficient factual findings upon which" to determine the substantial truth issue.

Third, defendants argued that the trial court erred in refusing to find that Ross was a limited purpose public figure. This argument was based upon the undisputed facts that when the article was published, Ross was the largest individual shareholder of the parent company of the oldest and largest savings and loan in Santa Barbara. Furthermore, in an effort to increase his influence over this institution, Ross had applied to federal and state regulatory agencies for permission increase his shareholdings. This maneuver by Ross took place in 1988-89, when the savings and loan industry was under intense public scrutiny in the wake of several scandalous institutional failings. The Santa Barbara institution itself had experienced several financial and managerial problems, many of which were the subject of numerous media reports. Thus, defendants argued that by attempting to increase his shares in the savings and loan, Ross assumed the risk that his background would be scrutinized, and that he should be deemed a limited purpose public figure. Further, the defendants argued that since the jury found that there was no evidence of actual malice, this provided another ground for a defense verdict.

The Court of Appeal, however, agreed with the trial court that Ross was a private figure. In part, the Court based this decision on a narrow reading of the case law that would reduce the number of limited purpose public figures significantly. The Court held that Ross was not a public figure for purposes of the lawsuit because he "had never given a press conference, had never held or run for public office, and never participated in any mass media . . . , had never given any public speeches, and [with one exception] had never appeared before any public agencies." Further, the Court of Appeal held without explanation or evidentiary support that while the savings and loan industry nationally may have been a subject of public discussion, that discussion was not localized to Santa Barbara and neither Ross nor Santa Barbara Savings & Loan were the topic of public controversy. Moreover, the Court held, even if there was a public controversy, Ross did not thrust himself in it by seeking to gain a controlling interest (even though that move required governmental approval), and that his status as a shareholder, a professional and a "prominent business person" did not "invite public attention."

Fourth, defendants argued that the evidence at trial did not establish the requisite causation between the only

item at issue -- the alleged "implication" -- and the damages claimed by Ross. At trial, several witnesses had testified generally that the articles had injured Ross' reputation and caused him emotional injury, but there was virtually no evidence linking such alleged injuries to the implication at issue, as opposed to the many other non-actionable statements in the detailed articles. Thus, defendants argued that even if their articles did damage Ross -- which they contended was not the case -- there was no causal link between the single alleged implication submitted to the jury and the \$7.5 million damage award. Instead, defendants' argued that any possible reputation and emotional distress injuries were caused by other, non-actionable statements. In denying defendants' JNOV request on this ground, the Court of Appeal said only that the First Amendment did not require it to "independently evaluate the causation issue[.]"

Fifth, defendants argued that special constitutional concerns are created by libel by implication claims, so that such claims should only be permitted under strict conditions that did not exist in the case at hand. The Court of Appeal, however, rejected defendants' arguments that defamation by implication claims require strict scrutiny because they seek to impose liability not for what was published, but for impressions and inferences others may perceive. Thus, in one of the very few implication decisions in California, the Court of Appeal refused to grant JNOV on the basis that absent an artificial juxtaposition of statements (or a critical omission) that creates an inference different from what was expressly published, an implication claim should not be viable. The California court also rejected defendants' argument that implication claims should only be recognized where the evidence demonstrated that the alleged implication is the publication's primary inference, or was intended by the publisher. Instead, the Court of Appeal found that "[t]o determine if the words or presentation were manipulated to create a false implication, a specific method of manipulation is not required." Thus, it is enough if it could be "reasonably understood" from the article that the defamatory implication exists.

Justices Patti Kitching and Richard Aldrich formed the majority affirming the trial court's denial of JNOV and granting of the new trial motion. Los Angeles Municipal Court Judge Brett Klein, sitting by designation, dissented in part, arguing that the retraction demand had been inadequate, and that Ross had failed to show that his damages were caused by the implication. The parties have until May 2, 1997, to petition the California Supreme Court for review of this decision.

Defendants are represented by Rex Heinke of Gibson, Dunn and Crutcher and Kelli Sager and Karen Frederiksen of Davis Wright Tremaine.

ASSISTED PARTICIPANT RECORDING HELD ILLEGAL IN MICHIGAN

By Gregory Curtner and
Elisa Angeli

In a surprising decision, the Michigan Court of Appeals held that a television show violated Michigan's eavesdropping statutes when, at a participant's request, it assisted in recording a conversation she had with her family and broadcast a portion of the conversation on television.¹ *Dickerson v. Sally Jessy Raphael*, ___ N.W.2d ___, 1997 WL 104604 (Mich. App. March 7, 1997) (NO. 172610, 176209). The court drew the distinction between a participant on her own taping a conversation, which was permissible, and a participant wearing a microphone which relayed the conversation for taping by a non-participant, which was not permissible.

The case concerns children who, out of concern for their mother, sought the assistance of the Sally Jessy Raphael Show in exposing her involvement in Scientology. In addition to appearing on the Show, the children wished to record their mother discussing the way in which she was being treated by Scientology. The Show's producers consulted counsel who advised that participant recording without the consent of all participants would not violate Michigan's eavesdropping statutes. The Show hired co-defendant GTN to provide technical assistance.

The children informed their mother of their intent to publicly expose Scientology, and specifically of their intent to appear on the Show. The Show invited the mother to appear as a guest on the show, but she did not respond to the invitation. The mother was not informed of the recording.

The children, one of whom lived in Iowa, then appeared unannounced at their mother's Scientology office asking to speak with her. The mother led them to a table in a nearby park. A discussion ensued concerning

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Seventh Circuit Affirms Dismissal of Minor's Invasion of Privacy Claim Against Television Talk-Show

By James A. Friedman
Robert J. Dreps

The U.S. Court of Appeals for the Seventh Circuit, in an opinion authored by Chief Judge Richard Posner, affirmed a district court's judgment on the pleadings, dismissing claims for invasion of privacy and infliction of emo-

tional distress against Tribune Entertainment Company, the producer of *The Charles Perez Show*. *Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 25 Media L. Rptr. 1370 (7th Cir. 1997). The plaintiff in *Howell* was a 16-year-old minor who had appeared as a guest

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Tommy and Pamela Lee Privacy Claims Against Penthouse Dismissed Sexually Intimate Story and Photos Found Newsworthy

By Stephen G. Contopoulos and
Catherine Valerio Barrad

On March 20, 1997, the United States District Court for the Central District of California dismissed an appropriation and invasion of privacy lawsuit brought by celebrities Tommy Lee and Pamela Anderson Lee, holding as a matter of law that an article in *Penthouse* magazine about them was newsworthy, and that sexually intimate photographs illustrating the article were therefore nonactionable appropriation. *Tommy Lee and Pamela Anderson Lee v. Penthouse International, Ltd., et al.*, Case No. CV 96-7069 (C.D. Cal., March 20, 1997). The Court also held that the photographs were not "private," as they had been previously published in the United States and abroad.

The celebrity plaintiffs Tommy Lee (drummer for the rock group Motley Crue) and Pamela Anderson Lee (actress, formerly of *Baywatch*) were married in February 1995. Apparently while on their honeymoon, or shortly thereafter, the Lees took Polaroid photographs of themselves in various stages of undress and engaging in sexual activities. Those photographs were allegedly stolen and later published in French *Penthouse*. About a year after the photographs first appeared in print, *Penthouse* published an article about the Lees, discussing their marriage, their careers, and the seeming influence Tommy Lee has had on Pamela Anderson Lee. One such reference was to Pamela Anderson Lee's seeming indifference to the

prior publication of the intimate photographs. The page layouts from two of the three prior publications of the intimate photographs accompanied the article.

The Lees sued the magazine's publisher, General Media Communications, Inc., and its distributors, Curtis Circulation Company and Worldwide Media Service, Inc., for statutory and common law commercial appropriation for publishing the Polaroids the Lees had taken of themselves engaged in sexual activities. (The California appropriation statute "complements" the common law cause of action, adding only a requirement that the use be a knowing one and providing for a mandatory award of attorneys' fees to the prevailing party.) The Lees alleged that the use of a stock cover photograph, a headline on the cover of the magazine, and the photographs of the Lees illustrating the article appropriated the Lees' names and likenesses for commercial gain.

