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MEDIALAWLETTER

Reporting Developments Through August 31, 2007

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MLRC ANNUAL DINNER

WEDNESDAY, NOVEMBER 7TH, 2007, NEW YORK CITY

MLRC will bestow its WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on

DAVID FANNING, Creator and Executive Producer, FRONTLINE

Followed by a Panel Discussion: *Witnesses to Our Time: Independent Voices of the Documentary*

Lowell Bergman
Heidi Ewing
Alex Gibney
Moderated by Judy Woodruff

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Federal Judge Orders Five Reporters to Identify Confidential Sources, Quashes Subpoenas to News Organizations

By Nathan Siegel

In what might be called the perfect storm of reporter's privilege disputes, U.S. District Court Judge Reginald Walton ordered five journalists to identify their confidential government sources to the plaintiff in *Hatfill v. Gonzales*, 2007 U.S. Dist. LEXIS 58520 (D.D.C., Aug. 13, 2007). At the same time, Judge Walton rebuffed, at least temporarily, the plaintiff's attempt to enforce additional subpoenas for confidential sources issued directly to eight news organizations, rather than individual reporters.

In so doing, Judge Walton's 31-page opinion addressed virtually every major issue that has arisen in reporter's privilege cases in the past few years: the applicability of the privilege in leak cases, whether a privilege exists under federal common law, the propriety of subpoenas issued to corporate news entities, and the significance of confidentiality waivers signed by government employees.

Judge Walton's 31-page opinion addressed virtually every major issue that has arisen in reporter's privilege cases in the past few years.

In almost every instance, Walton's opinion reinforced the steady drumbeat of recent bad news coming from federal courts addressing disputes over confidential sources.

Underlying Civil Lawsuit

The underlying case arose out of the government's criminal investigation into who was responsible for sending the anthrax-laced letters delivered to several media and congressional offices in 2001. Bioterrorism expert Dr. Steven Hatfill, who was identified as a "person of interest" in the investigation, sued the FBI and the Department of Justice. Hatfill alleged that anonymous leaks of investigative information linking him to those crimes violated his rights under the federal Privacy Act.

Six Reporters Sit for Depositions

During the course of discovery, Hatfill's counsel deposed roughly two-dozen government employees, who in all but a few cases denied being the source of any leaks to the press. With the court's approval, Hatfill also circulated form waiver documents to a large number of government employees. The form waivers, originally used by former Special Counsel Patrick Fitzgerald in the Plame investigation, purported to waive any confidentiality agreement the employee might have made with any reporter. Some employees executed the forms, though many did not.

In 2006, Hatfill then issued deposition subpoenas to six journalists: Brian Ross of ABC News, Michael Isikoff and Daniel Klaidman of *Newsweek*, Allan Lengel from *The Washington Post*, Toni Locy, formerly with *USA Today*, and Jim Stewart, formerly of CBS News. Each reporter sat for a deposition and each confirmed that they had confidential sources within the FBI and/or the Department of Justice who provided information about Hatfill. However, each refused to identify who those sources were, by name or otherwise.

Preliminary Litigation Over Sources

In a novel maneuver, Hatfill then sought to avoid a protracted battle with the press over confidential sources. Rather than move to compel the journalists to identify their sources, Hatfill and the government defendants first sought guidance from the Court as to whether the reporters' testimony that their sources worked for the defendant agencies was sufficient to make out the essential elements of a Privacy Act claim.

Because the Privacy Act only imposes liability on federal government agencies, rather than individual agency employees, Hatfill argued that it was not necessary to know the specific identities of the reporters' sources, as long as he had evidence they worked for the defendant agencies. The government disagreed.

Earlier this year Judge Walton sided with the government, in what can only be characterized as an advisory opinion. *Hatfill v. Gonzales*, Civil Action No. 03-1793 (D.D.C., March 30, 2007). Walton suggested that Hatfill's case would proceed "at his peril" without evidence about who were the specific individuals who provided information to the press.

Although Judge Walton's opinion on this issue did not receive a lot of attention at the time, his view has serious long-term implications for the press. Its logic suggests that knowledge of the identities of sources in similar Privacy Act cases will almost always be necessary. Judge Walton appeared to

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answer in the negative the question that was at least arguably left open in last year's Wen Ho Lee case, which also arose under the Privacy Act. *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2006).

Lee specifically noted that the reporters in that case had not confirmed that their sources worked for the same defendant agencies, *id.* at 60, leaving unanswered the question of whether such confirmation might obviate the need for specific identification of individual sources in future Privacy Act cases.

Shortly after Judge Walton's ruling, Hatfill moved to compel the reporters to identify their sources. At the same time, Hatfill issued new subpoenas to eight news organizations pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. The eight organizations included the five corporate employers of the six reporters who had previously testified, as well as three new targets: the Associated Press, *The Baltimore Sun*, and *The New York Times*. Each subpoena sought the designation of a corporate representative to testify to the identities of confidential government sources who provided information to reporters about Hatfill, as well as production of any documents, such as internal e-mails, which contained the names of those sources.

The reporters all opposed the motions to compel, while the news organizations all moved to quash their subpoenas. While the reporters' arguments focused on the merits of their assertions of privilege, the news organizations' arguments focused largely on the propriety of corporate subpoenas as a vehicle for discovering confidential sources, as well as issues related to the timing of their issuance in this case.

Strikingly, in opposing these motions, Hatfill argued explicitly that corporate subpoenas are a necessary tool to learn the identities of confidential sources because corporations will more readily succumb to judicial pressure to reveal sources than will individual reporters. The shadow of the *Miller/Cooper/Time, Inc.* cases clearly loomed large over these proceedings.

First Amendment Privilege

Judge Walton's opinion first addressed the merits of the First Amendment privilege invoked by the individual reporters. In logic that again bodes ill for future cases, Walton rejected arguments raised by the reporters that the Privacy Act does not bar the release of information about suspects in criminal investigations. Instead, Walton embraced a very expansive view of the Act's scope, holding that it potentially extends to virtually any piece of information in a government record that pertains to an individual. 2007 U.S. Dist. LEXIS 58520 at *11-17.

Walton found that this case is "strikingly similar" to *Lee* and held that *Lee*'s conclusion that the reporters' First Amendment privilege was overcome in that case compelled the same result here. *Id.* at *27. As in *Lee*, Walton held that the identities of alleged government leakers went to the heart of Hatfill's Privacy Act claim, and found that Hatfill's had sufficiently exhausted efforts to find alternative sources of that information. Going one step further, Judge Walton found that Hatfill's efforts to obtain waivers from government employees, whose validity the reporters declined to recognize, was further evidence of Hatfill's efforts to fulfill the privilege's exhaustion requirement. *Id*. at *30-31.

Federal Common Law Privilege

Walton then addressed the issue of whether a distinct reporter's privilege should be recognized pursuant to federal common law, along the lines suggested by Judge David Tatel in his concurring opinion issued in the *Miller/Cooper* case. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). According to Judge Tatel, federal common law recognizes a privilege that looks beyond the issues of need and exhaustion to ask whether the news value of the information provided by confidential sources outweighs the asserted interest in learning their identities. *Id.* at 991-1001 (Tatel, J., concurring in the judgment).

Judge Walton recognized that both the existence and scope of such a privilege is an open question in the D.C. Circuit, since in *Miller* the Circuit found it necessary to decide whether the issue, while *Lee* declined to address those questions. 2007 U.S. Dist. LEXIS 58520 at *32. However, *Hatfill* decisively rejected the existence of any common law privilege, becoming the second district court in Washington, D.C. to do so since *Miller*. *See also Lee v. Dep't of Justice*, 401 F.Supp.2d 123 (D.D.C. 2005).

Walton found that resorting to confidential sources is not nearly as important to journalism as the need for confidence is

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to facilitate other privileged communications, such as those between patients and psychotherapists. 2007 U.S. Dist. LEXIS 58520 at *35-36.

Moreover, Walton found that recognizing such a privilege would have a "perverse effect" in Privacy Act cases, effectively facilitating illegal leaks to reporters while leaving their victims without meaningful recourse. *Id*. at *36. Thus, even if a common law privilege were to be recognized in other contexts, Walton sweepingly held that it could never extend to Privacy Act cases "where a viable claim has been pled." *Id*. at *37.

Judge Walton also found Judge Tatel's proposed balancing test to be "extremely problematic", requiring courts to make judgments about news value to which they are ill-suited. *Id*. at *39. Moreover, he suggested that *Lee* had implicitly rejected broader balancing tests that might be applied pursuant to the First Amendment, so it was unlikely that the Circuit would embrace the same test under the different label of federal common law.

Consequently, the Court ordered the reporters to sit for renewed depositions and reveal their confidential FBI and DOJ sources.

Corporate Subpoenas

With respect to the corporate subpoenas, however, Judge Walton granted the motions to quash. His ruling appeared to distinguish between the subpoenas issued to the five news organizations whose reporters were the subject of the motion to compel, and the remaining three whose reporters were not subpoenaed during the discovery period. For the first group, Judge Walton held that the issuance of the subpoenas was "premature" because at least until the reporters had completed the renewed depositions, Hatfill had not exhausted reasonable alternative means of identifying the sources. *Id*. at *49.

In effect, Judge Walton treated the reporters as alternative sources of knowledge potentially held by their own news organizations – a novel theory that was not argued by the news organizations.

