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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through January 31, 2008

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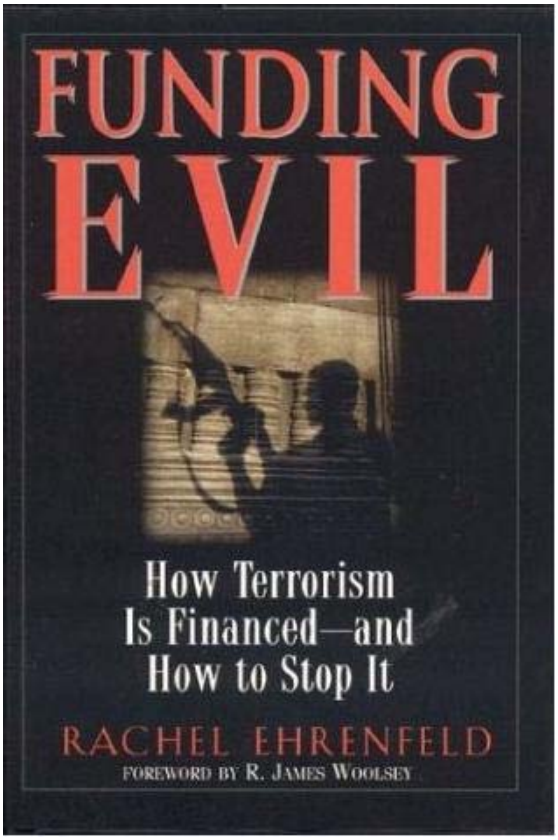
Libel Terrorism Protection Act Introduced in New York Legislature

Bill Would Protect Publishers From Foreign Libel Judgments

By Jason P. Criss

Last month, the New York Court of Appeals held that the New York long arm statute, Civil Practice Law and Rules ("CPLR") § 302, did not support the exercise of jurisdiction over a Saudi plaintiff who had sued a New York author for libel in the United Kingdom. *Ehrenfeld v. Bin Mahfouz*, 2007 WL 4438940 (Dec. 20, 2007). But all is not lost, as the Legislature has taken up the Court's invitation to respond to its decision by amending New York's long arm statute.

If enacted, the Libel Terrorism Protection Act (S. 6687/A. 9652) would provide authors with greater protections from foreign judgments achieved without First Amendment protections. Among those who will benefit most from the bill are authors and publishers who are the victims of "libel tourism," the practice of plaintiffs suing in foreign jurisdictions that have no legitimate connection to the challenged publication and that do not provide the same free speech protections as those afforded by the United States and New York constitutions.



Background

Rachel Ehrenfeld is a New York author and speaker who has published several works on international terrorism, including *Funding Evil: How Terrorism is Financed – and How to Stop It*, a book published by Bonus Books in 2003. The book was only published and offered for sale in the United States. Only 23 copies of the book were sold in the United Kingdom, and they were all purchased through United States internet sites. In *Funding Evil*, Ehrenfeld states that Khalid Bin Mahfouz, a Saudi Arabian subject, financially supported terrorist groups in the years preceding the September 11, 2001 terrorist attacks.

Bin Mahfouz sued Ehrenfeld in England for libel on the basis of these allegations. Ehrenfeld did not appear in the English action, and Bin Mahfouz obtained a default judgment against her. The judgment provided for monetary damages, an injunction against publishing the disputed statements in the United Kingdom, and a "declaration of falsity" in which the court determined that the challenged statements were false and defamatory. The court also ordered Ehrenfeld to issue an apology to Bin Mahfouz.

Declaratory Judgment Action

Ehrenfeld then filed suit in the United States District Court for the Southern District of New York, seeking a declaration that the English judgment is not enforceable in the United States on constitutional and public policy grounds. The district court granted Bin Mahfouz's motion to dismiss for lack of personal jurisdiction. *Ehrenfeld v. Bin Mahfouz*, 2006 WL 1096816 (S.D.N.Y. Apr. 26, 2006). Ehrenfeld then appealed to the Second Circuit, which held that the dispute between the parties was ripe, and certified to the New York Court of Appeals the question whether CPLR § 302(a)(1), which provides for personal jurisdiction over a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in this state," conferred jurisdiction over Bin Mahfouz. *Ehrenfeld v. Bin Mahfouz*, 489 F.3d 542 (2d Cir. 2007).

The New York Court of Appeals answered the certified question in the negative. The Court noted that its prior decisions held that "the overriding criterion necessary to establish a transaction of business is some act by which the defendant purposefully avails itself of the privilege of conducting activities within New York." The Court of Appeals then held that Bin Mahfouz's contacts with New York – sending a pre-filing demand letter to Ehrenfeld in New York and serving documents

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Libel Terrorism Protection Act Introduced

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in the English action on Ehrenfeld in New York – merely constituted actions "intended to further his assertion of rights under the laws of England" and did not "invoke[] the privilege or protections of [New York] State's laws."

The Court of Appeals acknowledged the problem of libel tourism, but stated that "however pernicious the effect of this practice may be, our duty here is to determine whether [Bin Mahfouz]'s New York contacts establish a proper basis for jurisdiction" under the current long arm statute. The Court of Appeals also rejected Ehrenfeld's argument that Court of Appeals precedents protecting non-domiciliaries' free speech rights "lead to the conclusion that CPLR 302(a)(1) must be interpreted to protect New Yorkers from the alleged chilling effect of foreign libel judgments. . . . [O]ur task is to interpret the New York statute as written. Thus, plaintiff's arguments regarding the enlargement of CPLR 302(a)(1) to confer jurisdiction upon 'libel tourists' must be directed to the Legislature."

Libel Terrorism Protection Act

Members of both houses of the New York State Legislature have responded to that invitation, and have introduced the Libel Terrorism Protection Act to amend the CPLR. The bipartisan legislation, sponsored by State Assemblyman Rory Lancman (D-Queens) and State Senator Dean Skelos (R-Long Island), would effectively overrule the Court of Appeals' *Ehrenfeld* decision by amending two CPLR provisions. First, it would add to CPLR § 5304's list of grounds pursuant to which a court has the discretion to not recognize a foreign judgment that "the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this state first determines that the defamation law applied in the foreign jurisdiction satisfies the freedom of speech and press protections guaranteed by both the United States and New York constitutions." Libel Terrorism Protection Act ("Act") § 2.

Second, the bill would amend New York's long arm statute to provide for jurisdiction over a plaintiff who secures a foreign defamation judgment with a sufficient nexus to New York State, by adding this new paragraph to CPLR § 302:

> The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York, or, if not a natural person, has its principal place of business in New York, for the purposes of rendering declaratory relief with respect to that resident's liability for the judgment, provided: 1. the publication at issue was published in New York, and 2. that resident (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment.