The Court disagreed, holding that the use of the Lees' names and likenesses were not actionable because the use was in conjunction with a newsworthy article. The Court pointed out that the Lees themselves had invited public attention and comment about the intimacies of their lives because the Lees had often discussed details of their personal and sex lives on nationally syndicated radio and television programs and in print. Thus, the Court held that the "newsworthiness" concept was broad enough to encompass

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Seventh Circuit Affirms Dismissal of Minor's Invasion of Privacy Claim

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on the daytime talk show. When she initiated a verbal assault on her stepmother, the court held, the plaintiff waived whatever protection may be afforded by privacy laws.

The plaintiff solicited an appearance with her sister, stepsister, and stepmother on a program about difficult relationships between stepparents and their stepchildren. During the taping of the show, the plaintiff joined her sister in accusing their stepmother of adultery and mistreatment of the stepdaughters. In return, the stepmother read portions of the plaintiff's confidential, juvenile police report describing her as "violent, abusive, indecent, profane, [and] boisterous" The defendant broadcast the show two weeks after the taping. During those two weeks, the plaintiff did not complain to the defendant about her stepmother's actions.

After the show was aired, the plaintiff sued for invasion of privacy and intentional and negligent infliction of emotional distress. On June 4, 1996, the U.S. District Court for the Western District of Wisconsin dismissed the action on the pleadings, holding that the plaintiff lost any expectation of privacy that she may have had concerning the "private facts" disclosed during the broadcast by voluntarily appearing on the program. *Howell v. Tribune Entertainment Co.*, No. 96-C-177-S (W.D. Wis. June 4, 1996); see LDRC Libel-Letter (August 1996), p. 10.

The Seventh Circuit affirmed. According to the court, the plaintiff waived any right to object to her stepmother's privileged response, including the disclosure of the police report, when she publicly defamed her stepmother.

Tammy joined her sister in accusing the stepmother of adultery as well as of mistreatment of her stepdaughters. . . . Tammy may not hide behind Wisconsin's privacy law and from that shelter pelt her stepmother with defama-

tory accusations with impunity.

Though a minor, the plaintiff was old enough, according to the court, to waive her right of privacy because "no circumstances of deception or overreaching or limited competence [were] shown."

The complaint, the court noted, was directed solely at Tribune Entertainment Company, not the plaintiff's stepmother. But the plaintiff's waiver extended to the defendant's broadcast of the stepmother's statements as well:

[I]f Tammy can broadcast her own accusations to millions, she should not be able to block her stepmother from broadcasting a reply to those accusations to the same audience. To prevent the audience from obtaining a one-sided view of the quarrel, the producer must be allowed to assert the stepmother's privilege.

The court questioned, in *dicta*, the basis for asserting claims against Tribune Entertainment Co. based on the stepmother's remarks, noting that "there is no principle in the law that by staging an event at which one person is likely to defame or invade the privacy of the other, the media become complicit in the defamation or the invasion of privacy."

The court also concluded that by remaining silent for the two weeks between the taping of the program and its broadcast, the plaintiff "forfeited any objection to the broadcast; for her silence would have led the broadcaster to believe, consistent with her manner during the program, that she thought she'd had the better of the exchange with the stepmother"

James A. Friedman is an associate and Robert J. Dreps is a partner at LaFollette & Sinykin in Madison, Wisconsin, which represented Tribune Entertainment Company in the reported case.

Lees' Privacy Claims Dismissed

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the intimate lives of celebrities. The Court rejected out of hand the Lees' argument that the intimate nature of the photographs put their use outside the realm of First Amendment protection, holding instead that the subject matter of the photographs was not relevant to the newsworthiness determination.

The Lees also sued on the ground that the intimate photographs were private by their very subject matter, and therefore their publication constituted an invasion of privacy. The Lees first claimed that the media defendants invaded their privacy by publishing private facts about them. The Court rejected this argument on the ground that the photographs, having been published at least three times previously (twice outside the United States and once in a regional domestic newspaper), were no longer "private" at the time *Penthouse* published them. The Court rejected the Lees' argument in their briefs that the prior publications had such limited circulation that the photographs remained private until published in *Penthouse*.

Although the Lees' Complaint alleged only facts sufficient to support a claim for publication of private facts, in opposing the motion for summary judgment the Lees argued that the publication placed them in a false light and was an intrusion into their solitude. The Court rejected the first argument, pointing out that the Lees had failed to allege facts sufficient to state a claim for false light. As for the intrusion claim, the Court held that the act of publication was legally insufficient to state a claim for intrusion.

Finally, in an extension of distributor liability theory to the privacy context, the Court also held that the distributors were also not liable for the offending publication because the Lees had failed to demonstrate that the distributors knowingly distributed a tortious publication.

Stephen G. Contopoulos is a partner and Catherine Valerio Barrad is an associate at Sidley & Austin in Los Angeles, which represented defendants in this action.

ASSISTED PARTICIPANT RECORDING HELD ILLEGAL IN MICHIGAN

(Continued from page 15)

the mother's experiences with Scientology and its effect on her marriage and family. At one point during the conversation, the mother expressed concern that her children would not accurately represent her views to the public. Several persons collecting trash walked by the park bench and a GTN representative stood within 15 to 20 feet from it. A concealed videocamera made a video recording of the conversation.

Prior to the discussion, GTN representatives had fitted one of the children with a transmitter. The transmitter simultaneously broadcast the conversation over F.M. radio waves. GTN picked up the waves and recorded the conversation from a nearby van.

The children later appeared on the Show. They voiced their vehement objections to Scientology, asserting that it had ruined their family life. A small portion of the recorded conversation, lasting less than one minute, was broadcast on the Show.

At the urging of Scientology, the mother then brought several claims, including invasion of privacy and violation of the Michigan eavesdropping statutes, against Sally Jessy Raphael individually, Multimedia, Inc., the producer and syndicator of the Sally Jessy Raphael Show, GTN and individual GTN employees.

"Eavesdropping" is defined in Michigan as "to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse."² The issue of whether the conversation was "private" was submitted to the jury. Defendants also argued that the First Amendment protected the children's right to relate the effect of Scientology on their family, and the right of the media to provide a forum. The jury returned an almost immediate defense verdict on all counts.

Plaintiff appealed, arguing that she was entitled to a directed verdict under the eavesdropping statute. The Michigan Court of Appeals interpreted

the Michigan eavesdropping statutes to preclude single participant recording assisted by a third party, held that the conversation was "private", and reversed the jury verdict in favor of defendants. Instead of remanding for a new trial, the Court of Appeals granted a directed verdict in favor of the mother and remanded for a determination of damages.

The Court held that while a participant to a conversation can "overhear, record, amplify or transmit" a conversation with impunity,³ a participant who does so with the technical assistance of a non-participant, subjects the non-participant to civil and criminal liability under the eavesdropping statutes.

A participant apparently may tape a conversation and may repeat a conversation, but he may not simultaneously transmit it or otherwise permit a third party to listen in on it. Without analysis or discussion, the court brushed aside Defendants' argument that the First Amendment prohibits such an arbitrary interpretation of the statutes, stating only that "[t]his case does not involve the media's First Amendment right to report a story." The video portion of the recording was found to be not actionable, because the conversation was in a public place.

Defendants have filed a motion for rehearing in the Michigan Court of Appeals, and plan to file an application for leave before the Michigan Supreme Court if the motion for rehearing is denied.

Gregory Curtner is a member and Elisa Angeli an associate of Miller, Canfield, Paddock and Stone and represented the defendants in this lawsuit.

ENDNOTES

1. In Michigan, unlawful eavesdropping is a felony:

Any person who is present or who is not present during a private conversation and who

willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00.

MCL 750.539c; MSA 28.807(3). Similarly, divulging unlawfully obtained information is a felony:

Any person who uses or divulges any information which he knows or reasonably should know was obtained in violation of sections 539b, 539c or 539d is guilty of a felony, punishable by imprisonment in a state prison not more than 2 years, or by a fine of not more than \$2,000.00 [MCL 750.539e; MSA 28.807(5).]

Additionally, Michigan statutory law provides the following civil remedies for eavesdropping violations: Any parties to any conversation upon which eavesdropping is practiced contrary to this act shall be entitled to the following civil remedies:

(a) An injunction by a court of record prohibiting further eavesdropping.

(b) All actual damages against the person who eavesdrops.

(c) Punitive damages as determined by the court or by a jury. [MCL 750.539h; MSA 28.807(8)].

2. MCL 750.539a (2); MSA 28.807(1) (2).

3. The Michigan Court of Appeals so held in a prior case. *Sullivan v. Gray*, 117 Mich. App. 476, 482; 324 N.W.2d 58 (1982).