Judge Walton further hinted that "depending on the outcome of the reporters' depositions, it may be necessary for the Court to revisit in the future" the issue of subpoenas to their corporate employers. *Id*. at *50. The opinion thus appears to leave the door open to the use of Rule 30(b)(6) subpoenas to pressure news organizations to identify sources in civil cases, but only after all reasonable efforts to elicit that information from persons with the most direct knowledge of sources, i.e. individual reporters, have been attempted.

Finally, turning to the subpoenas issued to the AP, *The Baltimore Sun*, and *The New York Times*, Judge Walton ruled that Hatfill had also failed to satisfy the exhaustion requirement since he had made no efforts to subpoena their reporters at all. Here, he cast some broader doubt on the evidentiary utility of corporate subpoenas as a means of identifying confidential sources.

He noted that any evidence about sources provided by corporate designees would likely be "inadmissible hearsay," since those witnesses could at best just recount conversations between sources and reporters. *Id*. at *51. Therefore, he found that any discovery would first have to target individual reporters who had personal knowledge of communications with sources.

However, since Hatfill had failed to seek discovery of those reporters during the discovery period, Judge Walton held that if he wanted to proceed now he would have to apply to the Court for permission to do, and show "good cause" for re-opening discovery to depose more reporters. *Id*. at *53. Were that to happen, however, the Court suggested that it "has concerns about" the propriety of any new discovery that Hatfill might seek at this juncture from AP, *Baltimore Sun* or *New York Times* reporters. *Id*. at *52.

Nathan Siegel, Lee Levine, David Schulz, and Chad Bowman of Levine Sullivan Koch & Schulz LLP represented The Associated Press, The Baltimore Sun, CBS Broadcasting Inc., The New York Times and James Stewart. Kevin Baine, Kevin Hardy, and Carl Metz of Williams & Connolly LLP represented ABC, Inc., Newsweek, Inc., The Washington Post, Michael Isikoff, Daniel Klaidman and Allan Lengel. Robert Bernius and ____ of Nixon Peabody LLP represented Gannett Co., Inc. and Toni Locy. Thomas Connolly, Mark Grannis, Charles Kimmett and Patrick O'Donnell of Harris Wiltshire & Grannis LLP represented Plaintiff Steven Hatfill. Paul Freeborne, Elizabeth Shapiro and Jeff Smith of the United States Department of Justice represented the Defendants.

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Federal Shield Law Bill Moves out of Committee

The House Judiciary Committee voted to pass a federal shield law bill out of committee at a mark-up held on August 1. The "Free Flow of Information Act of 2007" (H.R. 2102) was introduced in early May by Representatives Rick Boucher (D-VA) and Mike Pence (R-IN), among others, and this month's mark-up is the farthest a shield law bill has ever progressed in Congress.

Rep. Boucher introduced an amendment to the bill at the Committee's mark-up, and additional changes were made during the mark-up. Committee members raised a number of issues, including the scope of who may claim the privilege, the exception for national security, particularly in leak cases, and application of the privilege in investigations of past crimes. The sponsors pledged to create a working group to address these issues.

A summary of the bill's provisions follows below:

Summary of Legislation

- Scope of Protection: The bill provides a qualified privilege against disclosure of sources and information. The privilege may be claimed by a "covered person," defined as one who, "for financial gain or livelihood, is engaged in journalism."

"Journalism" is defined as the "gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

The privilege also extends to a covered person's "supervisor, employer, parent, subsidiary, or affiliate" and to protected information held by third-party communications service providers.

The definition of "covered person" excludes foreign powers or their agents, as well as any organization designated as a foreign terrorist organization by the Secretary of State.

- Test to Overcome Privilege: Before compelling disclosure, the party seeking to compel must show by a preponderance of the evidence that:

3. all reasonable alternative sources have been exhausted;
4. the subpoenaed information is "critical;"
5. "the public interest in compelling disclosure Y outweighs the public interest in gathering or disseminating news;" and
6. in criminal cases, there are reasonable grounds to believe that a crime has occurred.

- Compelling Confidential Sources: Where confidential sources are sought, the compelling party must also show that disclosure is necessary to:

1. prevent "an act of terrorism" or other "significant and specified harm to national security;"
2. prevent "imminent death or significant bodily harm;" or
3. identify a person who has disclosed (a) a trade secret actionable under 18 USC 1831 (economic espionage) or 1832 (theft of trade secrets); (b) "individually identifiable health information" actionable under federal law; or (c) nonpublic financial information actionable under federal law.

The exceptions for national security and for death or bodily harm stem from concerns raised by legislators during previous Congressional hearings on a federal shield law. The exceptions listed in (3) -- not typically found in shield laws -- were added at the request of business groups, including the National Association of Manufacturers.

- Defamation Cases: Rep. Boucher's amendment included a provision put forward by Rep. Ric Keller (R-FL) that addressed application of the federal shield law in defamation cases, namely that: "Nothing in this Act shall be construed as applying to civil

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defamation, slander and libel claims or defenses under State law, regardless of whether or not such claims or defenses, respectively, are raised in a State or Federal court."

The words "slander and libel" were added to Rep. Keller's provision during the mark-up.

Given the creation of a working group to address issues raised by members of the House Judiciary Committee at the mark-up, the bill is likely to undergo further revision.

Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

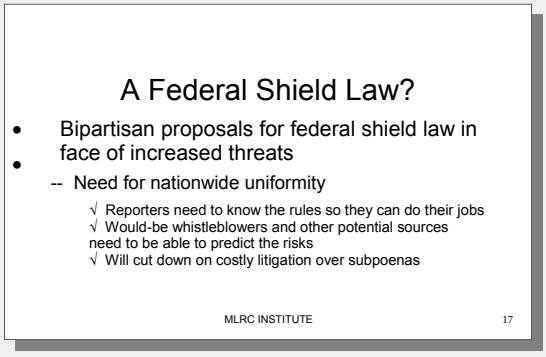
The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact Maherin Gangat, (212) 337-0200, ext. 214, mgangat@medialaw.org.

Suggestion for background reading:
Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.



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MLRC INSTITUTE

First Amendment Speakers Bureau

Publishing Online

The MLRC Institute will soon roll out a second topic for presentation through its First Amendment Speakers Bureau: Publishing Online.

We are looking for volunteers to give talks and help organize presentations.

This topic will address:

the media's use of the Internet
news organizations' interaction with their audience online
the use of content submitted by readers and viewers
blogs, whether kept by media staff, readers or others
liability for defamation for statements made online
copyright and privacy law

Speakers will have access to a turn-key set of presentation materials prepared by the MLRC Institute. As with talks on the reporter's privilege, the first topic taken up by the Speakers Bureau, presentations on publishing online will be done at colleges, high schools, bookstores, and libraries, and before rotary clubs, chambers of commerce and other civic organizations.

The MLRC Institute has received a grant from the McCormick Tribune Foundation to develop and administer the First Amendment Speakers Bureau.

If you are interested in joining the Speakers Bureau or in helping to organize a presentation in your area, please contact:

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Pennsylvania Newspapers Wins Private Figure Libel Trial

Following a six day trial last month, a Pennsylvania jury rejected a lawyer's libel claim against two local newspaper publishers over their reports about a domestic abuse petition in which the plaintiff was briefly mentioned. *Weber v. Lancaster Newspapers, Inc., et al.*, No. CI-98-13401 (Pa. Ct. Common Pleas, Lancaster County, jury verdict July 31, 2007).

Although the newspaper reports were literally true, plaintiff's claim was that the articles falsely portrayed her as the defendant in the petition. After only 50 minutes of deliberation the jury returned a verdict for the publishers, finding the articles substantially true or protected by the fair report privilege.

Background

At issue were a series of articles published in 1998 by Lancaster Newspapers and Ledger Newspapers about a dispute that developed between Patricia Kelley, a local police chief, and her long term partner, Dawn Smelz. After the couple separated, Smelz filed a "protection from abuse" petition against Kelley. The petition alleged that Kelley made harassing phone calls to Smeltz and threatened to kill her.

The petition also briefly mentioned plaintiff, stating: "Patti's friend, Gail Weber, phoned me at work, harassing me." At the time, Weber was an associate at the law firm of Shirk, Wagenseller & Mecum, which acted as the town's solicitors. Weber had begun a personal relationship with Patricia Kelley – and the two were living together.

The newspaper articles reported both on the petition and the controversy over how the allegations should be investigated. The first newspaper article was headlined "Attorney named in abuse petition" and began: "Woman who got protection from abuse order against Quarryville's officer in charge says member of solicitor's firm made harassing call." Another article was headlined "Woman charges Kelley with verbal abuse, threats. Borough lawyer also accused." Other articles focused on the appointment of an independent counsel to advise the town in light of the conflict issue with the town's law firm.

Plaintiff's sued the newspaper publishers for libel. The trial court granted the publishers summary judgment, holding the papers were protected by the fair report privilege. The appeals court reversed. The court found that while the reports about the petition were literally true they could create the defamatory implication that plaintiff was the defendant in the petition and, therefore, the articles were not protected by the fair report privilege. *Weber v. Lancaster Newspapers, Inc.*, No. 898 MDA 2004, 2005 WL 1217365 (Pa. Super. May 24, 2005). The appellate court explained that "one way a newspaper may abuse the privilege is by placing a misleading and sensationalized 'spin' on a relatively insignificant aspect of the public document."