Act § 3. The bill further provides that the amendment to the long arm statute "shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision." *Id.*

These proposed CPLR amendments would fill significant gaps in the protections for libel defendants under current New York law. Under the current law, if Bin Mahfouz were to enforce the English judgment, a New York court likely would refuse to do so. *See, e.g.*, *Bachanan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. County 1992) (declining to enforce an English defamation judgment because it would be repugnant to public policy to enforce a judgment imposed without First Amendment protections). But under the Court of Appeals decision, a libel defendant such as Ehrenfeld must wait for the foreign libel plaintiff to take action. This limitation permits a plaintiff like Bin Mahfouz to use the a foreign judgment to chill future criticism, while also ensuring that an American court will not have jurisdiction to declare the judgment unenforceable. If enacted, the Libel Terrorism Protection Act would allow the libel defendant to take the initiative by providing for personal jurisdiction over such a declaratory judgment action initiated by a New York resident. These New York declaratory judgment actions could prove to be a powerful check against libel tourists' attempts to chill criticism by United States authors and publishers.

The Libel Tourism Protection Act has been referred to the State Senate's Codes Committee and the State Assembly's Judiciary Committee. The committees have not yet scheduled hearings on it.

Jason P. Criss, a associate with Covington & Burling LLP in New York, represented a group of press freedom organizations and media companies as amici in the Ehrenfeld proceedings before the Second Circuit and the New York Court of Appeals.

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Nevada Supreme Court Dissolves Prior Restraint Barring MSNBC From Holding Candidates Debate

Lower Court Ordered MSNBC to Include Dennis Kucinich

Following an emergency appeal, the Nevada Supreme Court dissolved an extraordinary prior restraint that would have barred MSNBC from holding and broadcasting a Democratic Party presidential candidates debate. *NBC Universal, Inc. v. Kucinich*, No. 50889 (Nev., Jan. 15, 2008) (Gibbons, C.J., Maupin, Hardesty, Parraguirre, Douglas, Cherry, Saitta, JJ.). This decision reversed a trial court ruling ordering MSNBC to include Ohio Congressman Dennis Kucinich in the debate.

The Court recognized the importance of NBC's emergency petition as evidenced by it setting the matter for an en banc hearing just hours after the petition was filed.

Background

The whirlwind of litigation began when MSNBC chose not to include Kucinich in a Democratic candidates' debate that was held prior to the Nevada caucuses. MSNBC had originally extended invitations to the top four Democratic Party candidates to appear in the debate, but after the Iowa caucus and the New Hampshire primary, MSNBC decided that only the top three candidates should appear. Kucinich had failed to gain any delegates at the Iowa caucus and had less than 2% of the vote in New Hampshire. The other Democratic contender, former Alaska Senator Mike Gravel, was never invited to the debate.

Lower Court Decision

Kucinich, angered by MSNBC's decision, sued MSNBC in Nevada state court the day before the January 15 debate. In his complaint, he sought a temporary restraining order against NBC forcing it to include him in the debate or barring the debate altogether. He had two claims as to why such an order was proper.

Kucinich's first claim was breach of contract. He alleged that when MSNBC invited him to the debate, his acceptance made that a binding contract. For this alleged breach, he sought specific performance rather than damages. The second claim was that NBC, as partial owner of MSNBC, was not fulfilling its duty to act in the "public interest." The Federal Communications Act of 1934, section 315 requires that NBC provide equal opportunity to candidates for office.

Nevada district court Judge Charles Thompson ruled that MSNBC must include Kucinich, or he would issue an injunction barring the debate. MSNBC immediately appealed the decision to the Nevada Supreme Court. The Court recognized the importance of NBC's emergency petition as evidenced by it setting the matter for an en banc hearing just hours after the petition was filed.

Nevada Supreme Court

MSNBC argued on appeal that the judge's ruling was a prior restraint on speech and violated their First Amendment rights. Kucinich's lawyer urged the court to act in the "public interest" and include him in the debate. To allow MSNBC to hold the debate without Kucinich "would be detrimental to the voters."

Dennis Kucinich

The court returned a decision just hours before the debate was scheduled to start. In a unanimous ruling, the court reversed and found that both of Kucinich's claims failed. There was no breach of contract because there was no contract formed in the first place due to a lack of consideration. Kucinich's attempt to claim promissory estoppel failed because he did not raise the issue at the trial level.

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The Nevada Supreme Court also found that the district court lacked jurisdiction to rule on any claimed violation of section 315 of the Federal Communications Act because Kucinich "failed to allege that he first requested and was denied relief from the FCC." *Kucinich*, No. 50889 at *4. The proper role for a state court where a section 315 violation is alleged is to review an FCC determination.

Overall, the court found the lower court's threat to enjoin the debate was an "unconstitutional prior restraint" on MSNBC's First Amendment rights. *Kucinich*, No. 50889 at *5 n.15. The debate went on as scheduled without Kucinich who later announced he was abandoning his candidacy for President.

Donald J. Campbell and Colby Williams of Campbell & Williams in Las Vegas represented NBC. Kucinich was represented by William W. McGaha of DeLanoy, Schuetze & McGaha, P.C. in Las Vegas.

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ARTICLES & REPORT ON
SIGNIFICANT DEVELOPMENTS
WITH AN UPDATE ON CRIMINAL LIBEL DEVELOPMENTS

KEYWORD ADVERTISING PROGRAMS: TO BUY OR NOT TO BUY?
By Mitchell H. Stabbe

"One major issue that is now working its way through the courts is the legality of "keyword advertising" programs offered by Internet search engines by which a search for a phrase or term that may include a trademark can generate advertisements of companies other than the trademark owner. … Many trademark owners, however, object to this practice. They complain that keyword advertising provides consumers who are seeking information about their products with information about competitors and ultimately may steer such consumers to someone else's goods or services."

WHEN IS A FICTIONAL CHARACTER DEFAMATORY?
By Jonathan Bloom

"Whether or not based on actual people, works of fiction occasionally attract libel suits from individuals asserting that a character in the work depicts him or her in a false and defamatory way. Because fiction writers so often model their characters at least in part on real people, these claims may have some basis in reality. …For this reason the "of and concerning," "false factual statement" and fault elements of a libel claim are inherently tricky."

REYNOLDS PRIVILEGE: WHERE ARE WE NOW?
By Kevin Bays and Paul Chamberlain

"This so-called 'Reynolds privilege' is a slightly different creature from the traditional qualified privilege from which it sprang, that of privilege founded on a relationship where the emphasis was on the existence of a privileged "occasion." In this scenario, protection does not depend on the extent to which the maker of a statement has made proper enquiries, but rather on the nature of the occasion and whether it is a privileged one."

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Utah Supreme Court Adopts Shield Law Rule

New Rule of Evidence Provides Broad Protection

By Jeffrey J. Hunt and David C. Reymann

The Utah Supreme Court has approved a reporter's shield rule for Utah. Acting with remarkable speed, the Court adopted Rule 509 of the Utah Rules of Evidence just one day after the public comment period on the Rule closed. Utah Supreme Court Chief Justice Christine Durham signed the order promulgating the rule effective as of January 23, 2008.

Rule 509 was supported by the Utah Media Coalition, a coalition of Utah's leading news and journalism organizations, which has been lobbying for a shield rule for nearly three years. The rule creates a near-absolute privilege for confidential sources. The only exception: when disclosure is necessary to "prevent substantial injury or death." This language is even more protective of confidential sources than existing Utah case law.

