

LDRC LIBELLETTER

Reporting Developments Through February 19, 1999

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LDRC 1999 Report on Trials and Damages

**Trial Results Show High Defense Success Rate
Continues, But Award Size Increases
*Canadian Damage Awards Also on Rise***

LDRC published this month the LDRC 1998 Report on Trials and Damages. Contained in LDRC BULLETIN 1999:1, the report proved once again that the outcome of First Amendment cases against the media, at least if looked at only on a year-by-year basis, is *mixed and often unpredictable*. Damage awards against media defendants in 1998 were high — with half of the jury verdicts against the media over \$1 million — but the number of trials involving media defendants was low — *dropping to 16 from 22* reported in 1997. And significantly, media defendants won half of the cases against them in 1998, a win rate that, along with 1997, is the highest of the decade.

LDRC increasingly is looking at the statistics we gather on trial results on a longer term basis, decade by decade. The results reported below are more meaningful, we believe, when looked at not through the prism of the year-by-year gyrations — and we certainly see an almost bouncing-ball effect in the 1990's in statistics on number of trials per year, win rates, average and median damage award amounts — but at the decade as a whole and compared against the decade of the 1980's. In that light, interestingly, 1998 reflects some of the factors we have found in the comparing the 1990's with the 1980's. The number of trials on libel, privacy and similar claims against media defendants in the 1990's is lower than in the 1980's, by over one-third. Damage awards for the 1990's, sadly, are substantially higher than they were in the 1980's, but the

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PUBLISHED BY THE

LDRC

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LDRC 1999 Report on Trials and Damages

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1980's, but the media is winning more cases at trial than in the prior decade. Notably, the media is winning a higher percentage of cases tried before juries in the 1990's than in the 1980's.

We can only summarize some of the headlines from the data here in the newsletter. For the complete Report -- a 68 page document with detailed analysis, charts and graphs -- please see the LDRC BULLETIN 1999, Issue 1, January 31, 1999.

Highlights of the report include:

- **Number of Trials Down.** In 1998, the number of media trials dropped almost one-third from the previous year, from 22 to 16. This is slightly below the average for the decade of the 1990's to date, which is 18.1. The report also reveals a sharply lower number of trials in the 1990's than in the 1980's. The number of trials overall in the 1990's is 163, while the 1980's saw 261 trials. This 38% drop is due in large part to the nearly 50% drop in trials in the print media, both newspaper and magazine, in the 1990's.

- **Defense Win Rate of 50% Equals Last Year's Rate; Exceeds the Average for the 1990's.** Defendants won 50% of their trials in 1998, equal to the rate for 1997. This exceeds by 10% the overall average win rate for the decade to date, which is 40%. The 1990's average win rate exceeds the 1980's by 4.6%. In 1998, defendants won 45% of their jury trials (on par with 1997 and higher than the 1990's overall), but only 33% of their bench trials (1 of 3, in contrast to 2 of 2 in 1997). Defendants also won two directed verdicts in 1998.

- **Defendants more successful in state court.** In 1998, defendants succeeded in 54.5% of state court cases, as compared to 40% of federal court cases. These numbers have seesawed over the years. The averages over the decade to date reveal that the win rate in state and federal court is extremely close -- 39.8% in state court and 40.6% in federal court.

- **Defendants were significantly more successful in public figure cases in 1998, but the numbers are close for the decade to date.** Defendants won 75% of public figure cases in 1998, as compared to only 44.4% of private figure cases. However, for the decade to date the percentages are almost identical: 39.3% for public figures/officials and 40.2% for private figures. The respective numbers for the 1980's were 36.7% and 34.6%. Media defendants are clearly winning a higher percentage of private figure cases in the 1990's.

- **Actual malice and negligence wins up in 1998.** In cases where actual malice was the applicable standard of fault, defendants won 80% of their trials in 1998. As might be expected, defendants were less successful in negligence-based trials, winning 50%. However, for the decade to date, the win rate is only marginally greater in actual malice trials -- 41.7% for actual malice versus 40.0% for negligence trials. Looking at the 1980's where the win rate in negligence cases was 27.4%, the media has seen a significant positive change in the 1990's.

- **Overall damage awards are up.** The overall average and median awards for 1998 are among the highest of the 1990's. There was no single shocking award, such as occurred last year in *MMAR v. Dow Jones & Co.*, in which plaintiffs were awarded \$22.7 million in compensatory and over \$200 million in punitive damages. But, the median damage award of 1998 -- \$737,500 -- is more than twice as high as the median award in 1997, including the *MMAR* award.

The 1990's show a troubling trend of fewer trial awards but higher awards than existed in the 1980's. For the decade to date, excluding *MMAR*, the total dollars awarded were \$271,536,756. This is more than was awarded in the entire decade of the 1980's: \$241,229,122.

- **Million dollar awards.** Half of the six jury awards to plaintiffs in 1998 were for \$1,000,000 or more. This percentage is up sharply from 1997 and is higher than the percentage of such awards in the decade to date: 34.8%. The decade-to-date figure for the 1990's is more than one-third higher than the percentage of such awards in the 1980's.

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LDRC 1999 Report on Trials and Damages

(Continued from page 2)

which was only 22.2%. The two bench awards in 1998 totaled only \$14,999.

- **Compensatory damages.** In 1998, compensatory damages are again relatively high. Excluding last year's aberrational award in *MMAR*, 1998's average compensatory damages of \$845,562 are more than twice as high on average than in 1997, but lower than the decade to date average of \$1,199,226. The 1990's overall average far exceeds the average compensatory award of the 1980's, which was \$549,807.

The median compensatory award for 1998, \$587,500, was the decade's highest, even including *MMAR*. The median compensatory award for the decade to date including *MMAR* is \$175,000, again much higher than the median for the 1980's, which was \$100,000.

- **Punitive damages.** In 1998, 5 out of 8, or 62.5%, trial awards included a punitive damage component. This is higher than the decade to date figure of 50% and higher than the figure for 1997, which was 54.5%. On the other hand, the average punitive award in 1998 — \$716,500 — was far lower than the decade to date average of \$3,378,926. The median punitive award for 1998 — \$300,000 — is slightly less than the decade to date figure — \$315,000.

The average punitive award for the 1990's, excluding *MMAR*, is double that of the 1980's. And the median for punitive awards in the 1990's — \$315,000 — is also greater than the median for the 1980's — \$250,000 — 26% higher.

- **Post-trial motions have little success.** Of the 6 jury verdicts for the plaintiff only 1 was modified on post-trial motion. Overall, defendants have apparently fared a bit less favorably on post-trial motions in the 1990's than they did in the 1980's — with 23.3% of awards modified in some fashion on post-trial motion in the 1990's versus 27.0% in the 1980's.

- **Appeals.** Five of the eight awards are on appeal and four of the eight defense verdicts have been appealed by unsuccessful plaintiffs. Comparisons between the 1990's and 1980's are hampered by the fact that 16% of appeals from

plaintiff's verdicts in the 1990's are still pending.

- **Fewer cases appealed, settlements up.** The Report also revealed that defendants have chosen to settle or not appeal a greater percentage of plaintiffs' verdicts in the 1990's, than they did in the 1980's.

Canadian Awards

The Report also includes an article by Canadian media lawyer Roger D. McConchie on damage awards in Canadian media defamation actions since the watershed decision of the Supreme Court of Canada in *Hill v. Church of Scientology*. That 1995 case upheld an award of \$1.6 million (Canadian). Before that decision, the highest damage award upheld on appeal in a defamation case was \$135,000. In the three and one-half years since *Hill*, Canadian defamation awards have risen to dazzling heights, with several \$500,000 plus awards.

Since *Hill*, there have been three large damage awards in media cases, each far exceeding the pre-*Hill* norm. The largest damage award ever against the Canadian media -- \$880,000(Cdn) -- was handed down this past summer by an Ontario judge against the *Globe & Mail* newspaper. Also in 1998, a British Columbia judge awarded \$875,000 (Cdn) to a plaintiff who sued a business newspaper and an investment newsletter. In 1996, another large damage award -- \$700,000 (Cdn) -- was handed down by a jury against the *Globe & Mail* newspaper. All are on appeal.

The highest Canadian defamation damage award ever also occurred in 1998. In a non-media case, a Manitoba jury awarded \$2 million (Cdn). In addition to these mega-awards, *Hill* has also impacted the amount paid by defendants to settle defamation lawsuits.

Roger McConchie's article also includes a top ten list of Canada's highest defamation awards and a summary of Canadian law on damages.

Didn't Get the BULLETIN?

For those of you who are not subscribers to the LDRC BULLETIN, but would like to be, contact LDRC at 404 Park Avenue South, 16th Floor, New York, N.Y. 10016, FAX: 212-689-3315, EMAIL: LDRC@LDRC.com. All Media Members, and all DCS Members who pay annual dues of \$1,000 or more receive subscriptions to the LDRC BULLETIN with their membership.

Anti-Rapper Tucker Loses Time/Newsweek Summary Judgment

More Suits Against 100+ Media Pending

By Robin Bierstedt

Time and *Newsweek* won summary judgment in a libel suit brought in federal court in Philadelphia by the anti-rap advocate C. Delores Tucker and her husband. *Tucker v. Fischbein*, No. 97-6150 (E.D. Pa. Feb. 2, 1999). Both magazines had reported on the Tuckers' lawsuit against Tupac Shakur (and others), which was based on Shakur's lewd lyrics about Mrs. Tucker and which included a "loss of consortium" claim.

Based on the "consortium" claim, *TIME* reported that Shakur's lyrics caused Tucker "so much distress that she and her husband have not been able to have sex." *Newsweek* said the lyrics "iced their sex life" and that she "can no longer have sex with her husband." *Newsweek* also quoted Shakur's attorney Richard Fischbein, who said: "I can't wait to hear her testimony on that subject." Fischbein was also sued for libel.

The heart of the lawsuit was the Tuckers' claim that loss of "sex" was not part of their "consortium" allegation. The defendants, relying on the dictionary as well as legal precedent, made a motion to dismiss. They asserted that the statements were not defamatory as a matter of law, and should be protected by the "fair report" privilege. The judge denied the motion.

Following lengthy but lively discovery, the defendants moved for summary judgment -- on the grounds the statements were not defamatory, were substantially true, and were published without "actual malice." In their opposition papers plaintiffs' attorney stipulated that both Tuckers were public figures and that "actual malice" was the proper standard. But he presented numerous novel arguments to support "actual malice" --

including the fact that *Time* refused to allow its in-house attorney to be deposed about the pre-publication review process (a decision the judge upheld).

The judge (Ronald Buckwalter) ruled in favor of all the defendants. He said that the statements were not defamatory as a matter of law, noting that "[t]here is a vast difference between being annoyed and/or embarrassed on the one hand, and being disgraced and ridiculed to the extent that one's reputation is harmed and lowered in the estimation of the community, on the other." The judge found as well that there was no "actual malice." The plaintiffs' allegations -- which included *Time's* failure to review the complaint or contact plaintiffs' lawyer, *Newsweek's* failure to believe and report all that was said by plaintiffs' lawyer, the failure to ask critical questions, and reliance upon other publications -- would prove no more than negligence. He also noted that he had "not necessarily rejected" defendants' truth defense.

Many months after bringing the *Time/Newsweek* lawsuit, the Tuckers brought two more actions in state and federal court in Philadelphia against more than 100 media organizations that published similar articles. Those actions are pending. In the *Time/Newsweek* case, plaintiffs have filed a notice of appeal.

Robin Bierstedt is Vice President and Deputy General Counsel of Time Inc. Her colleagues Paul Gardephe, Deputy General Counsel, and Milton Williams, Assistant General Counsel, handled the case for Time. Newsweek was represented by Kevin Baine, a partner at Williams & Connolly, and Kumiki Gibson and Kathleen Jennings, associates at the firm.

INADVERTENT ERROR IS NOT PROOF OF ACTUAL MALICE COMPENSATORY DAMAGE CLAIM MUST BE CONCRETE TO SUPPORT LIBEL CLAIM

By Margaret J. Leong and Alice Neff Lucan

The Hawaii Supreme Court has rejected arguments that inadvertent error, publication of confidential information and failure to correct immediately are evidence of actual malice. The state's high court also held that references to fears of reputational injury are not enough to support a claim for actual damages in a libel case. *Jenkins v. Liberty Newspapers, dba Honolulu Star Bulletin, Phillips Media Services, Inc. and Rick Daysog*, P.2d ___, 1999 Hawaii LEXIS 11, (Ha.Sp.Ct. January 20, 1999). The state Supreme Court affirmed the trial court's decision to grant the defendants' motions for summary judgment.

Confusing Brothers Brian and Bill

The plaintiff was Brian Jenkins, the brother of Bill Jenkins, son of Margaret Jenkins. The latter two, as principles of a Maui-based insurance firm, were the targets of an investigation by the State of Hawaii Insurance Commissioner. The Commissioner filed an Ex Parte Petition for Seizure Order; Rick Daysog, reporter for the Honolulu Star-Bulletin, got the petition because it had been inadvertently placed in the public access bin at the courthouse. Daysog knew, and the Insurance Commissioner reinforced with a telephone call, that the state was required to keep the petition and its supporting papers confidential. Nonetheless, Daysog decided to write a story about the Commissioner's allegations.