The appeals court also held that plaintiff was a private figure, reasoning that she had no control over the fact that she was mentioned in the petition or that it generated significant media concern. "If anything the newspaper defendants turned Weber into a public figure by their newspaper reports," the court stated.

Trial

The trial began on July 23, 2007 before Judge Paul K. Allison. In opening statements, plaintiff's lawyer argued that Weber should not have been mentioned at all in the news articles. According to local news reports, plaintiff's lawyer displayed blow ups of the articles and stated:

> On Dec. 21, 1997, a Sunday morning, when Gail Weber looked at the front page she found a shocking article at the bottom of the front page with a large headline, 'Attorney named in abuse petition....She had nothing to do with the allegations of abuse in the petition."

In their opening, the publishers stressed that they accurately reported the contents of court documents. Plaintiff testified that she did call Smeltz but denied that she had harassed her. She also testified that she involuntarily resigned from her law firm and was unemployed for nearly ten years. The newspapers argued that plaintiff voluntarily involved herself in the dispute between Kelley and Smeltz. The newspapers also disputed that the news articles caused any damage to plaintiff.

A legal recruiter testified that plaintiff's frequent job changes (three firms in five years) made her unattractive to other firms. Moreover, according to a report in the Intelligencer Journal, the recruiter testified that plaintiff could have used the publicity surrounding the incident to cultivate gay and lesbian clients.

MLRC has asked defense counsel to prepare a more detailed summary of the trial.

John C. Connell, Archer & Greiner, P.C., represented Ledger Newspapers; George C. Werner, Barley Snyder LLC, represented Lancaster Newspapers, Inc. Plaintiff was represented by Ralph D. Samuel and Lynn Malmgren of Ralph D. Samuel and Co., P.C.

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MLRC Calendar

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September 17-18, 2007

London, England
MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & New Media

Stationers Hall, London.

September 19, 2007

London, England
MLRC London Conference

International In-House Counsel Breakfast

Reynolds Porter Chamberlain
Tower Bridge House
St Katharine's Way
London

November 7, 2007

New York City
MLRC ANNUAL DINNER

November 9, 2007

New York City
Defense Counsel Section Breakfast

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Sixth Circuit Applies Actual Malice Standard To Breach of Contract Claim in Libel Suit

In a very interesting non-media libel decision this month, a divided Sixth Circuit panel held that libel and breach of contract claims brought against a financial ratings company would both be subject to the actual malice standard. *Compuware Corp. v. Moody's Investors Services, Inc.*, No. 05-1851, 2007 WL 2386565 (6th Cir. Aug. 23, 2007).

Affirming summary judgment to the defendant, the majority noted that while enforcement of general laws against the press ordinarily is not subject to stricter scrutiny – "stricter scrutiny may be warranted where a plaintiff attempts to use a state-law claim to avoid the strict requirements for establishing a libel or defamation claim." *Id.* at *8 *citing Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

Background

Moody's is a financial publisher that analyzes the financial conditions of, and publishes credit ratings for, a variety of companies. In late 1999, Compuware paid Moody's $225,000 to review and rate the company's ability to repay a $900 million revolving bank credit facility.

Moody's ultimately downgraded Compuware to a "junk" rating. Compuware's sued for defamation and breach of contract, silent fraud and violation of the Investment Adviser's Act. The last two claims were dismissed for failure to state a claim. After discovery, the district court granted summary judgment to Moody's on the defamation and the breach of contract claims, holding that the actual-malice standard applied to both claims and that there was insufficient evidence of actual malice. The district held, in the alternative, that there was no evidence that Moody's was negligent in publishing its report. The district court also found that Compuware had consented to publication.

Sixth Circuit Decision

In an opinion written by Judge Alice Batchelder, and joined by Judge Ronald Gilman, the court affirmed for lack of actual malice as to both the defamation and contract claims.

On the defamation claim, the undisputed evidence showed that Moody's actively sought to compile a factually accurate and complete report. Moreover the court held that Moody's credit rating of Compuware was constitutionally protected opinion. "A Moody's credit rating is a predictive opinion, dependent on a subjective and discretionary weighing of complex factors. ... Even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation."

Actual malice was also the appropriate standard on the breach of contract claim because the claim was an attempt to recover damages for harm to reputation.

> Unhappy with the contents of the publication and the corresponding ratings downgrade, Compuware contends that Moody's breached this contract by incompetently compiling, investigating, and evaluating Compuware's credit position, and by publishing an erroneous report.... While ostensibly presenting a breach of contract claim, this argument is grounded in negligence, and amounts to nothing more than a back-door attempt to recover damages for the harm allegedly caused by Moody's protected expression of its opinion of Compuware's financial condition."

Dissent

Judge John Rogers agreed that summary judgment was warranted on the defamation claim, but wrote a vigorous dissent on the breach of contract issue.

> "In the context of the present case, in particular, one can contract to say good (or accurate) (or well-researched) things about the entity one contracts with. Requiring a showing of actual malice to prevail on a contract claim, however, effectively destroys the ability of public figures to make this last type of contract. The malice requirement does so by inserting into each such contract the right to violate the contractual obligation as long as there is no malice."

Moody's was represented by James J. Coster and Joshua M. Rubins, Satterlee, Stephens, Burke & Burke, New York. Compuware was represented by Mary Massaron Ross, Plunkett & Cooney, Detroit, Michigan.

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Disk-Jockey's Defamation Suit Against New York City Councilman Dismissed

Court Finds That Statements Constitute "Pure Opinion" and not Criminal Accusation

In a brief decision, the Southern District of New York dismissed a defamation claim brought against a New York City Councilman this month, holding that the statements at issue were non-actionable opinion, given the context in which they were made. *Torain v. Liu*, No. 06 Civ. 5851, 2007 WL 2331073 (S.D.N.Y. Aug. 16, 2007) (Daniels, J.). This "context" was as follows: Plaintiff Troi Torain, then a disk-jockey on New York's WWPR-FM radio station, was in the midst of a "war of words" with another disk-jockey, on rival New York station, WQHT-FM. During this time, Torain made some disturbing and disparaging comments on air about his rival's daughter.

Defendant John C. Liu, a New York City Councilman, upset about Torain's comments, held a press conference at City Hall to protest. At this protest, Liu said that Torain was a "sick pedophile loser" and a "lunatic" and called for Torain's removal as a disk-jockey. Liu also made media appearances – on the "O'Reilly Factor" and New York 1's "Inside City Hall"– where he referred to Torain a "a sick racist pedophile," said that Torain should be "behind bars" and stated that Torain had already been fired from another radio job "for making totally inexcusable remarks over the airwaves."

Torain alleged that Liu's comments were defamatory *per se* based on New York state law. The court disagreed. Judge Daniels held that Liu's statements were "clearly statements of opinion" and that no reasonable person would have understood Liu to be declaring as a fact that Torain was, e.g., a pedophile. The "war of words" between the disk-jockeys was, as Torain conceded, extensively covered in the media, so that in context the statements would obviously be Liu's opinion of Torain's on air statements.

Though Torain attempted to argue that Liu's statements constituted accusations of criminal conduct, but the court was not persuaded: "content is still relevant when considering whether a statement is a factual accusation rather than a pure opinion. And as already discussed, no reasonable listener, considering the entire context of defendant's comments, would conclude that defendant was accusing plaintiff of committing an act of pedophilia."

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Libel Suit a Case of Dumb and Dumber?

By Herschel P. Fink

Dennis Publishing prevailed in a libel suit last month, when the Eastern District of Michigan granted summary judgment to the company's *Maxim* magazine. *Dupuis v City of Hamtramck, et al*, E.D. Mich. No. 06-CV-14927, 2007 WL 2331952 (July 27, 2007.) (Friedman, J.). A police officer had sued the magazine based upon his inclusion in an "Idiot Nation Across the USA" roundup; the court found that the *Maxim* piece was substantially true and based on both public records and reliable news reports.

Background

When a thirsty policeman in a Detroit suburb shot his patrol car partner with a Taser gun after she refused his request to pull over so he could buy a can of soda, the story made humorous headlines around the world. The *New York Post* headlined it, "Weird but True," while London's *Daily Telegraph* quaintly titled it "Argument Over a Fizzy Drink." An aptly named website, makestupidity-history.org, dubbed Ronald Dupuis, II, the impatiently thirsty cop, its stupidest person of the day.

The prize for hyperbolic hilarity however, probably went to *Maxim*, an edgy men's magazine published by Dennis Publishing, Inc. It featured the former (he'd been fired and charged with assault and battery) officer's feat in its "Idiot Nation Across the USA" roundup of items celebrating "the dumbest feats performed by people across this great yet surprisingly stupid land."

Accompanied by a humorous cartoon featuring flying donuts and a "National Disgrace" headline, *Maxim* wrote:

> A thirsty police officer Tasered his partner when she refused to stop their patrol car so he could get a soda. Ronald Dupuis applied the shocker to Prema Graham after he grabbed the steering wheel in an attempt to pull over their cruiser. Dupuis was later fired and charged with assault and could spend three months in the clink. His best defense will be that he understandably went nuts because he worked in Hamtramck, a tiny city with the depressing distinction of being surrounded by Detroit.

