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LIBELLETTER

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Texas Jury Gives Win to CBS
— Finds No Falsity —

By: Tom Leatherbury, Bill Sims, and Michael L. Raiff

In a *Texas Lawyer* article which appeared before the trial, reporter John Council asked, "Question: What do you get when you combine a Texas attorney general, an internationally respected TV reporter and three Catholic nuns? Answer: The witness list in *Deborah Kastrin . . . v. CBS Inc. . . .*"

Although only one of the sisters actually testified, on August 13, 1997, after deliberating just less than six hours, a ten person jury in Judge David Briones's El Paso federal court completely vindicated CBS and found that the CBS *60 Minutes* report "The Other America" contained no false statements about members of the locally prominent Kastrin family and their real estate company.

"The Other America," broadcast in early October 1995, reported on living and health conditions in the colonias, rural subdivisions stretching the length of the U.S.-Mexican border. Written by correspondent Ed Bradley, producer Liza McGuirk, and associate producer Jonathan Wells, the Broadcast also discussed colonia developers' business practices and political connections.

The Broadcast contained a portion of an on camera interview with El Pasoan Deborah Kastrin, whose family owned several colonias without running water and central sewer systems. Ms. Kastrin had served as the Executive Director of the Texas Department of Commerce under Governor Ann Richards, and had been appointed by President Clinton to the Advisory Council of the Border Environment Co-operation Commission (a post-NAFTA

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body created to study and to solve water and wastewater treatment problems in the colonias and elsewhere along the border). The Broadcast was also based on interviews with numerous health officials and with Texas Attorney General Dan Morales and several members of his staff and on voluminous documentation. After the Broadcast, Deborah Kastrin was forced to resign from the BECC and the Kastrins were the subject of a great deal of local follow-up coverage about their relationship with Congressman Coleman and their colonias ownership.

The suit was filed originally on October 5, 1996 (two days before limitations ran) by five members of the Kastrin family, Deborah Kastrin, Veronica Kastrin Callaghan and William F. "Fred" Kastrin (Deborah's sister and brother), and William J. "Bill" Kastrin and Socorro Kastrin (Deborah's parents), and one of their companies, Kasco Ventures, Inc. Throughout discovery, the Plaintiffs were never able to allege any specific false statements in the Broadcast. Rather, the Plaintiffs alleged that the Broadcast contained the following four implications: (1) the Kastrins were illegal developers; (2) the Kastrins caused the onset and spread of highly infectious diseases such as cholera, tuberculosis, and hepatitis; (3) the Kastrins used unscrupulous business practices, charged usurious interest rates, and evicted residents when they missed just one payment; and (4) the Kastrins used their close political relationship with United States Congressman Ronald Coleman to impede the Texas Attorney General's investigation of the Kastrins' colonias.

After extensive discovery, CBS filed a Motion for Summary Judgment on the grounds that the Broadcast was not susceptible of the defamatory meanings alleged by Plaintiffs, that the Broadcast was not "of and concerning" certain Plaintiffs, that the Broadcast was true, that CBS had not acted with actual malice, and that the Plaintiffs had not been damaged by the Broadcast. Judge Briones granted the Motion for Summary Judgment only as to Socorro Kastrin and Veronica Kastrin Callaghan, who were not named or even referred to in the Broadcast.

The trial opened on August 4, 1997. Plaintiffs began by calling Fred Kastrin and by playing a portion of producer Liza McGuirk's deposition. Plaintiffs next called associate producer Jonathan Wells and correspondent Ed Bradley as adverse witnesses. Plaintiffs closed with the testimony of patriarch Bill Kastrin, Deborah Kastrin, and their one "character" witness, former El Paso County Judge Alicia Chacón. Chacón testified that she thought the Broadcast damaged the Kastrins' reputation, but that she did not think less of them and that she had not known about all of their colonias before the Broadcast. At the end of Plaintiffs' case-in-chief, the Court granted CBS judgment as a matter of law on Bill Kastrin's claims.

CBS opened its case with the moving testimony of Sister Janet Gildea, a medical doctor and nun who runs the family clinic closest to several of the Kastrins' colonias. CBS read portions of the depositions of Dr. Laurance Nickey, the retired Health Director for the City and County of El Paso, who had been interviewed for and shown in the Broadcast, Patricia Guillermo, a former spokesperson for the Texas Attorney General's office and a source for the report, and Jon Roberts, a former Commerce Department employee under Deborah Kastrin. Live testimony from Texas Attorney General Dan Morales and his assistant, Colonias Strike Force chief Javier Guajardo, about the living and health conditions in the Kastrins' colonias capped off the trial.

In response to the Court's questions, the jury found that the Broadcast was not even defamatory of Plaintiffs Fred Kastrin and Kasco Ventures, Inc. The jury found that the Broadcast was defamatory of Plaintiff Deborah Kastrin, but that the Broadcast was not false as to Deborah, Fred, or Kasco.

When interviewed by the El Paso press after the verdict, Ed Bradley summed it up best when he said, "I am proud of this report. It was an important story that needed to be told. Did people think less of Deborah Kastrin after my report? They probably did. Was there anything false in my report? No, there was not. Sometimes the truth hurts. And this verdict tells investigative journalists that if you go out and tell the truth — even if the truth is tough to hear — you will be vindicated."

Vinson & Elkins, including partners Harry M. Reasoner, Bill Sims and Tom Leatherbury, and associates Mike Raiff and Demetrios Anaipakos, represented CBS in this matter, with Susanna M. Lowy, Associate General Counsel for Litigation, and Naomi B. Wattman of CBS. Carlos Villa of Villa & Keith in El Paso served as local counsel.

Casino Mogul Awarded $3.1 Million In Libel Suit

A Nevada state court jury has ordered that more than $3.1 million in damages be paid to Steve Wynn, chairman of Mirage Resorts, Inc., which owns The Mirage, Treasure Island and Golden Nugget hotel-casinos in Las Vegas, by Barricade Books and publisher Lyle Stuart for defaming Wynn in promotional blurbs written to advertise the publication of *Running Scared: The Dangerous Life and Treacherous Ties of Las Vegas Casino King Steve Wynn*. This unauthorized biography, written by John L. Smith, a *Las Vegas Review-Journal* reporter, who was dismissed from the Nevada suit before trial, is itself the subject of a libel suit in Kentucky against Smith, Stuart and Barricade Books.

Wynn was awarded $1.5 million for damage to his reputation, $500,000 for emotional distress and mental anguish, $100,000 in presumed damages for injury to his business and professional standing, $1 million in punitive damages and an additional $73,000 which the defendant, Barricade Books, had made off sales of the book.

Wynn brought suit over statements about the book in a Barricade Books catalog advertisement written by publisher Lyle Stuart which Stuart testified was to be distributed to about 5,000 book stores and the media . The advertisement included the following statements which Wynn alleged to be defamatory:

> "Another contact represented Chicago mob lieutenant John Roselli. Thus would Steve Wynn's 3-percent investment in the Las Vegas Frontier blow up when investigators discovered that the true owners of the hotel were members of the Detroit mob."
>
> "[*Running Scared*] details why a confidential Scotland Yard report called Wynn a front man for the Genovese family."

While the jury found nothing false in the statements regarding Roselli or Wynn's involvement with the Frontier Hotel, they found that the "front man" allegation was enough to support the $3.1 million award. In the words of jury foreman, John Nobrega, who was quoted by *The Las Vegas Sun*, "He picked the wrong word and he picked the wrong guy . . . . I think he made a mistake using 'front man.'"

Wynn had powerful witnesses, including Nevada Governor Bob Miller and Las Vegas Mayor Jan Laverty Jones, who testified that they did not know about any ties to the mob. Miller and Jones also reportedly testified that the advertisement did not change their high level of esteem for Wynn.

The Scotland Yard report was challenged as containing unreliable evidence about Wynn, and the author of the book, Smith, apparently had told Stuart that the report contained a few inaccuracies.

Lyle Stuart was reported in the August 20 *New York Post* as stating that he would be forced to put Barricade Books into bankruptcy even in order to pay the appeals bond. At trial Stuart reportedly was vague in answering questions about his financial worth, saying that after paying stockholders, lending money to friends and gambling on the stock market, his personal worth was less than $1 million.

Stuart, a 75 year-old self-described "maverick publisher," started Barricade Books in 1990, a year after selling Lyle Stuart Books and Citadel Press to real-estate millionaire Steve Schragis. Stuart and his company came under fire last year for publishing the *Turner Diaries*, a race war novel which was thought to have inspired Oklahoma City bomber Timothy McVeigh.

Defense Verdict for Maine Broadcaster

By Charles J. Glasser, Jr.

A state court jury in Portland, Maine found last month that a Portland broadcaster did not defame a man whose dispute with his ex-wife over child custody issues had been the subject of a news report. Plaintiff's ex-wife had accused him, in custody pleadings, of planning to abduct their child and then flee to Egypt, accusations which she repeated in an interview on-air. The television report referred to a similar true story that became the story line in a feature film, *"Not Without My Daughter." Elshafei v. Elshafei* (Maine, CV-95-371) The plaintiff asserted that because the husband in the film was "a villain that had broken the law," there was an implication of criminal behavior satisfying the requirement of defamatory meaning.

The television station sought summary judgment on the theory of a "fair and true report" privilege based on the custody pleadings, but the Superior Court denied the motion, saying that there was a factual issue as to whether the additional references to the movie "carried a greater sting" than the precise story (in the pleadings) itself. *See LDRC LibelLetter* November 1996 at p. 11.

At trial, however, the jury found that the actual statements made by WCHS were true, and rejected plaintiff's claims that the reference to the movie character impliedly defamed the plaintiff. Reportedly, few of the jurors had seen the movie which the report compared to the Elshafeis, and the trial judge, over the objection of plaintiff's counsel, refused to screen the film for the jury, stating that the plaintiff had a right to a "reasonable" jury, not a "contaminated" one. The plaintiff has filed an appeal to the Supreme Judicial Court on this issue, claiming that this was reversible error. The court is expected to rule on this case in March of next year.

Former LDRC Intern Charles Glasser is an associate at Preti Flaherty Beliveau & Pachios in Portland, Maine.

Pitt v. Playgirl: Injunction Continues, Recall Granted

The battle over the publication of nude photographs of Brad Pitt in the August issue of *Playgirl* magazine continued this month as Los Angeles Superior Court Judge Robert O'Brien ordered the magazine to recall any remaining copies from distributors. *Pitt v. Playgirl*, BC 174503 (Cal. Super. Ct.). The ruling follows the temporary restraining order entered by Judge O'Brien last month barring future distribution of the magazine. At the time the TRO issued, the magazine had already been mailed to subscribers and delivered to newsstands.

Pitt, who was photographed by a so-far unidentified photograher in 1995 with former fiancee Gwyneth Paltrow while on vacation in the West Indies, is suing *Playgirl* for invasion of privacy and infliction of emotional distress arising out of the publication of the pictures in the August issue of the magazine. *Playgirl* denies that it solicited or was involved in the taking of the pictures.

While ordinarily a recall order would be stayed pending appeal, on Thursday, August 14, Pitt was granted an extraordinary writ from the California Court of Appeal ordering the magazine to comply with the recall order during the appeal process. *Playgirl*'s opposition papers to the extraordinary writ were to be submitted on August 22 and Pitt's reply on September 2.

As for the appeal of Judge O'Brien's temporary restraining order, both parties are seeking an expedited appeal process, but with *Playgirl*'s opening brief not yet filed, 30 days for Pitt's answering papers, and another 10 days for *Playgirl*'s reply, a decision by the California Court of Appeal is probably two to three months away.

THE SECOND CIRCUIT RULES THAT THE DUE PROCESS CLAUSE PRECLUDES THE EXERCISE OF JURISDICTION OVER OUT-OF-STATE NEWSPAPERS AND REPORTERS

By Elizabeth A. McNamara and Sharon L. Schneier

The United States Court of Appeals for the Second Circuit affirmed the dismissal of libel claims pending against *The Village Voice* for over a decade. The Court's decision in *John Chaiken and Marilyn Chaiken v. The Village Voice*, 1997 WL 403511 (2d Cir. July 21, 1997) contains the first extensive discussion of the statutory and constitutional limitations on the exercise of jurisdiction over out-of-state publications and reporters by the Second Circuit. This analysis is particularly significant given the Ninth Circuit's controversial and more expansive reading of jurisdiction in *Gordy v. Daily News, L.P.*, 95 F.3d 829 (9th Cir. 1996). The Second Circuit's decision is also noteworthy for its application of the gross irresponsibility standard to a number of issues -- including libel by implication -- that arise in defamation actions.

Facts

This libel action arose out of an article written by Robert I. Friedman ("Friedman"), a freelance reporter for *The Village Voice*, and published as the cover story in the November 12, 1985 edition of the *Voice* entitled "In the Realm of Perfect Faith: Israel's Jewish Terrorists." Ron Dagoni, the then New York correspondent for *Modiin*, a Hebrew-language daily newspaper published in Israel, Modiin Publishing House d/b/a *Modiin* ("*Modiin*"), wrote an article that appeared in the November 7, 1995 edition of *Modiin* summarizing the *Voice* Article.