The rule also protects unpublished non-confidential newsgathering material, e.g., video outtakes, notes, photographs, drafts, subject to the multi-factor balancing test that the Utah federal and state courts have been using for the past twenty years. This test derives from *Silkwood v. Kerr McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) and *Bottomly v. Leucadia National Corp.*, 24 Media L. Rep. 2118, 1996 U.S. LEXIS 14760 (D. Utah, July 2, 1996). Before compelling disclosure of such material, a court must consider (1) whether alternative sources for the information have been exhausted; (2) whether the information sought goes to the heart of the matter; (3) whether the information is of certain relevance; and (4) the type of controversy.

Once the court makes an initial determination that information claimed to be privileged should be disclosed, the court is required to conduct an in camera review of the information before making a final determination requiring disclosure.

The new Utah rule provides some of the strongest protections to news reporters of any shield law in the nation. The rule was supported by Utah Attorney General Mark Shurtleff, who worked with the Utah Media Coalition to advocate its adoption.

The Utah Supreme Court's adoption of the rule culminates a nearly three-year-long campaign to enact a reporter's shield law in Utah. There were many ups and downs along the way. A prior version of the rule that went out for public comment was so conceptually and analytically flawed that the Utah news media and Utah prosecutors opposed it. The Utah Supreme Court scrapped that version and directed its Advisory Committee to try again. After further study and re-drafting, the Committee proposed the current Rule 509.

Our thanks to all who submitted public comments on the rule, including, in particular, the MLRC. The public comments, along with the testimony of journalists who have been on the receiving end of subpoenas seeking their sources and newsgathering material, were critical in educating Utah lawyers, judges, and the Utah Supreme Court about the need for a meaningful shield rule and its value in ensuring the free flow of information to the public.

Jeffrey J. Hunt and David C. Reymann are partners at Parr Waddoups Brown Gee & Loveless in Salt Lake City, Utah, and represented the Utah Media Coalition.

Shield Law Hearing in Maine

On January 24, the State Judiciary Committee held a public hearing on a shield law bill that was introduced in Maine late last year. The bill would provide qualified protection against the compelled disclosure of confidential sources of information, information that identifies confidential sources, confidential information and certain data by journalists. The protection is qualified and could be overcome in specific situations.

The bill defines "journalist" as "any person or entity professionally or regularly engaged in gathering, preparing, collecting, writing, editing, filming, taping, photographing or disseminating written, oral, pictorial, photographic or electronically recorded information or data concerning events or matters of public concern or interest or affecting the public welfare or a person supervising or assisting that person or entity."

The text of the bill may be accessed at: http://www.mainelegislature.org/legis/bills/billpdfs/LD204701.pdf

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Rule 509: News Reporters
UTAH

(a) *Definitions*. As used in this rule:

(a)(1) "News reporter" means a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected.

(a)(2) "Confidential source information" means the name or any other information likely to lead directly to the disclosure of the identity of a person who gives information to a news reporter with a reasonable expectation of confidentiality.

(a)(3) "Confidential unpublished news information" means information, other than confidential source information, that is gathered by a news reporter on condition of confidentiality. This includes notes, outtakes, photographs, tapes or other data that are maintained by the news reporter or by the organization or entity on whose behalf the reporter was acting to the extent such records include information that was provided on condition of confidentiality.

(a)(4) "Other unpublished news information" means information, other than confidential unpublished news information, that is gathered by a news reporter. This includes notes, outtakes, photographs, tapes or other data that are maintained by the news reporter or by the organization or entity on whose behalf the reporter was acting.

(b) *Privilege for Confidential Source Information:*

A news reporter or confidential source has a privilege to refuse to disclose and to prevent any other person from disclosing confidential source information, unless the person seeking the information demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.

(c) *Privilege for Confidential Unpublished News Information:*

A news reporter has a privilege to refuse to disclose confidential unpublished news information, unless the person seeking such information demonstrates a need for that information which substantially outweighs the interest of a continued free flow of information to news reporters.

(d) *Privilege for other Unpublished News Information:*

A news reporter has a privilege to refuse to disclose other unpublished news information if the person claiming the privilege demonstrates that the interest of a continued free flow of information to news reporters outweighs the need for disclosure.

(e) *Who may Claim:*

The privileges set forth in this rule may, as applicable, be claimed by the news reporter, the organization or entity on whose behalf the news reporter was acting, the confidential source, the news reporter or confidential source's guardian or conservator or the personal representative of a deceased news reporter or confidential source.

(f) *In Camera Review:*

Once the court makes an initial determination that information which is claimed to be privileged under this rule should be disclosed, the court shall conduct an in camera review of that information before making a final determination requiring disclosure.

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Fifth Circuit Applies Single Publication Rule to Dismiss Libel Case Against Dallas Newspaper

Online Article not "Continuously Published" for Statute of Limitations Purposes

By Paul C. Watler and Ryan Pittman

In a case of first impression in the circuit, the Fifth Circuit affirmed the dismissal of a libel case against *The Dallas Morning News* on statute of limitation grounds, holding that under Texas law the single publication rule applies to publications on the Internet. *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, No. 06-11283, 2007 WL 4465124 (5th Cir. Dec. 21, 2007) (DeMoss, Dennis, Owen, JJ.).

A unanimous three-judge panel of the Fifth Circuit rejected the argument that a newspaper article was "continuously published" for statute of limitations purposes because it was available on the newspaper's Web site. The Court declined to adopt the continuous publication rule because it could have a "chilling effect on Internet communication."

the "functional similarities between print and Internet publication support application of the single publication rule to both types of media"

The case, decided December 21, 2007, involved a claim that *The Dallas Morning News* published a libelous article about Nationwide Bi-Weekly Administration, Inc., an Ohio-based mortgage services company. The article at issue originally appeared in the newspaper's print edition on July 29, 2003, and subsequently appeared on the newspaper's Web site. Nationwide sued *The Dallas Morning News*, its parent company, Belo Corp., and its financial columnist, Scott Burns, on July 28, 2004, but it did not serve any of the defendants until June 2005.

The Dallas Morning News filed a Rule 12(b)(6) Motion to Dismiss arguing, among other things, that the lawsuit was barred by Texas' one-year statute of limitations for libel claims. The district court granted the Motion, finding that Nationwide failed to exercise due diligence in serving the defendants within the limitations period.

Nationwide appealed, arguing that its claims were not time-barred because the article was "continuously published" on the newspaper's Web site. According to Nationwide, this fact meant that each time a reader accessed the article on the site a "republication" occurred, triggering a new statute of limitations period.

The Fifth Circuit soundly rejected Nationwide's argument. Judge DeMoss, writing for the panel, began the substantive part of the Court's decision by noting that Texas law traditionally recognized the single publication rule, but that no Texas court had yet applied the rule to Internet publications.

The Court explained that under the single publication rule, the statute of limitations begins to run for a libel claim on the date the libelous statement's publication is complete. The rule "prevents plaintiffs from bringing stale and repetitive defamation claims against publishers" because "retail sales of individual copies after the publication date and sales of back issues do not trigger a new limitations period." By contrast, the continuous publication rule advanced by Nationwide would trigger a new limitations period each time a reader accessed the article in which the libelous statement appeared. The Court noted that the continuous publication rule had been "widely argued [for] but virtually always rejected."