The *Maxim* piece was based upon the Associated Press account of the incident, which similarly read:

> HEADLINE: Michigan officer accused of using Taser on partner during fight about soda.
>
> Hamtramck, Mich (AP) – A police officer has been charged with using a Taser on his partner during an argument over whether they should stop for a soft drink. Ronald DuPuis, 32, was charged Wednesday with assault and could face up to three months in jail if convicted. The six-year veteran was fired after the Nov. 3 incident. Dupuis and his partner Prema Graham began arguing after Dupuis demanded she stop their car at a store so he could buy a soft drink, according to a police report. The two then struggled over the steering wheel, and Dupuis hit her with his department-issued Taser, the report said.
>
> She was not seriously hurt. Hamtramck police union lawyer Eugene Bolanski said he expected Dupuis to hire a private lawyer. Hamtramck is a city of 23,000 surrounded by Detroit.

The AP account, itself based on a *Detroit Free Press* story, tracked police incident reports, which are public under Michigan's open records laws.

If Dupuis' feat was "dumb," his resulting libel suit, filed in U.S. District Court in Detroit against *Maxim*'s parent company, was no smarter, the court granting early summary judgment to *Maxim* (Dennis Publishing) on multiple grounds. *Dupuis v City of Hamtramck, et al*, E.D. Mich. No. 06-CV-14927, 2007 WL 2331952 (July 27, 2007.)

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Libel Suit a Case of Dumb and Dumber?

(Continued from page 13)

Maxim argued that its story was true and an accurate account of public and official proceedings, was shielded by Michigan's adoption of the wire service (or AP) defense, and that the cartoon and headline characterizations were protected opinion and rhetorical hyperbole. U. S. District Judge Bernard A. Friedman agreed with all those arguments in his nine page opinion. (*Maxim* did not raise the *New York Times* defense, which would also be applicable, because that might have created fact issues requiring discovery.)

The Court in granting summary judgment held:

> The defendants argue that their statements regarding the incident are substantially true and accurately based on public records and reliable news accounts. The court is persuaded by these defenses.
>
> * * *
>
> Defendants' statements indeed derived from a "fair and true report," especially since the report need only be "substantially" accurate and not 100% accurate. Defendants need not prove they actually relied on, or even consulted, these reports. It suffices that their statements are consistent with such sources. Furthermore, DuPuis's argument that M.C.L. § 600.2911(3) requires the broadcast to be attributed to the public source is incorrect. Nowhere in this statute, or in case law, is it suggested that such a broadcast [sic] requires citation to the public record.
>
> Second, defendants emphasize their reliance on the original AP story, and how they made no material change to this version. Cited in its motion is Michigan's recent adoption of the "wire service defense." In *Howe v Detroit Free Press, Inc.*, 457 Mich. 871 (1998), the Supreme Court protected the reprinting of seemingly trustworthy news stories.
>
> * * *
>
> Furthermore, as discussed below, the dramatic additions to the story such as illustrations and subtitles also fail to constitute a substantial change under the wire service defense.
>
> * * *
>
> Even a publication that is crude or mean-spirited may constitute what the United States Supreme Court calls "rhetorical hyperbole" or a "vigorous epithet." *Greenbelt Co-op. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970).
>
> * * *
>
> In this case, Maxim is a men's lifestyle magazine, known for articles and reports that satirize and belittle public figures and those making headlines. This context supports defendants' position that its depictions were not meant to convey facts.
>
> The language and illustrations featured around the defendant's story also fall into this category of rhetorical hyperbole. The specific subtitles, captions, and illustrative components of the publication do not assert objective facts; instead they collectively color the story with sarcasm and exaggeration. In this sense, the title "Idiot Nation" and subtitle "National Disgrace" serve to complement and enhance the story – not assert identifiable facts. Moreover, the flying objects in the air during the Tasing (Graham's hat, her communicator, and two donuts) seem to function as merely a humorous backdrop to the story.
>
> * * *
>
> As for the defamation claim, as a matter of law the statements are incapable of defamatory interpretation. First, defendants' statements regarding the incident are substantially true and accurately based on public records and reliable news accounts. Second, the accompanying illustration and captions are constitutionally protected opinion and rhetorical hyperbole. Finally, the false-light invasion of privacy claim fails for the same reasons as the defamation claim.

It's been at least 90 years since Mack Sennett's Keystone Cops first flashed across the silent silver screen, but former Officer Dupuis (he was acquitted of the criminal charge, but his firing was upheld) may have a starring role in any modern remake (particularly since his exploit was captured on the in-car camera).

Herschel P. Fink of Honigman Miller Schwartz and Cohn LLP, Detroit, represented Dennis Publishing and Dennis Digital. Plaintiff is represented by Gary T. Miotke.

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Islamic Charity Drops Libel Suit Over Terrorism Book

By Katherine Vogele

Yale University Press, and Matthew Levitt, the author of a book on Hamas successfully defended a libel action brought against them in California Superior Court by the Islamic-based charity KinderUSA and the chair of its board of directors, Dr. Laila Al-Marayati.

The libel suit stemmed from publication of the book *HAMAS: Politics, Charity, and Terrorism in the Service of Jihad*, written by Dr. Matthew Levitt in cooperation with the Washington Institute for Near East Policy, and published by Yale. Dr. Levitt is a scholar specializing in Middle East policy and terrorism who has served as a Deputy Assistant Secretary of the Treasury and provided analytical advice on terrorism to government organizations including the FBI.

Plaintiffs' complaint asserted that certain passages in the book were false and defamatory because they linked KinderUSA with Hamas and implied a connection to the Al-Qaeda funding network. Plaintiffs filed suit in California Superior Court in Los Angeles on April 26, just weeks before the scheduled start date of the federal criminal trial of the Holy Land Foundation ("HLFRD"). (The book had reported in a passage challenged by plaintiffs that : "One organization that has appeared to rise out of the ashes of the HLFRD is KinderUSA.")

Yale University Press answered the complaint, denying liability, and filed an anti-SLAPP motion on June 11; Dr. Levitt and the Washington Institute also answered and filed their own anti-SLAPP motion on June 15. Both motions noted that the plaintiffs failed to allege fault on the part of any defendant, that the passages were not "of and concerning" Dr. Al-Marayati (who, indeed, was not mentioned in the challenged passages) and that the plaintiffs had no chance of showing the court a probability of prevailing on the merits (as required under the anti-SLAPP law) because the plaintiffs could not establish actual malice.

Defendants argued that both plaintiffs were public figures. KinderUSA, defendants noted, had courted publicity in connection with its charitable solicitations, and had used the media to voice its position on various issues. Defendants argued that Dr. Al-Marayati has had a very high-profile career, serving as a spokesperson for the Muslim Women's League, as well as previously serving as a Presidential appointee to the Commission on International Religious Freedom; she had also written a number of op-ed pieces and been quoted frequently on topics of concern to Muslim Americans.

Yale filed a declaration setting forth the absence of any actual malice on its part. It emphasized that as a book publisher it was entitled, and had in fact, relied upon Dr. Levitt's distinguished professional credentials and reputation and was not obliged to conduct its own fact-checking process.

Dr. Levitt filed a separate declaration, setting out the basis of his belief that all statements in question were correct. He cited extensive research that included review of "previously undisclosed intelligence documents" and seized Hamas documents, as well as interviews with imprisoned Hamas operatives and with government officials. Particularly, regarding KinderUSA, Dr. Levitt viewed as very significant the fact that KinderUSA's founding leadership included individuals who had held high level positions with HLFRD; he also pointed to the ongoing FBI investigation of KinderUSA, as well as KinderUSA's acceptance of $20,000 in funds from another organization "linked to Hamas," KindHearts. In his declaration, Dr. Levitt noted that Dr. Al-Marayati has admitted to reporters that she deliberately avoids tracking where KinderUSA funding is used.

As part of their anti-SLAPP motions, all defendants requested attorneys' fees.

Shortly before the August 15, 2007 hearing date, and prior to filing any papers opposing the anti-SLAPP motion, plaintiffs agreed to dismiss their case with prejudice. The dismissal required no payment by defendants, no agreement to alter the text now or in the future and no restriction on distribution. It also included a broad covenant from plaintiffs not to sue with respect to the published book in the U.S. or any other jurisdiction. The defendants agreed not to pursue their anti-SLAPP motion.

Yale University Press was represented in the case by Floyd Abrams and Dean Ringel of the New York law firm Cahill Gordon & Reindel LLP. They were assisted by Katherine Vogele, an associate at the firm, as well as by Stuart W. Rudnick and Kent A. Halkett of the Los Angeles firm, Musick, Peeler & Garrett LLP. Dr. Levitt and the Washington Institute for Near East Policy were represented by attorneys Robert F. Helfing and Laura Lee Prather of the firm Sedgwick, Detert, Moran & Arnold LLP, as well as by Richard H. Borow, Joseph M. Lipner, and Trevor V. Stockinger of the Los Angeles firm Irell & Manella LLP. Plaintiffs were represented by Todd E. Gallinger of Gill and Gallinger LLP, as well as by John P. Kilroy, of Lorain, Ohio.

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Public High School Basketball Coach Not a Public Official

The Utah Supreme Court last month ruled that a public high school basketball coach is not a public official. *O'Connor v. Burningham*, No. 20060090, 2007 WL 2212679 (Utah July 31, 2007).