The *Voice* Article reported on the then upcoming trial of members of the "Jewish underground" who had committed acts of violence against West Bank Arabs, and the ideological and financial support provided to them by the American Jewish community. As part of his research for the article Friedman traveled to Hebron, the home of several suspected "underground" members. Before introducing the individuals and events that are the subject of the Article, Friedman explored in the Article's introductory paragraphs the impetus and ideology of Jewish settlement generally on the West Bank and particularly in Hebron. It is only in this context that the plaintiffs John and Marilyn Chaiken, new immigrants to Hebron from Massachusetts, are discussed.

In these few paragraphs, the Chaikens discuss their views on moving to Israel and the settlers' rights to live there to the exclusion of the Arabs, reflecting what the Court characterized as a series of "virulent anti-Arab sentiments and actions." Friedman first recounts Mr. Chaiken's response to those who say it is unethical to force Arabs to leave: "Well, I say Western European values are bullshit. The messiah will come. There will be a Jewish kingdom. Jews will be the spiritual bosses of the world. . . . You can't create a messianic Jewish state with 1.9 million Arabs!" John Chaiken is then described as boasting of an incident when he and other armed settlers took over a mosque to give his son a ritual haircut.

Mrs. Chaiken explains the religious underpinnings to their relocation to Hebron: ". . . it's not enough to merely live in the Land of Israel, 'you have to live in the realm of perfect faith'," and is described as admonishing and slapping an Arab boy for selling combs on the site of a marker commemorating the murder of a Jewish settler, then commenting that "Arabs are worse than niggers, but not by much."

Having used the Chaikens as the backdrop for the religious ideology behind the Jewish terrorist movement, the Article then focuses on the Jewish underground and its terrorist activities. Thus, by way of transition, immediately following the excerpts from the Chaikens' interview, the Article states: "[s]ettlers like the [Chaikens] have turned the more than 114 settlements that now dot the West Bank into hothouses for the growth of terrorism." The remainder of the Article, which ran for several pages, discusses specific acts of terrorism and profiles West Bank settlers involved in terrorist activities.

Procedural Background

In 1988, the Chaikens brought suit in Massachusetts State Court arguing that Friedman, *The Village Voice*, *Modiin* and Dagoni had defamed them and intentionally inflicted emotional distress on them by publishing the articles. The Chaikens maintained that the incidents depicted and their quotes in the Article were manufactured or taken out of context. The action was removed to federal court in Mas-

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sachusetts. All defendants except *The Village Voice* moved to dismiss for lack of personal jurisdiction. The Massachusetts Court dismissed the claims against *Modiin* and Dagoni for lack of personal jurisdiction, and on the plaintiff's assent to *The Village Voice's* motion to transfer, transferred the claims against *The Village Voice* and Friedman to the United State District Court for the Southern District of New York.

In the Southern District of New York, the district court dismissed the claims against Friedman as untimely under New York's one-year statute of limitations applicable to defamation claims. The district court applied New York statute of limitations, rather than the Massachusetts statute (under which the action was timely), "to prevent plaintiffs from filing an action in a forum where the statute of limitations is favorable but where personal jurisdiction cannot be exercised, then transferring the action to the forum where personal jurisdiction can be exercised and attempting to carry with the action the most favorable statute of limitations."

After years of discovery, Judge Scheindlin found that *The Village Voice* (the only remaining defendant) was entitled to summary judgment since there was no showing that it acted in a grossly irresponsible manner in publishing the Article, and specifically found that *The Village Voice* was not grossly irresponsible in failing to foresee the alleged defamatory implication contained in the Article that the Chaikens are terrorists.

Judge Scheindlin did not definitively rule on the threshold inquiry of whether the Article could be read to imply the defamatory meaning argued: that the Chaikens are terrorists. The district court noted, however, that the title of the Article – "In the Realm of Perfect Faith: Israel's Jewish Terrorists" – which juxtaposed a quote from Mrs. Chaiken, and the transition sentence – "[s]ettlers like the Chaikens have turned the more than 114 settlements that now dot the West Bank into hothouses for the growth of terrorism" -- could be read to "imply that the Chaikens are somehow involved with the anti-Arab violence detailed in the rest of the article." Nevertheless, the district court held that *The Village Voice* could not be found grossly irresponsible on that basis since there was no evidence that *The Village Voice* "intended to imply the Chaikens were terrorists" and "it would be speculation to assume that the *Voice* realized that such an implication was possible." *Chaiken v. VV Publishing Corporation d/b/a The Village Voice*, 907 F. Supp. 689, 698 (S.D.N.Y. 1995).

On appeal, the plaintiffs raised a myriad of procedural and substantive arguments in support of reversal of the decision below. In a lengthy opinion written by Judge Leval, the Second Circuit carefully considered and rejected each of the arguments.

Personal Jurisdiction over Non-Resident Publications and Reporters

The Second Circuit held that constitutional due process precludes the exercise of personal jurisdiction over non-resident publications and freelance reporters notwithstanding that some copies of the newspapers may end up in a forum – in this case, Massachusetts -- and plaintiffs' allegations that the "brunt of the harm" of their reputations was felt in Massachusetts.

While not setting any bright-line tests, the Court categorically rejected the notion that *Modiin*'s contact with Massachusetts – four copies of its newspaper per day and 183 copies of the Sunday edition -- constituted the "substantial number of copies" that makes it fair to exercise jurisdiction over a non-resident publisher. Moreover, given that the Chaikens had appeared to settle permanently in Israel, *Modiin* had no reason to believe that any possible effects of the Article would be felt in Massachusetts, and did not "expressly aim" its actions at Massachusetts. The Court found the facts presented here distinguishable from those in *Gordy v. Daily News, L.P.*, 95 F.3d 829 (9th Cir. 1996), and therefore did not decide whether the "legal principles set forth in *Gordy* are correct."

Construing the Massachusetts long-arm statute (derived from the Uniform Interstate and International Procedure Act), the Second Circuit held that simply causing tortious injury in a state -- even with the knowledge that it might do so – without performing an "act" in the state did not constitute "an act or omission" in Massachusetts within the meaning of its long-arm statute.

As to the issue of the limitations law to be applied to the claims against Friedman following a venue transfer, the Second Circuit held that New York's law applied since the transferor court lacked jurisdiction over Friedman. The Court rejected the plaintiffs attempt to transport Massachusetts more generous limitations period by assenting to the venue transfer requested by *The Village Voice*.

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A Publisher Cannot Be Found Grossly Irresponsible in Relying on the Reporting of an "Established Writer"

The Second Circuit's decision is also noteworthy in that it strongly reaffirms the New York law which holds that a publisher does not have the "intolerable burden" of rechecking its reporters' reporting or assertions absent obvious reasons to doubt the truth of an article. Specifically here, the Court found that since *The Village Voice* Article was subject to *The Village Voice*'s "normal editorial process" and was written by a writer with a "sound reputation," *The Village Voice* had "no duty to take the extraordinary step [of checking sources and quotations]." *Slip op.* at 33. And the Court rejected the argument that the virulent anti-Arab statements and actions attributed to the Chaikens were so "inherently implausible" that *The Village Voice* was obligated to perform a more searching inquiry.

Most significantly, the Second Circuit rejected the Chaikens' contention that *The Village Voice* was grossly irresponsible in publishing "defamatory innuendo" which implied that the Chaikens were terrorists. In its first pronouncement of the standard for liability for alleged defamatory implications -- an ever-increasing claim in the law of libel -- the Court held that liability for "defamatory innuendo" cannot exist where there is no indication that the newspaper had "obvious reasons" to doubt the truth of the article. To make the publication of any potentially damaging remark an indication of irresponsibility would, the court stated, "place[ ] the cart before the horse." *Slip op. at 35*. Thus, where the standard is gross irresponsibility, a publisher has no duty to "undertake additional research to verify the truthfulness of any statement that might damage a reputation." *Slip op.* at 35.

The significance of the Court's ruling is that where a publisher has followed normal and appropriate journalistic practices, *i.e.*, does not act in a grossly irresponsible manner, a publisher will not be held liable for defamatory innuendo. And, under the Court's analysis, the subjective and often vague analysis of trying to ascertain whether a statement can be deemed to imply the defamatory implication the plaintiff urges, is of no moment.

Liability for the Acts of An Independent Contractor

The Second Circuit's decision is also helpful in recognizing that the terms and conditions of a freelance writer's (such as Friedman's) employment are illustrative of his independent status. Accordingly, as an independent contractor, *The Village Voice* could not be held liable for Friedman's actions on a theory of respondeat superior. The Second Circuit further rejected plaintiffs' argument that it is entitled to recover from *The Village Voice* under general agency principles reasoning that "[t]o hold that a publisher can be held liable for the defamatory statements of an independent contractor without a showing of gross irresponsibility would defeat the purpose of requiring that showing." *Slip op.* at 38.

Elizabeth A. McNamara and Sharon L. Schneier are with the firm Lankenau Kovner Kurtz & Outten, LLP in New York City and were counsel for The Village Voice and Robert Friedman in this matter.

Troubling Eighth Circuit Decision on Public Official Status

Reconsideration Sought

In a troubling decision, the Eighth Circuit Court of Appeals reversed a grant of summary judgment and reinstated a libel by implication claim brought by a Minnesota coroner against CBS. Equally disturbing is the Court's determination that, in performing an autopsy to assist, and that was paid for by, a neighboring county coroner, she was not a public official with respect to criticism of her professional duties in this case. Not decided was whether she was a public figure.

News Report on a Suspicious Death

The case of *Michaelis v. CBS Inc.*, 25 Media L. Rep. 1953 (8th Cir. 1997) arose out of a local television news report regarding the official investigation of the suspicious death of Lori Jensen, a young Minnesota women, whose death was ruled a suicide. The news report was critical of both the investigation into the death and many of the officials involved in the investigation, including Michaelis. Michaelis performed the autopsy on Jensen. Although Michaelis was the official coroner of Otter Tail County, Minnesota, this autopsy and investigation took place in Becker County, Minnesota where Michaelis performed the

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autopsy essentially as a medical examiner under contract to the Becker County coroner. As described below, the Court seized on this arrangement as relevant to her status as a public official since, according to the Court, it reduced her public responsibility.

The Allegedly Defamatory Statements

The complaint alleged three defamatory statements in the broadcast. 1) *Why was the death certificate signed and marked suicide and then filed when the case was still under investigation?* 2) *We tried to talk with the doctor about her qualifications to handle a suspicious case like this one. She hung up on us. Twice.* 3) *And WCCO has learned that Dr. Dorothy Michaelis was once sued in Keokuk, Iowa, after she reportedly changed the cause of death in a suspicious case there, apparently admitting she deviated from normal autopsy procedures.*

District Court Grants Summary Judgment

In granting summary judgment, the district court held the first statement was not actionable as a matter of law because it does not state a false defamatory fact about Michaelis. The broadcast as a whole made clear that this statement did not refer to Michaelis. Statement three was protected by Minnesota's qualified privilege for reporting public proceedings. It was a fair report of a prior lawsuit against the plaintiff. Statement two, however, was susceptible of a defamatory meaning toward Michaelis because it criticized by implication her professional abilities. The court, nevertheless, dismissed on the ground that Michaelis, as a public official, had failed to offer any evidence that the statement was made with actual malice.

Eighth Circuit Reverses; Coroner Is Not a Public Official

The Eighth Circuit affirmed regarding statements one and three, but reversed as to statement two. Regarding the defamatory meaning of statement two, the Court confirmed that defamation by implication is a viable cause of action under Minnesota law. *See Toney v. WCCO Television*, 24 Media L. Rep. 1993 (8th Cir. 1996) (White, J. retired, sitting by designation) (recognizing libel by implication for private figures under Minnesota law) (See *LibelLetter* June 1996, at p. 1). Thus, the Court held that "[c]onsidering statement two in conjunction with the context and tenor of the entire report, a jury could conclude that Michaelis was evading the reporter because she was neither qualified to handle the Jensen autopsy nor professional in her investigation of Jensen's death." 25 Media L. Rep. at 1956.

Reviewing plaintiff's public official status de novo, the Court found that Michaelis was not a public official for two reasons. First, although Michaelis was the publicly paid Otter Tail County coroner she was not the coronor or an employee of Becker County, the site of the investigation; rather in this case she "served merely as a private physician, to whom [the Becker County coroner] occasionally referred autopsies." *Id.* Second, the Court reasoned that even if Michaelis was a Becker County employee, she did not exercise "substantial responsibility or control" over the death investigation to warrant public official status. *Id.* at 1957.