Communications Decency Act Preempts Negligence Action for Defamatory Postings on America Online

(Continued from page 1)

The case arose as the result of a malicious hoax at the expense of the plaintiff, Kenneth Zeran. Zeran's name and phone number were used in a series of notices posted on an AOL bulletin board advertising t-shirts and other items with slogans glorifying the bombing of the Alfred P. Murrah Building in Oklahoma City, Oklahoma. Among the slogans advertised were "Visit Oklahoma . . . It's a BLAST!!", "Finally a day care center that keeps the kids quiet -- Oklahoma 1995," and "Forget the rescue, let the maggots takeover -- Oklahoma 1995." Readers of the posting were invited to call "Ken" at Zeran's telephone number.

Not surprisingly, following the initial April 25, 1995 posting, Zeran began receiving a flood of phone calls, at one point allegedly receiving one call approximately every two minutes, most of which were derogatory and some of which included death threats. AOL removed the initial posting and terminated the account responsible for the posting following Zeran's demand only to have the posting replaced the next day through another account with new slogans and a notice that some of the t-shirts from the prior day's posting had sold out. In fact, AOL terminated three accounts in response to the posting, but additional postings continued to appear through May 1, 1995.

On May 1, however, further attention was called to the postings when a broadcaster at radio station KRXO in Oklahoma City read the slogans on the air and encouraged listeners to call "Ken" to register their "disgust and disapproval." It was not until two weeks following the broadcast that the calls dropped to approximately fifteen per day, despite the fact that an Oklahoma City newspaper published a front page article exposing the hoax and KRXO broadcast an apology.

Zeran brought suit against KRXO in January of 1996 in the United States District Court for the Western

District of Oklahoma and filed a separate action against AOL in April claiming that the service provider "was negligent in failing to respond adequately to the bogus notices on its bulletin board after being made aware of their malicious and fraudulent nature." *Slip op.* at 3.

AOL moved to dismiss the complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P., or, in the alternative, to transfer the suit to the Eastern District of Virginia, where the company has its headquarters. The motion to transfer the case was granted, but the motion to dismiss was deferred. After answering the complaint on December 13, 1996, AOL moved for judgment on the pleadings pursuant to Rule 12(c), Fed.R.Civ.P.

Preemption Analysis

In the decision, Judge T.S. Ellis, III, noted that "the question presented is whether the CDA preempts any state common law cause of action Zeran may have against AOL resulting from its role in the malicious hoax perpetrated via AOL's electronic bulletin board." *Slip op.* at 3. The court continued to state that "there are two circumstances in which preemption of a state law cause of action is appropriate, namely, (i) where Congress specifically intends to displace state law in a particular field, and (ii) where state law directly conflicts with federal law." *Slip op.* at 4.

No Intent to Displace

Addressing the first of these circumstances, Judge Ellis first examined §230 of the CDA which provides:

Nothing in the section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section

47 U.S.C. §230(d)(3). According to the

court, "[t]his provision does not reflect congressional intent to preempt state law for defamatory material on an interactive computer service. To the contrary, §230(d)(3) reflects Congress' clear and unambiguous intent to retain state law remedies except in the event of a conflict between those remedies and the CDA." *Slip op.* at 4.

Judge Ellis continued, "§230's language and legislative history reflect that Congress' purpose in enacting that section was not to preclude any state regulation of the Internet, but rather to eliminate obstacles to the private development of blocking and filtering technologies capable of restricting inappropriate online content. This purpose belies any congressional intent to bring about, through the CDA, exclusive federal regulation of the Internet." *Slip op.* at 5.

Conflicts With State Law

Turning to the second set of circumstances which would give rise to preemption, Judge Ellis noted that there are three types of direct conflicts which would require preemption:

- (1) where it is impossible for a private party to comply with both federal and state law;
- (2) where state law conflicts with the express language of a federal statute;
- (3) where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Slip op. at 5, citations omitted.

Examining each of these conflicts in turn the court found that while compliance with state law and the CDA is not a "physical impossibility," state law does conflict with the language of the CDA as well as the purposes and objectives of the federal legislation.

First, the court stated this is not a case where compliance with state law and the CDA would be impossible.

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Communications Decency Act Preempts Negligence Action

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Rather, "[n]othing in the CDA imposes a duty on AOL that would conflict with a state law duty to avoid negligent distribution of defamatory material." In other words, "an interactive computer service provider, like AOL, can comply with the CDA even if it is subjected to state liability for negligent distribution of defamatory material." *Slip op.* at 5-6.

Turning to conflicts in language the court stated that despite the lack of physical impossibility, the state law did in fact conflict with the language of the CDA. Citing §230(c)(1) which provides:

[no] provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,

AOL argued that Zeran's claim was in direct conflict with the statutory language. Zeran contended that distributor liability did not come under the CDA as it is "a common law tort concept, different from, and unrelated to, publisher liability." *Slip op.* at 6.

Judge Ellis rejected Zeran's argument, stating that "distributor liability treats a distributor as a 'publisher' of third party statements where the distributor knew or had reason to know that the statements were defamatory." *Slip op.* at 7. Thus, Zeran's attempt to impose what is actually publisher liability on AOL was contrary to §230(c)(1) and accordingly preempted.

Addressing the third situation which will give rise to preemption, Judge Ellis again found that Zeran's state law claim was preempted by the CDA. In this instance, Judge Ellis found that the purposes and the objectives behind the legislation were in conflict with Zeran's state law claim. Stating that "Congress' clear objective in passing §230 of the CDA was to encourage [the]

Lawyer in Cyberspace Avoids New York Jurisdiction — Site on Web is Insufficient —

A site on the World Wide Web, without more, is beyond the reach of a New York's longarm jurisdiction, a federal magistrate has recommended in a trademark claim brought by Esquire magazine against a New Jersey lawyer who published a page on the Internet called "ESQWIRE.COM." *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997). See also *LDRC LibelLetter*, February 1997, at 17 for a review of Internet jurisdiction cases.

Magistrate Andrew J. Peck reached his decision after concluding that the defendant had yet to transact any business in New York and thus could not be subject to the jurisdiction under New York's Civil Practice Law and Rules (CPLR) §§ 301-02. A contrary holding "would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web

site." *Id.* at *1.

The court acknowledged that Esquire was put in the uncomfortable position that if it waited until Goldberger had established sufficient contacts to satisfy § 302 it risked a possible laches defense. However, the parties had stipulated to transfer to the U.S. District Court for the District of New Jersey should personal jurisdiction over the defendant be denied.

The defendant, Ari Goldberger, is a New Jersey resident and a lawyer with the Philadelphia firm of Pepper, Hamilton & Scheetz. In 1992, he endeavored to create "an electronic law office infrastructure network" that would provide legal support services to attorneys via computer. *Id.* at *10.

He dubbed his service ESQ.WIRE1 and sought to register the mark with the Patent and Trademark Office in September 1994. *Hearst* opposed

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development of technologies, procedures and techniques by which objectionable material could be blocked or deleted either by the interactive computer service provider itself or by the families and schools receiving information via the Internet," Judge Ellis reasoned that if state tort law liability frustrates this intent then preemption is warranted. *Slip op.* at 7-8.

The court then concluded that distributor liability would have just that effect;

Clearly, then, distributor liability discourages Internet providers from engaging in efforts to review online content and delete objectionable material, precisely the effort Congress sought to promote in enacting the CDA. Indeed, the most effective means by which an Internet provider could avoid the inference of a reason to know of objectionable material on its service would be to distance itself from any control over knowledge

of online content provided by third parties. This effect frustrates the purpose of the CDA and, thus, compels preemption of state law claims for distributor liability against interactive computer service providers.

Slip op. at 8.

Retroactivity of Application

Finally the court rejected Zeran's argument that the CDA does not apply to his claim because the events occurred prior to the enactment of the legislation. The court reasoned that §230(d)(3) which provides that, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section," constituted "an adequately clear statement of Congress' intent to apply §230 of the CDA to claims that are filed after the enactment of the CDA." *Slip op.* at 9.

Lawyer in Cyberspace Avoids New York Jurisdiction

(Continued from page 19)

Goldberger's application, and the PTO suspended its proceedings pending disposition of the current lawsuit. *Id.* at *10-*11.

Goldberger then registered the Internet domain name ESQWIRE.COM with the Internet Network Information Center (InterNIC) in September 1995. At this site, Goldberger published information about the services he plans to offer, offered an e-mail address for those seeking more information, as well as a summary of Hearst's "activities against Goldberger in this lawsuit." *Id.* at *11-*12.