In a lengthy opinion surveying U.S. Supreme Court and state court law, the Utah Supreme Court held that the public official category should be "comprised exclusively of individuals in whom the authority to make policy affecting life, liberty, or property has been vested."

The court recognized that high school sports commands intense public interest, but concluded that "public official status has nothing to do with the breadth or depth of the passion or degree of interest that the government official might ignite in a segment of the public."

Background

Plaintiff was the coach of the women's public high school basketball team in a small Utah town. Unhappy with his handling of a talented new member of the team, a group of parents began making a series of complaints against plaintiff and he was eventually dismissed as coach.

Among other things, parents accused plaintiff of giving special treatment to the star player, misusing team funds and violating recruiting rules. Plaintiff sued a group of parents for defamation. The trial court granted summary judgment to them, holding that plaintiff was a public official, and that he failed to show sufficient evidence of actual malice.

Utah Supreme Court Ruling

The Utah Supreme Court reversed. Reviewing the development of the public official category, the court cited with approval Chief Justice Earl Warren's concurring opinion in *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) where he discussed a public official as a person whose "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees."

The Utah Supreme Court went on reason that "apparent importance" means someone who has authority to make policy affecting life, liberty, or property.

> "So viewed, high school athletics can claim no 'apparent importance.' The policies and actions of the coach of any high school athletic team does not affect in any material way the civic affairs of a community-the affairs most citizens would understand to be the real work of government."

The court noted that some prior state court rulings had blurred the distinction between the public official and the public figure categories. To the extent any of these cases conflicted with the instant ruling, they are now overruled, according to the court.

Conditional Privilege

The court also went on to expressly adopt a conditional privilege for family relationships, as set out in § 597 of the Restatement (Second) Torts. § 597 provides:

> (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that: (a) there is information that affects the well-being of a member of the immediate family of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the well-being of the member of the family.
>
> (2) An occasion makes a publication conditionally privileged when the circumstances induce a correct or reasonable belief that: (a) there is information that affects the well-being of a member of the immediate family of the recipient or of a third person, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the well-being of the member of the family, and (c) the recipient has requested the publication of the defamatory matter or is a person to whom its publication is otherwise within generally accepted standards of decent conduct.

Here all the defendants – including those without children on the basketball team – had a legitimate interest in the affairs of the basketball team to be within the scope of the privilege – subject to issues of proof before the trial court on remand as to whether the privilege was abused.

Plaintiff is represented by Joseph C. Rust, Matthew G. Bagley, Salt Lake City. Defendants are represented by Harold L. Peterson and Michael W. Homer, Salt Lake City.

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Political Advertising

The New Hot Bed of Libel Litigation in Texas

By Laura Lee Prather

In the last year, political candidates in Texas have taken a new tact in trying to win their races for office. Instead of just presenting their issues in person, in debates, and in the media, most recently candidates have decided it is time to present their concerns over how political races are handled in the courtroom. Some argue it is just another tactic to impact voter sentiment. Since the last election cycle, two political candidates have chosen to follow this path.

In the primary election of 2006, long-time state representative, Tommy Merritt (R-Longview) was facing his first formidable (and well-funded) opponent since he took office a decade before. Merritt's opponent, Tommy Williams, was a political novice, but he was a well-established businessman in the local community and had the backing of some of the wealthiest campaign contributors in the state.

Both candidates seemed to run their political advertising with a "go negative" focus, and on the eve of the primary, with the polls showing that Williams had the lead, Rep. Merritt, took his charges to the courthouse. On the courthouse steps, within minutes of filing a defamation lawsuit against his opponent, Rep. Merritt and his wife made a plea to the community about the falsehoods found in Williams' political ads and the destructive impact these messages had had on their family. Rep. Merritt's campaign tactic proved successful – he won the primary and the general election. Somewhat surprisingly, though, he did not drop the lawsuit. In fact, over the months following, the lawsuit actually took on a new direction and built momentum.

In the meantime, in a political race in San Antonio, Texas, challenger Joe Farias was seeking to oust incumbent state representative George Antuna in the general election. Rep. Antuna's campaign aired some television ads that tied Mr. Farias to a convicted criminal. On the eve of the election, Mr. Farias sought a temporary injunction trying to prohibit the advertisements from running on television. The Application for Temporary Restraining Order and Temporary Injunction were brought against both Mr. Antuna and one of his campaign contributors, Dr. James Leininger. Several media outlets in San Antonio airing the Antuna ads filed opposition briefs. The injunction was denied, the underlying lawsuit continued, and Mr. Farias beat the incumbent state representative.

Both plaintiffs won their elections – so, presumably, there were no damages. Still, both plaintiffs continued on with their lawsuits – perhaps for the purpose of discouraging others from challenging them in elections to come. Days before the deadline to add additional parties in the *Merritt v. Williams* suit, Rep. Merritt added as defendants Williams' campaign consultant (Jeff Norwood), Williams' campaign contributor (Dr. James Leininger – yes, the same donor from the Antuna campaign), and Williams' direct mail house that distributed the advertisements at issue (Targeted Creative Communications). The claims brought against these new defendants were novel ones including: conspiracy to defame, vicarious liability, and aiding and abetting the alleged defamation committed by candidate Williams.

In a series of bizarre events, the Court required the new defendants to conduct all discovery and try the case within six months of being served – refusing to grant any meaningful extensions of time despite their late addition to the case. After discovery was completed, the newly added defendants filed a motion for summary judgment. Just before the hearing was to take place on the motion, the judge recused himself on the grounds that his wife was a witness for the plaintiffs.

Three weeks before trial was to begin, Judge Richard Davis heard the motions for summary judgment. Dr. Leininger, Targeted Creative Communications and Jeff Norwood filed a joint motion for summary judgment on the grounds that there had been no actual malice in the publication of the ads, the ads were true, protected by privilege, and the causes of action for aiding and abetting defamation and vicarious liability for defamation are not cognizable claims under Texas law.

Furthermore, there was no evidence of damages, conspiracy, aiding and abetting or vicarious liability. Williams filed his own motion for summary judgment on the

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Political Advertising

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grounds of truth and lack of actual malice. All of the defendants argued that the allegations in the case struck at the core of free speech and were simply an attempt to squelch political debate – the very essence upon which our democracy was built.

Dr. Leininger, in particular, argued that if he were to be found liable then every political donor in the future could be hauled into court for supporting a candidate or his views, and this would not only silence political debate, but stymie the ability of anyone to challenge a political incumbent in years to come. Targeted Creative Communications argued that they were merely a conduit for the message and had nothing to do with the development of them and, therefore, could not be held accountable for the substance. Just a week before trial, Judge Davis issued his ruling and granted summary judgment in favor of both Dr. Leininger and Targeted Creative Communications on the grounds of lack of actual malice. The Court denied summary judgment as to the political candidate, Mark Williams, and his campaign consultant Jeff Norwood. After the court's ruling and after more than a year of litigation and countless legal fees, all remaining parties agreed to walk away with a mutual apology. There was no trial on the merits.

Meanwhile, back in San Antonio in the *Farias v. Antuna* case, Rep. Farias amended his petition, dropped Dr. Leininger, but opted to add each of the television outlets that aired the offending political advertisements. He sued Clear Channel affiliate – WOAI, Belo station – KENS, and Post-Newsweek station – KSAT. His claims were that the stations defamed him by publishing the political advertisements purchased by his opponent and that they did so with actual malice because they had been put on notice of the libelous content in the ads by a letter from his attorney prior to the publication of the ads.

All three of the television stations filed a joint motion for summary judgment arguing that the stations were immune from liability for publishing political advertisements by a candidate for pubic office under FCC rules. Title 47 U.S.C. sec. 315 requires that the stations allow equal opportunity for legally qualified candidates for public office to use the broadcasting station to advertise, and, if the station allows a candidate to use its airwaves, the statute expressly prohibits the station from censoring the campaign material. Further, the United States Supreme Court had addressed the constitutionality of this statute in *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959), and the high court found the statute to be constitutional.

Surprisingly, despite U.S. Supreme Court precedent and an on point FCC rule, trial judge, Gloria Saldana, denied the motion for summary judgment. All three stations took an interlocutory appeal as provided under Texas law. Rep. Farias filed a motion to dismiss for lack of jurisdiction on the grounds that there was no free speech defense at issue and, thus, no basis for an interlocutory appeal. On August 8, 2007, the San Antonio Court of Appeals denied Farias' motion to dismiss, reversed the trial court's denial of summary judgment and rendered judgment in favor of the television stations. The case between the two political candidates continues.

The irony in the *Farias v. Antuna* case is that the plaintiff's counsel is U.S. Senatorial candidate Mikal Watts. Candidate Watts should be pleased about the ruling in favor of protecting political speech, even if his client lost this particular claim. With another political season in front of us, it will be interesting to see what new cases are brought and whether political donors, like Dr. Leininger, continue to be the target of such suits.