Reconsideration Sought: Eighth Circuit's Narrow Public Official Standard Contrary to Other Cases

CBS has filed for rehearing or rehearing en banc. It has argued that the Court's narrow formulation of public official status is contrary to several Supreme Court decisions that protect wide-ranging commentary and criticism of public officials not just of their official acts but on anything "which might touch on an [their] fitness for office." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964); *Monitor Patriot v. Roy*, 401 U.S. 265, 274 (1971); *Ocala Star Banner Co. v. Damron*, 401 U.S. 295, 300-301 (1971). The Eighth Circuit panel's inquiry into Michaelis' public official status should not have been limited to whether she exercised "control" over a specific investigation into a suspicious death, but should have included an analysis of whether the criticism leveled at her performance in the Jensen death investigation "might touch" on her "fitness" as a public coroner. Under this standard, the allegedly defamatory statements in the news report go directly toward plaintiff's fitness as a coroner.

Summary Judgment Granted in Case over Article Discussing Businessman's Lawsuits

Attorney Fees and Costs Awarded to Newspaper Against Plaintiffs and Their Attorney in the Amount of $113,101.43

By Charles A. Brown, Esq.

The Las Vegas Business Press, its managing editor and one of its reporters have won not only summary judgment in a libel suit brought by Clark County developer, Steven Rebeil, but have won $113,101.43 in costs and attorneys' fees under Nevada's Rule 11.

In *Steven W. Rebeil; Gem Homes, Inc., v. Wick Communications Co., d/b/a the Las Vegas Business Press, Aaron Cohen, & Paula Yakubik*, Case No. A 348937, Clark County Nevada District Judge Steven Huffaker ruled the article in question, published July 3, 1995, was properly, competently, and adequately researched and reported by the defendant Paula Yakubik (the reporter). The plaintiffs, Steven W. Rebeil and his Corporation, Gem Homes, Inc., sued claiming the defendants' article was done "recklessly" and "maliciously" and asked the court for damages in excess of $50,000,000.

The main thrust of the plaintiffs' lawsuit was that the defendants had over reported the number of "active" lawsuits that were pending against the plaintiffs as of June 27, 1995, causing them a great deal of damages in regard to financing that they were attempting to get into place at the time the article was published. Much of the discovery was focused on establishing the actual number of lawsuits pending against the plaintiffs during June of 1995 and that there was no causal connection between the article and the decision-making by the financial institutions with which the plaintiffs were dealing.

In the time frame referenced by the *Las Vegas Business Press* article, it was argued that the plaintiffs had at least 22 lawsuits that were outstanding and active, and that the defendants reported on only 18 of them. It was also established that Steven W. Rebeil was one of the largest home developers in the Clark County area, and was also in the process of applying for a gaming license because of his involvement in a casino/hotel that was soon to open.

Developer was Public Figure

Judge Huffaker ruled that the plaintiff Steven W. Rebeil was, at the very least, a limited purpose figure and for the purpose of this lawsuit was a general purpose public figure. He felt that the defendants made reasonable efforts to research and substantiate the article as it was written, and the defendants reliance upon the District Court records was reasonable, fair, and an accurate reporting of those court records.

Judge Huffaker also found that the plaintiffs did not show any evidence, documents, or testimony that would indicate that the defendants had any malice toward the plaintiffs, and the plaintiffs failed to establish a prima facie case in that regard. Stating that summary judgment is particularly appropriate in defamation cases, he held that there were no material issues of facts that would preclude entry of summary judgment.

Motion for Costs

Thereafter the defendants filed a Motion for Attorney Fees and Costs against the plaintiffs and the plaintiffs' original attorney who had signed the Complaint, Dominic J. Magliarditi. Under Nevada Rules of Civil Procedure, Rule 11, the defendants moved to include Mr. Magliarditi. Again, Judge Huffaker presided over the hearing, and granted the defendants' Motion for Attorney Fees and Costs. Judge Huffaker found that Mr. Magliarditi was, at the time the complaint was filed, the attorney for Steven Rebeil personally, the in-house counsel for Gem Homes, Inc., and the registered agent on behalf of Gem Homes, Inc. As such, both Mr. Magliarditi and his clients, the plaintiffs herein, were aware of the pending litigation that had been filed against Steve Rebeil and/or Gem Homes, Inc., prior to the publication of the article in question. He further found that the Complaint was not well-grounded in fact, and it was filed so as to harass. The Judge awarded the defendants the amount of $103,842.00 in attorney fees, pursuant to NRCP 11 and/or NRS 18.010(2)(b) and costs in the amount of $9,259.43 pursuant to NRS 18.005.

The plaintiffs have appealed the decision on granting the Motion for Summary Judgment and the award of attorney fees and costs, the parties are presently in the appellate process. The plaintiffs have posted a supersedeas bond for the amount of the Judgment pending the appeal.

Charles A. Brown is a solo practitioner in Lewiston, Idaho and represented the defendants in this matter.

Public Figure Category Narrow in Oregon

In a recent opinion, a court of appeals in Oregon articulated a narrow conception of public figure status when it reversed a grant of summary judgment that had been entered for defendants in a libel and privacy action brought by an aerobatics pilot. *Reesman v. Highfill*, 1997 WL 414262 (Or.App.). Defendant was owner and chief pilot of Mig Magic, Inc., a business engaged in air show performances which featured former eastern bloc jets.

Pilot v. PAAAX

The defendants are two members of the steering committee for a group called People Against Aurora Airport Expansion (PAAAX). PAAAX was formed to fight the airport's expansion in 1991. Between 1991 and 1994 it incurred substantial unpaid attorney fees related to its efforts. In an attempt to raise money to pay PAAAX's debts, for which the defendants were personally responsible, the defendants published and distributed a flyer detailing how PAAAX benefits its surrounding community.

In the flyer, they republished a picture and headline from the Oregonian which had reported that plaintiff Reesman, who at the time kept his aircraft at Aurora airport, had crash landed one of his stunt jet planes at the Aurora Airport. The flyer then goes on to treat the accident as an ominous harbinger of what could come should the airport be expanded and jet traffic increase. Reesman sued over statements made in the flyer, saying that the flyer suggested that Reesman routinely disregarded recommended takeoff and landing patterns and that he had been engaged in stunt flying over a residential neighborhood in direct contravention of FAA rules when the crash occurred.

In ruling for the defendants, the trial court found the flyer's statements incapable of defamatory meaning. The court of appeals reversed this finding, holding that although it agreed that the statements in the flyer could be read as statements regarding safety concerns generally, rather than the plaintiff particularly, "we also agree that the statements, taken in context, could reasonably be read otherwise and are capable of defamatory meaning." *Reesman*, 1997 WL at *4.

Pubic Figure Analysis

The trial court had also found that Reesman was a public figure who must show actual malice on the part of the defendants in order to prevail. Reesman's air shows, which involve former Communist bloc jets, had been the subject of several regional newspaper articles. Moreover, Reesman had distributed handbills and placed advertisements promoting his performances. Despite these facts, the appeals court reversed the trial court's finding that Reesman is a public figure. *Reesman*, 1997 WL at *5.

The appeals court cited *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979), as controlling precedent on the public figure issue. The *Wheeler* court refused to find a professional horse trainer, who was "well known among the public of Appaloosa racing," *Id.*, 286 Or. at 101, to be a public figure in a suit that he filed against his former employers for defamatory statements they made in a letter sent to the national Appaloosa racing newsletter. In making its decision, the *Wheeler* court held that "[w]e must conclude that under the principles now applied by the United States Supreme Court, one does not become a public figure simply because of general public interest in one's lifestyle and personal activities or because one's job happens to be one in which widespread publicity is given to outstanding performers." *Id.*, 286 Or. at 116. The appeals court went on to say that it understands *Wheeler* to be an explicit rejection of the "performer as public figure" equation adopted by other jurisdictions, including the Third Circuit in *Chuy v. Philadelphia Eagles Football Club*, 595 F. 2d 1265 (1979). *Reesman*, 1997 WL at *7.

The court understood Oregon law to reject the "performer as public figure" equation adopted by other jurisdictions.

Since *Wheeler* rejects the performer as public figure equation, the appeals court in *Reesman* went on to consider whether plaintiff Reesman qualified as a partial public figure because "he had 'thrust [himself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." *Reesman*, 1997 WL at *6 *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345. The appeals court found that "it is uncontroverted that plaintiff did not

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actively and publicly participate in the Aurora Airport expansion controversy." *Reesman*, 1997 WL at *7. Or, put in the language used by the *Wheeler* court, there was "no evidence that plaintiff had attempted in any way to influence that controversy or that he had taken any public part in it whatsoever." *Reesman*, 1997 WL at *7 *quoting Wheeler*, 286 Or. at 116. "Rather," the appeals court went on to say, "plaintiff was the quintessential involuntary participant in a newsworthy event." *Reesman*. 1997 WL at *7. That Reesman kept and maintained his jet aircrafts at the Aurora State Airport and promoted interest in jet flying through his performances was implicitly insufficient.

The court also rejected the argument that Reesman became a public figure by virtue of the news coverage given to his crash landing, saying that "[l]anding a flaming airplane – much less a vintage airplane – in the middle of a heavily populated area is, doubtless, a matter of considerable public interest. Nevertheless, '[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.'" *Id. citing Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 167-68.

False Light Requires Actual Malice

On a separate issue, the court of appeals applied the actual malice standard to the false light claims brought by Reesman, saying "[d]efendants are correct that, under our precedents, to ultimately prevail on a false light claim, a plaintiff must prove that the defendant had 'knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which [the plaintiff] would be placed.'" *Reesman*, 1997 WL at *8 *quoting Restatement (Second) Torts* § 652 E (b). Despite this being the standard, the court went on to reverse the trial court's dismissal of two of the three privacy claims brought, finding "[in] sum, there are disputed issues of material fact as to both defendants' actual malice with respect to some specifications of the false light claim. Accordingly, the trial court erred in granting summary judgment against that claim in its entirety." *Reesman.*, 1997 WL at *10.

Defendants' attorneys are seeking review in the Supreme Court of Oregon.

SUMMARY JUDGMENT GRANTED IN DEFAMATION CASE INVOLVING TELEVANGELIST

By Richard M. Goehler

On July 12, 1996, Reverend Leroy Jenkins, one of the most colorful and well known ministers in central Ohio, filed a defamation action both individually and on behalf of his church, The Leroy Jenkins Evangelistic Association, Inc., against River City Broadcasting and WSYX. As asserted in the Complaint, WSYX-TV6 (Columbus) allegedly defamed Jenkins and his association by falsely reporting that "Jenkins admits he still owes the IRS a bundle."

The broadcast which was the subject of the action arose out of a public announcement by Jenkins that his church property was for sale. WSYX broadcast a news report concerning Rev. Jenkins and the announcement of the proposed sale of his church property. The WSYX report, broadcast on June 18, 1996, stated in its entirety:

> He is one of the most colorful ministers in central Ohio...but now Leroy Jenkins says he's selling his church. Jenkins says the Healing Hill Cathedral in Delaware [Ohio] has been for sale for a few months. If it doesn't sell soon, he may put it up for auction. Jenkins admits he still owes the IRS a bundle. But he says he'll reopen his church in another location.

On July 31, 1997, Judge John Bessey of the Court of Common Pleas of Franklin County, Ohio issued his Decision granting Defendants' Motion for Summary Judgment and dismissing the Plaintiffs' Complaint. The Court found Jenkins and his association to be public figures, specifically finding that the evidence demonstrated (1) his extensive media coverage with regards to both ministry and numerous high profile legal actions; (2) plaintiff's general fame and notoriety within the evangelical movement; (3) plaintiff's general fame and notoriety in Ohio with regards to ministry as well as plaintiff Leroy Jenkins' past political aspirations; (4) the extensive television coverage plaintiff sought in about 25 states for the ministry; (5) plaintiff's extensive use of the media to promote his ministry; and (6) plaintiff Leroy Jenkins' numerous publications, audiotapes and videotapes. In addition, the Court specifically found that WSYX did not act with the requisite actual malice in broadcasting its report.

The Court's Decision dismissing Jenkins' Complaint came about two months after the Court of Common Pleas, Delaware County, Ohio had dismissed on summary judgment a similar complaint filed by Jenkins and his association against WBNS-TV10 (Columbus) over a similar broadcast.

Defendants River City Broadcasting LP and WSYX-TV6 were represented by Richard M. Goehler and Curtis A. Hansen of Frost & Jacobs.

Pennsylvania Court Holds Use of Plaintiff's Image in Crowd Scene Not Capable of Defamatory Meaning

By Joyce S. Meyers and Joseph Pelusi

On June 12, 1997, the United States District Court for the Eastern District of Pennsylvania granted summary judgment to Arts and Entertainment Cable Company ("A&E") and Kurtis Productions, Ltd., ("Kurtis") in a case alleging defamation, false light and loss of consortium. *Osby v. A&E Television Networks*, Civ. No. 96-7347 (E.D. Pa. 6/17/97) The court found that use of plaintiff's image, as he appeared in a scene in an airport, was not susceptible of defamatory meaning.

A&E had aired a program produced by Kurtis that exposed racial discrimination by authorities in airport drug searches. Plaintiff Gregory Osby, a jazz musician, appeared in two crowd scenes showing people walking through an airport. Asserting that the program implied that he was involved in drug trafficking, Osby and his wife, Kay Vaughn, took Kurtis and A&E to court.