Because no Texas court had applied either rule to libelous statements appearing in Internet publications, the Court was required to predict which rule the Texas Supreme Court would favor. Based on decisions from other jurisdictions and "sound policy reasons," the Court picked the single publication rule. The Court agreed with other courts that the "functional similarities between print and Internet publication support application of the single publication rule to both types of media" and that "the continued availability of an article on a website should not result in republication, despite the website's ability to remove it."

Thus, the Fifth Circuit held that the initial statute of limitations began on July 29, 2003, the date the original print publication was complete and that the limitations period began anew on April 4, 2004, the date the article was first posted online, because the article was "republished" in a new format. But because Nationwide did not serve the defendants until June 2005, the Court determined that its claims were barred by the one-year statute of limitations. Accordingly, the Fifth Circuit affirmed the district court's dismissal of the case.

Paul C. Watler of Jackson Walker L.L.P. represented Defendants Belo Corp., The Dallas Morning News, L.P, and Scott Burns. Barbara Jacobson of Vorys, Sater, Seymour, and Pease L.L.P. represented Plaintiff Nationwide Bi-Weekly Administration, Inc.

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Plaintiff A Public Figure For Articles About His Criminal Past

Publicized Crimes and Mob Ties a Public Controversy

A New Jersey appellate court affirmed summary judgment for the Philadelphia Inquirer and a reporter on libel and privacy claims stemming from discussions of plaintiff's criminal history. *Berkery, Sr. v. Kinney*, 936 A.2d 1010 (N.J. App. Dec. 17, 2007) (Parker, Coleman, Lyons, JJ.). The court held that plaintiff was a public figure for purposes of discussing his past and that he failed to show evidence of actual malice.

Background

At issue in the case were two articles published in the Philadelphia Inquirer that discussed John Berkery, Sr.'s attempts to stop publication of a book that discussed his criminal past. The book, entitled Confessions of a Second Story Man: Junior Kripplebauer and the K & A Gang, by Allen Hornblum, identified Berkery as a member of a notorious 1950-60s era criminal gang in Philadelphia. The book was scheduled to be published by Temple University Press, but the publisher backed out after threat of a lawsuit. The book was later published by Barricade Books.

Berkery sued the newspaper and reporter for libel, invasion of privacy, intrusion and intentional infliction of emotional distress. (He separately sued the book author.) He admitted that he had "minor scrapes" with the law, including convictions for larceny, passing bogus traveler's checks, attempted burglary, assault and battery, and two drug offenses. But he alleged that the book and newspaper article falsely accused him of being a "street thug," "a murderer and mob associate" -- and that it ignored his subsequent rehabilitation, including his recent career as a paralegal.

The trial court granted summary judgment to the defendants on actual malice grounds and also because plaintiff's convictions were public records. On appeal, Berkery argued that he was not a public figure.

The appeals court first noted that past criminal conduct does not automatically make a libel plaintiff a public figure for purposes of discussing those acts. *Citing Wolston v. Reader's Digest Assoc.*, 443 U.S. 157, 168 (1979). Instead, public figure status still requires involvement in a public controversy. But the court concluded that: "An individual's involvement in publicized criminal activities and associations with organized criminal groups qualifies as a public controversy or issue that gives rise to limited-purpose public figure status." *Citing, e.g.,*
Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978); *Scottsdale Publishing, Inc. v. Superior Court*, 764 P.2d 1131 (Ariz. Ct. App. 1988).

Moreover, despite the passage of time, and plaintiff's current private lifestyle, "once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy." *Citing Street v. National Broadcasting Co.*, 645 F.2d 1227, 1235 (6th Cir.); *White v. Berkshire-Hathaway*, 759 N.Y.S.2d 638, 640 (Sup. Ct. Erie County 2003), aff'd, 773 N.Y.S.2d 664 (4th Dep't 2004) ("a public figure, once established, remains a public figure for later comment on that controversy or subject matter").

Finally, the court noted that under New Jersey law libel a private figure plaintiff must prove actual malice if the alleged libel involves a matter of public interest.

Reviewing the record the court found no evidence to support actual malice, rejecting plaintiff's claim that the reporter's friendship with the book author provided evidence of fault.

The media defendants were represented by Warren W. Faulk, Brown & Connery. Plaintiff appeared pro se.

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Kentucky Federal Court Holds That Libel Plaintiff is a Private Figure

Court Rejects Involuntary Public Figure Argument

By Jon L. Fleischaker and Jeremy S. Rogers

In December, the U.S. District Court for the Western District of Kentucky granted partial summary judgment, for the second time, to Paxton Media Group in a lawsuit brought by radiologist Dr. Philip Trover. *Trover v. Paxton Media Group L.L.C.*, 2007 WL 4302088 (W.D. Ky. Dec. 5, 2007) (Heyburn II, J.) The court's ruling centered in part on the involuntary public figure doctrine.

Background

Trover filed suit in 2005 over six articles and one editorial, all published in March 2004 in Paxton's Madisonville, Kentucky, newspaper *The Messenger*. The articles and editorial concerned the reactions of the hospital and the Medicare authorities to an oncologist's claims concerning Trover's readings of x-rays and mammograms. The hospital in Madisonville is Regional Medical Center, which was owned by the Trover Foundation, an organization founded by Trover's father Loman Trover. The founder's son was chair of the hospital's radiology department and had practiced radiology there since the early 1980s.

In January 2004 the oncologist, Dr. Neil Kluger, wrote a lengthy and scathing letter to hospital administrators alleging, among other things, that Trover had a practice of misreading films and that numerous physicians knew of, but worked around, the problem rather than engage in what Kluger believed to be the futile endeavor of seeking redress from the organization controlled by Trover's father. Under the hospital's bylaws, the medical staff instituted a peer review of Trover's diagnostic radiology practice based on Kluger's letter and issued a precautionary suspension of a portion of Trover's hospital privileges.

Kluger sent copies of the letter to the Kentucky Medical Licensure Board as well as to the state authorities working in conjunction with the Centers for Medicare/Medicaid Services (CMS). In February 2004, CMS initiated an investigation which resulted in a fast-track threat to decertify the hospital for failure to maintain adequate quality assurance measures in radiology. The hospital was, therefore, required to take corrective actions which included publishing a full-page ad in the newspaper informing the public that the x-rays and mammograms interpreted by Trover over the prior 14 months would be re-read by outside radiologists.

The Articles

The first article was published in the same edition as the hospital's ad, March 3, 2004. While the ad did not mention Trover by name and referred only to "a physician" whose readings of x-rays and mammograms had been questioned, the newspaper article broke the story that the physician was Trover. Subsequent articles focused on the CMS investigation, the progress of the re-read program and a putative class-action lawsuit filed on behalf of patients against Trover and the hospital. The fourth article, published March 6, 2004, reported on the contents of the Kluger letter, detailing some of Kluger's more inflammatory allegations.

After completion of the investigative phases of the peer review, the hospital terminated Trover's employment under a not-for-cause provision of his contract. Trover subsequently sought and obtained employment in Michigan.