Daysog was unsure of the correct spelling of "Jenkins" in the plural, and decided to refer to the individuals by their first names, "Bill" and "Margaret." While drafting, Daysog needed to remind himself of the brother's first name, and picked up a letter signed by Brian Jenkins, who acted as the attorney for his family's firm. Thus, Daysog called Bill by his brother's name, Brian, in the second reference to the

brother, on the jump page, after naming Bill correctly on the first page.

When the story appeared on Friday morning, Brian Jenkins caught the error almost immediately and called to ask for a correction. Daysog got the message on Saturday morning, but the Star-Bulletin was not published on Sunday. A correction appeared on the following Monday morning. However, in the meantime, through the AP, The Maui News republished the story using Brian's name again.

Jenkins contended that all of this demonstrated actual malice, not the least because the defendants published information intended to be held in confidence by the Commissioner and he had clearly warned the newspaper against publication. Defendants argued that *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), demonstrated that because no liability could follow publication of legally obtained confidential information, it could not support enhanced damages. Further, knowing publication of confidential information is not the equivalent of "actual malice." Jenkins countered that *Florida Star* protected only publication of truthful information and here, the use of his name had been false. The Court rejected this argument and discussed the protection of *Florida Star* as a relevant framework for this case.

Paper Unaware of Error

The Court looked first at the reason for the false report and found no dispute between the parties that Daysog wrote the story and the Star-Bulletin published the story subjectively unaware of its inaccuracy. Jenkins had conceded this in the memorandum filed in opposition to the motion for summary judgment. Investigatory failure leading to mistaken copy does not constitute actual malice, the Court held, citing to decisions in other jurisdictions regarding inad-

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INADVERTENT ERROR IS NOT PROOF OF ACTUAL MALICE

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vertent error in which it found facts similar to Daysog's actions.

Jenkins persisted, relying on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) to argue that the Star-Bulletin's failure to obey the Hawaii statute requiring the petition to be held in confidence also demonstrated actual malice. The Court disagreed. The Hawaii insurance law is not a law of general application (as was Minnesota law of promissory estoppel relied upon by Cohen), rather it applies only to the Commissioner and his staff. Notwithstanding a warning telephone call from the Commissioner, Daysog and the Star-Bulletin were not violating that law when they published a story about the petition.

Finally Jenkins insisted that the failure to call the AP after his Friday call was more evidence of actual malice. The Court correctly recognized that failure to retract or other post-publication action is not relevant to an actual malice determination. Moreover, the Court notes, the message was received on Saturday morning. Without a Sunday edition, the Court held that the retraction was published "in the first edition of the paper following the discovery of its error" -- action cannot be construed as a failure to retract. Without actual malice and liability for original publication, the defendant could not be held liable for subsequent republication.

No Damages = No Negligence Claim

The Court's decision to deny Jenkins' damage claim was based on a long excerpt from the deposition testimony. Though Jenkins contended three or four people asked him about the article, he could remember the name of only person who had actually "said something to [him] about any of these articles." He could not identify new business he had lost. He had no evidence of an effort to take any remedial action for the emotional distress.

Relying on the damages language in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350, (1974), the Court found that evidence of compensatory damages in a libel claim must be more concrete. The Hawaii court held, "A libel plaintiff claiming loss of earnings must adduce admissible evidence that the defamation was a 'material element or substantial cause' of actual economic damage." Also, it must be possible to ascertain loss of future profits with reasonable certainty. And finally, recovery for negligent infliction of emotional distress, when no physical injury has occurred, must be supported by some proof of damage or injury to the plaintiff.

Margaret Jenkins Leong along with David J. Dezani and Kathleen Kelly, of Goodsill Anderson & Quinn, Honolulu represented the Honolulu Star Bulletin and Rick Daysog in this matter. Alice Neff Lucan, Washington, D.C., assisted on the arguments.

Place Your Orders for the 1999-2000 LDRC 50-State Surveys

The order forms for the 1999-00 LDRC 50-State Surveys: *Media Privacy and Related Law* and *Media Libel Law* have already been mailed.

The *Privacy Law* Survey is due out June 1999 and the *Libel Law* Survey is due out October 1999.

The 1999 LDRC 50-State Survey: *Employment Libel and Privacy Law* is currently available and may be ordered for immediate delivery.

The price for each 1999-2000 book is \$125.00 if paid before the print run. Please call 212-889-2306 to place an order for the books.

If you are a standing order subscriber please remember that the price of each book goes up to \$150 if you wish to pay 30 days after the book has been shipped. Please pay early to save \$25 per book!

“Scant and Questionable” Masquerades as “Clear and Convincing” Call-in Opinion Column Held to be Actionable

Rejecting arguments that an anonymous call-in letter-to-the-editor column and its headline were opinion, and upholding findings of falsity and actual malice, a South Carolina Court of Appeal affirmed a trial court's refusal to overturn a jury verdict for plaintiff-Police Chief Wayne Elder in a suit against a local newspaper. *Elder v. The Gaffney Ledger, Inc.*, 95-CP-11-167 (Jan. 4, 1999). The decision stands in contrast to a Florida opinion issued last year where a Florida newspaper also published statements on its editorial page that were taken from readers' telephone calls. *Higgenbotham v. Independent Newspapers*, Case No. 97-82-CIV-FTm-17D (M.D. Fla. April 4, 1998). See *LibelLetter* July 1998, at 3. In *Higgenbotham*, the court granted summary judgment to the newspaper defendant holding the alleged defamatory statements to be pure opinion.

In the South Carolina state court lawsuit, however, the case was tried to a jury, which awarded Police Chief Elder \$10,000 in actual damages and \$300,000 in punitive damages. *The Gaffney Ledger* motions for directed verdict and JNOV were denied, as was its motion for a new trial based upon the size of the punitive damage award. The newspaper appealed.

“What's Your Beef?”

The South Carolina action stems from an anonymous phone call received by *The Gaffney Ledger* for its “What's Your Beef?” column. The column, which appeared on the opinion page of the paper, allowed members of the public to anonymously express opinions by calling them into a computer answering machine.

Calls were transcribed at the paper, and the editor chose and headlined some for publication. The call at issue stated that plaintiff-Elder, Chief of Police for Blacksburg Police Department, knew of local drug dealers, but had done nothing to stop them. The caller “wondered” whether drug dealers in the area were pay-

ing the Chief of Police. The headline for the statement, which was written by editor Cody Sossamon, ran “Are the drug dealers paying?”

After reading the statement, the Chief of Police Wayne Elder contacted the newspaper, trying to find out who had made the statement. Editor Sossamon indicated that the tape of the telephone call had been erased and that the caller's identity was unknown. The editor then gave Chief Elder the opportunity to respond in the same column, but he declined to do so. Elder brought an action for defamation.

At trial, testimony was offered by various law enforcement officials that Elder had been aggressive in his efforts to thwart drug trafficking in the area. While editor Sossamon testified that he intended the headline as a question, not a statement, he also testified to incidents that had suggested to him that Elder knew of various local drug dealers. Sossamon testified that while he sometimes wondered whether drug dealers were paying Chief Elder, he did not have enough information to write a news story that Elder was taking bribes.

Sossamon also admitted on direct examination that he had been arrested for manufacturing marijuana (although not, it would appear, by Elder) but denied that the incident had anything to do with the decision to publish the “What's Your Beef” column.

“Are the Drug Dealers Paying?”--Ill Will Constitutes Evidence of Actual Malice

At the outset, the South Carolina Court of Appeals disagreed that the statement “Are the drug dealers paying?” was a pure question, incapable of making an accusation of bribery. The court reasoned that “a mere insinuation that is false and malicious is actionable if its meaning is plain.” *Id.* The court further reasoned that for a question to be defamatory, it “must be reasonably read as an assertion of a false fact; inquiry itself, how-

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Opinion Column Held to be Actionable

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ever embarrassing or unpleasant to its subject, is not accusation." *Id.* Holding that the question implied an affirmative answer when read in conjunction with the text of the column, the court found sufficient evidence of a "factual assertion" that Elder was taking bribes.

The court next found that Elder had presented sufficient evidence to show the statement's falsity and that the statement "must have been made with constitutional actual malice." *Id.* Here the court relied on circumstantial evidence to make the case for actual malice. The court reasoned that Sossamon may have been motivated by ill will against Elder due to Sossamon's previous problems with the law. It found that Sossamon had departed from professional standards when he failed to "verify the story" before printing the opinion column. Finally, because the tape of the phone call was never introduced into evidence, the authenticity of the tape was called into question. On these three points, the court found that Elder had established actual malice by clear and convincing evidence.

Rudeness and Punitives

The Gaffney Ledger argued that the trial court had erred in allowing into evidence testimony by Elder's wife that Sossamon had been rude to her approximately one year before the publication of the column. The appellate court, however, found no abuse of discretion by the trial court in allowing this evidence, citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 665, 666 (1989), for the proposition that motive can be "a factor to be considered in the proof of the defendant's state of mind." *Id.*

Finally, the court ruled that the \$300,000 punitive damage award was not excessive. "Charges of bribery, particularly when made against public officials, are extremely damaging. Although measurement of damages to reputation is intangible, we find no abuse of discretion in the trial judge's denial of the motion for a new trial absolute." *Id.*

Higgenbotham v. Independent Newspapers

In *Higgenbotham v. Independent Newspapers*, the U.S. District Court in Florida last summer held that the unchecked and unverified publication of multiple anonymous telephone messages to a newspaper was protected opinion even if factual does not constitute knowing or reckless publication of a falsehood. The messages called the general manager of the local electrical cooperative a liar and characterized him as a bad manager who harassed and mistreated employees.

The statements at issue were published in an opinion section under a heading called "Speak Outs." The plaintiff filed a defamation suit against the newspaper when he lost his job allegedly as a result of the messages published in the column.

The Florida court analyzed the messages on the basis of the context in which they appeared: the news coverage of the consolidation of the local cooperative and the general manager's role in that consolidation, and the location in the papers of the messages--on the opinion page, which provided in relevant part, "Unlike letters to the editor, 'Speak Out' is designed for anonymous expressions of opinions. We edit calls for brevity, relevance and fairness." The judge noted that it was clear that the statements were not the opinion of the newspaper but rather were the opinions of the callers. On this basis, each instance of calling the general manager a liar was held to be pure opinion.

With regard to the issue of actual malice, the judge held the editor's conscious ignorance of the facts and the fact that she had personally spoken against the consolidation at a county commission meeting were not sufficient to find actual malice.

It is interesting to note that the Florida court did not find the anti-consolidation feelings of the editor to be directed against the general manager personally.

California Supreme Court Rules that SLAPP Defendants Need Not Show Public Significance In Cases Arising Out of Official Proceedings

In a 5-2 decision, the California Supreme Court affirmed the broad application of California's anti-SLAPP statute, following the lead of the California Legislature which in 1997 amended the statute to add that it "shall be construed broadly." In a decision in January, the Court held that defendants moving under California's anti-SLAPP statute (Code of Civil Procedure § 425.16) to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding, need not separately demonstrate that the statement concerned an issue of public significance. *Briggs v. Eden Council for Hope and Opportunity ("ECHO")*, ____ Cal. 4th ____, 81 Cal. Rptr. 2d 471, 969 P.2d 564, 1999 Cal. Lexis 7, 99 DJDAR 687 (Cal. 1999).

The Statute

California's anti-SLAPP statute provides that "[a] cause of action against a person arising from any act of that person in furtherance the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." § 425.16 (b) (1).

"As used in [this section], 'an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" § 425.16 (e).

An Appellate Split

The Supreme Court's decision resolves a split among California's appellate courts concerning the application of §

425.16 (e) to cases which arise from statements made before or in connection with an official proceeding, but which might not necessarily concern an issue of public significance. Compare *Zhao v. Wong*, 48 Cal. App. 4th 1114 (1996) (§ 425.16 applies only to causes of action arising from statements or writings on issues of public significance) with *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036 (1997) (§ 425.16 applies to any cause of action arising from a statement or writing connected to an issue under consideration by an official proceeding).

Background

In the case at hand, defendant ECHO, a non-profit corporation which counsels tenants and mediates landlord-tenant disputes, attempted to avail itself of the anti-SLAPP statute's protections after it was sued by two residential rental property owners, Dan and Judy Briggs. The Briggs' complaint alleged that ECHO staff members made a number of defamatory comments about them in the course of counseling various tenants who were involved in disputes with the Briggs.

After the complaint was filed, ECHO moved to strike the complaint under § 425.16, arguing that the plaintiffs' claims were based upon statements made in or connection with issues pending before or under consideration by executive or judicial bodies. Plaintiffs countered by asserting that ECHO's alleged activities did not involve matters of "public significance." The trial court granted ECHO's motion, dismissed the complaint, and awarded ECHO attorney fees and costs.

On appeal, the California Court of Appeal reversed the judgments dismissing the suit and awarding fees and costs. The appellate court held that the lower court had erred in striking the complaint under § 425.16, because ECHO had not made a prima facie showing that the lawsuit arose from an act by ECHO in furtherance of its petition or speech rights in connection with a public issue. Thus, as the California Supreme Court stated, "the Court of Appeal impliedly held that a cause of action is not subject to being struck under the anti-SLAPP statute unless it arises from a statement or writ-

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SLAPP Defendants

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ing by the defendant which, substantively, addresses an issue of public significance, even if the statement or writing is made before or in connection with an issue under consideration by an official body or proceeding."