The program at issue, entitled "Seized By the Law," was part of the "Investigative Reports" series on A&E. Its thesis was that African-American and Hispanic men, because of their race, are more likely than other people to be stopped and searched for drugs and drug money. In addition to video images of people walking through an airport, the program contained statements by the producer, Bill Kurtis, and by attorney, E.E. "Bo" Edwards. Kurtis and Edwards explained that authorities often confiscate money from men of color because they fit the "profile" of drug dealers.

As an example, Kurtis told the story of Willie Jones, an African-American billing contractor whose cash was confiscated in an airport when he was traveling to make purchases for his business. Jones was described as an innocent "victim of an airport profile stop. He'd paid cash for his ticket, was traveling to a so-called drug city, planned a very short stay, and most importantly, was a person of color." Plaintiff Gregory Osby was shown walking through an airport with some other people as Kurtis said, ". . . most importantly, was a person of color."

Edwards also commented upon the Jones story. He stated that, "If a minority citizen of this country is traveling through an airport or traveling on an interstate highway, they are probably 10 times or 15 times, maybe even 20 times more likely to be stopped for the sole purpose of a law enforcement agent trying to get permission to search them to see if they have money." The second scene showing Osby and others appeared as Edwards said, "If a minority citizen of this country is traveling through an airport . . ."

Osby contended that the program was false and defamatory and that it portrayed him in a false light that was highly offensive to a reasonable person because it depicted him as involved in criminal activity. The defendants moved to dismiss on the ground that the program in which Osby appeared could not fairly and reasonably be construed to mean that Osby was involved in drug trafficking. Rather, it conveyed only the accurate and inoffensive impression that he was an innocent pedestrian in a crowded airport who might be subjected to unwarranted detainment by law enforcement personnel because of his skin color.

The district court agreed with the defendants. Judge Norma L. Shapiro held that "No reasonable viewer watching the segment profiling Willie Jones and the federal agents' unconstitutional seizure of this money could have concluded Osby, or any of the four other African American men seen in the airport, was involved in criminal activity, or was suspected of criminal activity. At most, a reasonable viewer could have concluded that Osby was at greater risk of being an object of law enforcement discrimination on the basis of race." Therefore, she concluded, "a reasonable person could not find the two scenes of Osby walking in an airport 'highly offensive.'"

Although persuaded by the defendants' arguments, Judge Shapiro denied their motion to dismiss. Citing *In re Medical Lab. Management Consultants*, 931 F. Supp. 1487, 1491 (D. Ariz. 1996), the court chose to convert the motion to dismiss to a motion for summary judgment because of the defendants' submission of a videotape and transcript of the program, along with authenticating affidavits. In granting summary judgment for the defendants on all counts, the court affirmed the right of the media to use images of people in public places to illustrate news reports.

Joyce S. Meyers is a member of Montgomery, McCracken, Walker & Rhoads, LLP in Philadelphia which represented Kurtis Productions Ltd. Joseph Pelusi is a third-year student at Harvard Law School.

Settlement Update

Dean v. St. Martin's Press

Former White House counsel, John Dean, has settled his lawsuit against St. Martin's Press, the publishers of *Silent Coup*, a book which portrayed Dean as the orchestrator of the 1972 Watergate break-in. Terms of the settlement were not disclosed. According to the book, the break-in was an attempt by Dean to get information on a supposed link between Democrats and a prostitution ring run by a friend of Dean's future wife, Maureen.

Dean's suit against Len Colodny and Robert Gettlin, authors of the book, and Watergate burglar G. Gordon Liddy was not affected by the settlement.

KXAS Settles With Cowboys

Dallas-Fort Worth television station KXAS has settled a defamation suit brought by Dallas Cowboys Michael Irvin and Erik Williams. Although attorneys for both sides would not disclose any terms, the Associated Press reported that an anonymous source said that $2 million was to be split between the players.

The defamation suit arose out of reports concerning the sexual assault allegations of Nina Shahravan, who claimed Williams raped her while Irvin held a gun to her head. The police later cleared the players and Shahravan was subsequently charged with perjury.

Hayes v. J.L. International

The August 9, 1997 issues of *Editor & Publisher* reported that Former San Jose Mayor Janet Gray Hayes has settled her $1 million libel suit against J.L. International, the owner of the now defunct Chronicle Communications. Chronicle, which published an annual reference book listing historical American events, was sued by Hayes after she was wrongly described in a Chronicle publication as an "avowed homosexual."

The settlement, which came days before a scheduled trial date, apparently conceded Hayes' request for $1 million in damages but stipulated that she must seek the amount from one of J.L. International's insurance carriers, which has refused to provide coverage in the case.

Time Magazine Publishes Clarification Regarding Jewell

According to an Associated Press report, *Time* magazine has reached an agreement with one-time Olympic Park bombing suspect, Richard Jewell, whereby Jewell has agreed not sue the magazine in exchange for a printed clarification. The August 25 issue of *Time* included the five-paragraph clarification acknowledging that statements about Jewell in two magazine stories "may have been inaccurate or incomplete." The clarification stated, "We express our regret to Mr. Jewell."

While Jewell had never actually brought suit against the magazine, Diana Pearson, a spokeswoman for *Time* acknowledged that after the clarification was printed "Richard Jewell and his attorneys agreed to drop their threat to sue *Time* magazine." No money was involved in the agreement.

MMAR Settles With LASERS

In a related note, the Associated Press has reported that MMAR Group, Inc. has settled a lawsuit brought against it by the Louisiana State Employees Retirement System ("LASERS") for $2.7 million. The pension fund was seeking $28.5 million in "secret profits" that the investment firm allegedly made off the handling of the system's investments.

Earlier this year, MMAR won a $222.7 million judgment against Dow Jones for a *Wall Street Journal* article which reported that regulators were investigating the firm and its Louisiana pension fund trades. In May, U.S. District Court Judge Ewing Werelin threw out the $200 million punitive damage award against Dow Jones, but allowed the $22.7 million remainder stand. Dow Jones has filed an appeal or intends to appeal.

According to the Associated Press report, MMAR, which went out of business shortly after LASERS filed suit, did not admit any wrongdoing in the settlement which is to be paid over three years. The firm also reportedly based the collateral for the installment agreement on real estate and the libel judgment from the Dow Jones suit with an agreement that the entire settlement amount will be paid to LASERS immediately if MMAR collects on the libel judgment.

California Anti-SLAPP Update: California Expands Anti-SLAPP law; Supreme Court to Review Anti-SLAPP Case

In an interesting confluence of events, on August 11, 1997 California Governor Pete Wilson signed into law an amendment to the anti-SLAPP statute specifically aimed at broadening its scope and application. Just two days later, the California Supreme Court, possibly unaware of the Governor's action, voted unanimously to review *Briggs v. Eden Council for Hope and Opportunity*, 54 Cal. App. 4th 1237, 53 Cal. Rptr. 2d 434 (1997), a non-media case presenting the issue of the statute's reach. The Court accepted review of a case from the one appellate division that has insisted on a narrow reading of the statute. The amended law now requires a broad interpretation, although it is not clear whether the amendment moots the review of *Briggs*. In addition, the amended law itself raises many new issues some of which may be addressed in a review of *Briggs*.

The Amended Statute

The legislative intent of the amendment, is to "provide that the [law] be construed broadly" and that it apply "to any conduct in furtherance of the constitutional rights of petition or of free speech in connection with a public issue." New language was added to section 425.16(a) requiring that the law "be construed broadly." In addition, section 425.16(e), setting forth the conduct included within the scope of the statute – the disputed section of the law – was amended to include a new subsection (4). Prior to amendment, the law covered statements made at official proceedings, sec. (e)(1); statements made in connection with official proceedings, sec. (e)(2); and statements made at a public forum in connection with an issue of public interest, sec. (e)(3). New section (e)(4) adds "*or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.*"

This new section extending anti-SLAPP protection to conduct in connection with "a public issue or an issue of public interest" raises interesting new possibilities and questions in the landscape of California defamation and privacy law. The new law may dramatically increase the media's protection in such cases. By no longer requiring that protected statements be linked to official proceedings and public events, a protection conceptually akin to the fair report privilege, the anti-SLAPP law may now apply to almost any defamation claim against the media – so long as the media's conduct was "in connection with a public issue or an issue of public interest." Moreover, by also protecting conduct the new law apparently applies to newsgathering and thus may be a significant defense in privacy and trespass actions.

California's First Appellate District, Division One, has disagreed with Division Four of its own District and with other appellate districts over whether the anti-SLAPP statute applies broadly to defamation actions relating to official proceedings or whether it is more narrowly limited to actions arising out of traditional petitioning activities and issues of public significance. *Compare Averill v. Superior Court*, 42 Cal. App. 4th 1170, 1176, 50 Cal. Rptr. 2d 62 (Ct. App. 4th Dist., Div. 3 1996) (broad interpretation of statute) (*LibelLetter* June 1996, at 9) and *Braun v. The Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (Ct. App. 1st Dist., Div. 4 1997) (anti-SLAPP statute applies broadly and covers press reports of government investigation) (*LibelLetter* March 1997, at 7) with *Zhao v. Wong*, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (Ct. App. 1st Dist., Div. 1 1996) (anti-SLAPP statute does not apply to alleged slanderous statements relating to will contest; no relevance to self-government) (*LibelLetter* September 1996, at 9; November 1996, at 4).

Briggs was a defamation and intentional infliction of emotional distress lawsuit filed by private figure landlords against the Eden Council for Hope and Opportunity ("ECHO"), a non-profit fair housing advocacy group. Plaintiffs' defamation claims arose out of ECHO's involvement and counseling in various landlord-tenant disputes with plaintiffs, and include claims that ECHO called one plaintiff a "drunk," a "jerk," a "redneck" and "racist" to HUD officials investigating tenant complaints. The trial court dismissed the complaint on an anti-SLAPP motion. The Court of Appeal, however, reinstated because the "underlying conduct of [ECHO] was not a matter of *public significance*" it held was required to bring the complaint into the ambit of the anti-SLAPP law. (emphasis added)

According to the Court, "the anti-SLAPP statute was not intended to immunize every statement made before or in connection with an official proceeding but was instead intended to protect statements on a *public issue* made in an official proceeding and statements made in connection with a public issue under consideration or review in an official proceeding." *Briggs*, 63 Cal. Rptr. 2d at 437. Quoting the *Zhao* decision

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with approval, the Court noted that the mere existence of a lawsuit is of no significance in determining whether a public issue exists. "'The existence of a public issue depends rather on whether the statements possessed the sort of relevance to self-government that places them in a specially protected category of First Amendment value.'" *Id.* at 437-438 (quoting *Zhao*, 55 Cal. Rptr. 2d 909). Even granting that ECHO's activities involve tenants' right of petition, the underlying housing issues were, according to the court, matters of private, not public, concern.

In its petition for review, ECHO argues that its activities are matters of public concern, and alternatively that a "public issue" requirement should not be read into the law.

Interestingly, the California Supreme Court in June 1997 denied review in the case of *Braun v. The Chronicle Publishing Co.*, *supra*, a media anti-SLAPP case. In *Braun*, the First District Court of Appeal embraced a broad interpretation of the anti-SLAPP law, specifically criticizing the holding in *Zhao*. (*LibelLetter* March 1997, at 7) *Braun*, involved a series of *Chronicle* newspaper articles that reported on the investigation of alleged malfeasance at a state university medical program. The court held that the newspaper reports were "writings made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law," (section 425.16(e)(2)) and thus fell squarely within the protections of the statute. The court in *Braun* did not read into the statute an additional "public issue" requirement, as later articulated in *Briggs*.

And Kato Kaelin Ordered to Pay Attorneys' Fees for SLAPP

A Los Angeles judge ordered Kato Kaelin to pay attorneys' fees to Globe Communications, which successfully fended off Kaelin's libel suit. Kaelin's libel suit against Globe Communications was thrown out on a motion to strike pursuant to California's anti-SLAPP statute (section 425.16 California Code of Civil Procedure). *See LibelLetter* May 1997 at 5. The court held that Kaelin failed to establish a prima facie defamation case against Globe magazine or its reporter for their coverage of a talk radio show that discussed Kaelin's knowledge of facts in the O.J. Simpson case. In July, Superior Court Judge Robert Letteau, who granted the motion to strike Kaelin's complaint, added to Kaelin's woes by ordering him to pay $23,929.95 in legal fees to the Globe pursuant to section 425.16(c) of the statute.

D.C. District Court Judge Applies California Law

Failure to Comply With California Retraction Statute

In an order from the bench, District of Columbia Federal District Court Judge Paul L. Friedman ruled that California law governed a complaint brought by French national and current resident of Paris, Marc Stephane Goldberg, against ABC over a 1996 *ABC World News Tonight* broadcast. *Goldberg v. Capital Cities/ABC, Inc.*, Docket No. CA 97-39 (D.D.C. July 1, 1997). Goldberg asserted libel, false light, interference with existing and prospective contractual relations and intentional infliction of emotional distress claims from the broadcast.