The Correction Issue

Shortly before filing suit, Trover's attorney sent a letter to Paxton Media demanding a retraction as to each of the seven publications. Paxton Media published the demand letter in full in *The Messenger*. Shortly after the lawsuit was filed, Paxton Media moved to strike Trover's demand for punitive damages pursuant to Kentucky's correction statute, KRS 411.051. The statute prohibits the recovery of punitive damages for the publication of a defamatory statement in a newspaper unless the plaintiff demands a correction and the publisher fails to make a conspicuous and timely correction. In addition to defining "correction" as the "publication, in a fair and impartial manner as a matter of law, of the plaintiff's statement of the facts (as set forth in his demand for correction)," the statute permits the publication of the demand letter as an alternative.

The court rejected Trover's arguments that the correction was not sufficiently timely and that it should have been published six times because there were six allegedly defamatory articles. However, the court found that a jury

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question existed with respect to whether the correction was sufficiently conspicuous. The correction began on the front page below the fold and continued for a full page inside the paper, whereas several of the allegedly defamatory articles began on the front page above the fold. This was an issue of first impression under Kentucky's correction statute, which has been on the books since 1964.

First Summary Judgment Motion

Trover's causes of action were defamation, false light invasion of privacy, intentional infliction of emotional distress, and tortious interference with business relations against both Kluger and Paxton. Six months after the lawsuit had been filed, the Medical Licensure Board issued an emergency order suspending Trover's Kentucky medical license. Trover later entered an agreed order limiting the scope of his medical license and agreeing to other conditions.

Paxton then moved for summary judgment as to Trover's defamation claims based in part on arguments of collateral estoppel arising from the agreed order and in part on the argument that Trover could not prove the falsity of the articles. In a February 2007 opinion, the federal district court rejected the estoppel argument but dismissed Trover's defamation claims as to all but the March 6 article, finding some of them to be true and others, which reported on the putative class action lawsuit, to be privileged as fair reports of judicial proceedings. The court did not address Trover's alternate tort theories.

The court declined to extend the fair report privilege to the article, however, because the article did not show that Paxton knew at the time of publication that the letter had been presented to those government agencies.

As for the March 6 article that reported on Kluger's allegations, Paxton argued that Kentucky's fair report privilege applied because the Kluger letter had been sent to, and was the basis for investigations by, both the Medicare authorities and the Medical Licensure Board. Kentucky's fair report privilege, codified at KRS 411.060, protects "[t]he publication of … a fair synopsis of any … document presented, filed, or used in any proceeding" of any state or local government agency or officer.

The court declined to extend the fair report privilege to the article, however, because the article did not show that Paxton knew at the time of publication that the letter had been presented to those government agencies. The court acknowledged that Kentucky's fair report statute does not impose any such knowledge requirement and that no Kentucky cases address the question. However, the court was persuaded that the "government watchdog" policy underlying the fair report privilege would not be advanced by extending the privilege to situations in which the publisher of information was not aware, at the time, that the subject of the report had been presented to a government agency.

Second Summary Judgment Motion

Paxton then moved for summary judgment on the remaining claims. Relying on the principle of *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988), Paxton argued for the dismissal of Trover's alternate tort theories with respect to the six articles that had already been found to be true or privileged.

As for the March 6 article, Paxton argued that Trover should be held to the actual malice standard as an involuntary public figure under the holding of *Gertz v. Robert Welch*, 418 U.S. 323 (1974). The Court in *Gertz* said that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own," but then immediately cautioned that these so-called "involuntary public figures must be exceedingly rare." *Id*. at 345.

Paxton argued that Trover was the central figure in a major public controversy and, as such, should be treated as a public figure without the need to examine whether he voluntarily thrust himself into the controversy or had significant media access. Paxton relied on *Dameron v. Washington Magazine, Inc*. 779 F.2d 736 (D.C. Cir. 1985), in which the D.C. Circuit considered a plaintiff who had been an air traffic controller on duty at the time of a plane crash. Although he did not voluntarily "inject" himself into the controversy surrounding the crash, the court found him to be -- through nothing more than "sheer bad luck" -- an in-

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Kentucky Federal Court Holds that Libel Plaintiff is a Private Figure

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voluntary limited purpose public figure for the limited purpose of discussion of the crash because of the nature and extent of his involvement in the incident. *Id.* at 741. The Second Circuit made a similar holding in *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977), that the sons of Julius and Ethel Rosenberg were involuntary public figures with respect to a book about their parents' trial.

Trover argued that there was no public controversy because CMS had already tentatively accepted the hospital's corrective action plan prior to the March 6 article. He also argued that the scope of any public controversy was limited to the narrow issue addressed by CMS, quality assurance protocols within the radiology department, which did not necessarily center on Kluger's allegations against Trover.

He also argued that the involuntary public figure doctrine, which has never been expressly adopted by Kentucky or the Sixth Circuit, was not a viable avenue by which to hold Trover a public figure, given the absence of evidence that he injected himself into the controversy or that he had much media access.

plaintiff could proceed on his defamation and false light claims under Kentucky's simple negligence standard.

Involuntary Public Figure Analysis

Agreeing with Paxton's arguments under the *Hustler* decision, the court dismissed Trover's alternate tort theories as to all of the articles and the editorial. The focus of the court's opinion was on the involuntary public figure issue.

Although the court recognized that Trover had been at the heart of an ongoing public controversy, it held that Trover was not a public figure, reasoning that "[t]he Sixth Circuit's approach, to the extent it seems to identify involuntary public figures as a subset of limited purpose public figures, appears to this Court to be the approach most faithful to *Gertz*." The court observed that the Supreme Court had declined to find involuntary public figures in the only two cases presented to it on that subject, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979).

The court also noted that "reviews of *Dameron*, however, are mixed" among the federal circuits, district courts, and the state courts. Because neither the Sixth Circuit nor Kentucky courts have expressly entered the involuntary public figure discussion, the court determined that the Fourth Circuit's decision in *Wells v. Liddy*, 186 F.3d 505, 532 (4th Cir. 1999), "provides the better approach for determining those rare circumstances where one may involuntarily become a public figure for First Amendment purposes." The Fourth Circuit in *Wells* focused on the nature of the plaintiff's actions, holding that even where a plaintiff has become a central figure in a significant public controversy and the allegedly defamatory statement concerns the public matter, the defendant must still demonstrate that "the plaintiff has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere." *Id.* at 539-40.

The court found that Trover had not acted or failed to act in the manner set forth in *Wells*, and, as such, plaintiff could proceed on his defamation and false light claims under Kentucky's simple negligence standard. Applying the negligence standard, the court observed, "[w]hile [Trover]'s remaining defamation claim appears to be an uphill fight even under a negligence standard, no doubt disputes remain as to some material factual issues."

Jon L. Fleischaker and Jeremy S. Rogers of Dinsmore & Shohl LLP in Louisville, Kentucky represent Paxton Media Group, LLC. Plaintiff is represented by Allen W. Holbrook, Charles E. Mountjoy, Frank Stainback, Jr., Sullivan, Mountjoy, Stainback & Miller, P.S.C., Owensboro, KY, and Byron Lee Hobgood, Franklin, Gordon & Hobgood, Madisonville, KY.