Goldberger's site has been accessed by New Yorkers, as well as by computers in at least 20 other states and 34 foreign countries although he has no products to sell, nor has he sold any in New York or any other place. *Id.* at 4.

Hearst sued in May of 1996, alleging, *inter alia*, Lanham Act violations for infringement of its trademarks ESQUIRE and ESQ. and false designation of origin, as well as unfair competition under New York common law and dilution of Hearst's marks under both federal and New York law. *Id.* at *16.

In addition to the publishing of a Web page accessed by New Yorkers, Hearst relied on Goldberger's sending of e-mail to newspapers in New York about this lawsuit, to argue for personal jurisdiction over the defendant in New York. *14.

Determining Jurisdiction Under New York Law

Because the Lanham Act does not provide for nationwide service of process, the court turned to the forum state's jurisdictional rules. *Id.* at *22.

The court held that no jurisdiction existed under CPLR § 301 because Goldberger's Internet site and e-mail were not sufficient contacts to establish that Goldberger was "doing business" in New York. *Id.* at *26.

National Advertising/Post-Complaint Correspondence Not Enough to "Transact Business"

Analyzing Hearst's claim under

New York's long-arm statute, CPLR § 302, the court said that Goldberger's Web site was analogous to an advertisement in a national magazine: "His Internet web site is, at most, an announcement of the future availability of his services for attorneys." *Id.* at *31.

The court found that New York law was clear: advertisements in national publications are not sufficient to provide personal jurisdiction under the New York long-arm provisions on "transacting business" in the state. Magistrate Peck went on to discuss New York cases that have held that even advertisements directed to the forum state are not sufficient in themselves to create a "transaction of business" within the state. *Id.* at *32-*36.

Separately dealing with Goldberger's e-mails to New York media, the court said the e-mails, considered either alone or in conjunction with the Web site, were not sufficient under CPLR § 302(a)(1), or due process, to provide personal jurisdiction, because they were made after Hearst brought suit. Moreover, the court said, they are analogous to letters or phone calls to persons inside of New York from out of the state, which in themselves do not constitute the transaction of business within New York. *Id.* at *37-*40.

Nor Does it Meet the Long-Arm Reach for a Tortious Act

The court rejected Hearst's contention that the publication of an Internet page was a tortious act within the state, creating jurisdiction under CPLR § 302(a)(2). The court responded that even if Goldberger's web site were considered an "offer for sale," jurisdiction would be lacking under § 302(a)(2) because Goldberger had no product or service available for sale and personal jurisdiction under § 302(a)(2) is generally appropriate only when the defendant is physically present within New York when committing the tort. *Id.* at *42-*43.

Finally, the court considered *sua sponte* whether jurisdiction would be appropriate under CPLR § 302(a)(3), which covers tortious conduct outside the

state causing injury in the state and requires that the defendant either (i) regularly transacts business or derives substantial revenue from goods used or consumed or services rendered in New York or (ii) expects his act to have consequences in New York and derives substantial revenue from interstate or international commerce. This section was also held inapplicable because Goldberger did not receive any revenue from interstate or international commerce related to the business described on the Internet. *Id.* at *45-*49.

In reaching its conclusions, the court followed the decision in *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996). In that case, the New York jazz club the "Blue Note" sued King, the owner of a small Missouri jazz club with the same name, over King's Internet web site. Evaluating jurisdiction under due process standards, the court in *Bensusan* held that King had done nothing to purposefully avail itself of New York; his Web site was accessible to anyone who could find it. *Id.* at *50-*51.

The court then either declined to follow or distinguished a number of cases that had upheld Internet personal jurisdiction on the ground that they had involved additional contacts with the forum state. *Id.* at *53-*65. The court stated that to allow personal jurisdiction based on an Internet web site "would in effect create national (or even worldwide) jurisdiction, so that every plaintiff could sue in plaintiff's home court every out-of-state defendant who established an Internet web site." *Id.* at *66. Concluding that this "would have a devastating impact on those who use this global service," the court declined to reach such a result "in the absence of a Congressional enactment of Internet specific trademark infringement personal jurisdictional legislation." *Id.*

The court not only provides an excellent bibliography of recent cases on the issue of cyberspace jurisdiction, but he also provides an excellent bibliography of law review articles on the subject.

U.S. Supreme Court To Consider State-Run Public Television's Role as Journalist Is Candidate Debate A Limited Public Forum?

By Richard Marks

On March 17, 1997, the United States Supreme Court agreed to consider the issue of whether a legally qualified, third-party candidate can demand to be included in a political debate sponsored by a state-licensed, public television station. *Forbes v. The Arkansas Educational Television Commission*, No. 99-779. The case arises out of an Eighth Circuit Court of Appeals holding that journalists working for a government-owned public television station could not make the same types of news judgments regarding whom to invite to a political debate as their counterparts who are employed by the private press. *Forbes v. The Arkansas Educational Television Commission*, 93 F.3d 497 (8th Cir. 1996).

The Eighth Circuit's holding in *Forbes* conflicts squarely with the Eleventh Circuit's decision in *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F. 3d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991). *Chandler* held that the Georgia Public Telecommunications Commission ("GPTC") did not violate the First Amendment when it decided not to invite the Libertarian candidates for governor and lieutenant governor to a debate sponsored and broadcast by GPTC. The Eleventh Circuit applied the public forum from *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), in holding that the debate in *Chandler* was a non-public forum.

The Forbes "Viability" Standard

The *Forbes* case arose when the Arkansas Educational Television Network ("AETN") sponsored a debate between the Republican and Democratic candidates for Congress in Arkansas' Third District race in 1992. Ralph P. Forbes, a legally qualified, third-party candidate in

that race, asked to be included in the debate but was refused. Mr. Forbes then sued AETN, claiming, among other things, that AETN's decision violated his First Amendment rights.

Initially, the District Court for the Western District of Arkansas dismissed Mr. Forbes' complaint. However, the Eighth Circuit, sitting *en banc*, reversed the decision in part and held that Mr. Forbes "did allege a First Amendment violation well enough to survive a motion to dismiss." *Forbes v. Arkansas Educ. Television Communications Network Found.*, 22 F.3d 1423 (8th Cir. 1994). The Eighth Circuit remanded the case for determination of (1) whether the debate in question was a limited public forum or a non-public forum and (2) whether AETN had a constitutionally sufficient reason for excluding Mr. Forbes from the debate.

On remand, a jury found that Mr. Forbes was not excluded from the debate because of an opposition to his views or because of political pressure. With this jury verdict and a ruling as a matter of law that the debate in question was a non-public forum, the District Court found in favor of AETN.

Debate Is Public Forum

However, on appeal for the second time, a panel of the Eighth Circuit reversed, holding that a debate sponsored by a state-licensed public television station was a limited public forum and that AETN's reason for excluding Mr. Forbes -- that Mr. Forbes was not "viable," i.e., he did not have a reasonable chance of winning the election -- was not legally sufficient.

The Court of Appeals stated that excluding Mr. Forbes was unconstitutional because AETN's reason was neither compelling nor narrowly tailored. In the court's opinion, while the decisions as to Mr.

Forbes' viability and exclusion from the debate were the types of determinations normally made by journalists and were made in good faith by the journalists at AETN, journalists employed by the government could not make those judgments because they were government employees.

The Petition for Cert.

AETN filed a petition for writ of certiorari on November 19, 1996. AETN argued that the Eighth Circuit misapplied the Supreme Court's precedent regarding forum analysis, and mistakenly found that the debate was a limited public forum. The reason, according to AETN, is that the network always intended to invite to the debate only those candidates of interest to viewers. AETN's editors carefully reviewed Mr. Forbes' campaign and concluded that he had no public support and was of little or no interest to voters. Under Supreme Court precedent, the government's intent in setting up a public forum is crucial to deciding whether a non-public forum or a limited public forum has been created. Using the intent test, the debate should have been held to be a non-public forum.

AETN asserted that the Eighth Circuit's decision seriously constrains a state-licensed public television station's ability to make editorial decisions and to operate as an FCC licensee. In addition, counsel for AETN believes that, left unchanged, the *Forbes* decision has implications beyond the realm of political debates sponsored and broadcast on government-owned public television or radio stations. The decision could affect the ability of all state-owned entities, including state colleges and universities, to operate institutions of the press or to make editorial judgments about the content of a web site, a campus computer net-

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U.S. Supreme Court To Consider State-Run Public Television's Role as Journalist

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work, or any campus forum to which the public has some access.