While ABC was not wholly successful in making its motion to dismiss, Judge Friedman did rule that under California law Goldberg had failed to comply with the state's retraction statute, § 48(a), which limits a plaintiff to special damages unless he has first demanded a correction within 20 days after publication or knowledge of the publication.

Goldberg was the focus of a February 1996 *ABC World News Tonight* segment addressing economic espionage. According to the report, by ABC reporter Brian Ross, U.S. authorities alleged that Goldberg was paid by the French government to go to America and work in the computer industry where authorities say he was an "economic spy." Goldberg did come to the U.S. and worked for two companies in California. With commentary provided by Dr. James Chandler, an FBI consultant, the report then told of Goldberg's arrest at the San Francisco airport with "a suitcase full of company secrets."

While Goldberg admitted in his six-count complaint that he had, in fact, pled guilty to two counts of taking and attempting to take trade secrets in December of 1990, he asserted that being identified as "an 'economic spy' who was 'paid by the French government'" defamed him and brought suit against ABC, Peter Jennings, Brian Ross, Dr. Chandler and WJLA-TV, ABC's D.C. affiliate. *Complaint* at 2.

Judge Finds Defamatory Meaning . . .

Arguing its motion to dismiss before Judge Friedman, ABC contended that the part of the broadcast which was defamatory (that the plaintiff stole trade secrets) was, in light of Goldberg's conviction, concededly true, and that the additional implication alleged by Goldberg to be false (that he stole the se-

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crets for the French government) was not defamatory. In other words, ABC argued that "once one accepts the fact that someone committed a crime, there's nothing defamatory about suggesting that it was done at the request of his country or for the benefit of his country or in service for his country." *Transcript* at 4.

Having trouble accepting the argument, Judge Friedman questioned if whether there wasn't "a difference between saying somebody took documents and pleaded guilty to theft of documents from saying somebody had the job of being a spy and went to work for this company with the intent of spying for his country and taking things from this company." *Transcript* at 8.

In the end, Judge Friedman refused to recognize the distinction, ruling "that despite [ABC]'s best efforts at painting Mr. Goldberg as a patriot and how there ought to be less opprobrium for being called a patriot than for being somebody that steals trade secrets for your own purposes . . . I think there is a sting, there is a bite to being called on a nationwide broadcast a spy for a foreign sovereign." *Transcript* at 53.

. . . But California Law Applies

ABC, however, had greater success in convincing Judge Friedman that California law should properly govern the case. Pointing out that the plaintiff resided in California for a number of years, had never resided anywhere else in the United States, was living in California at the time of the broadcast and was alleging injury which occurred in California, ABC argued that California was the only state whose law should apply.

Judge Friedman agreed stating that under Restatement of Conflict of Laws (Second) § 6, "you look to the general principles of where the injury occurred, where the conduct causing the injury occurred, the residence, the domicile, place of incorporation, place of business of the parties, the place where the parties' relationship, if any, centered, and also what are the relevant policies of this forum and of other interested States in determination of particular interests." *Transcript* at 62.

Working his way through the factors, Judge Friedman recognized that while the publication was nationwide and therefore caused injury in many places, "the injury occurred most dramatically in California, if the allegations of the complaint are to be believed, because, after all, the allegations are that that's where Mr. Goldberg was working and . . . that he was leaving his job as a result of this because of his reputation with respect to that employer and others and he lost a subsequent job in Silicon Valley as a result of this." *Transcript* at 63.

Further, Judge Friedman, citing *Liberty Lobby v. Dow Jones*, stated, "'the law to be applied in a defamation action is not that of the forum where the offending publication was prepared but the place where the plaintiff suffered the most significant harm to reputation.' Again," Judge Friedman continued, "in this case it's California." *Transcript* at 64.

Failure to Comply with Retraction Statute

Upon determining that California law would govern the case, Judge Friedman applied the state's retraction statute, § 48(a), stating that the statute "is quite clear that a plaintiff shall recover no more than special damages unless he has first demanded a correction within 20 days after knowledge of the publication or publication of the statements that he claims would be libelous." *Transcript* at 66.

Judge Friedman continued, "Mr. Goldberg, under California law, is not entitled to general damages which are damages for loss of reputation, shame, mortification and hurt feelings under § 48(a). He is not entitled to exemplary damages . . . to punish or to set an example. The only thing he's entitled to under California law are special damages which are those damages which he can prove he has suffered in respect of his property and business, trade, profession or occupation." *Transcript* at 66.

The court then noted "the implication of [limiting the plaintiff to special damages] is that the heart of what's left of the complaint are probably counts four and five, interference with business or contractual relations, but to the extent that the plaintiff wants to pursue the other counts he is limited on the damages he can get to special damages." *Transcript* at 67.

ABC Affiliate and Correspondent: Complaints Dismissed

Judge Friedman also dismissed the complaint against WJLA-TV, the Washington D.C. affiliate which broadcast the segment, finding that the station was "more of a conduit or a distributor rather than a publisher." *Transcript* at 56.

The court also dismissed the complaint against ABC's senior investigative reporter, Brian Ross, reasoning that the reporter's contact with the District of Columbia fell within the newsgathering exception of the District's long-arm statute.

Finally, because he was not clear on what effect the retraction statute had on Dr. James Chandler, Judge Friedman suggested that Chandler renew his motion to dismiss or move for summary judgment based upon "a more refined analysis" of the effect of § 48(a) on an individual source.

International Libel Roundup

Sri Lanka

A Sri Lankan court last month sentenced the editor of a weekly newspaper to 18 months in prison on a charge of defaming Sri Lanka's president with malice in a February 1996 gossip column. The court suspended the sentence for seven years, which means that the editor, Sinha Ratnatunga, would have to serve the prison term if he is again convicted of libel within that time.

Although President Chandrika Kumaratunga said during her 1994 election campaign that she would promote freedom of the press, three other newspaper editors are facing criminal defamation charges for criticizing the president, according to a letter the Committee to Protect Journalists wrote to Kumaratunga protesting Ratnatunga's conviction.

The gossip column in the *Sunday Times* that led to Ratnatunga's conviction said that the president had sneaked into a late-night party at a luxury hotel. It was one of several articles in which the *Sunday Times* accused Kamaratunga of un-presidential behavior. The paper later admitted that the gossip column was incorrect, but argued that the mistake was unintentional and the editor should not be subject to criminal liability.

In a letter to the Committee to Protect Journalists, Ratnatunga said that his conviction has spurred Sri Lanka's main opposition party to move that Parliament abolish criminal defamation laws. Ratnatunga also said he would appeal the verdict.

United Kingdom

McDonald's Hardly a Winner

In an apparent attempt to staunch a flow of bad publicity in England and around the world, McDonald's Corp. said on July 18 that it would not try to collect any of the $98,000 libel judgment it won last month against two British environmental activists who had handed out pamphlets accusing the fast-food chain of, among other things, mistreating animals and underpaying workers.

McDonald's also let pass a July 17 deadline for filing to recoup its legal costs or enjoin distribution of the defendants' pamphlets. The company spent 12 years and an estimated $16 million prosecuting the "McLibel" case, which culminated in a 314-day bench trial. The defendants, former postal worker Dave Morris and part-time pub worker Helen Steel, had said they would disobey any injunction against publication and risk incarceration, according to the Associated Press.

Morris and Steel, who represented themselves at trial, are being represented by Liberty, a London-based non-profit group, in an appeal of the libel judgment to the European Court of Human Rights. *The National Law Journal* reported that they plan to argue that Britain's libel laws violate the free speech and fair trial provisions of the European Convention on Human Rights. Britain has ratified the Convention and could have to change its libel laws if Morris and Steel succeed in the Strasbourg court.

Morris and Steel plan to emphasize that indigent libel defendants, unlike many other poor civil litigants, are not entitled to have the government pay their lawyers' fees.

Many commentators have called the McLibel verdict a Pyrrhic victory for the chain. Besides running up huge litigation costs, McDonald's also saw a string of former employees testify about activity such as watering down drinks, serving out-of-date food and dumping waste that was marked for recycling, according to *Maclean's*. And even though he found some of the pamphlets' statements to be false and defamatory, Justice Sir Roger Bell of the High Court in London also said that the chain had in fact treated beef cattle and other animals cruelly, helped to depress wages in Britain and unethically aimed advertising at children.

Former Cabinet Minister's Case Falls Apart

In June, Jonathan Aitken, who was Treasury chief secretary in former Prime Minister John Major's cabinet, dropped a libel suit he had filed in 1995 against *The Guardian* newspaper and Grenada television.

The case is significant because Aitken apparently tried to take advantage of Britain's libel law -- which saddles the defendant with the burden of proving a defamatory statement's truth -- and was caught. The defendants had run stories saying that when Aitken was defense procurement minister in 1993, he improperly allowed a Saudi official to pay his bill

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for a weekend at the Ritz in Paris. The defendants also reported that Aitken had procured prostitutes for Saudi businessmen. In court, Aitken told an elaborate story to explain the hotel bill. He said that the Ritz had made a mistake and that his wife, unable to use credit cards because of dyslexia, had paid the bill in cash. The weekend in Paris, Aitken said, was a stop that he, his wife and his daughter made on the way to Switzerland, where his daughter was enrolling in boarding school.

But with Aitken's wife, daughter and mother-in-law scheduled to take the stand, Aitken's story unraveled. The defendants unearthed rental car bills, airline records and bills from an out-of-business Geneva hotel that showed that Aitken's wife and daughter were not in Paris when Aitken said they were.

The Guardian, which has won several high-profile libel cases recently, still faces about $800,000 in legal bills stemming from Aitken's suit, *The New York Times* reported. It was reported elsewhere that Aitken will owe over $3 million in costs. In addition, Aitken also faces a perjury investigation and the collapse of his marriage, and was forced to resign from the Privy Council, which advises the Queen.

Ireland

On July 31, a Dublin High Court jury awarded $450,000 to an Irish politician in a libel action against *The Sunday Independent*, Ireland's largest circulation newspaper. The jury ruled that a 1992 article written by Eamon Dunphy falsely accused Proinsias De Rossa, leader of the Democratic Left party, of being involved in or tolerating serious crime as well as personally supporting anti-Semitism and violent Communist oppression. The costs of the case, which has now been tried three times, could increase the judgment to over £1.5 million.

Reaction to the verdict in the Irish media was mixed as one columnist characterized the verdict as an "epic triumph" while others questioned whether De Rossa, who was re-elected and became a government minister since the story appeared, had really suffered any "tangible harm" to his reputation. Looking ahead to the potential for appeal, *The Irish Times* noted that the highest award that the Supreme Court has ever upheld in a libel suit was £90,000. One article also stated that a quarter of Irish libel plaintiffs are public officials.

In a related development, Eamon Dunphy, the columnist who wrote the 1992 article, is facing a contempt of court charge arising out of comments Dunphy made on his Radio Ireland show during the trial. According to *The Irish Times*, Justice Carney, the presiding judge, said he considered the remarks "an advance speech to the jury" which he assumed jury members heard.

Kenya

In late June a trial judge in Kenya handed down the largest libel award in the African nation's history. The judge ordered *The People*, a weekly newspaper owned by the chairman of a party that opposes the government of President Daniel arap Moi, to pay about $185,000 to one of Moi's aides. *The People* had reported last January that the aide had a "retinue" of businessmen who relied on him for government contracts, and he argued that the article implied he was corrupt.

The verdict came down with astonishing speed. Other libel cases, the Associated Press reported, have taken years to resolve. *The Sunday Nation*, an independent newspaper in Kenya, observed that although libel awards in countries such as Britain dwarf the one awarded against *The People* in raw terms, Kenya's economy is quite small, with an average per capita income of $200. "Colossal fines such as these have the terrifying potential of killing the independent media in Kenya, the *Sunday Nation* editorialized, according to the AP.

Egypt

Six Journalists Face Imprisonment

Six journalists at a London-based Saudi magazine face a defamation action and possible imprisonment in Egypt for publishing an advertisement promoting a story implicating Egyptian President Hosni Mubarak's two sons in illegal business dealings.

The May 27 advertisement in the daily *Ashraq Al Awsat* promoted an article in a sister publication, the weekly *Al Jadida*. Press reports conflict as to whether any copies of *Al Jadida* containing the allegedly defamatory article were ever sold, but it appears that the Egyptian government blocked the distribution of all but a handful of the issues, and that *Al Jadida* itself killed the article in at least some editions in response to the Mubaraks' legal action.

The defendants apologized to the Mubaraks late last month,

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admitting wrongdoing and asking the Mubaraks for leniency. But the plaintiffs refused to drop their suit, which has many of the characteristics of a criminal action – such as the potential for three-year prison terms and monetary fines. The Cairo court hearing the case has adjourned until September 7.

Sadat's Widow Wins Libel Suit

Jihan Sadat, widow of Egyptian President Anwar Sadat, has won a libel suit brought over an article which said that she had given birth to an illegitimate son. Despite the fact that reporter Ahmed Fikry claimed he was trying to expose government corruption by describing how he bribed a government worker in order to get a birth certificate listing Mrs. Sadat and himself as the parents of a baby boy named Sherif, the court sentenced him to one year in prison. The court, however, suspended the sentence.