In the Merritt v. Williams case, Dr. Leininger was represented by Laura Lee Prather and Brian Calhoun of Sedgwick, Detert, Moran & Arnold. Plaintiff Tommy Merritt was represented by Jerry Harris. In the Farias v. Antuna case, WOAI was represented by Laura Lee Prather and Catherine Robb of Sedgwick, Detert, Moran & Arnold. Other defendants were represented by Paul Watler and Howard Newton. Plaintiff Joe Farias was represented by Mikal Watts.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

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New Jersey Long Arm Jurisdiction Reaches California Internet-User in Defamation Case

Messages Directed at New Jersey; Jurisdiction Proper

This month the New Jersey Appellate Division held that the State's long arm jurisdiction provision could extend to an internet user in California who had allegedly posted defamatory material about two New Jersey residents in a chatroom. *Goldhaber v. Kohlenberg*, No. A-5114-05T2, 2007, WL 2198181 (N.J. Super. App. Div. Aug. 2, 2007) (Wefing, Parker, Yannotti, JJ).

Although the defendant, Charles Kohlenberg, had "no contacts of any type with New Jersey," he could, have reasonably expected to be brought to court in the State based upon the nature and content of his Internet postings.

Background

Father and daughter Richard Goldhaber and Danna Goldhaber brought their libel suit against California resident Kohlenberg after he allegedly posted a number of defamatory messages on an Internet newsgroup about cruises and cruise ships. All three parties were members of the newsgroup. The court refused to reproduce the "vile messages" but did describe the content, noting that the messages "accused plaintiffs of base activities, including incest and bestiality" and that they "contained cruel references to the hearing limitations of plaintiff Danna Goldhaber."

Defendant was advised by counsel that there was no jurisdiction over him so he did not answer the complaint and a default judgment was entered against him by the New Jersey Superior Court. As part of the judgment, the Goldhabers were awarded $2,644.11 in compensatory damages and $1,000,000 in punitive damages. Defendant appealed the judgment to the New Jersey Superior Court, Appellate Division on the jurisdiction issue.

New Jersey Court Decision

The court first noted that the State Supreme Court had previously "declined to adopt new principles to analyze the fundamental concept of long-arm jurisdiction in an Internet context." (citing *Blakey v. Continental Airlines*, 164 N.J. 38 (2000)). Thus, the test would remain whether defendant should have reasonably anticipated being haled into a New Jersey Court.

While simply posting a statement to a website that could be read elsewhere would not confer jurisdiction, defamatory statements directed at a particular state and intending or expecting an effect there could. In this instance, defendant's messages were targeted at New Jersey. According to the court, defendant disparaged the New Jersey municipality where the plaintiffs lived and made "insulting comments" about the police department there. He also posted the plaintiffs' address and mentioned their neighbors in the postings. Finally, some of defendants statements were posted to respond to the Goldhabers' when they responded to the attacks.

Due to the nature of the Internet postings, the court held: "we would deem it against the policy of our courts to deny these plaintiffs a forum in which to seek redress." The court affirmed the trial court's decision to grant personal jurisdiction, but found that the defendant should be excused for not responding to the complaint on advice of attorney, set aside the default judgment, and remanded the case to proceed on the merits.

Danna and Richard Goldhaber were represented by Jason A. Storipan and Paul W. Norris of Stark & Stark. Charles Kohlenberg was represented by Noel E. Schablik and Joseph P. Kreoll.

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S. Carolina Federal Court Denies Summary Judgment on Libel Claim Over Online Article

Online Article a "Continuous Publication" – Raises Issue of Fault

The federal district court in South Carolina this month granted in part and denied in part summary judgment on a libel claim over print and online versions of a news article. *Taub v. McClatchy Newspapers, Inc, and The Associated Press, Inc*., No. 9:05-678, 2007 WL 2302503 (D.S.C. Aug. 7, 2007) (Blatt, Jr. J.).

At issue were print and online versions of articles that reported on a plea agreement. The first article, published in hard copy and online at the *Beaufort Gazette* was headlined "Former Beaufort mayor reaches plea agreement." The article was picked up by the Associated Press, edited and automatically resent to the *Gazette's* website. The AP's version had the much catchier headline "Former Beaufort mayor guilty of illegally importing monkeys."

Plaintiff sued the newspaper and AP for libel alleging the articles were defamatory because the plea agreement was between the government and plaintiff's company – not him personally. The newspaper later published a clarification.

The federal district court ruled that the original print and online article were substantially true and/or published without actual malice. Similarly there was no evidence at all that AP published its edited version with actual malice even with its more dramatic headline. But the court denied summary judgment as to the *Beaufort Gazette's* archived version of the AP edited article. Issues of fact existed as to whether the newspaper article remained online with knowledge that it was inaccurate.

In a confusing analysis, the court considered the online article under the rubric of the single publication rule. The court found no state law that directly considered the single publication rule, but found one appellate court decision that in dicta appeared to reject it in theory. In *Moosally v. Norton*, 394 S.E.2d 878 (S.C. App. 2004), the court held there was jurisidiction over an out of state publisher where several hundred copies of the book were sold in the state. The court also noted that the book was available in libraries and added that every time the book was checked out it was disseminated and republished in the state.

Although the federal court had "some issues" with this analysis since it would "render futile South Carolina's statute of limitations for defamation claims," the court found it could not conclude that South Carolina would follow the single publication rule. The federal court's analysis of the issue itself is arguably dicta since its denial of summary judgment appeared to rest on the possibility of fault. Indeed, the court went on to also reject the application of the wire service defense to the newspaper. The wire service defense did not fit the facts where the original source material was the newspaper's own reporting.

Issues of fact existed as to whether the newspaper article remained online with knowledge that it was inaccurate.

Nearly ten years ago, a member of the South Carolina Supreme Court noted with surprising frankness that portions of state's defamation jurisprudence were "mind-numbingly incoherent" – an observation that may still be true today. *See Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497, 516 (1998) (Toal, J. concurring).

Plaintiff was represented by C. Scott Graber, Beaufort, South Carolina. Defendants were represented by Carl Frederick Muller, John Moylan, III, Matthew Richardson, Wyches Burgess Freeman and Parham in South Carolina.

SAVE THE DATE

November 9, 2007

New York City

Defense Counsel Section Breakfast

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Florida Federal Court

FEMA Must Cough Up Records Now

By Charles D. Tobin

A federal judge, following weeks of delay and propaganda by the government, recently gave the Federal Emergency Management Agency just 72 hours to begin producing records under FOIA to three Gannett newspapers in Florida. *The News-Press, et. al v. U.S. Dep't of Homeland Security*, Case No.: 2:05-cv-102-FtM-29DNF (Order Granting Motion for Entry of Judgment, rendered August 24, 2007) (Steele, J.).

At the conclusion of a late-Friday expedited hearing, Judge John Steele, of the U.S. District Court for the Middle District of Florida, ordered the agency to place in the newspapers hands – by the following Monday, August 27 – the addresses of the individual Florida households that received FEMA aid following the 2004 hurricane disasters in the state.

The judge also ruled that by September 10, FEMA must release the addresses of recipients of flood insurance administered by the agency.

Judge Steele's ruling comes on the heels of the Eleventh Circuit Court of Appeals' decision in June in favor of the Gannett newspapers and the Tribune Co. newspaper in Ft. Lauderdale, in the consolidated appeal of two federal cases. *The News-Press, et. al v. U.S. Dep't of Homeland Security*, 489 F. 3d. 1173 (11th Cir. 2007).

The appeals court reversed Steele's 2005 summary judgment decision that denied, on privacy grounds, the Gannett newspapers' Freedom of Information Act requests for the addresses; the Ft. Lauderdale Judge in the Tribune Co. case had reached the opposite conclusion, ordering disclosure of the addresses.

Citing Congressional and Executive Branch investigations of fraud in the delivery of aid in Florida, the Eleventh Circuit wrote:

> Plainly, disclosure of the addresses will help the public answer this question by shedding light on whether FEMA has been a good steward of billions of taxpayer dollars in the wake of several natural disasters across the county, and we cannot find any privacy interests here that even begin to outweigh this public interest.

FEMA announced on August 6 that it would not pursue further appeals from the 11th Circuit panel's ruling. The agency, however, immediately began a campaign of press releases and letters that:

- Falsely told 1.2 million aid recipients that the Florida newspapers had asked for their social security numbers. The newspapers had not done so.

- Misled aid recipients in California and North Carolina into believing that the Gannett newspapers had asked for information about them. The Gannett newspapers had not asked for any information outside of Florida. The Tribune Co. newspaper had made the broader request.

- Blamed the Eleventh Circuit for finding that an aid recipient's address is a public record, and suggested it will not take the court's ruling into account in future FOIA requests: "[T]he agency will continue to protect the names and addresses of disaster victims in the future under both the Privacy Act and the personal privacy exemption to the Freedom of Information Act."

- Told the Gannett newspapers that they would have to wait to receive the info until entry of the Eleventh Circuit's mandate, but that since the appeals court upheld the entirety of the Ft. Lauderdale judge's ruling, the Tribune Co. newspaper would get the records sooner. FEMA rescinded that decision when the Gannett newspapers protested.

FEMA's press releases had set out a timetable for the release, but when the agency failed to meet its first self-imposed deadline, the Gannett newspapers asked Judge Steele to enter a new judgment and force the agency's immediate compliance. After an hour-long argument on Friday, August 24, he agreed with respect to the records related to household assistance and told the agency those records must be delivered by the following Monday.