Plain Language, Legislative Intent, and Public Policy

In reversing the decision of the Court of Appeal, the Supreme Court rooted its opinion in the plain language of the statute, the legislative intent behind the statute, and the public policy considerations surrounding the statute.

First, the court, examining the statute's plain language, concluded that "plainly read, § 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." According to the court, the statutory provisions for statements or writings made in connection with official proceeding creates a bright-line test for determining what constitutes a public issue.

"Under the plain terms of the statute it is the context or setting itself that makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding [The legislature] equated a public issue with the authorized official proceeding to which it connects." Quoting *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036 (1997) (emphasis in original).

In examining the statute's plain meaning, the California Supreme Court also held that a SLAPP defendant does not have to demonstrate that its protected statements or writings were made on its own behalf, rather than on behalf of its clients or the general public.

Next, the court found that the appellate court's narrow reading of the statute "contravenes the specific legislative

intent expressly stated in § 425.16, as well as that implied by the statute's legislative history as revealed by legislative history materials in the record." The court noted that in 1997, following the appellate court's decision below, the legislature amended the statute's subdivision (a) to include the provision that the statute "shall be construed broadly." "[T]he provision is not surprising, since the 'stated purpose of the [anti-SLAPP] statute . . . includes protection of not only the constitutional right to "petition for the redress of grievances," but the broader constitutional right of freedom of speech.'" Quoting *Averill v. Superior Court*, 42 Cal. App. 4th 1170 (1996).

The court then noted that its "construction of § 425.16 to protect not just statements and writings on public issues, but all statements and writings made before, or in connection with issues under consideration by, official bodies and proceedings, is consistent with that purpose, as well as with the statute's plain language."

The court also noted that the timing of the 1997 amendment, which came within a year of three decisions narrowly construing § 425.16 — including the appellate court's decision below — supported the inference that the legislature felt that "these decisions were mistaken in their narrow view of the relevant legislative intent."

Finally, the court stated that it believes "that the broad construction expressly called for in subdivision (a) of § 425.16 is desirable from the standpoint of judicial efficiency and that our straining to construe the statute as the Court of Appeal did would serve Californians poorly." The court found that the bright-line official proceeding test embedded in subdivision (e) served to provide clarity in determining whether a public issue exists, thus avoiding the "confusion and disagreement about what issues truly possess 'public significance'" which would only delay the resolution of § 425.16 motions and waste precious judicial resources. To illustrate the point, the court noted that the appellate court below was divided on the question of whether ECHO's statements were in fact connected to a "public issue."

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SLAPP Defendants

(Continued from page 10)

In Concurrence and Dissent

Justices Baxter and Brown concurred in the majority's determination to reverse the judgment of the California Court of Appeal, reasoning that ECHO was acting in "furtherance of its right of petition or free speech in connection with a public issue or issue of public interest when it assisted tenants in pursuing legal claims against their landlords."

The two justices dissented, however, from the holding that defendants moving specially under subdivision (e) of § 425.16 need never further demonstrate that such proceeding involved a public issue or issue of public interest. According to the dissent, the anti-SLAPP statute "is not . . . generally available to the parties to any civil action, but is instead expressly limited to those lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" 'in connection with a public issue.' (§ 425.16 (a), (b).)" Quoting *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994). "The majority's holding in this case," the dissenters continued, "belies that carefully delineated legislative purpose and will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply."

Mark Goldowitz, a California attorney and member of the California Anti-SLAPP Project, was among counsel who represented the defendants in this matter.

\$50 Million Lawsuit Filed Based on Stephen Glass Article

The morning-after effects of the revelation that wunderkind reporter Stephen Glass, who wrote for the *New Republic* (among other substantial periodicals), fabricated quotes and other elements of his articles, was felt by *Rolling Stone* this month.

A \$50 million lawsuit has been filed against *Rolling Stone Magazine* by the national drug-education program Drug Abuse Resistance Education (D.A.R.E.). D.A.R.E. alleges that a March 5, 1998 Stephen Glass article was filled

with fabricated and falsified information and accused D.A.R.E. of operating as a criminal organization. Stephen Glass is a former journalist for *The New Republic*. He left the magazine in May, 1998 after it was discovered that he had contributed fabricated pieces to that magazine and several others.

The lawsuit alleges that *Rolling Stone* editor Robert Love contacted Glass "in order to solicit and publish a negative and derogatory article about D.A.R.E. as part of [*Rolling Stone* and publisher Jann Wenner's] ongoing efforts to discredit anti-drug organizations and promote legalization of drugs." Among the statements at issue in the article were allegations that D.A.R.E.'s president, Glenn Levant, "uses strong-arm tactics to suppress damaging research", and that D.A.R.E. supporters threw a rock through the window of a New York graduate student whose research indicated that D.A.R.E. actually made children less afraid of drugs and taught them about drug culture.

The plaintiffs allege that when Glass was contacted by fact checkers from *Rolling Stone*, Glass referred them back to *The New Republic* 1997 article, which was the model for the *Rolling Stone* article. Glass left *The New Republic* after it was discovered that he had contributed fabricated pieces to the that magazine and several others. Glass has since admitted that he wilfully manufactured some facts in his story for *Rolling Stone*.

Levant recently stated that D.A.R.E. filed the lawsuit to defend its reputation and to "recoup the damages incurred by these libels. Let there be no question-this is not a case about the First Amendment nor simply about sloppy journalism. It is about a magazine that wilfully and falsely attributed criminal conduct in furtherance of its own socio-political agenda."

D.A.R.E. and Glass entered into a settlement agreement and the lawsuit against Glass was dropped.

In response to the lawsuit, *Rolling Stone* disputes the allegations and has stated that the magazine believed that it had acted responsibly. "We view this libel action as little more than an attempt to intimidate and discourage legitimate debate on the viability of the D.A.R.E. program."

TV Report Gave Context to False Statements

Defendant Saved by Tease

A California Court of Appeals has affirmed a lower court's ruling to grant defendant's, a local union, special motion to strike plaintiff's defamation claim, or SLAPP suit, pursuant to Cal. Civ. Proc. sec. 425.16, the California anti-SLAPP statute. The litigation challenged statements by the organizer made to and broadcast by a local television station in a news report on a labor dispute with the plaintiff-hotel. The station was not sued. But although the court finds that the key statement made by the defendant-union organizer was false and defamatory, the court concludes that in the entire context of the news report, no reasonable viewer could have interpreted it in such a fashion. *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees Local 483 et al.*, 1999 Daily Journal D.A.R. 1253 (Cal. Ct. App. Jan. 8, 1999). The dispute arose after an investigation by the NLRB led to a charge that the plaintiff was guilty of threatening two of its employees who became involved with the defendant's union activities. That charge, however, was dismissed after it was concluded that the workers at issue were supervisors who could be lawfully discharged for union activity.

Before the dismissal, the defendant's union representative, Maya Holmes, was interviewed about the labor dispute on KCCN-TV and stated that the federal government had found that the firings made by the plaintiff were illegal. After the airing of the in-

terview, the plaintiff filed a defamation claim against the defendant alleging that the union representative's statements were false and made with malice. The plaintiff claimed that the defendant's statement led to canceled events and a loss of potential business of approximately \$1.6M.

In affirming the lower court's ruling, the court found that the plaintiff had failed to make out a prima facie case of slander or false statement with malice as required by law. The court rejected the plaintiff's argument that the broadcast could reasonably be perceived as defamatory. While Holmes' statements on its face could be construed as false, within the context of the news broadcast no reasonable viewer could have construed the statements that way. The broadcast contained numerous comments such as: the plaintiff "may be facing charges" and "many are anxious for the outcome of this" which let the viewer know that the dispute had yet to be resolved. In fact, in the report and in response to Holmes' allegedly false statements, the plaintiff's general manager stated: "To date we've been found guilty of nothing." Even the tease was helpful, stating that the plaintiff was facing "escalating allegations." The court concluded that all of these statements combined throughout the broadcast would make a viewer aware that the outcome of the dispute was still pending.

Magistrate Recommends Dismissal of Suit Against Navy

Finds Various Claims are All Really Libel

A U.S. Magistrate judge has recommended that a \$12 million lawsuit brought against the U.S. Navy by the family of a Navy Petty Officer, be dismissed on the grounds that the claims fall within the intentional tort exception to the "waiver of sovereign immunity" imposed by the Federal Tort Claims Act (FTCA) sec. 2680(h). With no waiver of sovereign immunity, the court lacked subject matter jurisdiction. *Hartwig v. United States of America*, Case No. 1: 92 CV 1315 (E.D. Ohio Jan. 26 1999) Clayton Hartwig was killed in the 1989 explosion of the U.S.S. Iowa. After the accident, the Navy publicly accused Hartwig of causing the explosion. In 1991, after further investigation, the Navy recanted their allegations citing lack of evidence. The family brought the suit in 1993 claiming intentional and negligent infliction of emotional distress.

Can't Sue U.S. For Libel

"The United States is immune from suit unless consent is expressly given." *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976). But under the FTCA sec. 1346(b), Congress has provided a limited "waiver of sovereign immunity" for damages for certain injury or loss of property, personal injury or death caused by government employees. Section 2680(h) of the act, however, creates exceptions to the waiver including an "intentional tort" exception that includes libel and slander.

The crux of the conflict between the two parties was whether the plaintiff's fell within the waiver of sovereign immunity or within the exceptions to the waiver. The claims included leaking confidential information to the media, conducting a sham investigation, and either selectively using, suppressing or falsifying evidence. The Defendant-Navy asserted that although the plaintiff's causes of action were for intentional and negligent infliction of emotional distress, they arose out of the statements and conduct that implicated Hartwig as the perpetrator of the explosion and therefore, could be considered under the libel and slander exceptions to the waiver.

All Libel Claims Barred

In siding with the defendant, the Judge found that all the actionable claims fell within a tort of defamation under sec. 2680(h) and therefore, were barred from relief. The Judge relied

in part on *Kugel v. United States*, 947 F.2d 1504, 1505-1506 (D.C. Cir. 1991), where a plaintiff accused the FBI of negligently investigating his business practices and disclosing statements about the investigation to the public. The court in *Kugel* found that "the cause [of the plaintiff's] injury was not the FBI's execution of the investigation but its dissemination of information associated with the investigation." *Id.* at 1507. Ultimately, the court held that defamation was essential to the plaintiff's claim of negligence and therefore, was dismissed for lack of jurisdiction under sec. 2680(h). *Ibid.*

The judge also relied on *O'Ferrell v. United States*, 968 F.Supp. 1519, 1528 (M.D. Ala. 1997) where the court held that the publicity surrounding the FBI's investigation of a series of mail bombings fell within the tort of defamation, that the alleged defamatory conduct of the FBI agents and other officials was "essential" to the plaintiff's claims. The claims were therefore, barred by sec. 2680(h). *Id.* at 1530.

In recommending that the defendant's motion to dismiss be granted, the Judge concluded that all but one of the claims at core arose out of the communication to others of information plaintiffs contend was false and injured Hartwig's reputation. As such, these claims fell under the tort of defamation and could not be given relief under sec. 2680(h). One claim should be dismissed, the court held, for failure to exhaust administrative remedies.

NBC Suit Dismissed in 1994

The case is to be reviewed by Judge George White of the U.S. District Court for the Northern District of Ohio, Eastern Division.

The Hartwig family also sued NBC in federal district court in Northern Ohio over news reports about the explosion and the Navy investigation. The lawsuit alleged claims of intentional infliction of emotional distress. In 1994, NBC won a motion for summary judgment when the court held that the plaintiffs had failed to prove the extreme emotional distress required by the cause of action. *Hartwig v. NBC*, 863 F. Supp. 558 (N.D. Ohio July 18, 1994), aff'd 1996 WL 33252 (6th Cir. Ohio). The court refused to dismiss the case, however, on the basis that the claims were no more than defamation of the dead claims dressed up as emotional distress, and did not reach NBC's assertions that the statements in the broadcast news reports were protected by fair report and neutral reportage privileges. The Sixth Circuit affirmed.

Defamation Complaint Based on Interoffice E-mail Survives Motion to Dismiss

A defamation claim by a talk show guest against NBC based on an interoffice e-mail survived a motion to dismiss on opinion and privilege grounds. *IFC Personal Money Managers Inc. v. National Broadcasting Company*, QDS: 22216821, (N.Y. Sup. Ct., January ___, 1999). The claim was brought by Gary Schatsky, the president of an investment company, and, up until the underlying dispute, a regular guest on CNBC's "The Money Club."

The alleged defamatory e-mail related to a squabble between Schatsky and the show's producer over the use of car service. Despite being told by the producer that he could not do so, Schatsky had a car which was scheduled to take him home after a taping of a show wait while he had dinner with another guest. Schatsky subsequently reimbursed CNBC for the car service. The producer of "The Money Club" sent an interoffice e-mail to six people stating that Schatsky was a guest who "I can no longer in good faith expect professionalism or respect from" and recommended that he no longer be used as an on-air guest. The plaintiff's complaint in part alleged that the e-mail had a wider distribution than just within CNBC and claimed that the producer relayed the same message to subsequent employers.