The August 1996 story ran in the opposition newspaper *Al-Ahrar* under the headline, "Jihan Sadat Gives Birth to Illegitimate Son," and Fikry did not make clear until the end of the story that there was no baby.

Serbia

The son of Serbian president, Slobodan Milosevic, has also reportedly been successful in obtaining a $23,000 damage award against *Srpska Rec*, an opposition weekly, for damaging his reputation. According to the Associated Press, Marko Milosevic, the 23-year old son of the Serbian leader, sued the paper in May after it published several stories alleging that he had avoided the country's obligatory military service. The paper also alleged that Marko had "smashed almost 20 sports cars with his wild driving," and that his family's undeclared income bought him a villa in Greece.

Danica Draskovic, the editor of the paper and wife of opposition leader, Vuk Draskovic, called the verdict "an act of political retaliation and violence," and vowing never to pay the judgment stated that the paper will appeal the ruling. According to Mrs. Draskovic, the court refused to accept evidence from defense attorneys that would have proved the articles were true.

Taiwan

Taiwan's National Security Bureau brought its first-ever libel suit against a news organization last month for a front-page newspaper story accusing the bureau of tapping phones of legislators who opposed a constitutional change backed by the ruling Koumintang party.

In a case with strong political overtones, a story in the *Independence Morning Post* said that the bureau was eavesdropping on National Assembly deputies who planned to vote against constitutional amendments that reduced the authority of Taiwan's provincial government. The amendments, which passed on July 19, are seen as cutting a symbolic link to China, which maintains that Taiwan is a renegade province.

In April, Taiwan's press won a substantial victory when a trial court adopted a *Sullivan*-type fault standard for criminal libel. (*See LDRC LibelLetter* May 1997 at p. 1). That case is currently on appeal.

Singapore

Workers Party leader J.B. Jeyaretnam faces $5.7 million in damages if found guilty of libeling Singapore Prime Minister Goh Chok Tong and ten other government officials during a campaign rally at which he announced that a Workers Party colleague had filed police reports against Goh "and his people."

Despite the fact that Tang Liang Hong, a candidate in the election, had in fact filed police reports accusing the prime minister and other government leaders of defamation and conspiracy a few hours before the rally, the case has proceeded to trial over the alleged innuendo of Jeyaretnam's statement and the effect it was likely to have on the crowd that heard it.

With Jeyaretnam serving as one of only three opposition members in Parliament and a ban from Parliament threatened if he loses the suit, Amnesty International released a statement expressing concern over "reports that the government of Singapore has used civil defamation suits against political opponents in a manner that violates their right to freely hold and peacefully express their convictions."

As for Tang Liang Hong, who filed the police reports after he was faced with accusations of being "anti-Christian," "a Chinese chauvinist" and "a dangerous man," he was forced to leave Singapore after being slapped with 13 lawsuits, including some based upon what he said in the police report.

NINTH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN FAVOR OF ABC ON EAVESDROPPING AND PRIVACY CLAIMS

By Steve Perry

On July 29, 1997, a three-judge panel of the Ninth Circuit Court of Appeals affirmed the entry of summary judgment in favor of ABC and an ABC producer in a suit brought by a woman whose conversation with the producer was surreptitiously audiotaped and videotaped. *Deteresa v. American Broadcasting Companies, Inc.* Cite The plaintiff, Beverly DeTeresa, was an American Airlines flight attendant who was assigned to the first-class section on a June 12, 1994 flight from Los Angeles to Chicago. One of the first class passengers that night was O.J. Simpson, whose estranged wife had been brutally slain a few hours earlier.

In the days after the murder, intense public and media attention began to focus on Simpson's whereabouts on the evening of June 12. Both KCBS-TV and the NBC Nightly News reported that a flight attendant had told police that Simpson had kept his hand in a duffel bag throughout the flight. Other news organizations reported that Simpson had been seen icing his hand during the flight.

A Hidden Camera and Microphone

On June 19, 1994, an ABC associate producer, Anthony Radziwill, came to the front door of Beverly DeTeresa's condominium. The front door was visible from the street, and an ABC cameraman was videotaping Radziwill from a van parked in the street. Radziwill was wearing a hidden microphone as well. When DeTeresa answered the door, Radziwill immediately told her his name and said that he worked for ABC News. DeTeresa then walked out on to her front porch and closed the door behind her.

DeTeresa told Radziwill, whom she assumed to be a reporter, that she had seen several inaccurate news reports about the flight to Chicago. She told Radziwill that Simpson had not kept his hand in a bag or iced his hand during the flight. At no point during the conversation did DeTeresa request "off-the-record" treatment or ask that anything she said be held in confidence.

Radziwill asked DeTeresa to appear on an ABC news program the following day. DeTeresa said that she would consider Radziwill's request but that she had concerns about her status as a potential witness and about American Airlines' policy regarding media contacts.

On June 20, 1994, ABC broadcast a "Day One" program that included a chronological account of Simpson's activities in the days before and after the murder, told when possible through the words of individuals such as DeTeresa who had seen or talked to Simpson. The "Day One" program did not use any portion of the audiotape of the conversation between DeTeresa and Radziwill. Approximately five seconds of the videotape were used, while a reporter (accurately) recounted DeTeresa's comments regarding Simpson's demeanor on the flight to Chicago. ABC did not identify DeTeresa by name nor state her city or state of residence.

On June 12, 1995, the first anniversary of the Brown/Goldman murders, DeTeresa sued ABC and Radziwill for: (1) unlawful recording of confidential communications under California *Penal Code* § 632 *et seq.*; (2) invasion of privacy; (3) unlawful electronic eavesdropping under 18 U.S.C. § 2511; (4) fraud; and (5) unfair business practices. In November 1995, the District Court entered summary judgment in the defendant's favor as to each of DeTeresa's claims. The Ninth Circuit's July 1997 opinion, authored by Judge O'Scannlain, affirmed the District Court's opinion in all respects. District Judge Whaley (E.D. Wa.) filed a dissent as to the California *Penal Code* claim but joined in the remainder of the opinion.

Competing Views on the California Law

Much of the majority opinion, and the entirety of the dissent, addresses the California *Penal Code* section that bars the recording of "confidential communications". Section 632 defines "confidential communications" in part as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto . . . ." According to the majority opinion, California's appellate courts "have stated two competing formulations of what a party must reasonably expect for a communication to be confidential" under this section. *Slip op.* at 9. The majority noted that one of the two approaches requires nothing more than an expectation that no one is *overhearing* the conversation. *Id.*, *citing Frio v. Superior Court*, 250 Cal.Rptr. 819, 824 (Ct.App. 1988), and *Coulter v. Bank of America*, 33

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Cal.Rptr.2d 766, 771 (Ct.App. 1994). Under the other approach, a court must determine whether either party "reasonably expected, under the circumstances . . . , that the conversation would not be divulged to anyone else." *Id.*, *quoting O'Laskey v. Sortino*, 273 Cal.Rptr. 674, 677 (Ct.App. 1990).

The majority opinion predicted that the California Supreme Court would adopt the *O'Laskey* approach, principally because the *Frio/Coulter* approach "stands at odds with the plain language of the statute.. . . " *Slip op.* at 11. (The Court could also have considered the relevant language in *Frio* and *Coulter* to be *dicta*, as ABC and Radziwill had argued.) The Court went on to hold that under *O'Laskey*, DeTeresa's *Penal Code* claim was doomed by the undisputed facts that she believed she was talking to a television news reporter and did not request that he keep her remarks in confidence. *Slip op.* at 11-12.

A Dissent

In his dissent, District Judge Whaley criticized both the *O'Laskey* and *Frio/Coulter* approaches and proposed a third approach that appears to differ only slight from *O'Laskey*:

> "In my view, the focus of our inquiry should be whether DeTeresa had a reasonable expectation that Radziwill knew she did not want her statements divulged, not whether she had a reasonable expectation he would actually keep her confidence."

Slip op. at 24. Judge Whaley took the position that under this approach (or even the *O'Laskey* approach), DeTeresa's claim should have been resolved at trial rather than by summary judgment. *Id.* (Whaley noted that although DeTeresa's claim was "not particularly strong", the fact that she had been taped on her doorstep, from the moment she opened her door, by someone who was asking her to submit to an interview not at that moment but the next day, supported the position that she reasonably expected her comments would not be disseminated. *Id.*)

Other Claims Dismissed

The Ninth Circuit unanimously disposed of DeTeresa's remaining claims. The court rejected DeTeresa's federal eavesdropping claim because the federal eavesdropping statute allows a party to a conversation to record it as long as he or she does not do so "for the purpose of committing any criminal or tortious act." 18 U.S.C. § 2511(2)(d). The court stated simply that "DeTeresa has presented no evidence that this was Radziwill's purpose" in taping the conversation. (DeTeresa had contended that she had satisfied the "purpose" requirement by arguing that the taping had violated FCC regulations and had invaded her privacy rights. In a footnote, the Ninth Circuit held that "[t]his argument begs the question" at the summary judgment stage, where DeTeresa had to present probative evidence "that Radziwill taped the conversation *for the purpose of* violating Cal. Penal Code § 632 . . . or invading her privacy . . . ." *Slip op.* at 16 n.4. (emphasis added). In other words, the defendants did not have the burden under 18 U.S.C. § 2511(2)(d) of proving that they had *not* intended to violate the law or commit a tort in making the tape in question. This approach follows naturally from the language of the statute and the *Anderson/Celotex* line of cases.)

The Court also rejected DeTeresa's fraud claim, which was based on Radziwill's failure to tell DeTeresa that he was taping their conversation. As the Court explained, California law does not support "the imposition of additional liability on an intentional tortfeasor for failing to disclose his or her tortious intent before committing a tort." *Slip op.* at 18, *quoting Limandri v. Judkins*, 60 Cal.Rptr.2d 539, 543 (Ct. App. 1997).

The Court also rejected DeTeresa's unfair business practices claim. DeTeresa and her counsel, Neville Johnson (who has pursued numerous eavesdropping and privacy claims against each of the networks) had argued that ABC was "engaged on a massive scale in criminal and tortious conduct." *Slip op.* at 18. The Court held, however, that DeTeresa had failed to present any specific facts in support of this charge.

Finally, the Court also upheld the dismissal of DeTeresa's common law invasion of privacy claim, which was based upon both the videotaping and audiotaping. As to the videotaping, the Court held that "[w]ith no dispute that ABC videotaped DeTeresa in public view from a public place, broadcast only a five-second clip of the tape, and did not broadcast either her name or her address, no intrusion into seclusion privacy claim lies as a matter of law." *Slip op.* at 14. With respect to the audiotaping, the court noted that the ABC producer had neither entered DeTeresa's home nor recorded any intimate details of her life, and it pointed out that no portion of the audiotape was ever broadcast. *Slip op.* at 15.

Steve Perry is with the firm Munger, Tolles & Olson in Los Angeles, CA and represented ABC in this case.

Attorney-Client Communications and the Crime-Fraud Exception: Are Discussions of Newsgathering At Risk?

By Douglas F. Curtis

The legal protections for attorney-client communications are frequently assumed, perhaps by lawyers more than anyone, to be sacred and untouchable. But at a time when the need for frank and open exchanges between journalists and their legal counselors is most obvious, at least one trial court -- the federal district court for the Middle District of North Carolina in *Food Lion v. Capital Cities/ABC* -- decided last October that some such communications were *not* legally protected from disclosure. The court reasoned that consultations between ABC journalists and their in-house attorney about how to conduct an undercover investigation could be construed to be in furtherance of an alleged scheme to defraud, and therefore the privilege for attorney-client communications was forfeited under the "crime-fraud" exception to the privilege. While it is far from clear that this court's expansive application of the "crime-fraud" exception will be followed by other courts in lawsuits against the media, it is an important cautionary tale for both journalists and the lawyers who counsel them.

"A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." Clark v. United States, 289 U.S. 1, 15 (1933).

The "Crime-Fraud" Exception to the Attorney-Client Privilege

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Supreme Court has explained that the privilege serves important public ends by "encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice." *Id.* Yet because the privilege has the effect of withholding relevant information from the fact-finding process, the Supreme Court has also stated that "it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

One important limitation on the reach of the attorney-client privilege is the "crime-fraud" exception. This doctrine is grounded in the principle that "[t]he privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." *Clark v. United States*, 289 U.S. 1, 15 (1933). As the Court has more recently explained, "It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the `seal of secrecy' between lawyer and client does not extend to communications `made for the purpose of getting advice for the commission of a fraud' or crime." *United States v. Zolin*, 491 U.S. 554, 563 (1989) (citation omitted). As courts have traditionally applied the exception, the inquiry has focused on whether the party seeking to overcome the privilege has produced sufficient evidentiary proof -- more than mere allegations -- to create probable cause to believe that a lawyer's services were solicited to further a crime or a fraud: "To drive the privilege away, there must be something to give colour to the charge; there must be prima facie evidence that it has some foundation in fact. When that evidence is supplied, the seal of secrecy is broken." *Clark*, 289 U.S. at 15 (internal quotations and citations omitted).