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Florida Federal Court

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At the hearing in Ft. Myers, the agency asked the district court to give it until mid-October to release the flood-insurance records, on grounds that it had not yet notified people of that release. The Gannett newspapers objected, arguing that FOIA does not permit delays for notifications, and citing FEMA's misstatements in the letters to other aid recipients. After closely questioning FEMA's counsel on the logistics involved in producing the insurance records, Judge Steele gave the agency less than three weeks to comply.

The newspapers in both the Ft. Myers and Ft. Lauderdale actions have brought motions for attorney's appellate and district court-level attorney's fees.

Charles D. Tobin, Timothy J. Conner, and Jennifer A. Mansfield, of Holland & Knight LLP in Washington D.C. and Jacksonville, FL, represent Gannett's newspapers The News-Press, FLORIDA TODAY, and Pensacola News Journal. Rachel Elise Fugate and Deanna K. Shullman, of Thomas & LoCicero PL, in Tampa, FL, and David Bralow, Tribune Co., New York City, represent the South Florida Sun-Sentinel.

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Second Circuit Clarifies False Advertising Law

Upholds Injunction Against Ad That Is "False By Necessary Implication"

By Saul B. Shapiro, Sarah E. Zgliniec, and Catherine A. Williams

The Second Circuit clarified three aspects of false advertising law in its decision in *Time Warner Cable Inc. v. DIRECTV, Inc.*, No. 07-0468-CV, 2007 WL 2263932 (August 9, 2007) (Opinion by Straub, J., joined by Kearse and Pooler, JJ.). The Court adopted for the first time the doctrine of "false by necessary implication"; clarified when a visual depiction constitutes non-actionable puffery; and held that irreparable harm may properly be presumed in some cases where an ad is comparative but does not identify the plaintiff by name.

Background

Earlier this year, Time Warner Cable had successfully sought a preliminary injunction regarding several DIRECTV television and internet ads. See Time Warner Cable Inc. v. DIRECTV, Inc., 475 F. Supp. 2d 299 (S.D.N.Y. 2007) (Swain, J.). The District Court found that the ads were literally false, and as a result Time Warner Cable was spared the time and expense of proving falsity through consumer surveys or other means.

In one television ad, the actor Jessica Simpson stated "You're just not gonna get the best picture out of some fancy big screen TV without DIRECTV. It's broadcast in 1080i [the HD standard]." In another, the actor William Shatner stated "I wish he'd just relax and enjoy the amazing picture clarity of the DIRECTV HD we just hooked up.... Settling for cable would be illogical." The District Court found that both ads were literally false because they claimed that DIRECTV's HD picture quality is superior to cable's, while it was undisputed that the parties had equivalent HD picture quality.

The internet ads showed a split-screen image, one side of which was crystal clear and labeled "DIRECTV," and the other side of which was grossly distorted and labeled "Other TV." The District Court also found that these ads were literally false because they falsely depicted cable's picture quality, and could not be discounted as puffery because there was a reasonable danger that consumers would rely on the false images.

"False by Necessary Implication' Doctrine

The Second Circuit's analysis began with the television ads. The Court agreed that the Simpson Ad was literally false. The Shatner ad's statement that "settling for cable would be illogical" presented a more difficult problem. DIRECTV, relying on American Home Products Corp. v. Johnson & Johnson, 577 F.2d 160 (2d Cir. 1978), had argued that the statement could not be literally false because it did not explicitly compare DIRECTV HD to cable HD, and that the District Court must therefore have based its decision improperly on its subjective perception of the ad as a whole.

Time Warner Cable, relying on Avis Rent A Car System, Inc. v. Hertz Corp., 782 F.2d 381 (2d Cir. 1986), had argued that the District Court properly determined that the statement was literally false by considering it in context.

> ***"An ad can be literally false even though it does not explicitly make a false assertion, if the words or images, considered in context, necessarily and unambiguously imply a false message."***

The Second Circuit explained that American Home Products and Avis Rent A Car appear to conflict: the first holds that evidence of consumer confusion must be considered if an ad does not make an explicitly false statement, while the second holds that a court may find an ad that uses literally accurate words to be literally false – without evidence of consumer confusion – by considering the overall context of the ad (including the context of the business at issue).

The Court then explained that American Home Products does not contradict the principle that an ad's meaning should be determined in context, and stated that to reconcile the two decisions, it would formally adopt the "false by necessary implication" doctrine recognized by other Circuits. Thus, the Court held that "an ad can be literally false even though it does not explicitly make a false assertion, if the words or images, considered in context, necessarily and unambiguously imply a false message." Under this doctrine, the Court upheld the District Court's decision as to the Shatner Ad.

Puffery

Turning to the internet ads, the Second Circuit noted that its previous descriptions of non-actionable puffery did not

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Second Circuit Clarifies False Advertising Law

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"translate well into the world of images." It held that the "category of non-actionable 'puffery' encompasses visual depictions that, while factually inaccurate, are so grossly exaggerated that no reasonable consumer would rely on them in navigating the marketplace." It then held that the District Court "exceeded its permissible discretion" in finding that the internet ads were not puffery, because their depictions of cable television was so grossly distorted that no reasonable consumer would rely on them.

Irreparable Harm

Finally, the Second Circuit held that the District Court had properly presumed that Time Warner Cable would suffer irreparable harm. In previous cases, the Court had established that while irreparable harm must usually be demonstrated, it may be presumed where a false comparative ad mentions the plaintiff's product by name.

Here, neither television ad mentioned Time Warner Cable, and the Simpson Ad did not even use the word "cable" or any equivalent term. Nonetheless, the Court agreed with Time Warner Cable that the presumption also should apply "where the plaintiff demonstrates a likelihood of success in showing that the defendant's comparative advertisement is literally false and that given the nature of the market, it would be obvious to the viewing audience that the ad is targeted at the plaintiff, even though the plaintiff is not identified by name."

Thus, the Court agreed that the presumption was proper as to the Shatner Ad, which mentioned "cable," because Time Warner Cable is "cable" in markets where it operates. The Court also agreed that the presumption was proper as to the Simpson Ad, which did not mention "cable," because most consumers have either satellite or cable service, and therefore it "would be obvious" that DIRECTV's claims were directed at cable.

Saul B. Shapiro, Sarah E. Zgliniec, and Catherine A. Williams of Patterson Belknap Webb & Tyler LLP represented Time Warner Cable in this case. DirectTV was represented by Quinn Emanuel Urquhart Oliver & Hedges, LLP.

SAVE THE DATE

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Vote-Swapping Websites Constitute Protected Speech

California Violated Site Operators' First Amendment Rights by Threatening Prosecution

Earlier this month the Ninth Circuit held that the State of California violated the First Amendment rights of the operators of two"vote-swapping" websites when it threatened them with prosecution. *Porter v. Bowen*, No. 06-55517, 2007 WL 2230526 (9th Cir. Aug. 6, 2007) (Fisher, Clifton, Martinez, JJ).

The activities conducted on the "vote-swapping" sites constituted protected speech, and the threatened prosecution – which caused the websites to cease operation – was not "sufficiently tailored" to further the State's professed interests.

Background

The two websites at issue in this case were created during the 2000 Presidential election. The sites included information about the election, and were intended to pair voters who were committed to voting for a third party candidate with those who supported a major party candidate. The third party voters could then "swap" their vote with a major party voter in a "safe state."

No money was to be exchanged between parties. For example, on voteswap2000.com, Ralph Nader supporters who lived in swing states were encouraged to "swap" their votes with Al Gore voters residing in Democratic strongholds. The purpose of this was to secure Gore as President and to insure that Nader received the 5% of the popular vote required for federal election funding.

California's Secretary of State threatened the sites with prosecution based upon election law provisions, and the sites effectively closed down. Plaintiffs later sued the state in federal district court. The trial court dismissed the complaint as moot and also ruled that the state defendants were entitled to qualified immunity.

Ninth Circuit Decision

Reversing, the Ninth Circuit held that the vote-swapping websites were "clearly protected" by the First Amendment, for they provided election information, offered "a reasonably clear message of support for third-party candidates," expressed concern about the current electoral process methodology, and put voters in touch with each other, presumably to discuss politics. Since no money was involved, the "swapping" was not illegal.

The Circuit Court ultimately found the Secretary of State's actions to be unconstitutional by applying *United States v. O'Brien*'s intermediate scrutiny test for expressive conduct, though it noted that its conclusion would have been the same were it to have applied strict scrutiny. California's stated interests in closing the vote-swapping sites were preventing corruption, fraud, and the electoral college.

The court held that there was no threat of corruption since votes were not traded for money or any other items or promises. While the vote-swapping raised issues of electoral misconduct – there was no way for the site users to confirm that the person they were paired with was a registered voter who would actually follow through with the swap – closing the websites entirely was not the most narrowly tailored approach the State could have taken.

The Secretary of State for California failed to show that the threat of fraud was great and did not offer any less restrictive means of preventing fraud, as was his burden before the court. Finally, the electoral college was not threatened by the vote-swapping sites since the purpose of the websites was merely to "prevent the preferences of a majority of a state's voters from being frustrated by the winner-take-all systems in place in most states."

The electoral college would still function normally; by vote-swapping the website users would simply "offset the anomalies that [vote swapping] advocates believe can result when more than two candidates face off in winner-take-all systems."