In determining whether the language of the e-mail met the threshold for a defamation cause of action, and thus whether the statements were based on fact and not opinion, the court pointed to the accusations of lack of trust and professionalism as evidence that "the phrases used appear to be code language descriptive of extreme misbehavior and suggest that underlying facts exist."

The court rejected NBC's assertion that the e-mail was protected under a common interest privilege, finding that plaintiff had pled allegations of actual malice which may defeat the privilege, and that the e-mail had a wider dissemination than just within CNBC. As to the latter assertion, plaintiff had not

pled in specificity the identity of the third parties outside of CNBC who received this e-mail and therefore, was granted leave to amend on this portion of his complaint.

Plaintiff's other causes of action for tortious interference with existing and potential business relationships, and unjust enrichment were dismissed for failing to state claims or as simply restating the defamation claim as other causes of action.

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FEDERAL COURT DISMISSES SECTION 1983 CLAIMS BASED ON MEDIA FOLLOW-ALONG

By Michael Kovaka

A federal judge in Georgia has dismissed section 1983 claims against several news organizations based on their actions in accompanying law enforcement officers during a drug raid at a private farm. *Nichols v. Hendrix*, No. 2:98-CV-161-WCO (O'Kelley, J.) (N.D. Ga. Feb. 1, 1999). The opinion, which distinguishes the decision in *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, 119 S. Ct. 403 (1998), without adopting that court's reasoning, holds that members of the press were not transformed into state actors simply because they accepted a local sheriff's invitation to follow along during the execution of a search warrant.

The case arose from an ill-fated drug raid at a North Georgia chicken farm in March of 1997. Plaintiffs Kathy Ann Nichols and her husband, Randall Nichols, complained that Forsyth County Sheriff Denny Hendrix invited journalists from several area television stations and a local newspaper to cover what was expected to be a major bust. In the end, the raid was a bust, yielding only significant amounts of chickens. Suspected methamphetamines were uncovered, but turned out later to be nothing more than chicken vitamins.

Joint Action Alleged

According to the complaint, law enforcement officers violated plaintiffs' Fourth Amendment rights by entering portions of their property not identified in the search warrant and by disconnecting incubators, causing the deaths of hundreds of baby chicks. The plaintiffs alleged that in covering these events, the attending press had engaged in joint action with the law enforcement agents, thus exposing them to liability under 42 U.S.C. § 1982. Each of the news organizations also faced state claims for trespass and defamation, based

on their entry onto plaintiffs' land and their subsequent publication and broadcast of news reports on the raid.

In addition to painting a predictably unflattering portrait of both law enforcement and the media, the complaint also contained allegations that ultimately undercut plaintiffs' section 1983 claims against the press defendants. Apparently intending to establish that the search warrant did not permit law enforcement to bring along members of the media, the complaint emphasized that "the members of the press were not invited along to video tape and preserve evidence, but were solely along for news media and commercial purposes." The press defendants moved to dismiss, arguing that plaintiff's allegations did not present the type of joint action necessary to make private parties state actors under section 1983.

Berger Distinguished

In answers to mandatory interrogatories, plaintiffs cited the Ninth Circuit's ruling in *Berger* as its primary authority for imposing section 1983 liability on the press. The press defendants argued that the *Berger* decision -- itself constitutionally suspect -- involved a much more highly integrated course of conduct between press and law enforcement than was presented by plaintiffs' complaint. The Court agreed, noting that in *Berger* the media and law enforcement were found to have acted with a significant degree of interdependence, including entering into a written contractual arrangement, holding joint pre-search meetings, sharing confidential information, and arranging to wire a government agent with a media microphone.

The Court adopted the press defendants' position that more relevant precedent was supplied by *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996) and *Mullins v.*

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FEDERAL COURT DISMISSES SECTION 1983

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Bookman, No. 1:94-CV-1591, 1995 WL 693962 (N.D. Ga. Apr. 26, 1995). Each of those decisions dismissed section 1983 claims against members of the media who did no more than accompany law enforcement officers in order to cover their activities. Seizing on the plaintiffs' allegations that the press defendants had attended the raid solely for journalistic purposes, the Court found that there could be no section 1983 liability against those parties: "The fact that the media defendants were invited to accompany the officers and to film the raid is not enough to turn the defendants into state actors."

Having dismissed the plaintiffs' sole federal claim, the Court declined to exercise supplemental jurisdiction over the remaining trespass and defamation claims against the press defendants. The case adds to a growing body of precedent holding that members of the media cannot be treated as government actors simply because they have accepted law enforcement invitations to follow along during official activities.

The lawsuit continues, however, in federal court against the law enforcement officers.

Michael Kovaka, a member of Dow, Lohnes & Albertson, PLLC, along with Peter Canfield, Sean Smith and Cynthia Counts, represented defendant Georgia Television Company, d/b/a WSB-TV.

IRS May Deny Deduction for Punitive Damage Payments

A proposed change in the tax treatment of punitive damage payments may increase the bottom line cost of such awards. Under current law, a company can write off punitive damage payments as a business expense. A Treasury Department "Revenue Proposal" contains a provision to eliminate the deductibility of such payments, a change the Administration estimates would raise \$600 million over five years.

The proposal provides that: "No deduction would be allowed for punitive damages paid or incurred by the taxpayer, whether upon a judgment or in settlement of a claim. Where the liability for punitive damages is covered by insurance, such damages paid or incurred by the insurer would be included in the gross income of the insured person. The insurer would be required to report such payments to the insured person and to the Internal Revenue Service. The proposal would apply to damages paid or incurred on or after the date of enactment."

The justification for the change, according to the Treasury Department proposal is that: "The deductibility of punitive damage payments undermines the role of such damages in discouraging and penalizing certain undesirable actions or activities." The *Wall Street Journal* on February 1, 1999 reported that "the change is likely to draw fire from companies that have complained that the civil-jury system is already stacked against big corporations and that damage awards are already too high." A list of this and other proposed tax code changes is available at the Treasury Department's web site at www.ustreas.gov/press/releases/grnbk99.htm.

CERT GRANTED: U.S. Supreme Court to Hear Commercial Access Case

On January 25, the U.S. Supreme Court granted certiorari in a Ninth Circuit opinion which held that a California law that puts arrest records off limits to commercial requesters violates the First Amendment. *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998), cert. granted, 67 U.S.L.W. 3464 (U.S. Jan. 25, 1999) (No. 98-678). The California law makes the information available to those requesting it for "scholarly, journalistic, political or governmental" purposes but denies access to lawyers and others who seek the information for commercial purposes.

United Reporting Publishing Corporation bought the names and addresses of recently arrested persons from police agencies and then resold the names and addresses to lawyers, insurance companies, drug and alcohol counselors, religious counselors and schools. The corporation sought an injunction under 42 U.S.C. § 1983 against enforcement of the California statute, arguing that the corporation's right to lawfully communicate information generally available to the public had been violated, thereby implicating the free expression rights of the corporation. Both the U.S. District Court and the Ninth Circuit agreed that the corporation's First Amendment rights had been violated.

The Ninth Circuit reasoned that the underlying purpose of the statute—to protect the privacy of arrestees—was defeated because, while the Los Angeles Police Department and the California Highway Patrol would not allow access to the information for commercial purposes, the agencies made the same information available to the press and the general public. Under the third prong of a four-part test for analyzing commercial speech that was set out in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the court found that the statute could not "directly and materially [advance] the government's purported privacy interest."

No date has been set for oral argument.

CNN Argued for Access To Impeachment Proceedings

By Hillary Greene and Jonathan Sherman

On January 29, 1999 Cable News Network filed an application with the U.S. Senate, sitting as a court of impeachment, requesting a determination that closure of the Presidential impeachment proceedings violates the First Amendment to the United States Constitution. Random House subsequently filed an application supporting CNN's position.

On February 9 a majority of the Senators, 59, voted to permit the public access to the deliberations, but that fell short of the sixty-seven votes necessary and the deliberations remained closed under the Senate's rules for impeachment.

CNN's application took note of the Constitution's grant to the Senate of the "sole Power to try all Impeachments" coupled with the recognition that in adopting its rules the Senate itself is bound to abide by the Constitution. *United States v. Ballin*, 144 U.S. 1, 5 (1892). The constitutional limitations include those of the First Amendment and "the command of the first amendment," wrote CNN, "could not more strongly favor the broadest dissemination of information about, and comment on, government."

The Application, while taking note of the closed door deliberations in the impeachment trial of President Andrew Johnson, suggested that this historical fact was relevant but not controlling because "our society in 1868 - and more significantly still our law in 1868 - was far different than it is today." Our First Amendment jurisprudence, the application argued, is "essentially a creature of the twentieth century." The nation's deeply-rooted commitment to the principle that debate on public issues should be open has become embedded in the doctrine of constitutional law in this century, epitomized by such landmark decisions as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

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CNN Argued for Access To Impeachment Proceedings

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which emphasized First Amendment protection of the "citizen-critic" of government, and *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) holding that the First Amendment "assure[s] Freedom of communication on matters relating to the functioning of government."

The Application also included Chief Justice Rehnquist's observation that, "censorship . . . as often as not is exercised not merely by forbidding the printing of information in the possession of a correspondent, but in depriving him of access to places where he might obtain such information." William H. Rehnquist, "The First Amendment: Freedom, Philosophy, and the Law," 12 Gonz. L. Rev. 1, 17 (1976).

CNN recognized that closure of Senate deliberations may be warranted in limited circumstances, as in matters of national security. CNN argued, however, that deliberative efficiency (whether real or merely perceived) does not justify closure: "[That] is, at its core, an argument against democracy itself, against the notion that it is the public itself which should sit in judgment on the performance of this body. It is nothing less than a rejection of the First Amendment itself."

Hillary Greene and Jonathan Sherman participated with Floyd Abrams and Dean Ringel in Cahill Gordon & Reindel's representation of CNN in the filing of its Application to the U.S. Senate.

Up #?!%# Creek With Only a Paddle Michigan Court Upholds Obscenity Law

Expressing displeasure at falling out of his canoe could cost a twenty-four year old Michigan man \$100 and 90 days in jail. A Michigan court has ordered Timothy Boomer to stand trial for violating an 1873 Michigan statute that provides "[a]ny person who shall use indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor." *The People of the State of Michigan v. Boomer*, No. 98-1728-SM.

After falling out of his canoe on the Rifle River in Michigan, Timothy Boomer apparently waded down the river, paddle in hand, splashing a particular group of canoers while yelling, "You fucking bitches" and "You mother fuckers." A sheriff's deputy was nearby and heard the three-minute tirade, as did a mother and her two young children. Boomer maintains that too much is being made of his outburst and argues, along with the American Civil Liberties Union, that the law violates the right to free speech.

Conceding that the statute violated equal protection, the prosecutor argued and the court held that the portion of the statute regarding women could be severed without affecting the remainder of the statute. The court also rejected challenges that the statute lacked a specific scienter requirement and was vague and overbroad.

County Judge Allen Yenior, in reviewing Boomer's motion to dismiss, found that while Boomer's words were not obscene as the United States Supreme Court has defined the term, the words might nevertheless constitute "fighting words" and therefore lack constitutional protection. Boomer, however, asserted that his words were not shouted in anger. Recognizing both that there is a "compelling community and governmental interest in protecting the morality of our children" and that "under most circumstances" that interest has to take "a back seat to the First Amendment right to free speech," the court queried whether Boomer's words could be characterized as speech at all. "[W]hen anger is discounted at [Boomer's] request, there is no discernable thought, idea or concept of any kind being conveyed by 'Mr. Boomer's words'." *Id.*

The court ultimately denied Boomer's motion to dismiss, citing a "compelling community and governmental interest in protecting the morality of our children." Boomer's trial is set to begin February 25.

PRESS AND PUBLIC HAVE RIGHT TO ATTEND DEPOSITIONS IN GOVERNMENT CIVIL ANTITRUST ACTIONS, D.C. CIRCUIT RULES IN MICROSOFT CASE

By Jay Ward Brown

The Publicity in Taking Evidence Act, 15 U.S.C. § 30, requires that depositions in civil antitrust actions brought by the government be open to the public, the U.S. Court of Appeals for the D.C. Circuit has held. *United States v. Microsoft Corp.*, 1999 WL 34827 (D.C. Cir. Jan. 29, 1999). The unanimous ruling, authored by Judge Ginsburg for Judges Sentelle and Williams, means that the press will gain access to transcripts and videotapes of the depositions of Microsoft Chairman Bill Gates and approximately 100 others taken in the government's case against the software giant.

The United States filed suit against Microsoft in May 1998, alleging that the company had illegally tied its Internet browser to its popular Windows operating software. Three days later, The New York Times Company moved to intervene to be heard on any motion by the parties for a protective order and to enforce the public's rights of access to the proceedings and record generally. The Seattle Times, ZDTV, ZDNet, Bloomberg News and Reuters America Inc. followed suit.

Notwithstanding the pending motions to intervene, and without holding a hearing, District Judge Thomas Penfield Jackson granted the parties' request for a protective order governing all discovery pursuant to Fed. R. Civ. P. 26(c). The order's express purpose was to protect trade secrets belonging to Microsoft and numerous third parties.