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South Carolina Court Applies Common Law Malice Standard to Private Figure Case

Failure to Proofread Could be Evidence of Malice

South Carolina courts have repeatedly stumbled over libel law issues, as demonstrated again in a recent libel decision by a federal district court. Although other states typically apply a negligence standard to private figure libel suits involving matters of public concern, the federal court ruled that South Carolina requires proof of "ill will" or a "reckless disregard of plaintiff's rights" in such cases. *Floyd v. WBTW*, No. 4:06 Civ. 3120, 2007 WL 4458924 (D.S.C. Dec. 17, 2007) (Harwell, J.) Having settled on this unusual standard, and finding no evidence of ill will or hostility toward the plaintiff, the court nevertheless denied summary judgment to a television broadcaster, finding an error could amount to a "reckless disregard" of the plaintiff's rights.

Background

The plaintiff in the case, James Floyd, is a South Carolina medical doctor whose license was suspended in 2005 for addiction to alcohol or drugs. In March 2006, television station WBTW, which serves the Florence - Myrtle Beach area of the state, broadcast a news story entitled "Medical Professionals Addicted." The story named Floyd as a doctor whose medical license had been suspended because of addiction to alcohol or drugs.

The same evening the story was posted to the station's website, but a reporter made a transcription error and wrote that Floyd's license had been suspended because of abuse of crack cocaine. Floyd sued WBTW, which is owned by Media General, Inc., for libel.

South Carolina Law

The court ruled that plaintiff was a private figure and that the news report involved a matter of public concern. "Clearly, the public has a right to know, and an interest in, which medical professionals in the region have been disciplined or had their licenses suspended for substance abuse." But rather than applying a negligence standard, the court found that South Carolina requires proof of common law malice.

In a lengthy footnote analyzing the issue, the court began by stating: "The court is especially troubled by the state of defamation law in South Carolina." The footnote explains that in 1998 the South Carolina Supreme Court appeared to rule that negligence is the appropriate standard in private figure cases against the media. *See Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497, 508-9 (S.C. 1998) (Toal, J., concurring). However eight years later in *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 664 (S.C. 2006), the court stated the issue was not properly before the court in *Holtzscheiter* and that South Carolina precedent required a common law malice standard. The federal court concluded it was bound to follow this state law.

Summary Judgment Denied

The federal district court denied summary judgment to WBTW finding that "arguably there is evidence from which a reasonable jury could conclude that the Defendants' conduct amounted to common law malice." Although the reporter who posted the news story to the website stated in his affidavit that he made a simple transcription error and had "no ill will or hostile or malicious feelings towards" the plaintiff, the court ruled that a jury could find that the error amounted to a reckless disregard of plaintiff's rights where the material was not proof read before publication and "no precautionary measures were in place or utilized to protect against this type of reporting error."

Finally, the court denied WBTW's motion to dismiss plaintiff's claim for punitive damages – adding its own contribution to the incoherent state of South Carolina law. Addressing punitive damages, the court acknowledged that recovery of punitive damages requires clear and convincing proof of actual malice. But after accurately stating the law the court, without any citation to case law on actual malice, concluded that WBTW's possible "recklessness" in the common law sense could also constitute reckless disregard in the constitutional sense.

The case settled before trial this month.

The media defendants were represented by George Alfred Reeves, III and Jay Bender, Baker Ravenel & Bender, Columbia, S.C.; and Susan Tillotson Bunch, Thomas & LoCicero, Tampa, FL. Plaintiff was represented by Lonnie Morgan Martin, Hearn Brittain and Martin, Conway, SC; and Thomas C. Brittain, Hearn Brittain and Martin, Myrtle Beach, SC.

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Alaska Supreme Court Affirms Summary Judgment for Newspaper

Actual Malice Standard Applies to Matters of Public Interest

The Supreme Court of Alaska recently affirmed summary judgment for a newspaper and its reporter because plaintiff failed to demonstrate any material fact as to the existence of actual malice. *Olivit v. City and Borough of Juneau*, 171 P.3d 1137 (Alaska Nov. 23, 2007) (Eastaugh, J.). The court applied the actual malice standard because the article concerned issues of public interest.

The Article

In 2004, the *Juneau Empire* published an article about local resident Jake Olivit, Sr. Olivit had recently filed a lawsuit against the Juneau Police Department and one of its officers, alleging harassment. The *Empire's* article detailed Olivit's current lawsuit and other lawsuits he had filed in the past against the city. Olivit claims that the night before the article was published, someone who claimed to be the city attorney had called him and threatened to discredit him on the front page of the *Empire* the following day if he did not return an item to the police department.

The article contained three items which Olivit claimed were defamatory. First was the part of the article that alleged Olivit had some sort of "history" with the city. Next was a section that described an incident with his children and some stolen money at school. Last was that the article stated that Olivit had pled guilty to misdemeanor assault.

Olivit sued the *Juneau Empire* for defamation, with additional claims against police and city officials.

Summary Judgment Motion

The *Empire* had moved for summary judgment at the trial level, which was granted. On appeal, the Alaska Supreme Court first affirmed that the article concerned matters of public interest since it discussed accusations of misconduct against the police, other criminal accusations, and multiple lawsuits against the city. "Therefore, each of the article's three challenged statements is conditionally privileged and not actionable unless it was false and defamatory and uttered with actual malice."

Plaintiff had to show actual malice to overcome the public interest privilege regardless of whether he was a private or public figure. The court found that plaintiff failed to offer any evidence that the newspaper or its reporter acted with actual malice. The reporter had relied on court records and had interviewed four city officials to research the article. The reporter had even attempted to contact plaintiff to no avail. Overall, there was nothing to suggest that the reporter or the newspaper had acted with actual malice.

Juneau Empire and Tony Carroll were represented by L. Merrill Lowden of Simpson, Tillinghast, & Sorensen, in Juneau. Jake D. Olivit, Sr., appeared pro se.

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Illinois Court Dismisses Claims Against Newspaper

Editorial Not Defamatory

By Brendan Healey and Lindsay LaVine

An Illinois trial court dismissed a libel claim against a Korean language newspaper over an editorial about a dispute in the Korean-American community. *Yoo v. Joong-Ang Daily News, Inc. (Korea Central Daily)*, 07 L 7036 (Ill. Cir. Ct. Jan. 10, 2008) (Flanagan, J.).

Background

It all started with an anonymous flyer deriding business competition in the Korean-American community in Chicago. The flyer denounced business practices between two Korean beauty supply competitors, and insinuated that one of the parties was in cahoots with the other's landlord to "sharply increase" the rent and take over his competitor's lease.

Korea Central Daily, a Chicago-based Korean-language newspaper, reported on the controversy in two newspaper articles and opined on the dispute in an unsigned editorial. The articles reported both sides of the story, and even quoted one of the plaintiffs.

Nonetheless, plaintiffs, the owners of one of the beauty supply stores involved in the dispute, sued the newspaper in the Circuit Court of Cook County for defamation *per quod*, false light, and intentional infliction of emotional distress. Although it was not entirely clear what statements were at issue, plaintiffs basically claimed the newspaper had blamed them for an increase in store rents for Korean retailers in Chicago.

Plaintiffs claimed the statements led to such pressure within the Korean community that they decided to surrender the lease on the store at the heart of the rent controversy. Surrendering the lease, they alleged, cost them approximately $9,000 in out-of-pocket costs and $960,000 annually in gross sales over the life of the 10-year lease. Because they had pled a *per quod* claim, plaintiffs did not seek presumed damages.