AETN will ask the Supreme Court to reverse the Eighth Circuit's decision, and to find that the debate was a non-public forum and that AETN's reasons for excluding Mr. Forbes were legally sufficient under precedent governing non-public forums. However, even if the Court finds the debate to be a limited public forum, AETN will ask the Court to find that its reasons for excluding Mr. Forbes were constitutional. AETN will ask the Court to apply forum doctrine so that journalists employed on state-owned public radio and television stations can make the same editorial judgments about programming as do employees of privately-owned radio and television stations.

Marcus v. Iowa Public Television

The Eighth Circuit, the same court that decided the *Forbes* case, also has before it a case that arose out of circumstances similar to those in *Forbes*: *Marcus v. Iowa Public Television*, No. 96-3645 (October 11, 1996). Seven third-party candidates who were legally qualified to run for Congress in Iowa challenged the decision of Iowa Public Television (IPT) to exclude them from joint appearances of the Democratic and Republican candidates for office on a program called *Iowa Press*. The case was tried last fall in U.S. District Court in Des Moines on an emergency basis — only 20 days separated the filing of the complaint and the jury's verdict.

Iowa Press is a regularly scheduled news interview program similar in style to *Meet the Press* or *Face the Nation*. The candidates claimed that the *Forbes* decision compelled their inclusion in the *Iowa Press* programs that featured joint appearances of their Republican and Democratic opponents. The candidates argued that, while *Iowa Press* was not a traditional "debate," the

joint appearances of political opponents were in essence debates that were controlled by the *Forbes* decision.

The jury delivered a special verdict that included findings that no political pressure had been applied to IPT, that IPT had not considered the merits of the excluded candidates' views, and that the excluded candidates were not newsworthy.

The jury also found, however, that the candidates' appearances on *Iowa Press* were debates under the broad definition of the Eighth Circuit's opinion in *Forbes*. As a matter of law, the District Court agreed and found that the joint appearances on *Iowa Press* were debates, as that term is used in *Forbes*. Therefore, the District Court held, under the *Forbes* decision, that the programs were limited public forums, so that, to satisfy the First Amendment, IPT's decision to exclude the candidates must serve a compelling interest and be narrowly tailored. However, the District Court in *Marcus* went on to find that IPT's reason for excluding the candidates from the debate — that the candidates were not newsworthy — advanced compelling state interests and was narrowly tailored.

Because the District Court's decision was rendered before all the *Iowa Press* programs at issue were aired, the candidates in *Marcus* filed an emergency motion for injunctive relief with the Eighth Circuit pending an appeal on the merits. A panel of the Eighth Circuit denied the candidates' request for emergency injunctive relief.

The panel held, two-to-one, that IPT's operating as an institution of the press and maintaining the licensee discretion required of all broadcast licensees are compelling state interests. The dissenting judge saw *Marcus* and *Forbes* as indistinguishable. *Marcus v. Iowa Public Television*, 97 F.3d 437 (8th Cir. 1996). All the *Iowa Press* programs

aired without participation by the third-party candidates.

Prior to the grant of certiorari in the *Forbes* case, the Eighth Circuit agreed to sit *en banc* to hear the merits portion of the *Marcus* case. The Eighth Circuit on its own motion has held *Marcus* in abeyance until the Supreme Court rules in *Forbes*. The attorney for AETN and Iowa Public Television, Richard D. Marks of Washington, D.C., expects oral argument in *Forbes* to be scheduled in the fall, with a decision in 1998.

Richard Marks is with DCS member firm Dow Lohnes & Albertson in Washington, DC and represents The Arkansas Educational Television Commission

LibelLetter Committee:

Peter Canfield (Chair)
Adam Liptak (Vice-Chair)
Robert Balin
Richard Bernstein
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Robert Dreps
Julie Carter Foth
Charles Glasser, Jr.
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Nory Miller
Ken Paulson
Madeleine Schachter
Charles Tobin
Stephen Wermiel

SUPREME COURT UPHOLDS MUST-CARRY PROVISIONS

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nated channels, is left to the discretion of the cable operators.

The cable industry challenged the provisions on the ground that they were content-based restrictions on the freedom of cable operators to choose which programming to carry and the opportunity of cable programmers to have their programming carried, in violation of the First Amendment. The government and the broadcast industry argued that the provisions were content-neutral and were enacted not to suppress speech but to preserve and promote speech from multiple sources and to promote fair competition where market forces are unable to operate freely.

The litigation has included two summary judgment proceedings and two reviews by the United States Supreme Court. The provisions were initially challenged by Turner Broadcasting System, Inc., Time-Warner Entertainment Co., the National Cable Television Association, Inc., and other members of the cable industry in 1992. The must-carry challenge was removed to a three-judge district court under expedited procedures provided in the Act for challenges to the constitutionality of its provisions. That court upheld must carry in a 2 to 1 vote, with Judges Thomas Penfield Jackson and Stanley Sporkin in the majority and Judge Stephen F. Williams in dissent. The challengers appealed the decision directly to the U.S. Supreme Court. H. Bartow Farr III argued for the cable industry; Solicitor General Drew S. Days III argued for the government.

Turner I

The Court did not dispose of the case in this first review in 1994. Instead, the Court decided the appropriate standard of review and remanded the case to the lower court for application of that standard to the facts. The Court rejected the challengers' claims that the provisions were subject to strict scrutiny and determined that the appropriate standard was the test promulgated in *United States v. O'Brien*, 391 U.S. 367 (1968), for regulations that are unrelated to the content of speech but impose incidental burdens on speech. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*). The Court found that the provisions were content-neutral regulations that were not enacted in order to suppress unpopular ideas or to manipulate the public debate but rather were enacted to counteract the gatekeeper control cable operators held over the television programming entering the homes of their subscribers. The Court found that Congress was concerned with this bottleneck monopoly because it also controlled the access of broadcast stations to the majority of their potential viewers, which affected advertising revenues, and therefore the

stations' ability to purchase programming and to survive.

The Court found that Congress was concerned with the impact of non-carriage on the video programming and information remaining available to the 40 percent of Americans without cable, who had access only to over-the-air programming. *Id.* at 2461. Thus, the Court found that Congress' purpose in enacting must carry was to preserve the benefits of free broadcast television, to promote the availability of information from multiple sources, and to promote fair competition in the market for television programming. *Id.* at 2469. The Court had an extensive legislative record from which to make such determinations. Congress had held three years of hearings on the structure and operation of the cable television industry before passing the 1992 statute, and had included "unusually detailed statutory findings" in the legislation itself. *Id.* at 2461.

The Court remanded the case to the three-judge district court for findings on whether must carry would further Congress's purposes and whether the provisions burdened substantially more speech than was necessary. Because Congress's fact-finding and predictive judgments were due substantial deference, the lower court was more specifically charged with determining whether Congress had drawn "reasonable inferences based on substantial evidence" in concluding that significant numbers of broadcast stations would be refused carriage on cable systems, that such stations, if denied carriage, would either deteriorate to a substantial degree or fail altogether, and that must carry was a reasonable regulatory choice. *Id.* at 2471-72.

A Narrow Majority

The majority was narrow. Justice Kennedy, who wrote the opinion for the Court, was joined by Chief Justice Rehnquist and Justices Blackmun and Souter, but joined only in part by Justice Stevens. Justice Stevens would have affirmed rather than remanded but concurred in the judgment in order to break the tie between the four Justices voting to remand and the four voting to reverse. Justices O'Connor, Scalia, Ginsburg, and Thomas dissented on the grounds that must carry was content based, and in any event, not sufficiently tailored to pass intermediate scrutiny.

On Remand

On remand, both sides conducted discovery followed by renewed requests for summary judgment. No party requested a trial. The tens of thousands of pages of evidence before the three-judge court included not only the extensive legislative record, but evidence not before Congress about the cable and broadcast industries at the time, and evidence about the cable and broadcast industries since the legislation had been in effect. The three-judge district court again upheld must carry on summary judgment.

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ment, by a 2 to 1 vote, but in three disparate opinions.