The logic behind the crime-fraud exception would appear to support its assertion in many if not most cases where criminal or fraudulent conduct is alleged to have occurred near in time to attorney consultations. As a practical matter, however, the number of reported cases in which courts have actually applied the exception is relatively small -- due at least in part to the difficulty parties have heretofore experienced in demonstrating not only that there were attorney consultations, but that the assistance of the attorney was sought "in furtherance of" improper activity. Significantly, the decision by the *Food Lion* court was the first time the exception had been found to apply in the newsgathering context.

The *Food Lion* Court's Decision

To obtain entry-level jobs as part of their investigation of

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the Food Lion supermarket chain, PrimeTime Live producers created false employment backgrounds, omitting any reference to their ABC News affiliation during the application process. Prior to trial, Food Lion sought full discovery of communications between Capital Cities/ABC's in-house counsel and the producers who sought employment, including consultations about the propriety of the proposed undercover investigation before it began, as well as ongoing communications during the investigation of how it should be conducted. The grocery chain argued that such communications were in furtherance of the fraudulent scheme alleged in its complaint to obtain access to its stores. ABC argued that the crime-fraud exception only applies where the plaintiff makes a showing that an attorney was consulted for the conscious purpose of furthering a fraud, and where the privilege is invoked to hide evidence of that fraud. ABC noted that Food Lion had made no such proffer, and the only available evidence suggested that the attorney-client communications at issue had been pursued in good faith to obtain legal advice on whether the undercover investigation could lawfully be undertaken, and if so, to ensure that it was pursued in compliance with applicable laws.

District Judge N. Carlton Tilley, Jr. (M.D.N.C.) recognized that "[t]he state of mind of the client is an important consideration in determining whether the communication was sought in furtherance of a crime or fraud." The court went on to reason, however, that "[e]ven without knowledge of the[] specific elements" of a fraud claim, the PrimeTime Live producers, "at the very least, should have known that the creation of false identities [etc.] . . . *could* amount to fraud or misrepresentation" (emphasis added). The court noted that the producers "sought the assistance of ABC attorneys in the preparation of their falsehood," and concluded that Food Lion's "allegations of attorney involvement in the undercover operations [were] sufficient to state a prima facie case that ABC attorneys were consulted in furtherance of a fraud." Accordingly, the court allowed discovery of the communications to proceed, and evidence of the substance of those communications was later introduced into evidence at trial. This ruling appears to call into question the viability of the attorney-client privilege whenever journalists consult with their lawyers about conduct that "could" later become the subject of a colorable claim of "fraud or misrepresentation" or other wrongdoing.

The Potential Ramifications for Journalists and Their Lawyers

The attorney-client privilege, like most privileges, is fundamentally premised on the understanding that assurances of confidentiality will encourage individuals to consult attorneys, and to be more open and candid with attorneys than they might otherwise be. To the extent uncertainty is injected into the equation, these assurances are eroded. At a minimum, the *Food Lion* ruling, if followed elsewhere, could introduce a measure of uncertainty that did not previously exist about just how absolute the protections for attorney-journalist communications will be in the face of aggressive lawsuits that seek to brand journalists' newsgathering conduct as tortious and/or unlawful.

Even traditional newsgathering can involve tactics that might later be vulnerable to charges -- whether justified or not -- that the journalist engaged in fraud or even a crime. For example, journalists occasionally use some measure of deception (from subtle flattery to posing as a different person to go undercover) -- but is this "fraud"? Journalists often obtain consent to enter private property in circumstances where consent might not have been given if the owner had known that the reporter was preparing a critical story -- but does that vitiate the consent and transform the entry into a "trespass"?

Because journalists and their counsel must address questions of this nature in circumstances that change from day to day and from story to story, they must now attempt to discern where legal lines will be drawn even in the absence of definitive statements of controlling law in the newsgathering context. If lawyers counsel journalists that they may engage in certain of these activities, and the conduct is later alleged in a lawsuit to be unlawful, the question for a court will be whether the lawyer provided advice "in furtherance of" a fraud or crime.

Reliance on basic statements of when the crime-fraud exception applies will provide little guidance in answering this question when the conduct at issue is admitted and the ultimate issue for decision in the case is the legal consequence of the conduct. Thus, courts have declared that the advice of lawyers may not be used "in furtherance" of a fraud (*In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)), or that a client loses the privilege when he has a communication with an attorney that is "related" to ongoing or future fraud (*In re Grand Jury Inves-*

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tigation, 842 F.2d 1223, 1227 (11th Cir. 1987)). Yet in the newsgathering context it may be readily conceded that an attorney's approval of a proposed course of conduct is "related" to and will "further" that conduct to some greater or lesser degree, but that in itself will not answer the question whether the privilege has been misused. *See United States v. White*, 887 F.2d 267, 271-72 (D.C. Cir. 1989) (crime-fraud exception did not apply where it appeared only that defendant had sought legal advice before taking allegedly fraudulent action, but there was no showing that the advice was intended to accomplish an illegal purpose). Indeed, an overly narrow focus on whether attorney consultations "related" to or "furthered" fraudulent conduct could, under such an approach, only be answered by a court that was willing to pre-judge the ultimate legal issue in a case: Does the conduct at issue constitute a crime or fraud?

Similarly, the conventional approach courts have employed to identify circumstances warranting invocation of the crime-fraud exception, at least in the aftermath of the emphasis of the Supreme Court in *Clark v. United States*, 289 U.S. 1 (1933), on ascertaining whether there is "prima facie evidence" that such a charge has "some foundation in fact," has been to focus on the quantum of evidence that a party is able to muster in advance of trial to support a charge of attorney involvement in improper activity. But such an inquiry is inapt when the facts surrounding a journalist's conduct are not in question, nor is there any dispute that attorneys were consulted throughout the newsgathering process. There may be ample "evidence" in such circumstances, but if the ultimate question presented in a case is a legal one -- *i.e.*, whether admitted conduct was allowed or prohibited by governing law -- then no amount of factual evidence will shed light on whether the attorney-client privilege was abused in such a manner that it should be deemed forfeited.

Even if a factfinder may ultimately decide that the newsgathering conduct in which an attorney was involved does constitute a fraud, there is still something missing in the analysis, because such a conclusion does not necessarily answer the bedrock question that is properly posed by the doctrine -- *viz.*, whether the protections of the attorney-client privilege have been forfeited because the attorney-client relationship has been *abused*, as would be the case when individuals consult with an attorney to find out how to carry out a scheme that they know to be unlawful, or they consult an attorney because the attorney's participation is necessary to the accomplishment of the scheme. By contrast to such classic "crime-fraud" scenarios, when journalists approach a lawyer in a good-faith effort to determine whether their intended conduct would be consistent with governing law, they are doing precisely what the privilege was meant to encourage them to do. And when an attorney provides good-faith advice that the conduct may proceed, the application of the privilege should not turn on the fortuity of whether that judgment -- which is increasingly made in murky areas of the law -- turns out to be one that a trial court or jury ultimately disagrees with. Indeed, so long as the advice is requested and given in good faith, the privilege should be able to accommodate a determination that even when erroneous advice is given, the lawyer and the client are living up to the purposes for which the privilege was created. *See* 3 Weinstein's Federal Evidence § 503.16[3], at 503-83 (2d ed. 1997) ("If . . . the client is unaware of the true nature of the intended act, the client should not forfeit the protection of the privilege simply because the client was erroneously advised that the proposed action was within the law."); *see also State ex rel. North Pac. Lumber Co. v. Unis*, 579 P.2d 1291, 1294 (Ore. 1978) ("Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper."). *See generally In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) ("[T]he client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act."); 8 Wigmore, Evidence § 2298, at 573, 577 (McNaughton rev. 1961) (to fall within the crime/fraud exception, "the advice must be sought for a *knowingly* unlawful end").

Tips for Preserving the Privilege

The increasing popularity of non-defamation claims like those at issue in *Food Lion* means that law-abiding journalists who engage in aggressive newsgathering techniques are well-advised -- now more than ever -- to consult with attorneys about where the legal lines are likely to be drawn, and how best to stay within them. Yet somewhat paradoxically, the *Food Lion* court's decision to strip away the legal protections for the attorney-client communications before and during ABC's undercover investigation of Food Lion threatens to discourage journalists from doing what the privilege was meant

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to encourage them to do: consult with attorneys to ensure that their conduct conforms to, rather than violates, applicable laws.

There is no particular reason to believe the court's decision in *Food Lion* to order disclosure of attorney-client communications is anything but an anomaly. But the court's ultimate willingness to force ABC to reveal the substance of communications that most people would assume to be absolutely protected from disclosure is an important reminder that the privilege is not absolute, and may in fact yield in litigation.

There is little that can be done once claims have been filed to deter aggressive counsel from raising the crime-fraud exception and arguing for its application. But there are steps lawyers and journalists should consider taking that would persuade a court to respect and preserve the privilege once it has been challenged.

First, both attorneys and reporters should be aware of the likelihood that before the privilege would ever be stripped away, a court will have an opportunity to review pertinent documents *in camera*. If the court's review of such documents persuades the court that consultations were made in good faith, much of the battle will be won. Thus, attorneys and reporters should keep in mind and emphasize the purpose for which their consultations are taking place. Many media organizations have formal policies requiring consultations with lawyers before reporters may engage in certain newsgathering activities. The principal reason for these policies is to ensure that due consideration is given to the legality of proposed conduct before any activities commence. Reporters and the lawyers who counsel them must clarify -- in their own minds, and in any correspondence or other documentation that may be created -- that this is the real purpose of the contact, and this should remain the dominant theme running through the discussions.

Second, attorneys who give advice about the legal propriety of a certain course of newsgathering conduct must give due consideration to the particularities of local and state laws that will govern the conduct. Judges who sit in the various states may better perceive the bona fides of attorney-client communications if they see that a lawyer has undertaken to ascertain and review precisely what duties are imposed by the laws in their jurisdictions. Reasonable diligence in this context means doing what one can to provide meaningful advice about the specific conduct in light of the particular substantive standards that will later be applied to it. And again, courts will frequently review documents that are claimed to be privileged *in camera* before ordering that anything be produced to opponents in litigation. If the documentary record conveys the clear message that the attorney made a serious effort to identify and analyze local laws, the bona fides of the attorney's purposes are strengthened, as is the likelihood that a court will determine that attorney-client consultations were undertaken in a good-faith effort to comply with the law -- and the privilege will be more likely to be respected.

Third, although it may be anathema to many in-house counsel, attorneys should consider making a contemporaneous record of at least some of the steps they have taken in approving conduct, and the advice they have given. Years after a lawyer has given advice that at the time did not seem remarkable, it may be difficult to remember precisely what the client was advised, not to mention all the specific factors that were considered and resources consulted -- but such issues will become important if the attorney is called upon to justify the bona fides of the consultations. This is not to say that attorneys should fill their files with self-serving memoranda following each consultation. It is meant to suggest, however, that there are certain facts about the care that was taken to consider pertinent issues in the newsgathering context that can later become important, and there are sometimes legitimate reasons to keep records of these efforts in story files.

In the end, there is no way to guarantee that a judge who is inclined to view aggressive newsgathering techniques as violative of local laws and the rights of local citizens will not deny the protections of the privilege. It is therefore prudent to remember that all attorney-client communications are potentially subject to disclosure, and to proceed accordingly.

What is clearly *not* called for is the elimination of lawyers from the process of reviewing proposed newsgathering activity that would involve deceit. Indeed, in a post-*Food Lion* world, full consideration of both the activities of journalists and the legal standards that govern them are more important than ever.

Douglas F. Curtis is a partner at the Washington, D.C. firm Miller, Cassidy, Larroca & Lewin, LLP, which represents Capital Cities/ABC in the Food Lion case.

Freelancers' Challenge Rejected, Electronic Distribution of Periodicals Upheld Under Copyright Act

By Bruce P. Keller and Thomas H. Prochnow

In a case of first impression, Judge Sonia Sotomayor of the Southern District of New York has ruled that, in the absence of any express agreement to the contrary, newspaper and magazine publishers automatically acquire certain types of electronic publishing rights from freelance contributors under Section 201(c) of the Copyright Act. In *Tasini v. The New York Times, et al.*, the Court rejected an effort by the National Writer's Union to require publishers to separately negotiate and pay for all non-print publication rights.

In late 1993, a group of freelance writers selected by the National Writers Union sued the publishers of *The New York Times*, *Sports Illustrated*, *Newsday*, and *The Atlantic Monthly*, as well as the owners of the LEXIS/NEXIS database, and University Microfilms, Inc. ("UMI"), which manufactures several CD-ROM products featuring *The New York Times*. (The claims against *The Atlantic Monthly* were settled before Judge Sotomayor's ruling.) According to the plaintiffs, at the time they submitted their articles and accepted payment, they had intended to convey only "first, one time, North American print publication rights" that were "exhausted" when the print editions of the respective newspapers and magazines at issue were published.