Access to Gates' Deposition Granted Then Stayed

At a status conference in open court on August 6, 1998, the public learned for the first time that the government had noticed Bill Gates' deposition, set for August 12. The next day, the media intervenors notified the parties that they would exercise their rights under 15 U.S.C. § 30 to attend Gates' deposition. The little

known 1913 statute provides, in relevant part, that depositions for use in civil antitrust actions brought by the government "shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable."

When Microsoft objected, the media intervenors filed an emergency motion to enforce section 30. At a hearing on August 11, Judge Jackson expressed dislike for the statute and the delay he believed it would impose on preparation for trial. Nevertheless, declaring himself bound by the plain language of the statute, he ordered "that intervenors and all other members of the public shall be admitted to all depositions to be taken henceforth in this action . . . to the extent space is reasonably available to accommodate them consistent with public safety and order."

Judge Jackson also stayed all depositions in the case pending entry of "an agreed form of order establishing a protocol for affording access for intervenors and other members of the public to pretrial depositions which comports with 15 U.S.C. § 30, but which also protects the interests of the parties and third-party deponents in preventing unnecessary disclosure of trade secrets or other confidential information."

Within days, the parties - including Microsoft - had agreed on a "protocol." Before it could be entered by Judge Jackson, however, the D.C. Circuit granted Microsoft's motion for a stay pending its interlocutory appeal. The appellate court explained that, in its view, the balance of harms favored Microsoft: If the software company prevailed, "the disclosure could not be undisclosed," whereas, if the media prevailed, "the text and videotape of a private deposition can then be disclosed."

As a result of the stay, depositions resumed in secret in the trial court while the appeal proceeded.

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D.C. CIRCUIT RULES IN MICROSOFT CASE

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Did "Deposition" Mean Deposition?

On appeal, Microsoft argued principally that the word "deposition" as used by Congress in 1913 when it adopted the Publicity in Taking Evidence Act could not have meant the type of pretrial discovery deposition now in widespread use because such depositions were not authorized in federal court prior to 1938.

The Court of Appeals, however, agreed with the media intervenors that Microsoft had missed the point. After canvassing turn-of-the-century legal treatises and cases, the appellate court concluded: "[D]eposition" had the same meaning in 1913 as it has now - the pretrial examination of a witness in which testimony is given under oath pursuant to a process authorized by law; it is only the use to which a deposition may be put in federal court that has changed." In other words, although depositions generally were not permitted purely for purposes of pretrial discovery in 1913, depositions were regularly used for other purposes - and sometimes for discovery. Thus, the court ruled, "the depositions taken in the case before us fall within the plain meaning of the term 'deposition' as it is used in the Publicity in Taking Evidence Act of 1913."

By the same token, the court rejected Microsoft's contention that section 30 was intended to apply only to proceedings before the special masters frequently appointed to travel the country and take testimony in antitrust actions at the turn of the century. Under applicable equity rules, such special masters were not empowered to make evidentiary rulings; rather the job consisted of making the written record of testimony, noting objections by the parties, and submitting a report and recommendation to the trial judge.

Shortly before section 30 was enacted, the Supreme Court revised its equity rules to provide that all equitable actions, including antitrust actions, would be tried on oral testimony in open court, rather than on a written record. Special masters were to be appointed only in

"exceptional" cases under the new rules.

From this, Microsoft argued that the purpose of section 30 was to permit public access to what, in 1913, was the only "live" portion of an antitrust trial: the proceedings before a special master. With the advent of the new equity rules and the presumption - now codified in the Federal Rules of Civil Procedure - in favor of live public trials, the *raison d'être* for section 30 could be fulfilled without opening discovery depositions to the public, Microsoft contended.

Although the D.C. Circuit agreed that "the reason originally underlying the statute has for the most part vanished" in the face of live public trials, this, the court observed, is no bar to enforcing the plain language of the statute. Indeed, "[t]he statutory purpose of disclosure is at least somewhat furthered, and by no means thwarted, when a deposition is taken in public," the court noted.

Was it Superseded by 26(c)?

Finally, Microsoft argued that, if section 30 applied to modern discovery depositions, it was superseded by Rule 26(c) of the federal rules pursuant to the Rules Enabling Act, 28 U.S.C. § 2072(b). That Act provides that, when a rule of civil procedure and another statute "conflict[] irreconcilably," the statute will be deemed superseded unless such supersession would "abridge, enlarge or modify [a] substantive right."

Microsoft argued that section 30's command that depositions be open to the same extent as trials irreconcilably conflicts with the right to obtain a protective order under Rule 26(c) for "good cause shown." According to Microsoft, since the standard for closing a courtroom to the public is much higher than the standard required for entry of a protective order governing pretrial discovery, the two provisions are incompatible.

The Court of Appeals, however, agreed with the media intervenors that "there is no conflict because the 'good cause' standard of Rule 26(c), properly understood, is informed by and incorporates the policy underlying § 30." Put differently, if the public may be excluded during trial - as for example, for the limited pe-

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D.C. CIRCUIT RULES IN MICROSOFT CASE

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riod during which an actual trade secret is disclosed - then the public likewise can be excluded from the same limited portion of a deposition governed by section 30.

In short, rather than conflicting with Rule 26(c), section 30 "provides one of the interests to be weighed under it in assessing [a party's] need for a protective order upon the particular facts of th[e] case." Significantly, the D.C. Circuit added, "As we understand [Supreme Court precedent], the good cause standard of Rule 26(c) comports with the first amendment not fortuitously but precisely because it takes into account all relevant interests, including those protected by the first amendment. We see no reason why that broad standard should not also be deemed, and be applied, to take into account the interests advanced by § 30." The court's analysis on this point should be helpful to the news media generally when challenging the validity of a pretrial protective order, even in contexts unrelated to section 30.

The appellate court, like Judge Jackson, questioned whether the Publicity in Taking Evidence Act has outlived its usefulness: "Like Tithonus, to whom Zeus gave eternal life but not eternal youth, §30 may well be with us longer than most anyone would wish. In our system of separated powers, however, it is for Congress, not the courts, to jettison outdated statutes."

Microsoft has until mid-March to decide whether to seek further appellate relief. In the meantime, the media intervenors have moved to expedite the effective date of the appellate ruling in order to obtain access to depositions still to be taken in the ongoing trial.

Mr. Brown is associated with the Washington, D.C. firm of Levine Sullivan & Koch, L.L.P., which represents the media intervenors in this case. Lee Levine, a partner in the firm, argued the appeal on behalf of the media.

Military Court Quashes Subpoenas to CBS and Rolling Stone

Showing surprisingly more sympathy to the reporter's privilege argument for non-confidential information than the Second Circuit, in recent months, the military court in Camp Lejeune, South Carolina presiding over the court martial of two marine aviators involved in the accidental downing of a cable car in the Italian Alps, granted motions to quash by CBS and *Rolling Stone* magazine. *United States v. Captains Ashby, Schweitzer*, (Feb. 4, 1999).

As reported in last month's *LibelLetter*, military prosecutors subpoenaed *Rolling Stone's* outtakes of on and off-the-record taped interviews with the marine pilot for a December 10, 1998 article. The subpoena to CBS sought all tapes of on-the-record interviews with the pilot and another crewmember used in a *60 Minutes* piece on the accident.

In a transcribed bench ruling, the court, referring to *Branzburg v. Hayes*, 408 U.S. 665 (1972) accepted that a qualified privilege exists protecting both confidential and non-confidential material. The court then set out the factors it considered in balancing the First Amendment interests against the prosecutors request for information. First, it noted that the information sought was not case dispositive, finding, in fact, that the interview outtakes were more likely exculpatory than incriminating. In this connection, the court distinguished a reporter's witnessing of a crime from what was at issue here -- the, perhaps, self-serving statements of a criminal suspect.

In conclusion, the court noted that the government's request was "a bit of a fishing expedition." While the information sought may have been useful for impeaching the defendants' testimony, it was not necessary to prosecute the case, and therefore of insufficient importance to overcome the First Amendment privilege.

Floyd Abrams, Cahill Gordon & Reindel, represented CBS. Laura Handman, Ed Davis and Rebecca Reed of Davis Wright & Tremaine LLP represented *Rolling Stone* magazine.

Post-Gonzales: Federal Court Orders Reuters to Produce Nonconfidential Information

In a parallel proceeding to the Dow Jones subpoena case reported on in the December 1998 *LibelLetter*, Reuters News Service was ordered to produce non-confidential interview notes and tapes to defendants in the same underlying federal securities case pending in Massachusetts against Centennial Technologies. *In re: Application of Raemakers to Compel Compliance with a Subpoena Duces Tecum*, 98 Misc. 8-85 (S.D.N.Y. Jan. 15, 1999); see also *LibelLetter* Dec. 1998 at 1 (discussing *In re Application of Dow Jones & Co.*).

Briefly reviewing the facts, in 1997, a Reuters financial reporter in Boston interviewed Centennial's CEO, a recently appointed turn around specialist. According to the complaint in the securities litigation, the reported remarks caused a huge run-up in the company's stock price. Dow Jones reported on the run-up and on subsequent company "clarifications" which caused the stock price to plummet.

The opinion by Southern District Judge William H. Pauley III reiterates that now in the Second Circuit *Gonzales v. National Broadcasting Co.*, 155 F.3d 618 (2d Cir. 1998), simply forecloses any qualified reporter's privilege argument over producing non-confidential information. In addition, the opinion addresses two points that were raised by Dow Jones but not addressed in that decision by Judge Peter Leisure.

First, Reuters raised the same objection as Dow Jones that the request for interview tapes and notes was unreasonably cumulative or burdensome under Rules 26 and 45 of the Federal Rules of Procedure because the defendant conceded in a declaration that the Reuters' article quoted him accurately. According to the decision, however, defendant's declaration is a reconstructed recollection of earlier events. Thus, the subpoenaed tapes and notes remain the sole contemporaneous record of the original interview.

Second, the opinion responds tersely to the objection that third party discovery requests can be particularly disruptive to the day to day business of a news organization. According to the opinion, *Gonzales* specifically rejected this argument by noting that the press is not differently

situated from any other business that may find itself possessing relevant evidence. *Slip op.* at 13 (quoting from *Gonzales v. NBC*, 155 F.3d 618, 625 (2d Cir. 1998)).

Also of interest is the decision's analysis of defendant's apparent "forum shopping" in New York to take advantage of *Gonzales*. Specifically, Reuters urged the court to engage in a choice of law analysis and apply First Circuit law to quash the subpoenas. This invitation was rejected. Besides refusing to speculate on how the First Circuit would decide the question, the court noted that choice of law analysis is generally inappropriate in federal question cases where the choice involves the law of two or more circuits. This is particularly so with regard to subpoenas, according to the decision, where courts have an interest in enforcing them in a consistent and predictable manner. Not only would a choice of law analysis spawn wasteful litigation but "an itinerant analysis" would result in uncertainty over the basis of decisions. Finally, with regard to forum shopping, the court noted that, in fact, service in New York was proper since Reuters is headquartered in New York.

Second Circuit Denies Dow Jones' Motion for Expedited Appeal; Petition for Rehearing En Banc in *Gonzales* Still Pending

A motion by Dow Jones to expedite its appeal of Judge Leisure's adverse decision was denied by the Second Circuit. A short order signed by the Second Circuit Clerk states in part that "indeed, it may be advisable to suspend this appeal to await any further proceedings in *Gonzales*." *Dow Jones & Co., Inc., v. J. Alix & Assoc.*, 99-7014 (2d Cir. Jan. 14, 1999). It is not clear whether this enigmatic comment signals anything about the status of *Gonzales*. A petition for rehearing or rehearing en banc was filed in October 1998 and remains pending before the Second Circuit.

Tennessee Court of Appeals Refuses to Rule on Prior Restraint Court Cites Incomplete Record

Finding that the parties' "deliberate abridgement of the record" prevented the construction of a "fair, accurate and complete" record, the Tennessee Criminal Court of Appeals has refused to rule on the validity of a prior restraint entered against *The Knoxville News-Sentinel*. At issue in the case is the publication of detailed records of court-appointed defense counsel's fees, experts and other expenses while the case of *State v. Huskey*, a four-count capital prosecution, is pending. *Huskey v. The Knoxville News-Sentinel*, CCA No. 03C01-9811-CR-00410 (Tenn. Ct. Crim. App., Jan. 29, 1999).

An Injunction Entered and Defied

The newspaper, which in early 1998 successfully obtained access to *summary* information about the defense costs of the four-year old criminal case, was given the *detailed* records by a source in May 1998. On October 22, 1998, *Sentinel* reporter John North contacted one of Huskey's attorneys to advise him that the paper was going to publish an article about the information contained in the records.

The following day, Huskey's attorneys filed an application for temporary restraining order and injunction which was granted by the trial court. Considering the order to be invalid on its face, the *Sentinel* defied the order by publishing an article which utilized some of the information from the records. The paper then moved to have the temporary restraining order dissolved. Following hearings on October 28, and November 4, 1998, the trial court entered an order enjoining the *Sentinel* "from the publication or dissemination in any manner of any information contained in the detailed time records" Slip op. at 5. See *LDRC LibelLetter*, November 1998 at 27.