Motion to Dismiss

Defendants moved to dismiss on several grounds and argued, among other things, that plaintiffs' claims really traced to statements in the anonymous flyer.

Plaintiffs, however, had not sued based on the flyer—it merely provided certain "extrinsic facts" upon which plaintiffs attempted to base their claims. The statements actually at issue reflected innocuous reporting and editorializing on a matter of public concern in the Chicago Korean-American business community.

The court recognized this and determined that "[t]here is nothing in the articles and editorial which is defamatory and the Plaintiffs have failed to identify any extrinsic facts which render the articles and editorial defamatory to the Plaintiffs here."

The court also determined that plaintiffs had failed to plead special damages and actual malice, which was fatal to the defamation and false light claims. Like a number of other Illinois courts, the court also took a dim view of plaintiffs' attempt to transform a defamation claim into a claim for intentional infliction of emotional distress. The court noted that plaintiffs "failed to properly plead that the statements at issue were highly offensive to a reasonable person, or extreme and outrageous conduct, intent to cause distress and the suffering of severe distress."

Finally, the court stated that "[w]hile it does not appear form [sic] the facts and circumstances here that the Plaintiffs will be able to state the causes of action so alleged in the instant complaint, the Court will, nevertheless, allow the Plaintiffs one opportunity to do so."

As of press time, plaintiffs had not filed an amended complaint.

Steve Mandell, Brendan Healey, and Natalie Harris of Mandell Menkes LLC represent Defendants Joong-Ang Daily News, Inc. (Korea Central Daily) and Choon Ho Park. Patricia E. Bender represents the plaintiffs.

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New York Federal Court Dismisses Claim Against American University Magazine for Faux Gay Alumni Note

By Charles D. Tobin and Colleen A. Sorrell

A federal judge in New York dismissed two American University graduates' libel claims, arising out of an alumni note that they said falsely portrayed them as gay. *Weil and Royce v. American University*, 07 Civ. 7748 (DAB), Memorandum and Order (S.D.N.Y. January 2, 2008) (Batts, J.).

The court held that it lacked personal jurisdiction over the Washington, D.C. university. It did not reach the interesting issue over whether an allegedly false imputation of homosexuality is defamatory at all.

Background

The AU alumni filed the lawsuit following a Spring 2007 publication in the "class notes" section of the university's *American* magazine. The note announced that Ross Weil, who graduated the university in 2002, "was named chief operating officer of the Gay Rights Brigade, which lobbies for constitutional amendments providing for homosexual privacy and marriage rights." The note also reported that Weil had 'married his life-partner," 2001 AU grad Brett Royce, in Boston in 2006.

In their lawsuit, the two men alleged that the note was false, that they each were involved in serious relationships with women, and that the publication was defamation *per se* because it imputed homosexuality. In their opposition to the dismissal motion, the plaintiffs told the court that each lives with a girlfriend "in a committed relationship" and that the publication has caused "a strain on their lives."

AU moved to dismiss on grounds that the court lacked either general or specific jurisdiction under New York's jurisdictional statutes, CPLR § 301 and § 302. To support its argument of a lack of general jurisdiction, which requires that a defendant is generally "doing business" in the state, AU pointed out that it: is not licensed to do business there; has no designated agent for receipt of process in New York; has no offices or employees in the state; maintains no bank accounts, telephone listings, or mailing address in the state; issues its tax-exempt bonds through the District of Columbia Revenue Bond Program and not a New York brokerage; and has not held a Board of Trustees meeting within New York since 2000.

With respect to specific jurisdiction, § 302 explicitly excludes defamation torts which cause injury to a person or property within the state from conferring jurisdiction on an out-of-state defendant. Therefore the allegedly wrongful activity must arise through the transaction of business category of § 302 in order for the plaintiffs to exercise jurisdiction over the university. Further, case law shows that the circulation of an alleged defamation within New York, in and of itself, is insufficient to be a business transaction.

Rather, the allegedly wrongful act must arise out of a party's sufficient business activity conducted in New York in order to confer jurisdiction under the long-arm statute. AU demonstrated in an affidavit that all activities connected with publishing and distributing the magazine, including the content development, layout, printing and mailing, were performed outside of New York.

And in a sharp rebuke to plaintiffs' premise for the litigation, AU noted:

> *While it is beyond the scope of this motion, which solely challenges the invocation of personal jurisdiction, American University expresses its strong disagreement with the offensive notion underlying this entire lawsuit, that is, Plaintiffs' allegation that false statement about someone's sexuality exposes him to "hatred, contempt or aversion or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him," as is required to sustain a defamation action.*

In response to the motion, plaintiffs submitted internet pages and affidavits to demonstrate that: some groups of AU alumni advertise gatherings in the university's name; the university itself has sponsored events in New York; a number of alumni receive *American* in New York; and the insurance agent handling this claim on AU's behalf had an office on Long Island. This record, they argued, warranted exercise of jurisdiction under the Second Circuit's "solicitation plus" theory, which holds that solicitation in a state can be coupled with other significant activity to create jurisdiction.

Responding to AU's criticism of them for alleging that a false imputation of homosexuality should be considered defamatory, plaintiffs said in their responsive papers:

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New York Federal Court Dismisses Claim Against American University Magazine for Faux Gay Alumni Note

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> *The gravamen of the complaint is misrepresentation of plaintiffs and not as defendant suggests a critique of one's sexual preference.*

In her January 2, 2008, decision, Southern District of New York Judge Deborah A. Batts agreed with AU. The court determined that "[t]he mere fact copies of the Magazine were mailed to individuals in New York does not constitute a transaction of business under §302(a)(1) in the absence of additional facts connecting either the publication or the allegedly defamatory statements contained therein to New York." She also noted that the record shows the magazine is sent to university alumni and donors all around the world; there was no target of New Yorkers. The court rejected plaintiffs' argument that sponsoring alumni events or information sessions would constitute a transaction of business in New York, but that even if it did, there was still no articulable nexus between the alleged defamatory statements in *American* and those activities. She dismissed the lawsuit.

To date, no appeal has been filed from the New York decision, and no lawsuit has been initiated in D.C.

Charles D. Tobin and Colleen A. Sorrell, with the Washington D.C. and New York City offices of Holland & Knight LLP, represent American University in this action. Michael A. Kaufman of Michael A. Kaufman, P.A. in New York City represents the plaintiffs Ross Weil and Brett Royce.

Miranda Rights Unnecessary to Use Media Interview Against Prisoner

An appeals court in South Carolina held that an inmate who spoke to a television reporter following a prison riot was not entitled to be advised of his Miranda rights for the interview to be used against him at trial. *State v. Lynch*, 2007 WL 4230801 (S.C. App. Nov. 27, 2007) (Williams, J.).

Jacob Lynch was an inmate at the Lee Correctional Institution in Bishopville, South Carolina. Lynch and another prisoner took a guard hostage as part of a prison riot. Lynch asked to speak to the media and agreed to free his hostage and surrender if he was granted access to the media. In order to meet Lynch's demands, the head of the Corrections Department allowed a television reporter, Craig Melvin, to enter the prison. Melvin interviewed Lynch and Lynch made several incriminating statements.