Plaintiffs were represented by Peter J. Eliasberg and Mark D. Rosenbaum of the ACLU Foundation of Southern California and by Lisa J. Danetz and Brenda Wright of the National Voting Rights Institute of Boston, Mass. The Secretary of the State of California was represented by Bill Lockyer, Attorney General, and by Stacy Boulware Eurie, Catherine M. Van Aken, Diana L. Cuommo, and Zackery P. Morazzini

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California District Court Permanently Enjoins Enforcement of Video Game Violence Act

Statute Not Narrowly Tailored to State's Professed Interest

A California federal district court this month entered a permanent injunction barring enforcement of a state law that would have created a labeling requirement for violent video games and prohibited their rental or sale to minors. *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007) (Whyte, J.).

While the court sympathized with the legislature's attempts to regulate minors' exposure to violent video games, the court held that the "the evidence does not establish the required nexus between the legislative concerns about the well-being of minors and the restrictions on speech required by the Act."

Background

The court had ordered a preliminary injunction in this case in 2005, finding that plaintiffs would likely succeed in showing that § 1746 was unconstitutional. *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (2005). *See also* "Video Game Laws Enjoined by Three Federal Courts," Katherine Fallow, Paul Smith, Matthew Hellman, *MediaLawLetter, p. 46 (December 2005)* (http://www.medialaw.org/MembersOnly.cfm?ContentFileID=1578).

On motion for summary judgment, the Video Software Dealers Association and Entertainment Software Association argued that the statute was unconstitutional and that enforcement of the Act should be permanently enjoined. As a content-based regulation, the Act received strict scrutiny review.

While it did promote a compelling interest (protecting childrens' physical and psychological well-being), the Act did not use the least restrictive measures. The court found that the Act's definitions of "violent video games" were overbroad and vague. The definition in subsection A was equally applicable to all minors, neglecting to address the reality that older adolescents might be less psychologically and physically sensitive.

Meanwhile, subsection B neglected to provide an exception for material with some redeeming value, so that it "could literally apply to some classic literature if put in the form of a video game."

In addition, the court noted that the State of California had not made an adequate showing that the Act was more effective at protecting minors than the narrower industry standards, which were already in place.

Finally, the court stated that while it was "not as doubtful as other courts have been as to the legislative power to restrict the access of minors to violent video games," it could not find that the State had shown that the Act actually furthered the protection of the physical and psychological well-being of minors.

There was no proof that "violent video games" caused harm to children "*in the absence of other violent media*," nor had there been a study of the effects of these games on minors of different age groups. Finally, the court found no showing that video games were particularly more harmful to minors than other violent media, such as violent movies, websites and television shows.

As the Act could not pass strict scrutiny, the court declared it unconstitutional and permanently enjoined its enforcement.

The plaintiffs were represented by Paul M. Smith, Katherine A. Fallow, Matthew S. Hellman of Jenner & Block.

Section § 1746(d), provides in relevant part:

(d) (1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

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(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

(2) For purposes of this subdivision, the following definitions apply:

(A) "Cruel" means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.
(B) "Depraved" means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.
(C) "Heinous" means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.
(D) "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.
(E) "Torture" includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

(3) Pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

Other Cases Striking Down Video Game Laws

American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001)
Interactive Digital Software Ass'n v. St. Louis County, Missouri, 329 F.3d 954 (8th Cir. 2003).
Entertainment Software Ass'n v. Foti, 451 F.Supp.2d 823 (M.D. La. 2006).
Entertainment Software Ass'n v. Granholm, 426 F.Supp.2d 646 (E.D. Mich. 2006).
Entertainment Software Ass'n v. Blagojevich, 404 F.Supp.2d 1051 (N.D. Ill. 2005).
Video Software Dealers Ass'n v. Maleng, 325 F.Supp.2d 1180 (W.D. Wash. 2004).

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ETHICS CORNER

What to Say and Not to Say When the Publisher Wants to Keep That Pesky Plaintiff's Lawyer Out of His Pocketbook Forever

By Luther T. Munford

The publisher never wants to hear the name Grady Liston, Esq. again. Liston has filed five suits against the newspaper. In the process Liston actually learned something about libel law. He is feisty, good with a jury, smooth with a judge, and has the capacity to be particularly obnoxious at depositions.

This time, the publisher is going to fork over big bucks rather than risk a jury trial. All the paper did was put the photograph of an innocent college student leader with a story about a murderer with the same name. The editor was on a deadline. These things happen. Juries don't like them.

The following conversation takes place between the publisher and her lawyer:

Publisher: "Can't we just pay this Liston guy a chunk of money and get him to agree not to sue us anymore?"

Lawyer: "Makes sense to me, but we can't do it. There is an ethics rule [Model Rule 5.6(b)] that says a lawyer can't agree to restrict his practice as part of a settlement."

Publisher: "What if we just pay his client more, rather than pay the lawyer? Surely the bar wouldn't invent a rule that keeps clients from getting too much money?"

Lawyer: Don't bet on it. One of the reasons for the rule is to keep clients from getting "awards that bear less relationship to the merits of their claims than they do to the desire of the defendant to 'buy off' plaintiff's counsel." ABA Formal Opinion 93-371. S*ee also Florida Barr v. St. Louis*, __ So.2d ___, 2007 WL 1285836 (Fla. 2007)("As a matter of law, [the client's best interest] is not a defense...").

Publisher: But that happens all the time! Isn't the bar supposed to protect clients?

Lawyer: "Well, you see, the bar is protecting the ability of future clients to hire Liston, whether they exist or not. Of course, Liston can't represent present and future clients at the same time, that would be a conflict, but the bar can trim his sails for the sake of future clients."

Publisher. "Mumbo-jumbo. Sounds like a lawyer full-employment act to me."

Lawyer: "What's wrong with that?"

Publisher: "Can we just get him to quit advertising on television that he 'eats newspapers for breakfast?'"

Lawyer: "No. As long as the bar says the advertisement is ethical, he can't agree to stop it."

Publisher: "He's also representing the governor we hate in a case against us. What if we settled that case and just got him to stop representing the governor in suits against us? That wouldn't involve any future client."

Lawyer: "The rule doesn't make an exception for one client agreements. That nasty divorce lawyer who represents your wife can keep representing her forever and there is nothing you can do about it."

Publisher: "What if we just got him to agree not to use any information he's learned about us in the past against us in the future? Once he agreed to that, he'd be tied in a knot because if he filed a new suit he would risk invalidating his former client's settlement!" Or does the bar care about former clients?

Lawyer: "It does. But the ABA says that is too neat a trick. It would have the same effect as getting him to agree not to sue you in the future. So you can't do that either." ABA Formal Opinion 00-417 (2000).

Publisher: "Well, what can I do?"

Lawyer: "Well, you can require him to turn over his client's file to you to protect your confidentiality. But that won't, of course, include his confidential communications with his client or his legal research."

Publisher: "What does it take to get the whole file?"

Lawyer: "He could give it to you in a box and you could agree not to open it so you would not know about his

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ETHICS CORNER

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client's secrets. But Liston would have to reasonably believe that would not restrict his future practice." New Mexico Advisory Op. 1985-5. And, of course, he could still use anything he had collected that was a matter of public record. D.C. Bar. Ethics Op. 335.

Publisher: "Then what's the point?"

Lawyer: "Exactly. But with an agreement to keep confidential information confidential you could get him to keep the terms of the settlement confidential. That would at least keep him from advertising how much you are paying."

Publisher: "Is there any way to enforce that?"

Lawyer: "Depends on the judge."

Publisher: "But the judge is our problem in the first place."

Lawyer: "I know. You could try holding some of the settlement in escrow for two years and provide that it would not be distributed if the confidentiality promise were violated. That might work."

Publisher: "Please tell me something good."

Lawyer: "In some states you can enforce the agreement against the lawyer even if it is unethical for him to be a part of it. The courts say he should not benefit from his own wrong and the ethics problem is for the bar." *See Lee v. Florida Department of Insurance and Treasure*r, 586 So. 2d. 1185 (Fla. App. – 1st Dist. 1991). *But see Jarvis v. Jarvis*, 758 P.2d 244 (Kan. Ct. App. 1988) (refusing to enforce agreement).

Publisher: "Well, let's give it a try."

Lawyer: "Sorry, not me. It is just as unethical for me to propose the agreement as it is for him to agree to it. The bar can be tough on this stuff. One recent case disbarred a lawyer, another suspended a lawyer for two years and lawyers in three other cases have been suspended for at least a year." *Florida Bar v. Rodriguez*, 959 So.2d 150 (Fla. 2007). *Florida Bar v. St. Louis*, 2007 WL 1285836 (Fla. 2007).

Publisher: "As far as this newspaper is concerned, you are suspended now if that's the best advice you can give me."

Lawyer: "Why?"

Publisher: "You just told me how to solve this problem. If I fire you I can just do it myself."

Lawyer: "But the bar might still come after me." Maryland Ethics Op. No. 82-63 (1982) (lawyer cannot recommend that client circumvent the rule).

Publisher: "I don't care."

Lawyer: "Why not?"

Publisher: "Next time a reporter makes a mistake I'm going to hire Grady Liston myself. I may not be able to do a deal with him now, but nobody's going to keep me from hiring the best there is when the time comes."

Luther Munford is a partner with Phelps Dunbar, LLP, Jackson, MS

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