Judge Sporkin found that Congress drew reasonable inferences from substantial evidence in concluding that significant numbers of broadcast stations would be refused carriage absent must carry, that cable operators had increasing incentives to use their bottleneck control to capture advertising revenues from broadcasters and to promote programming from affiliated cable programmers. He also found that must carry was narrowly tailored, both because the effects of must carry on cable operators was minimal (only 1.2 percent of all cable channels had been used for broadcast signals added because of must carry), that the burden was likely to diminish further as channel capacity expanded, and that the proposed alternative regulatory choices would not be effective. Judge Jackson expressed misgivings that the questions would be decided without a trial, but joined Judge Sporkin in upholding the provisions as the better choice absent a trial. Judge Williams strenuously dissented.

Turner II

The Supreme Court scheduled the case as its first argument of the current Term. H. Bartow Farr III again argued for the cable industry; Solicitor General Walter Dellinger argued for the government, and Bruce J. Ennis argued for the broadcast industry. The decision did not issue until March 31, 1997. Since the Court had last reviewed must carry, Justice Blackmun had stepped down and Justice Breyer had joined the Court. The Court upheld must carry, again by a narrow 5 to 4 majority. Justice Kennedy wrote the opinion for the Court, joined in full by Chief Justice Rehnquist and Justices Stevens and Souter. Justice Breyer also joined much of Justice Kennedy's opinion, and joined in the judgment, but diverged in one significant respect. Justices O'Connor, Scalia, Ginsburg, and Thomas again dissented.

The majority examined the record before Congress and the additional evidence obtained on remand and held that Congress's judgment was based on reasonable factual findings supported by substantial evidence. It explained that the deference due Congress's judgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television cannot be ignored or undervalued even when the challengers cast their claims under the umbrella of the First Amendment. *Turner Broadcasting System, Inc. v. FCC*, Docket No. 95-992 (slip op. at 43) (March 31, 1997) (*Turner II*).

The Court rejected the cable industry's primary

argument that because must carry was not necessary to prevent the broadcast industry as a whole from failing, it therefore was not a justified intrusion. The Court recognized that Congress "was under no illusion that there would be a complete disappearance of broadcast television nationwide in the absence of must-carry." *Id.* at 8. Rather, the Court found, must carry was aimed at promoting the widest possible dissemination of information from diverse and antagonistic sources, and at preventing a reduction in the number of media voices available to consumers. *Id.* at 9.

The Court found that cable companies controlled the television programming entering each subscriber's home, and could "silence the voice of competing speakers with a mere flick of the switch." *Id.* at 14. It found that 99 percent of communities are served by only one cable operator, and even in communities served by two or more systems, each system typically has a monopoly over its area. The Court further found that the accelerating horizontal concentration in the cable industry gave multiple system operators increasing market power, and that increasing vertical integration in the industry provided an incentive for many multiple system operators to favor affiliated programmers over local broadcast stations.

Cable systems were also found to have incentives to drop independent broadcast stations because they compete with cable programming for advertising, and particularly independent broadcast stations which tend to have programming and advertisers most similar to cable programmers. In addition, cable systems have an incentive to drop broadcast stations in order to improve their market for premium cable services. Indeed, the Court found that significant numbers of broadcast stations had been refused carriage before must carry was enacted. *Id.* at 22.

The Court also found considerable evidence that stations denied carriage were at serious risk because being cut off from large segments of their potential audience meant lower viewership and therefore lower advertising revenues. Although the Court noted that there was evidence supporting the opposite conclusion, the Court found Congress's conclusion reasonable that the growth of cable threatened broadcasting, given the decline in the rate of growth in the number of broadcast stations before must carry, the unprecedented failure of a number of broadcast stations, and the decline in broadcast revenues in real terms during a period in which cable's advertising revenues nearly doubled. *Id.* at 29. The Court thus found must-carry a direct and effective means of addressing this problem because it ensured that

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a number of local broadcast stations would retain cable carriage, and thus audience access and revenues. *Id.* at 31.

The Court addressed the narrow tailoring question first by finding that the burden imposed by must carry on the cable industry was modest. Most cable systems (94.5 percent) had not dropped any programming to fulfill their must-carry obligations either because they were already carrying sufficient broadcast stations to meet those obligations or because they had sufficient unused channel capacity. Only 1.18 percent of cable channels nationwide was used to carry signals that had to be added to fulfill their must-carry obligations. And even this modest burden was diminishing as cable channel capacity increased. *Id.* at 32.

Although rejecting the strictest least restrictive alternative analysis as inapplicable for a content-neutral regulation, the Court then analyzed the regulatory alternatives proposed by the cable industry and determined that none was an adequate method of accomplishing Congress's purposes. The alternatives that had been suggested included: a more limited must-carry requirement; a switch on subscribers' television sets that, in combination with an antenna, would permit viewers to switch between cable and broadcast signals; leased access channels open to both broadcast stations and cable programmers at regulated rates; government subsidies for financially weak broadcast stations; and enforcement of antitrust laws against cable operators.

Breyer Concurs In Part

Justice Breyer parted with the other members of the majority with respect to justifying must carry as a means of promoting fair competition. Intimating doubt that must carry could be upheld as an economic regulation alone, Justice Breyer nonetheless provided a fifth vote for upholding the provisions on the ground that must carry survived intermediate scrutiny as a regulation aimed at providing viewers who lack cable with "a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate." *Turner II* (Breyer, J., concurring) (slip op. at 1).

In his view, important First Amendment interests supported both sides. He argued that compulsory carriage extracts a serious First Amendment price, but also that by promoting dissemination of information from diverse and antagonistic sources must carry was aimed at furthering "the public discussion and informed deliberation" that "the First Amendment seeks to

achieve." *Id.* at 2. In Justice Breyer's view, therefore, the key question was whether must carry struck a reasonable balance between potentially speech-restricting and speech-enhancing consequences. Breyer emphasized that the statute imposed only a limited burden on the cable industry and its customers and that absent must carry the revenues and programming of broadcast stations would likely decline. He therefore concluded that Congress could reasonably determine that must carry will help over-the-air viewers more than it will hurt cable subscribers and that the First Amendment does not "dictate[] a result that favors the cable viewers' interests." *Id.* at 4.

Four Justices Dissent

The dissenting justices argued that must carry was far broader than necessary to promote fair competition and therefore could not be justified as a narrowly tailored means of addressing anticompetitive behavior. Furthermore, they saw no argument for must carry as a means of promoting a multiplicity of programming sources that was not heavily content-based. They found that the record indicated no overall threat to the broadcast system and explained that because must carry protected only the more marginal stations within each market, the regulations indicated a specific interest in protecting content offered by those stations. Therefore, the dissenters reiterated their earlier position that the provisions "should be subject to strict scrutiny, which they surely fail." *Turner II* (O'Connor, dissenting) (slip op. at 7).

Left Open: Low Powers

Finally, one question was left open by the Court: the constitutionality of a provision requiring cable operators to carry low power broadcast stations on unfilled must-carry channels if the FCC determines that the stations would address informational needs not adequately served by full power stations because of the distance between the full power stations and the community. See 47 U.S.C. §§ 534(c), 534(h). In *Turner I*, the Court had expressly remanded the question whether these provisions were content-neutral. 512 U.S. at 643-44, n.6. On remand, the lower court had found the provisions content-neutral and upheld them under intermediate scrutiny. Nonetheless, the Court, over a strongly-worded objection by the dissenting Justices, found the record insufficient to support disposition and expressly left the question open.

Nory Miller is a partner in the Washington office of Jenner & Block, which defended the must-carry provisions of the 1992 Cable Act on behalf of the National Association of Broadcasters and the Association of Local Television Stations.

UPDATES

Atlanta Journal-Constitution Moves To Dismiss Jewell Suit

The Atlanta Journal-Constitution has answered what the attorney for former Olympic park bombing suspect, Richard Jewell, has called the "mother of all libel claims," with a motion for judgment on the pleadings. Dividing the eighteen passages identified by Jewell as defamatory into four categories; i.e., "(1) statements reporting that plaintiff approached the media for interviews or sought out publicity for his actions; (2) statements reporting that investigators believed plaintiff fit the profile of a lone bomber; (3) statements characterizing plaintiff's prior record as a law enforcement officer; [and] (4) observations in the opinion columns of David Kindred musing about the sometimes fleeting quality of the label 'hero' and noting similarities between the law enforcement investigation into plaintiff's possible involvement with the Olympic Park bombing and the past investigation of another famous murder suspect;" the newspaper's motion attacks the complaint on several grounds.