The defendants argued that the publication of plaintiffs' contributions as part of the periodicals -- not only in paper editions, but also in microfilm, online databases, and CD-ROMs -- expressly was authorized by Section 201(c) of the Copyright Act. Section 201(c) provides that:

> Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

The defendants asserted that, whether regarded as "that particular collective work" or "any revision of that collective work," LEXIS/NEXIS, CD-ROM, and other, similar electronic redistribution of their periodicals fell within the scope of rights automatically conveyed to publishers under Section 201(c).

Both plaintiffs and defendants moved for summary judgment, and on August 13, 1997, Judge Sotomayor ruled in favor of the defendants. In adopting a "principled approach to analyzing Section 201(c)," Judge Sotomayor recognized that the provision "cannot be understood in isolation, but must be considered alongside other sections of the [Copyright] Act." The Court relied on several other sections of the Act, along with its legislative history, to conclude that the Copyright Act is intended to operate in a media-neutral fashion, and that publishers of collective works are entitled to make extensive "revisions" of those collective works under Section 201(c). Quoting from the legislative history on this point, the Court noted that although an individual contribution to a collective work may not be revised without the permission of the copyright owner, the collective work itself could be changed without infringing the contributor's rights. In order to fall within the definition of "revision" under Section 201(c), the owner of a copyright in a collective work "must preserve some significant original aspect of those works -- whether an original selection or an original arrangement."

The record before the Court demonstrated that the revisions made to the defendants' collective works in connection with their electronic publication on NEXIS and in CD-ROM format successfully preserved that "significant original aspect." In evaluating those revisions, Judge Sotomayor applied tests traditionally employed to resolve claims of copyright infringement in factual compilations, such as telephone books and maps. First, the Court found that the selection of the articles that appeared in the defendants' publications easily met the originality requirement for copyright protection. Second, the Court concluded that this original selection of articles was preserved in the electronic versions of those col-

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lective works: "Articles appear in the disputed data bases solely because the defendant publishers earlier made the editorial determination that those articles would appeal to readers." In other words, the versions of the defendants' publications that appeared online were "substantially similar" to those versions that appeared in print, and were therefore within the scope of revisions permitted under Section 201(c).

The Court also directly addressed the equitable argument "that a ruling for defendants in this case leaves freelance authors without any significant protections" under the Copyright Act. It emphasized that Section 201(c) does not permit publishers to sell a freelance article to another periodical for republication, to include a freelance article in an anthology, to rework a freelance article into a full length book, or to create television or film versions of freelance articles. The narrow "privilege" granted to publishers under Section 201(c) of the 1976 Copyright Act was thus counterbalanced by a wide array of rights retained by individual contributors. Although the plaintiffs might feel this compromise has become inequitable given "the ways in which modern technology [has created] such lucrative markets for revisions," Judge Sotomayor observed that authors were free to lobby Congress for appropriate statutory changes.

The plaintiffs reportedly are considering either an appeal of Judge Sotomayor's ruling, a legislative push to revise the allocation of rights under Section 201(c), or perhaps both. For now, however, in the absence of an express agreement to the contrary, publishers can rely with confidence on their statutory rights to republish collective works in any medium.

Bruce P. Keller is a partner and Thomas H. Prochnow is an associate at Debevoise & Plimpton, which represented The New York Times Company, Newsday, Inc., Time Inc., UMI Co., and Lexis/Nexis in the Tasini case.

A Small Claims Court Also Ok's Electronic Publication of Newspaper

In *Bartel v. Capital Newspapers Division of the Hearst Corp.*, 25 Media L. Rep. 1959 (1997), a freelance journalist, who had several articles published in the *Times Union*'s Sunday magazine section in 1991 filed a small claims court complaint against the Albany, New York newspaper in April 1997 alleging that the on-line archiving of her work breached her one-time publication agreement with the *Times Union*. The complaint, requested $3,000 in damages, the small claims jurisdictional maximum.

The Court reserved decision on the *Times Union*'s motion that the claim was preempted by federal copyright law and the case proceeded to a one-day trial on June 23, 1997. Plaintiff testified on her own behalf, and also offered the testimony on an expert witness, Mr. Dan Carlinsky, the Chair of the Contracts Committee of the American Society of Journalists and Authors, Inc. ("ASJA"). The *Times Union* provided the testimony of the newspaper's On-Line Editor, Ms. Patricia Hart to establish that no republication occurred since the electronic archiving -- without any editorial revisions or other change in content -- is the modern equivalent of other historic forms of archiving -- *e.g.*, maintaining a physical collection of old newspapers and microfilming.

In a written decision dated July 2, 1997, the Court (Hon. John C. Egan, Jr.) dismissed plaintiff's breach of contract claim. The Court endorsed the republication/archiving distinction and also found it significant that the *Times Union* did not profit commercially from viewers having access to its electronic library, holding that:

> The placement of each day[']s *Times Union* "on-line" in electronic format is in the Court's view merely the modern day equivalent of the former practice of micro-filming, or before that, of simply saving extra copies of each day[']s paper in archives. While the on-line version of the *Times Union* did not exist back in 1991, neither did micro-filming back in 1925; in each case technology advanced and the *Times Union* was able to take advantage of that. There is no proof that the *Times Union* reaps any financial advantage from a present day reader being able to access old articles that once appeared in print via computer and I find that the Plaintiff's rights have not been violated.

NBA v. Motorola Revisited? NFL Attempts To Limit On-Line Transmission of Facts and Photographs

In an apparent attempt to overrule by contract *NBA v. Motorola*, a Second Circuit decision holding that the NBA had no right to prohibit the real-time transmission of facts and figures concerning NBA games, the NFL has begun to require the reporters and photographers who cover NFL games to sign an agreement not to transmit photographs or other facts about games while they are in progress in order to obtain a press credential.

The credential requirement provides that:

1. Unless authorized to do so by a separate NFL license, neither a credential Bearer nor the Accredited Organization to which the Bearer's credential is issued may transmit or distribute descriptions or accounts of any NFL game (including but not limited to statistical or play-by play descriptions of a game) while such game is in progress, except as follows:

Game summaries consisting of only the game score, most recent scoring play, quarter and time remaining, injury information, records set in the game, and team and individual statistics may be transmitted and distributed while the game is in progress.

Quarterly game summaries, including only the game score, a list of scoring plays, injury information, records set in the game, and team and individual statistics, may also be distributed after each quarter of a game in progress.

All distributed information must be non-cumulative (old transmissions of information must be deleted when the information is updated).

The information transmitted must be text only -- NO GRAPHICS (INCLUDING CLUB OR LEAGUE MARKS OR LOGOS), AUDIO, VIDEO, PHOTOS, OR ANIMATION!!

2. Transmission or distribution of more detailed information, more frequent updates, graphic enhancements, photos, video clips, audio information, and/or NFL or club marks or logos requires an express written license form the NFL.

3. The Accredited Organization to which the credential is issued must distribute information directly to fans; the organization may not authorize other entities to redistribute the information.

Reaction to the new restrictions was swift with The New York Times, the Associated Press and Sports Illustrated, among other media organizations, each sending a written objection to the NFL.

Reminding the NFL of the recent holding in the *NBA* case, counsel for the New York Times urged the NFL not to "threaten" the good relationship between the league and the media because of "a narrow commercial interest." With regard to the provisions regarding the on-line transmission of photographs, the letter points out that the "on-line transmission of photos is hardly competitive with the viewing of actual game, just as the transmission of statistics and up-to date scores is not competitive with the broadcast of a basketball game." Further, the Times wrote "from a copyright point of view, the NFL has even less basis for its position since the photograph is in fact owned by the artist, *i.e.*, the photographer, not the League or the players pictured in a photograph."

Noting that the restrictions would completely bar the Associated Press from transmitting photos and graphics, bar AP from distributing its news dispatches and news photos to its member newspapers and broadcasters while the game is in progress, and severely restrict the organization in the timing and content of the transmission of its news dispatches to its members, AP management called the NFL's credential requirements "unacceptable." In addition, AP wrote that "we are unwilling to consent to the provisions of [the restriction] . . . and we are instructing our editors, reporters and photographers to indicate on behalf of AP that they do not accept these restrictions."

NEW LDRC STUDY SHOWS HIGHEST INCIDENCE OF SUMMARY JUDGMENT GRANTS TO DEFENDANTS IN MEDIA DEFAMATION CASES

1995-96 Update Finds Rate of Defense Success Continues to Climb

In the LDRC BULLETIN published this month, we released a 67-page report updating our 16-year study of summary judgment motions filed in libel, privacy and related tort cases. The report, which adds data from published decisions on 212 motions decided in 1995 and 1996 to the previous database, finds that media defendants' ultimate success rate on these motions for summary judgment climbed to an all-time high of 82.3% in the 1995-96 period. The success rate in the 1990-96 period was 79.4% and over the entire study period, 1980-96, was 76.7%.

The numbers continue to bear out the positive effect of the Supreme Court's decision in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). There the high court ruled that summary judgment must be granted in federal court in media defamation cases in which "actual malice" is at issue unless plaintiffs can demonstrate — at the summary judgment stage — that they will be able to offer a jury "clear and convincing evidence" of actual malice. The entire post-*Anderson* period (July 1986-1996) has a defense success rate of 77.9%; the pre-Anderson rate (1980-June 1986) was 74.6%.

The success rate in suits by public figures and officials achieved by media defendants in the reported decisions suggests the *Anderson* impact. In the post-*Anderson* period (July 1986-1996), media defendants prevailed in 83.1% of the summary judgment motions in public plaintiff cases while the success rate was 77.8% in the pre-*Anderson* period studied (1980-June 1986). The success rate for media defendants is decidedly lower in the reported private figure cases: 66.1% win rate for media defendants in the post-*Anderson* period and only 57.6% in the pre-*Anderson* study period.

Other key findings of the study:

- ☐ *Trial court decisions*. At the trial court level, the numbers are also on an upward slope. In the 123 trial court decisions reported in the 1995-96 period, the defense success rate with trial judges was 84.6%. In 1990-96, the rate is 83.6%. The entire post-*Anderson* period has a success rate of 82.1%. The pre-*Anderson* rate was 79.5%.

- ☐ *Appellate decisions*. Defendants' overall success rate on appeal -- including both plaintiffs' appeals from grants of summary judgment to defendants and defendants' appeals of denials -- was a new high of 81.6% in the 1995-96 period. The 1990-96 rate is 75.0%, while the entire post-*Anderson* period rate is 73.6%. The pre-*Anderson* rate was 72.1%.

Trial court grants of summary judgment to media defendants were affirmed by appellate courts 80.3% of the time in the 1995-96 period. This is up from the 74.2% for the 1990-96 period and the 74.5% for the post-*Anderson* period. It is also higher than the affirmance rate of 76.4% for the pre-*Anderson* period.

Media defendants are meeting with tremendous and growing success when appealing the denials of their summary judgment motions, in those jursidictions which allow for such appeals. Media defendants won reversals and the dismissal of the cases against them in 83% of the decisions in 1995-96, a large increase from the 74.4% rate of 1990-96 and the 57.0% rate of the

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entire post-*Anderson* period. The pre-*Anderson* rate was only 50.0%.

☐ *State and federal court comparisons*. In the most recent study period, media defendants ultimately won on summary judgment in 84.4% of the cases reported in state court and 79.4% of the cases reported in federal court. Over the entire post-*Anderson* period, the success rate in state court is 79.1% and the success rate in federal court is 75.5%.

☐ *The public figure effect*. Classification of the plaintiff as a public figure or public official significantly boosts defendants' likelihood for success on summary judgment. This is no surprise and is evident from the LDRC findings.

In 1995-96, the defense success rate was 85.2% where plaintiff was a public figure or public official. In contrast, where plaintiff is characterized as a private figure, the success rate drops to 68.4%.

This mirrors the rates from 1990-96 (84.7% public figure/ official; 70.5% private figure) and over the entire post-*Anderson* period (83.1% public figure/ official; 66.1% private figure). Before the *Anderson* decision, the rate was only 77.8% for public plaintiff cases and 57.6 % for private figure cases.

☐ *Other claims*. In the post-*Anderson* period, defendants succeeded on 85.4% of summary judgment motions aimed at claims related to defamation, such as invasion of privacy and intentional infliction of emotional distress. This rate is virtually the same as the 85.6% rate reported in the last LDRC summary judgment survey for 1986-94.

The complete findings are published in the quarterly ***LDRC Bulletin*, 1997 Issue No. 3**, along with articles from defense counsel discussing strategies and suggestions that emerge from their motion battles.

*Summary Judgment and the First Amendment: A Decade After *Anderson v. LibertyLobby* by Samuel Fifer and Gregory R. Naron

* Summary Judgment in Negligence Cases: It Can Happen To You by John Borger

* A Summary Judgment Shortcut: Proving the Absence of a Material Issue of Fact By Filing a Motion To Determine Plaintiff's Status by Joseph D. Stein field

* Select Your Summary Judgment Issue and Bifurcate Discovery by Anthony M. Bongiorno

* "Truth" or Consequences: Is There Danger in Litigating Truth? by Julie Ford

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