On December 16, 1998, the Tennessee Criminal

Court of Appeals granted *Sentinel's* application for extraordinary appeal, and subsequently granted an application challenging certain aspects of restraining order filed by Huskey. Due to the nature of the case, the appellate court departed from the usual practice of receiving briefs and heard oral arguments on December 31, 1998.

An Incomplete Record

In its decision, filed January 29, 1999, the appellate court noted that the record on appeal "does not include the detailed time sheets which *Sentinel* obtained from North's source and were the basis for the October 25, 1998 article it published." Slip op. at 8. Despite the fact that the appellate court admitted that "the record in the trial court may contain some, if not all, of [the] time sheets," the court stated that, "the time sheets at issue in this case are the time sheets North received in May 1998." Slip op. at 9.

Further, the court noted that, despite the fact that the time sheets were referred to as "exhibit 1" to North's deposition, and both parties had copies of the time sheets, neither party actually filed the time sheets as an exhibit in the trial court. Rather, the court noted that the parties agreed to keep the time sheets in their possession in order to keep them out of the public record. Slip op. at 9.

"In light of the parties' deliberate abridgement of the record and this court's unfulfilled attempt to supplement the record," the court stated that it, "declined to initiate further steps to construct a record that we would consider to be 'fair, accurate and complete.'" The court further stated that it could not order supplementation of the appellate record pursuant to Tenn. R. App. P. 24(e) "with material that is not otherwise properly includable in the record" — in other words material, such as the time sheets, which were never actually filed in the trial court. Slip op. at 9.

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Tennessee Court of Appeals Refuses to Rule on Prior Restraint

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The Prior Restraint

Despite its admission that the record on appeal was incomplete, the appellate court moved on to address the issues at hand. Noting that the case involved the often-competing interests of the rights of the press and the rights of criminal defendants, the court stated that it "[felt] compelled to express [its] concern for the for the rights and abilities of this and other indigent criminal defendants to be represented by counsel and to receive compensation for the individuals who provide them with legal and other expert services without nondiscoverable information being made public via the First Amendment." Slip. op. at 12.

Specifically, the court stated that "the disclosure of information that could be contained in defense counsel's application for fees, expenses and authorizations could impermissibly impair a defendant's right to a fair trial." Slip op. at 12. The court also attempted to distinguish *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), on the basis that *Nebraska Press* concerned the public impact of pre-trial publicity, whereas in the case at hand, the "primary evil" is "prejudice to the dynamics of the defense via the prosecution gaining otherwise nondiscoverable information. In this situation," the court continued, "less restrictive alternatives — other than sealing the records involved — are not as apparent." Slip op. at 14, citing *State Record Co. v. South Carolina*, 504 S.E.2d 592 (S.C. 1997) (emphasis in original).

Ultimately, however, the court ruled that it could not decide the case stating, "[i]n this case, the nature and extent of this threat [to Huskey's rights] can only be determined upon an examination of the detailed time sheets — the very materials that Sentinel has been restrained from publishing and which serve as the basis for Huskey's claims of risk." Slip op. at 14.

Calling any attempt to resolve the case based upon the record without the records "frustrating" and "futile" the court finally dismissed the appeals of both parties as "improvidently granted." Slip op. at 15-16.

Petition for Rehearing Denied

On February 12, 1999, the Tennessee Criminal Court of Appeals denied the *Sentinel's* petition for rehearing to the full Court of Criminal Appeals. The court rejected the *Sentinel's* argument that it should not be held accountable for the incompleteness of the appellate record, finding that the *Sentinel* knew or should have known that the record was incomplete. The court also rejected the *Sentinel's* argument that despite the incomplete record, the heavy presumption against prior restraints should have led the appellate court to dismiss the injunction, stating that "[i]n the context of an extraordinary appeal, the appellant should be even more diligent in preparing a complete appellate record." *Huskey v. The Knoxville News-Sentinel*, CCA No. 03C01-9811-CR-00410, slip op. at 7 (Tenn. Ct. Crim. App., Feb. 12, 1999).

1999 NAA/NAB/LDRC Libel Conference

September 22-24

Hyatt Regency Crystal City Hotel
Arlington, Virginia

LDRC Annual Dinner

Tribute to Floyd Abrams

Wednesday, November 10, 1999

Sheraton New York Hotel & Towers

LDRC Defense Counsel Section

Annual Breakfast Meeting

Millennium Broadway

Thursday, November 11, 1999

[NOTE NEW LOCATIONS FOR BOTH!]

GLOBE SEEKS PRIOR RESTRAINT OF ENQUIRER

Tabloids Face Off L.A. Federal Court

By Gerson Zweifach and Paul Gaffney

In May 1997, the *Globe* came under criticism for its role in orchestrating and videotaping an intimate encounter between former flight attendant Suzen Johnson and *Monday Night Football*'s Frank Gifford. Although there were rumors of a prostitution investigation, the *Globe*/Gifford encounter did not find its way into the courts until New Year's Eve 1998, when the matter arrived in the United States District Court in Los Angeles – with *Globe* as plaintiff. Even more unusual was that *Globe* arrived in district court asking for the media to be barred from the courtroom as it explained its need for a prior restraint against publication of the January 8, 1999 issue of *National Enquirer*'s page one story, "How I Set Up Frank for \$250,000." Both motions were denied.

TRO Sought on Copyright Claim

On December 30, *Globe* filed an action for a temporary restraining order to block distribution of the *Enquirer*'s interview with Ms. Johnson, in which she talked about how she became involved with *Globe*, how the *Globe* worked with her to create a cover story that she had a prior sexual relationship with Mr. Gifford (before the taping of the 1997 encounter), the prostitution investigation that followed publication, and her regrets.

Globe alleged breach of contract against Ms. Johnson (based on an alleged exclusivity agreement) and tortious interference against the *Enquirer*, but the prayer for injunctive relief rested on a copyright and trade secrets claim. The copyright claim purportedly was based on *Globe*'s exclusivity contract with Ms. Johnson – *Globe* claimed that because its alleged confidentiality agreement with Ms. Johnson treated her relationship with Mr. Gifford as confidential information that she would share only with *Globe*, and because Ms. Johnson had given an interview to *Globe* and helped create a videotape that *Globe* claimed embodied her confidential and protected "expression" regarding the Johnson/Gifford relationship, the story about to be run by the *Enquirer* would necessarily infringe on the *Globe*'s copyright.

The *Globe* relied on *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). While the allegations of breach of contract (and tortious interference) were predictable, the claim that the exclusivity contract gave rise to a protected copyright interest was relatively novel. United States District Judge Christina A. Snyder heard *Globe*'s application for a temporary restraining order on New Year's Eve.

Enquirer Responds

The *Enquirer* responded that, first, its story – which was critical of the *Globe*'s reporting – hardly resembled, let alone infringed on copyrighted material in the 1997 *Globe* article, and with respect to the as yet unpublished information from Ms. Johnson that was the gravamen of *Globe*'s application, *Globe* had failed to register those materials and so it could not institute an infringement action pursuant to 17 U.S.C. § 411(a). Whereas some pre-1976 case law was more forgiving of registration after a lawsuit was underway because the pre-76 statute spoke of plaintiff having to file in order to "maintain" an infringement action, the 1976 Act required registration before an action could be "institute[d]," and so registration was deemed a jurisdictional requirement, see *Dielsi v. Falk*, 916 F. Supp. 985, 994 (C.D. Cal. 1996)).

Second, not only did the *Enquirer* lack access to the unpublished material (and so it could hardly have been copied), the *Globe* did not submit any portion of the material other than a synopsis of a planned interview, which mentioned some plainly newsworthy topics, but hardly embodied protected expression.

As for the trade secrets claim – the "secrets" being the amount that the *Globe* paid Ms. Johnson, and the fact that it allegedly subjected her to a lie detector test – the *Enquirer* observed that the amount of the payment was already published in the December 31 *Los Angeles Times*, and the fact that the *Globe* at least claims to use lie detectors with certain sources was asserted by its publicist years earlier.

Finding that the *Globe* had not demonstrated a likelihood of success on the merits of the copyright claim, and expressing skepticism about whether *Globe*'s real complaint lay

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GLOBE SEEKS PRIOR RESTRAINT OF ENQUIRER

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against the *Enquirer* as opposed to Ms. Johnson, the district court denied the application. The *Enquirer* was broadly disseminated within hours of the court's ruling.

Preliminary Injunction To Stop More Articles

One week later, *Globe* sought a preliminary injunction, on a new and far more sweeping theory. While recognizing that the *Enquirer's* January 8 issue was already published, *Globe* asked the district court to enjoin the *Enquirer* from publishing any additional first-person accounts from Johnson relating to the Gifford affair. Again, *Globe* relied on its contract with Johnson, and this time on the notice of the copyrights on the previously unpublished information which were filed in open court – pages of transcripts from the videotaped encounter between Gifford and Johnson, the polygraph report, as well as of an interview between Ms. Johnson and a *Globe* reporter.

Citing *Harper & Row*, *Globe* argued again that any additional publication by the *Enquirer* would inevitably infringe on *Globe's* own prior interviews, and that *Globe* “owned” the copyright to anything Ms. Johnson might say to the *Enquirer* about her affair with Mr. Gifford. In effect, while Ms. Johnson could call a press conference and announce that everything published by the *Globe* in May 1997 was a lie, the *Globe* was arguing that the *Enquirer* (and anyone else embraced by the injunction) could be barred from reporting that news on a copyright theory. The *Enquirer* argued that the *Globe* was really claiming what amounted to a “transactional” copyright – ownership as against all the world of everything that a source might say in the future about a newsworthy event.

Injunction Rejected

After a hearing on January 7 in Los Angeles, the United States District Court denied *Globe's* motion. Judge Snyder's Findings of Fact and Conclusions of Law were filed January 25, 1999. The Court expressed grave concern about any application for a prior restraint that might affect dissemination of information about a newsworthy subject such as the

Globe's role in paying for a hotel room and taping a sexual encounter between a celebrity and a source. The Court, citing *Religious Technology Center v. Lerma*, 897 F. Supp. 260 (E.D.Va. 1995), also rejected the notion that its concern about prior restraints was inapplicable to a copyright claim.

As for the notion that *Harper & Row* somehow contemplated an injunction about everything that Ms. Johnson might say because of a contract between Ms. Johnson and *Globe*, the Court emphasized that *Harper & Row* squarely rejects the notion that a holder has a copyright over anything other than works that are fixed in a tangible medium of expression. “Harper & Row may own the copyright to Gerald Ford's autobiography, but the publisher obviously has no grounds to enjoin him from speaking about his presidency, or to enjoin another publisher from reporting his account.” Findings of Fact and Conclusions of Law, ¶ 23.

The Court also cautioned that any copyright claim would likely encounter a fair use defense, which could only be evaluated based on a detailed comparison of the *Globe's* protected materials and whatever interview Ms. Johnson might give to the *Enquirer* in the future – a comparison that could not be made until such time as the interview and publication might take place. Under these circumstances, the Court found that it could not rule that “any future use of the *Globe's* materials by the *Enquirer* or any other publication would automatically fail the case-specific fair use test.” *Id.* ¶ 24.

The Court again observed that it had failed to demonstrate that anything published by the *Enquirer* represented disclosure of a trade secret. Accordingly, the district court denied the *Globe's* motion for a preliminary injunction.

The case is still pending in the Central District, where discovery is underway. *Globe* apparently intends to continue to press its theory that its contract with its source somehow gave rise to broad-based copyrights enforceable against other publishers, as well as its more conventional claims.

Gerson Zweifach and Paul Gaffney of Williams & Connolly, DC, represented the Enquirer in this matter.

GLOBE'S RESPONSE TO THE ENQUIRER

By Amy D. Hogue

In its May 20, 1997 edition of *Globe* magazine, Globe published an exclusive article reporting Suzen Johnson's first-hand account of her extra-marital relationship with Frank Gifford -- an article that was and is the envy of its much larger competitor, *The National Enquirer*. As part of its ongoing exclusive coverage of Johnson's story in 1997 and 1998, Globe prepared -- but deferred publishing -- a November 1998 story describing Johnson's reaction to an FBI investigation of prostitution charges initiated by Gifford's wife, Kathie Lee.

The Copyrighted Works

The copyright in Johnson's story came into being when Globe fixed Johnson's expression in various tangible published and unpublished forms including audiotapes, videotapes, and the November 1998 draft article. Globe acquired ownership in the copyright when Johnson assigned all rights to the story to Globe under a confidentiality and exclusivity agreement that also precluded her from sharing her story with other reporters or publishers.

On December 30, 1998, Globe learned that despite these precautions, the *National Enquirer* was about to publish an "exclusive interview" with Suzen Johnson addressing certain aspects of her story. The *Enquirer* article had already been sent to the printer and included unpublished aspects of Johnson's story as well as gratuitous false and disparaging statements about Globe's involvement in the story designed to harm Globe's position as a competitor of the *Enquirer*.