The Atlanta Journal-Constitution argues that the statements must be dismissed because; "(1) they are not defamatory; and/or (2) they do not contain verifiable statements of fact, but rather constitute statements of opinion that are not susceptible to being proven true or false; and/or (3) they cannot reasonably be interpreted as conveying the meaning ascribed to them by the plaintiff." In addition, the newspaper argued that should the court convert the motion to one for summary judgment and consider the public record materials submitted with the motion, the court should conclude that Jewell will not be able to bear the "constitutional burden of proving substantial falsity."

The Atlanta Journal-Constitution is being represented by Peter C. Canfield of Dow Lohnes & Albertson in Atlanta, GA.

California Supreme Court Grants Review of "Fly Along" Suit

The California Supreme Court has agreed to the defendants' request for review in *Shulman v. Group W Productions*, 1996 WL 718183 (Dec. 13, 1996), an invasion of privacy suit arising out of a 1990 episode of "On Scene: Emergency Response" which broadcast the rescue of plaintiffs, Ruth and Wayne Shulman, following an automobile accident on a California highway.

In its December 1996 opinion, the California Court of Appeal affirmed the dismissal of those portions of the complaint arising out of the filming that took place on the highway but reinstated the claims for the portions of the broadcast which were filmed once inside the rescue helicopter. See *LDRC LibelLetter*, January 1997 at p. 1.

In their brief to the California Supreme Court the defendants argued that the California Court of Appeal improperly applied the balancing test for claims premised upon invasion of privacy laid out by the California Supreme Court in *Hill v. NCAA*, 7 Cal.4th 1, 865 P.2d 633, 26 Cal.Rptr.2d 834 (Cal. Sup. Ct. 1994). The defendants argued that *Hill*, in which the court found that college athletes' privacy interests were outweighed by the interests of the NCAA in maintaining a drug testing policy, was inapplicable because *Hill* did not involve any First Amendment principles.

The defendants also contended that the media should not be held liable for the broadcast of legally obtained and newsworthy material merely because members of the audience might find it offensive. In addition, the defendants argued that liability should not attach for the disclosure of true facts which have already been published or for newsgathering activities which result in a publication in the public interest.

Davis Wright Tremaine in Los Angeles will be representing the media defendants before the California Supreme Court.

Rue v. K-Mart — Pennsylvania Superior Court Orders Retrial For \$1.49 Million Employment Libel

Holding that the doctrine of collateral estoppel does not apply to an unappealed decision of an unemployment referee, the Pennsylvania Superior Court has reversed a \$1.49 million libel judgment against K-Mart for comments made concerning the termination of the plaintiff, Patricia Rue. *Rue v. K-Mart Corp.*, No. 02531 (Pa. Sup. Ct. 03/20/97). Following Rue's firing in 1989, K-Mart officials called a meeting of Rue's co-workers to tell them that she was fired for eating and concealing a bag of potato chips. Rue then filed for and received unemployment compensation benefits. K-Mart appealed the award of benefits and lost with the referee stating that Rue "did not misappropriate company property and did not eat a bag of potato chips on January 10, 1989." K-Mart did not appeal the decision while Rue followed up her victory by instituting an action for defamation.

At trial, K-Mart was precluded on the basis of the unemployment referee's decision from attempting to prove that Rue did, in fact, steal a bag of potato chips. While a panel of the Pennsylvania Superior Court initially affirmed the decision, motion for reargument en banc was granted in August of 1996. In ordering the new trial, the court noted that the policy considerations underlying unemployment compensation did not support the extension of collateral estoppel into defamation suits. In the words of the court, "[t]o do so would be to hold, in effect, that [K-Mart] loses [sic] the defamation suit based upon the finding of an unemployment compensation referee, even though significantly different procedures apply and different policies and goals are at stake in the unemployment compensation proceeding. Those policies and procedures operate to render a [sic] unemployment

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compensation hearing less than a 'full and fair opportunity to litigate' the facts relevant to the subsequent action." *Slip op.* at 23-24.

K-Mart was represented by Mark R. Hornak of Buchanan Ingersoll in Pittsburgh, PA.

Minnesota Supreme Court Denies Review in Suspected Arsonist Case

The Minnesota Supreme Court has denied further review of *Knaeble v. Cowles Media, Inc.*, No. C3-96-1738 (Minn. 03/18/97), a suit which arose out of 1994 *Star Tribune* article which reported on several suspicious fires and the ensuing investigation which focused on the plaintiff, Ray Knaeble, Jr. See *LDRC LibelLetter*, March 1997 at p. 5.

The denial of review lets stand a grant of summary judgment in favor of the defendant. The Minnesota Court of Appeals found the article to be nonactionable on the basis that it simply did not contain a defamatory message. Citing *Haynes v. Alfred A. Knopf*, 8 F.3d 1222, 1227 (7th Cir. 1993), the court stated that, "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, a conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."

Cowles Media was represented by John P. Borger of Faegre & Benson in Minneapolis, MN.

Saddam Hussein's Lawsuit Dismissed

A French court has dismissed a libel suit filed by Iraqi leader Saddam Hussein against *Le Nouvel Observateur*,

a French weekly magazine. The suit was dismissed on the ground that Hussein should have sued under laws protecting chiefs of state from insult, rather than under libel laws. The action arose out of a September 1996 editorial written by Jean Daniel which criticized France and the European Union for their apathy in the face of Hussein's tyranny. In the editorial Daniel referred to Hussein as a perfect idiot, a killer and a monster.

Rip Torn Wins \$475,000 Libel Judgment From Dennis Hopper

Another actor versus actor libel suit has resulted in liability and a rather sizable award as actor Rip Torn has reportedly won \$475,000 from Dennis Hopper following a March 7 verdict.

Torn sued Hopper for comments made during a May 1994 Tonight Show appearance. During the segment Hopper discussed the making of the movie "Easy Rider," in which he starred and directed. Discussing the casting of the film Hopper disclosed that Torn did not get the part because he pulled a knife. The \$475,000 award was made up of \$300,000 for loss of income and \$175,000 for emotional distress.

In 1995, actress Elke Sommer was awarded \$3.3 million in a libel suit against Zsa Zsa Gabor and her husband, Frederic Von Anhalt, for comments the couple made to a German reporter alleging that Sommer was broke, lied about her age, hung out in sleazy bars and made money selling handknit sweaters. See *LDRC LibelLetter*, January 1996 at p. 1.

IN CASE YOU MISSED IT...

Broadcasting & Cable magazine reported that Inside Edition had won the Investigative Reporters & Editors award for the best investigative news report on broadcast television for 1996. It was the first time the award was won by a syndicated news magazine program. The report was an expose on certain insurance sales scams and involved the use of hidden cameras to capture the insurance salesmen committing fraud and forgery. The judges, noting the controversy engendered by the Food Lion litigation, stated the Inside Edition report was "a terrific piece of TV journalism that helps justify the use of hidden cameras."

The same investigative report won the prestigious George Polk Award last month.

**LDRC Would Like to Thank
Intern Brian Larkin,
Fordham University
School of Law, Class of 1997,
For His Contributions
To This Month's
LibelLetter.**

SUPREME COURT UPDATE

***Word of Faith
World Outreach Center
Church v. Sawyer,***
90 F.3d 118 (5th Circuit), *cert.
denied*, 65 U.S.L.W. 3624 (No.
96-1056, 3/18/97)

The Supreme Court also let stand the dismissal of claims of RICO and civil rights violations brought by televangelist Robert Tilton's church, the Word of Faith World Outreach Center Church, against ABC. Following a 1991 *PrimeTime Live* broadcast which alleged that the minister led an extravagant lifestyle and lied to his followers, the church brought suit alleging that ABC had violated the RICO statute and had conspired to deprive Tilton and his followers of their religious rights. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of the claims in August of 1996 holding that the church failed to show a pattern of racketeering activity and rejecting the church's argument that 42 U.S.C. §1985, which was intended to address conspiracies motivated by racial animus, should be expanded to cover conspiracies against religions. See *LDRC LibelLetter*, September 1996 at p. 1, May 1995 at p. 1, April 1995 at p. 1.

The questions presented by the petition were: (1) Is the coverage of 42 U.S.C. §1985 (3), limited solely to cases involving racial bias, or does the statute reach conspiracies, such as the one here, specifically intended to shut down church and its ministries with the aid of state officials because of religious bigotry? (2) May predicate acts of racketeering activity—no matter how many, of what character, or extending over what period of time—form a "pattern of racketeering activity" only when they are part of separate illegal schemes?

Millus v. Newsday, Inc.,
89 N.Y.2d 840 (N.Y. Ct. App.),
cert. denied,
65 U.S.L.W. 3646
(No. 96-1315, 3/25/97)

The United States Supreme Court has let stand a decision of the New York Court of Appeals holding that a statement in an editorial that the plaintiff, who was running for state assembly, "admits he doesn't expect to win and is relieved by the prospect," was a statement of opinion and not of fact. The decision by the New York Court of Appeals reversed a decision of the Appellate Division, New York's mid-level court, which held that the use of the word "admits" created a tacit quotation under the Supreme Court decision in *Milkovich* and conveyed to the reasonable reader that the newspaper was giving a factual account of a statement actually made by the plaintiff. See *LDRC LibelLetter*, December 1996 at p. 9, March 1996 at p. 9.

The questions presented by the petition were: (1) Did the petitioner, a public official, meet the burden imposed by *New York Times v. Sullivan* and its progeny of showing falsity and actual malice on the part of the respondents sufficient to defeat their motions for summary judgment? (2) When the evidence demonstrates that the word "admits" was never stated by the petitioner, and that the word used in the reporter's draft is "seems," is it within the contemplation of constitutionally protected freedom of expression for newspaper, in substituting "admits," to assume that its readers will accept the result as opinion? (3) May any statement appearing on an editorial page be considered opinion per se and thereby be constitutionally protected?

***Schoering v.
Courier-Journal and
Louisville Times,***
unpublished (Ky. Ct. App.),
cert. denied, 65 U.S.L.W.
3624 (No. 96-1110, 3/18/97)

The Supreme Court also denied review of a affirmance of summary judgment for the defendant in a case arising out of pre-election editorials critical of the plaintiff, who was seeking re-election as Jefferson District Court Judge. The Kentucky Court of Appeals found that the editorials, which included allegations that the plaintiff had an "uncertain grasp of the law and an erratic temperament," were either incapable of being proven false or were not published with actual malice, as many of the statements were supported by the interview notes taken by the editorial writer.

The questions presented by the petition were: (1) Are statements which are defamatory per se at common law, which impute inappropriate courtroom behavior and legal incompetence to sitting judge, absolutely privileged under the First Amendment because they are purportedly incapable of being proven true or false? (2) May "absence of malice" be said to have been conclusively established in a media/public figure defamation case in which the plaintiff has not been given a fair opportunity to complete her discovery?

SLAPP Suit Law Does Not Prohibit Malicious Prosecution Claim
Lucas v. Swanson & Dowdall, No. G0157273 (Cal. Ct. App. 4 Dist. Feb. 27, 1997)

The malicious prosecution action of a newsletter publisher — who had been sued for libel and tortious interference by the owner and management of a mobile home park in California — was incorrectly dismissed, held a California appeals court, which reinstated the action. The court said that newsletter's comments relating to a controversy over rent control were protected under the petition clause, and therefore any accusations against the publisher would have to include claims the statements were made with actual malice. *Lucas v. Swanson & Dowdall et al.*, No. G0157273, 1997 Cal. App. LEXIS (Cal. Ct. App. 4 Dist. Feb. 27, 1997) (to be reported at 61 Cal. Rptr. 2d 507).

Describing the original case against the newsletter publisher as a SLAPP (strategic lawsuit against public participation) suit, the court also said that California's adoption of an anti-SLAPP law was not intended to reduce remedies otherwise available to a SLAPP-suit defendant, such as malicious prosecution.

Newsletter Campaign Leads to Libel and Tortious Interference Claims

In late 1986, Nelson Lucas purchased a mobilehome in the Del Pardo Mobilehome Park in Anaheim, Calif. He soon became active in the park homeowners' association, and began writing newsletters about rent control. 1997 Cal. App. LEXIS 140 at *4-5.

Owners of the mobilehome park sought long-term leases from tenants in November of 1988; such leases would have circumvented a circulating ordinance for mobilehome rent control. *Id.* at *5. In a series of newsletters, Lucas urged tenants not to sign any long-term leases, criticized rent increases, and described campaign contributions by park owners to city

council members. *Id.* at *6.

In December 1988, the owners instituted two rent increases, bringing the total increase in 1988 to 44.6% in some cases. Lucas urged mobilehome residents to write to the mayor and city council to "let them know there are real live people who are being bankrupted for the benefit of greedy park owners." *Id.* at *7 n.5.

In March 1989, the limited partnership owner and management of the mobilehome park sued Lucas for libel, trade libel and interference with prospective economic advantage. The suit sought \$500,000 in punitive damages and a permanent injunction to stop a "course of defamation."

In May 1990, the suit was voluntarily withdrawn. In July 1990, Lucas filed a malicious prosecution action. *Id.* at *9.

This claim was dismissed in August 1993, with the trial court holding that the defendants' lawyers could "form at least a prima facie opinion" that there was a "tenable basis" to bring a libel action against Lucas. The trial court concluded that if the statements were false, they would "tend to reflect poorly on the management company," and dismissed Lucas' malicious prosecution suit. *Id.* at *10.

Anti-SLAPP Law Does Not Bar Malicious Prosecution Suit

The appeals court began by noting that Lucas' malicious prosecution claim would have been unnecessary had the California anti-SLAPP provision, CAL. CODE OF CIV. PROC. § 425.16, been effective at the time the initial libel suit had been filed. Indeed, the court had earlier characterized the initial suit as follows: "If ever there was a SLAPP suit, the one filed in March 1989 by a mobilehome park owner and its management against a rent control activist was it." *Id.* at *2.

Although the anti-SLAPP law did not take effect until Jan. 1, 1993,

too late to have benefited Lucas, the court rejected the contention that its passage had rendered Lucas' case moot:

While the commentators have generally considered malicious prosecution to be an unsatisfactory remedy for SLAPP suits, nothing in section 425.16 (or anywhere else for that matter) indicates that the Legislature wanted to reduce existing remedies against SLAPP suits, however cumbersome and unsatisfactory those remedies might be.

Id. at *12.

Under California law, the test for malicious prosecution is the "objective tenability" of the original claim. *Id.* at *14-15. The mobilehome owners' claims thus had to be evaluated in light of the activity that gave rise to those claims — Lucas' comments in a local political struggle. Given the broad protection afforded such comments "under the federal and state constitutions, including the right to petition, freedom of the press, and freedom of speech," the court held that "no reasonable attorney would press tort claims against Lucas for statements in a newsletter without at least first considering whether he was constitutionally immune from them." *Id.* at *16.

The court found it unnecessary to consider Lucas' speech and press rights, holding that it should have been "clear to any reasonable attorney that Lucas' comments were protected by his right to petition as guaranteed by the federal constitution." *Id.*

In reaching this conclusion, the court considered the Noerr-Pennington doctrine (derived from *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S.

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SLAPP Suit Law Does Not Prohibit Malicious Prosecution Claim

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127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965)), which the appeals court held provides "broad immunity for petitioning activity." *Id.* at *19. The court said that the Noerr-Pennington immunity from liability for injury resulting from exercise of the right to petition the government applies not only in the antitrust context, but limits liability on defamation and economic interference theories as well. *Id.*

The court then considered the impact of the Supreme Court decision in *McDonald v. Smith*, 472 U.S. 479 (1985), which, without considering the Noerr-Pennington doctrine, declined to afford absolute immunity to allegedly libelous statements made to government regarding an official nominee, providing instead a qualified immunity defensible upon a showing of malice. The court reasoned that even taking account of *McDonald*, the Noerr-Pennington doctrine would require "a reasonable attorney to conclude there is at least a need for actual malice before proceeding in a tort action based on activity within the petition clause" *Id.* at *22) -- an actual malice "analogous to the traditional and familiar rule of *New York Times v. Sullivan*" *Id.*

The court concluded that it was thus unnecessary to determine whether Lucas' comments were absolutely immunized or protected only under the actual malice standard of *New York Times v. Sullivan*, 346 U.S. 254 (1964):

Even given the latter standard, no reasonable lawyer could have concluded that libel and economic interference claims were viable without actual malice. On top of that, no reasonable lawyer would ever have thought that comments in a newsletter bearing on a rent control controversy and directed against "greedy landlords" could ever be the object of

prior restraint via an injunction.

Id. at *30.

In closing, and without elaboration, the court rejected the mobile-home owners' argument that the actual malice standard was not necessary because only private communications between private parties were involved. *Id.* at 33.

The court also has a useful set of citations to other cases around the country in which the petition analysis was applied to newsletters and other communications addressed to the public.

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