The Lawsuit

Globe filed suit against the *Enquirer* and Johnson the same day. Although the thrust of its action filed in the United States District Court, Central District of California, alleged tortious interference with contract, interference with prospective advantage, and misap-

propriation of Johnson's confidential information, Globe also asserted a claim for copyright infringement. Globe sought immediate enforcement of its copyright in Johnson's unpublished story, filing an application for temporary restraining order to prevent the *Enquirer's* imminent infringement and then a motion for preliminary injunction to prevent further publication.

In its requests for injunctive relief, Globe sought to protect its rights to Johnson's first person, specific autobiographical expression of her relationship with Gifford, her encounter with the FBI, and her dealings with Globe -- all of which was assigned to Globe in written agreements with Johnson. Globe did not seek to prevent publication of the basic facts surrounding the story, facts that Globe concedes can and have been reported in countless publications. Nor did it seek to exclude members of the press from the proceedings, except as necessary to prevent disclosing to additional competitors the specific unpublished expression governed by its Agreement with Johnson and protected by its right of first publication.

Harper & Row

Although there are relatively few cases addressing the issue, first-hand autobiographical expression of historical events is plainly protected by copyright as the Supreme Court confirmed in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). In *Harper & Row*, the work at issue was President Gerald Ford's unpublished memoirs recording his expression of historical events during his presidency. Like Globe, Harper & Row sought to protect rights in the percipient expression of a particular person rather than the historical facts per se.

Globe also sought protection for one of the most important rights held by a copyright owner --

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GLOBE'S RESPONSE TO THE ENQUIRER

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the privilege of being "first to publish." By inducing Johnson to breach her agreement with Globe, the Enquirer obtained access to yet-to-be published elements of Johnson's first hand expression of various events -- expression that Globe had already recorded in audiotapes, videotapes, and at least one draft article.

The Enquirer opposed Globe's request for injunctive relief, arguing that the Court lacked jurisdiction (because Globe had not yet registered its unpublished works) and that the Court had no power to order a "prior restraint." It is well settled, however, that a copyright holder may register unpublished works after filing suit and that registration will relate back to the time of filing suit. *See, e.g., Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970). Indeed, if that were not the rule, the right of first publication could be eviscerated with impunity by any unscrupulous person gaining access to an unpublished work.

First Amendment Copyright

Moreover, although the Court was persuaded by the Enquirer's "prior restraint" arguments, the great weight of authority rejects the notion that the First Amendment is a "trump card" allowing a competitor to infringe a copyrighted work. Indeed, as the Ninth Circuit noted recently in *Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121 (1997), the fact that both plaintiff and defendant are in the business of gathering and selling news vitiates any fair use argument.

Many cases have recognized that a competitor cannot use the arguably unprotected factual basis of a historical work as an excuse to copy it, thereby

saving all the time and expenses invested by the original author and copyright holder. For example, in *Meeropol v. Nizer*, 560 F.2d 106 (1977), the defendants published letters written by Julius and Ethel Rosenberg who were executed for spying on behalf of the Soviet Union. The Second Circuit reversed summary judgment entered by the trial court in favor of the publisher on fair use grounds:

We agree that the mere fact that [defendant's] book might be termed a popularized account of the Rosenberg trial lacking substantial scholarship . . . does not, standing alone, deprive [defendants] of the fair use defense. For a determination whether the fair use defense is applicable on the facts of this case, however, it is relevant whether or not the Rosenberg letters were used primarily for scholarly, historical reasons, or predominantly for commercial exploitation. The purpose and character of the use of the copyrighted material, the nature of the copyrighted work, and the amount and substantiality of the work used and its effect upon the potential market for the copyrighted material are factors that must be evaluated in concert . . . [citations omitted]."

Id. at 1069-70.

Likewise, in Globe's case, First Amendment considerations are properly addressed by applying the fair use factors rather than by treating the First Amendment as an independent and dispositive basis for denying injunctive relief. Moreover, the four fair use factors weighed in Globe's favor because

(1) the Enquirer's infringing use was plainly commercial rather than scholarly;

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GLOBE'S RESPONSE TO THE ENQUIRER

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(2) the Enquirer article infringed Globe's unpublished November 1998 article, violating Globe's important right to first publication;

(3) the Enquirer article usurped a substantial portion of Globe's unpublished expression relating to the FBI investigation and Johnson's dealings with Globe; and

(4) the Enquirer article directly damaged Globe's market for articles reporting its unpublished Johnson expression. Having gained access to Globe's copyrightable expression by interviewing Johnson, the Enquirer should have been enjoined.

In a highly analogous case, *Marvin Worth Productions v. Superior Films Corporation*, 319 F. Supp. 1269 (S.D.N.Y. 1970), a District Court enjoined film producers from releasing a biographical film about comedian Lenny Bruce based on plaintiffs' ownership of rights in two autobiographical works: "How to Talk Dirty and Influence People," an autobiographical book, and "The Essential Lenny Bruce," a collection of his commentaries, jokes, monologues and routines. The Court enjoined the competing work noting that while the copyright laws are not intended to restrict dissemination of information about persons in the public eye, they are intended to reasonably protect the product of an author and his manner of expression. Where the intended publication involves previously unpublished material, the fair

use defense is much weaker. The Supreme Court explained why in *Harper & Row*:

The obvious benefit to author and public alike of assuring authors the freedom to develop their ideas free from fear of expropriation outweighs any short term "news value" to be gained from premature publication of the author's express The author's control of the first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as valuable adjunct to publicity and marketing . . .

Id. at 555.

Globe's case against the Enquirer, including its claims for tortious interference and infringement of trade secrets, is ongoing and Globe will pursue compensation for damages. While the Court's strong First Amendment views might have been welcome in another context, the "prior restraint" mantra should not carry the day when a publisher sues a competitor for violating its copyright monopoly -- a monopoly that, by its very nature, restrains competitors from infringing its expression.

Globe was represented by Amy Hogue and Jason Erb of Pillsbury, Madison & Sutro's Los Angeles Office

Trademark Claims Against "Bally Sucks" Web Site Dismissed

In what appears to be one of the first decisions involving trademark dilution on the Internet, a California federal district court granted summary judgment to a web site designer who created a site dedicated to exchanging complaints about Bally's health club. *Bally Total Fitness Holding Corp. v. Faber*, CV 98-1278 DDP (C.D. Cal. Dec. 29, 1998). The web site, still accessible at www.compupix.com/ballysuck, states that it is "unauthorized" and features Bally's stylized "B" mark with the word "sucks" printed over it. In addition to inviting readers to send in any complaints, the site contains defendant's detailed complaints against Bally -- and now a link to the decision in this case.

The decision by Judge Dean Pregerson dismissed Bally's trademark infringement and dilution claims, and related state unfair competition claim, on the simple ground that the site is protected noncommercial consumer criticism. The decision is, nevertheless, of interest because it goes through the elements of trademark infringement and dilution claims as applied to a web site, possibly giving some guidance to closer questions of law that may arise in the use of trademarks on the Internet.

The trademark infringement claim failed as a matter of law because, among other things, no reasonable viewer would believe defendant's site was affiliated or connected to Bally. The court rejected Bally's argument that because it also maintains a web site giving information about its health clubs Bally's and defendant's sites provided "related goods." The court also rejected Bally's claim that web surfers would be confused by the results of search engine queries that turned up both sites, noting that the "the average Internet user may want to receive all the information available on Bally." *Slip op.* at 4. Even the use of "Bally" in a domain name, such as "www.Ballysucks.com," may be protected since no reasonably prudent Internet user would believe such a site to be an official Bally site. *Id.*

Bally's dilution claim, in contrast, did not require any confusion over the origin of the mark. Instead, Bally claimed its mark was tarnished by being associated with

pornography, namely that the "Bally suck" site was linked to another one of defendant's sites, this one containing pictures of nude men. Again, the court held that the claim failed because defendant's sites were not commercial, including one site which listed the sites defendant designed. The court referred to this site as an "on-line résumé" as opposed to an advertisement for defendant's design services. *Id.* at 6. Moreover, even if the sites were commercial, the court reasoned that the consumer commentary use of the mark would negate any tarnishment.

Finally, and perhaps more significantly, the court described Bally's linking argument as just too broad in scope.

If the court accepted this argument it would be an impossible task to determine dilution on the Internet. . . . Looking beyond the "Bally sucks" site to other sites within the domain or to other linked sites would, to an extent, include the Internet in its entirety. The essence of the Internet is that sites are connected to facilitate access to information.. Including linked sites as grounds for finding commercial use or dilution would extend the statute far beyond its intended purpose *Id.* at 7.

Ticketmaster and Microsoft Settle Linking/Dilution Case

A closely watched case with the potential to settle some of the trademark issues surrounding linking and dilution settled this month. *Ticketmaster v. Microsoft*, No. CV97-3055 RAP (C.D. Cal. filed April 1997). Ticketmaster sued Microsoft over a city guide site called Sidewalk Seattle that provided a "deep link" into Ticketmaster's web site -- a ticket order form page. Microsoft filed a counterclaim seeking a declaration that linking is per se legal. Microsoft has reportedly agreed not to deep link into Ticketmaster's site.

VERDICT FROM PORTLAND

By Martin London

The Clients

Meet Sam Newhall. Ten years old, short hair, big eyes, freckles, shy smile, structurally shaped like a middle linebacker. Sam's idea of bundling up for cold weather is to add a second tee shirt. Got the picture? A Norman Rockwell natural. But there is an uncharacteristic wariness to Sam's demeanor that sets him apart from his contemporaries.

You see, Sam knows things other American 10-year-old boys don't know. He knows he must be extra-attentive to his surroundings, of people and cars in his vicinity, of unusual circumstances, because there are people out there who have threatened to kill his father. Sam can't go to school on the bus, because waiting on a corner with his parents is too dangerous; he can not be seen standing at a specific place on a predictable timetable. Sam also knows of contingency plans no American kid should have to know, such as, when shots are fired in or about his home, Sam must go to the safest place in the house, the bathtub, and lie there until told "all clear."

No, Sam's father is not a Columbian drug lord, or a Mafia don engaged in a battle with a competing clan. In fact both of Sam's parents are physicians who provide gynecological and obstetric services to their patients -- all kinds of services from taking pap smears to delivering babies and, oh yes, they also provide safe, legal early term abortions to those women who want that medical service as well. Sam's parents wear bulletproof vests, even in the operating room, and in the courtroom where they were two of the six plaintiffs.

Meet Bob Crist. He too provides abortion services, in St. Louis, Missouri. He lives and works behind bulletproof glass, home and hospital. He travels with law enforcement bodyguards and uses an alias when making travel reservations lest his name be found in an airline computer. He is the last person on every plane and the first one off. And he must fly to several cities every

week because of the lack of abortion providers. He treats patients from seven states. He wears his bulletproof vest everywhere and has done so since a shotgun blast ripped into the family room of his suburban home. He dramatically upped and reinforced his personal security since a "WANTED" poster bearing his picture, home address, and other personal information was distributed in his neighborhood.

Fear

These doctors are not paranoid. The FBI has explicitly warned these physicians that they have been targeted by a group of fanatics who have endorsed the murder of physicians and the bombing of clinics where reproductive health services are offered. FBI agents have told these physicians that hit lists and "WANTED" posters bearing their names are real threats, uttered by a group with close ties to convicted killers and bombers who share the "I-don't-have-to-obey-the-law-because-God-tells-me-I'm-right" view of the social contract.

It just won't do to discuss these radicals as insignificant. They are powerful because the murders of Doctors Gunn, Britton, Patterson, Slepian and the attempted murder of doctors Romalis and Tiller, and the killings and maiming of clinic workers, volunteer escorts, and law enforcement officers have made this a serious business indeed. An untold number of physicians have simply stopped providing abortions because they are afraid. The fear is pervasive. So much so that today, 26 years after *Roe v. Wade*, there are no abortion providers in 83 percent of the counties in the United States of America! In those counties, the terrorists have trumped *Roe v. Wade*. The Supreme Court's decisions are meaningless if citizens do not have the option to utilize the rights granted to them by the Constitution.

How did this happen? Where were the great defenders of our liberties? Where was the medical profession, the law enforcement agencies, the organized bar? Doing too little, too late, that's where. The supreme irony is

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that the terrorists assert they have the *right* to intimidate physicians, the *right* to publish hit lists and "WANTED" posters with names, home and work addresses and telephone numbers of physicians who provide abortion services to patients. Some of these lists and files even contain information such as photos of physicians, their homes, their cars, their license plate numbers. The terrorists are eager to collect all this information and more, including the names of the physicians' spouses and their children. Breathes there a physician who would not feel threatened in that environment?

The Portland Lawsuit

Legal Basis of Claim

The lawsuit entitled *Planned Parenthood of the Columbia/Willamette, Inc., et al. v. American Coalition of Life Activists, et al.* is an effort to stop, or at least slow the spread of this terrorism. On February 2, 1999, a civil jury of eight citizens sitting in a Federal District Court in Portland, Oregon returned a \$108 million compensatory and punitive damage verdict in favor of four physicians and two clinics against twelve defendants who, the jury found, had threatened bodily harm to doctors and clinic workers for the purposes of intimidating them and interfering with their decision to supply reproductive health services. A request for a permanent injunction is pending.

The claim was based on two federal statutes: (1) the *Freedom of Access to Clinic Entrances Act* (FACE), 18 USC § 248, (threat of force used to intimidate or interfere with the supplying of reproductive health services), and (2) the *Racketeering Influenced Corrupt Organizations Act* (RICO), 18 USC § 1961, et seq., the predicate acts for which were violations of the *Hobbs Act*, 18 USC 1951, (threat of force in an attempt to deprive plaintiffs of their property). The defendants are two organizations (ACLA and AFLM)

and ten individuals, who, acting in concert, published the threats described below.

The Factual Context

Context is vital to an understanding of this claim. In the nineties, there was a wave of violence directed at abortion clinics, physicians, and health care workers. Specifically, in 1993, anti-abortion extremists circulated a "WANTED" poster of Dr. David Gunn, an abortion provider in Pensacola, Florida. The poster evoked the "Wanted, Dead Or Alive" experience of the wild west, as did other posters to follow. Typically, these posters contained a bold heading across the top that read either "WANTED" or "GUILTY." In the center of the poster was a photograph and below that photograph was personal information informing where the "WANTED" physician worked, his or her home address, and other personal information. Below, again in bold type, is the word "REWARD."

Dr. Gunn, after being "postered," is killed

On March 10, 1993, shortly after the publication of a "WANTED" poster bearing his name and picture, Dr. Gunn was shot three times in the back and killed outside a clinic in Pensacola, Florida. His killer, an anti-abortion demonstrator by the name of Michael Griffin, was immediately lauded by an extremist splinter group of anti-abortion activists.

(Because of the group's refusal to renounce violence, it was ultimately shunned by Operation Rescue and other established anti-abortion forces. The splinter group formed its own organization, entitled the American Coalition of Life Activists. The ACLA, and eleven others who acted in concert with it, are the defendants in the FACE count. ACLA is the enterprise in the RICO count.)

Dr. Patterson is "postered" and killed

A "WANTED" poster was published of an abortion provider by the name of Dr. George Patterson in Mobile, Alabama. Several months later, on August 21, 1993, he too was shot and killed. His killer remains

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unidentified. (In this time period, one Shelley Shannon of Oregon -- shot and attempted to kill Dr. George Tiller, an abortion provider from the State of Kansas, after Dr. Tiller's name, photograph, and personal information were published by the defendants in their house organ *Life Advocate Magazine*. Shannon testified that copies of the magazines were in her possession at the time of her apprehension, and she used them to identify Dr. Tiller so she could shoot him.)

*Dr. Britton is
"posterred" and
killed*

The pattern continued. Dr. Gunn's replacement at the Pensacola clinic was a physician by the name of John Bayard Britton. The activists who applauded Griffin's murder of Dr. Gunn monitored the clinic carefully and photographed the comings and goings of his successor, Dr. Britton. One of those photographs then found its way on to a "WANTED" poster of Dr. Britton, and thereafter, on July 29, 1994, one Paul Hill killed Dr. Britton, his 73-year-old unarmed escort, James Barrett, and wounded Mr. Barrett's wife, June. (Aware that Dr. Britton wore a bulletproof vest, Hill approached Dr. Britton's vehicle, and using a shotgun from a distance

of three feet, shot him in the head.)

All of these killings and shootings were vigorously applauded by the defendants. The killers became front page heroes in defendants' magazine and defendants made statements to the media endorsing the violence. They signed petitions urging acquittal of the killers. In all, more than 250 clinics have been bombed and a score of doctors, health workers and unarmed escorts have been killed.

GUILTY

OF CRIMES AGAINST HUMANITY

ABORTION WAS PROVIDED AS A CHOICE FOR EAST EUROPEAN AND JEWISH WOMEN BY THE (NAZI) NATIONAL SOCIALIST REGIME, AND WAS PROSECUTED DURING THE NUREMBERG TRIALS (1945-46) UNDER ALLIED CONTROL ORDER NO. 10 AS A "WAR CRIME"

THE DEADLY DOZEN

Steven Kaali Howard Silverman	NORTHEAST MA, NY
Thomas H. Gresinger Joseph Booker	SOUTHEAST MS, MD
Ulrich Klopfer Paul Seamans	NORTH CENTRAL IN, MI
George Tiller Douglas A. Karpen	SOUTH CENTRAL KS, TX
George Kabacoff James & Elizabeth Newhall	NORTHWEST OR, OR
Warren Hern David Alfred	SOUTHWEST CO, CA

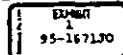
\$5,000 REWARD

FOR INFORMATION LEADING TO ARREST, CONVICTION AND
REVOCATION OF LICENSE TO PRACTICE MEDICINE

ABORTIONIST

THE AMERICAN COALITION OF LIFE ACTIVISTS

Box 9869 / Norfolk, VA 23505 SM 0004



The Hit List and Wanted Poster Threats

That was the "context" as we entered January 1995. In that month defendants held a press conference in Washington, D.C. on the occasion of the 22nd anniversary of *Roe v. Wade* and exhibited to the media a three feet by five feet billboard type poster, The "Deadly Dozen" List. At the top, in bold six-inch letters was the word, "GUILTY." In the center were the names and home addresses of twelve abortion providers throughout the United States. Below

their names in bold was the word "REWARD." The publication of the Deadly Dozen List received nationwide media publicity. It also received attention from the Federal Bureau of Investigation and the United States Marshal's Office: FBI agents through-

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out the country were despatched to visit every physician on the list to inform those physicians that a serious threat had been made against their lives, the people who made the threat were known to have associated with people who had been convicted of murder and bombings, and they were people who advocated killing physicians. The physicians were offered round-the-clock federal marshal protection and advised immediately to take suitable precautions including wearing bulletproof vests, to reinforce their homes and offices with steel doors and bulletproof glass, to wear disguises to and from work, to inform schools to take extra precaution with respect to their children, and to take various other security measures that it would be inappropriate to discuss here.

More Doctors "Wanted"

The reaction to the Deadly Dozen hit list was widely reported in the press and indeed several of the defendants' publications even noted with satisfaction the fear that "rippled through the ranks" of abortion providers. Having seen the fear-inducing effects of the publication of the Deadly Dozen hit list, defendants actively republished it, including home addresses, in the next issue of their magazine, which had on its front cover a picture of the Grim Reaper, skeleton face, black hood, scythe, and all.

Several months later, the defendants had a conclave in St. Louis, Missouri, where they again republished the Deadly Dozen List, and published more old-style "WANTED" posters of three physicians, one of which targeted Dr. Robert Crist of that city. Dr. Crist was immediately contacted by federal law enforcement authorities, given warnings that his life was in jeopardy, and he too, was offered around-the-clock protection of federal marshals. Dr. Crist was one of the plaintiffs in this suit. The other two posterred physicians promptly quit providing abortions.

Doubtlessly pleased with the terrifying effects of

the Deadly Dozen List and the Crist poster, the defendants, in January 1996 published before a news conference what came to be called the Nuremberg Files -- a large poster board that contained the photograph and extensive personal data of two more abortion providers. They also produced a box of files that was said to contain the personal details of approximately 30 abortion providers throughout the United States. A video clip of one of these files showed that the defendants had gathered not only photographs of the physician (Sam Newhall's father, in fact) but personal information about his family, photographs of his home, and other information gleaned by defendants' acknowledged surveillance of Dr. Newhall.

The Website

Ultimately, photos and personal information of the two physicians, along with other data, was published on a website that named ACLA as the sponsor of the site. Visitors to the site were urged to send ACLA additional names of abortion providers and to provide personal information about their spouses, children, and the like. The site also listed, among pictures of what purported to be fetal remains and dripping blood, the names of judges who had presided over cases in which anti-abortion activists had been enjoined, the names of the law enforcement officials who had investigated anti-abortion violence, and the names of pro-choice activists.

At trial, defendants asserted that the website was in fact managed by one Neal Horsley, a non-defendant, and they claimed it was Horsley who was responsible for such gruesome details as adding the name of Dr. Slepian and drawing a line through his name the day he was murdered, drawing a line through the name of other murdered physicians, and graying out the names of physicians who are wounded.

While the website received the most press attention, in fact, the trial focussed much more heavily on the Deadly Dozen List and the Crist poster. The actual contents of the box displayed at the January 1996 press conference were never produced in discovery or at trial. Defendants' witnesses said that pursuant to

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"anonymous" instructions, they sent the actual files off to an "unremembered" post office box!

The Legal Issues

1. Threats are not protected speech.

There can be no doubt that threats of bodily harm are proscribed both by FACE and by RICO. There is also no doubt that threats of bodily harm are not protected by the First Amendment. Threats have no societal value whatsoever and the Supreme Court has made unambiguously clear that a "true threat" enjoys no constitutional protection. That is not a debatable proposition. After all, terrorists, as well as bank robbers, use speech to gain an unlawful end. "Stop performing abortions, or you will be killed" is every bit as felonious as "Give me the money, or you will be killed."

2. Legal standard for determining whether a statement is a threat - the jury charge.

Once one accepts the proposition that threats are not protected speech, the only remaining question is: "Were defendants' statements threats?" Obviously a threat may be explicit or implicit, and any set of words possibly conveying a threat must be viewed in context. For example, telling someone, "I'm going to get you," could be a child's school yard jest, an adult playing-field competitive challenge, a sexual quip, or a murderous threat, all depending on the context of the communication.

The legal standard for determining whether or not a statement is a "true threat," varies slightly from circuit to circuit, but the variations are minor. The Ninth Circuit has adopted an objective speaker-based test: "A statement

is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." The judge also instructed the jury, as he was required to do, that a statement that is ambiguous, subtle, or conditional can amount to a threat when examined in light of the factual context in which the statement was made. Further, the jury was told it need not find that the defendants intended to carry out the threat or were even capable of carrying out the threat in order to find that the statement was, in fact, a true threat. (After all, a bluff can be an effective threat, too.)

3. Objective vs. subjective intent

While the Ninth Circuit had adopted an objective speaker-based test, some circuits have adopted an objective listener-based test, i.e., given the context, would a reasonable *addressee* be fearful? (Presumably a listener-based test is more favorable to plaintiffs than a speaker-based test.)

The ACLU, in an *amicus* brief, agreed with the concept that ambiguous words can be true threats depending on the context, but urged the district court to adopt a *subjective* rather than an *objective* speaker-based test, i.e., the ACLU urged the judge to charge the jury that they could find these posters to be a "true threat" if they found that the defendants *subjectively intended* to create fear in the minds of the addressees. The district judge responded that he could not give a subjective intent charge when the Ninth Circuit standard specifically required an objective intent charge.

In this case, that is a distinction without a difference, for several independent reasons. First, the jury returned a verdict granting punitive damages in favor of every plaintiff against every defendant, thus plainly and clearly declaring that they found defendants' conduct to be malicious, an entirely subjective standard. Second, the judge charged the jury that in order to find a RICO violation they had to find that the defendants *intended* to deprive the plaintiffs of their property -- also a subjective test. And third, in connection with the pending application

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for a permanent injunction, the judge has informed the parties that he intends to make a supplementary finding, based on the overwhelming evidence, that the defendants in fact subjectively intended to threaten the plaintiffs.

The judge's charge was, on the whole, favorable to defendants. He told the jurors that speech is protected even if it is insulting, outrageous or offensive, and that even coercive speech may be protected if the speaker refrains from violence or from making a "true threat." The judge further instructed the jury that the abstract teaching of the moral propriety or necessity for a resort to force or violence is protected speech, as long as it is not a "true threat."

4. "Incitement" not involved.

A point missed by some morning-after commentators on this case is that "incitement" is not part of plaintiffs' claim and was not part of the jury deliberations. The judge instructed the jury that none of the three statements (the Deadly Dozen List, the Crist poster and the Nuremberg Files) was a claimed incitement to violence. He explained that incitement was speech that is intended and likely to produce imminent violence, and he instructed the jury that they were "not to consider any evidence that any of the three statements allegedly 'incited' violence against the plaintiffs." The Monday-morning "First Amendment experts" who were quick to question whether the result can stand up under the *Brandenburg v. Ohio*, 395 U.S. 444 (1969) decision are simply misinformed. *Brandenburg* simply stands for the proposition that "imminence" is a necessary element to an incitement claim. It is not a threat case. Because the district judge explicitly instructed the jury that incitement was no part of plaintiffs' claim and should be ignored, *Brandenburg* is irrelevant.

The Verdict is correct, and unassailable.

Conclusion: The only issue here was whether the

words were "true threats," a simple fact decision that the jury, upon proper instructions, made correctly. Indeed, no other finding could be supported by this record. It is simply not debatable that these defendants counted on plaintiffs' fear, and that defendants made their statements knowing they would generate fear of bodily harm -- a state of facts that meets anyone's definition of a "true threat." While the transcript runs to thousands of pages, one need only point to the question put to one of the defendants as to whether or not, given all the bombings and shootings, did he not recognize that the uttering of these "WANTED" posters and hit lists would exacerbate the targeted physicians' fear of bodily harm? His response, "If I were an abortionist, I would be afraid" is as close to a summary judgment admission any trial lawyer is likely to get in a lifetime of cross-examining adversaries.

At trial, plaintiffs were represented by Maria Vullo, Martin London, and Elizabeth Maringer of Paul, Weiss, Rifkind, Wharton & Garrison of New York City, and Carol Bernick of Davis Wright Tremaine of Portland, Oregon. Neither firm received any legal fees.

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