At trial, Lynch sought to suppress these statements, arguing that he had not been advised of his Miranda rights. The television reporter was called to testify about the circumstances of the interview. The trial court found that Lynch was not subject to custodial interrogation because Melvin was acting as a reporter, not as an agent of the state. Lynch was convicted and sentenced to life without parole.

The appeals court affirmed holding that even if the reporter had been acting on behalf of the state, Miranda warnings were not required because under the circumstances Lynch would not have been aware that the reporter was an agent of the state and thus there would have been no coercive environment for purposes of the Miranda rule. Finally, the court stated that any Miranda violation would still not taint the verdict because there was other overwhelming evidence of Lynch's guilt.

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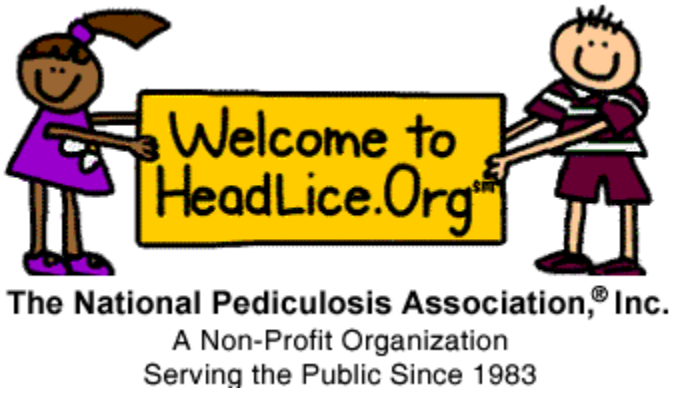
Illinois Pharmaceutical Corporation's Defamation, Trade Disparagement Claims to Proceed

By Brendan Healey and Lindsay LaVine

Although some might characterize the complaint as nit-picking, an Illinois pharmaceutical company has nonetheless managed to survive (barely) three motions to dismiss the lawsuit it brought against alleged critics of its products. *Morton Grove Pharmals., Inc. v. Nat'l Pediculosis Ass'n, Inc.*, Case No. 06 C 3815 (N.D. Ill. Nov. 30, 2007).

Background

Plaintiff Morton Grove Pharmaceuticals makes Lindane Lotion and Lindane Shampoo, FDA-approved products for the treatment of lice and scabies. Plaintiff is the only U.S. manufacturer and distributor of such products.



In 2006, Morton Grove sued the National Pediculosis Association ("NPA"), a Massachusetts non-profit, and the Ecology Center, Inc., a Michigan non-profit, as well as two Michigan doctors, whom plaintiff alleged were responsible for certain Ecology Center statements. Plaintiffs alleged that defendants had launched an attack campaign on Lindane. Plaintiff brought claims under the Lanham Act and Illinois Deceptive Trade Practices Act (IDTPA) as well as for defamation and trade disparagement.

What followed was a hair-raising sequence of motion practice that resulted in a series of opinions in which the Northern District of Illinois whittled down the claims and defendants but ultimately decided the case should remain in Illinois federal court. *Morton Grove Pharmals., Inc. v. Nat'l Pediculosis Ass'n, Inc.*, Case No. 06 C 3815 (N.D. Ill. Nov. 30, 2007) ("*Morton Grove III*"). *See also Morton Grove Pharmals., Inc. v. Nat'l Pediculosis Ass'n, Inc.*, 494 F. Supp. 2d 934 (N.D. Ill. 2007) ("*Morton Grove II*"); *Morton Grove Pharmals., Inc. v. Nat'l Pediculosis Ass'n, Inc.*, 485 F. Supp. 2d 944 (N.D. Ill. 2007) ("*Morton Grove I*").

Morton Grove I: May 3, 2007

In *Morton Grove I*, the court granted certain defendants' motions to dismiss for lack of general and specific jurisdiction. There, plaintiff argued the court had jurisdiction over the Ecology Center (an environmental group) and the doctors based upon their contacts with Illinois. The Ecology Center had sent newsletters into Illinois, solicited donations in Illinois, received two large donations from an Illinois foundation, and maintained a website viewable by Illinois residents.

The court found neither general nor specific jurisdiction, and, of particular interest to many media defendants, determined that the website did not provide a basis for jurisdiction. The Ecology Center maintained the website in Ann Arbor, Michigan. Although the website was equipped to take online donations, the Ecology Center had not received any online donations from Illinois residents. Finally, the court found that nothing in the website's content targeted Illinois residents.

Plaintiff also alleged, in part, that the court had specific jurisdiction because it suffered harm to its reputation and economic injury in Illinois. In order to prevail, the court noted, the plaintiff must prove that the tort occurred in Illinois. The plaintiff failed to prove that defendants made any false or defamatory statements, either in a newsletter or on the website, to Illinois residents, and that the materials provided to the court did not identify plaintiff as the manufacturer of Lindane.

Morton Grove II: June 18, 2007

The following month, in *Morton Grove II*, the court ruled on a 12(b)(6) motion filed by the NPA, which sells the Lice-Meister comb and is a non-profit devoted to protecting children from "potentially harmful" lice and scabies treatments. The court dismissed the defamation *per se* claim, but allowed plaintiff's other claims (including a claim for defamation *per quod*) against the NPA to proceed.

The NPA statements at issue, which appeared on its headlice.org website, referenced lindane the chemical ingredient as

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Illinois Pharmaceutical Corporation's Defamation, Trade Disparagement Claims to Proceed

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opposed to plaintiff's "Lindane" product. In *Morton Grove II*, the court noted that none of NPA's allegedly defamatory statements referred to plaintiff. In fact, the only lindane-based product NPA mentioned by name was manufactured by another company. The court therefore held that "the statements can be reasonably read as referring to the chemical lindane and not to MGP's product" and reasonably subject to an innocent construction.

In finding an innocent construction, the court refused to accept plaintiff's argument that, because it was the only United States distributor of Lindane, it had to be the subject of the statements at issue. The court noted that such extrinsic facts are not cognizable on a *per se* claim.

the court found that the Ecology Center's mailings allegedly caused injury within Illinois.

Perhaps not surprisingly, plaintiff's *per quod* claim survived the motion to dismiss. On that claim, plaintiff's assertion that it was the only U.S. manufacturer and distributor of Lindane products adequately established the extrinsic facts necessary to make its defamation *per quod* claim. The court also found that plaintiff had adequately pled special damages, when it alleged that it experienced a decrease in sales of 23 percent, or $9.3 million dollars in less than one year as a result of defendants' statements.

Finally, the court found that plaintiff adequately pled its claim for trade disparagement and violations of the IDTPA when it took into account the fact that plaintiff was the sole U.S. manufacturer and distributor for the allegedly disparaged products.

NPA subsequently brought a motion to sever, arguing that the statements made by NPA and the Ecology Center were not identical and did not arise from the same transaction or occurrence. Plaintiff contended the defendants made similar statements and were acting in concert. The court determined that plaintiffs failed to identify any concerted effort between the Ecology Center and NPA and granted NPA's motion to sever.

Morton Grove III: November 30, 2007

Five months later, the court issued its latest ruling in *Morton Grove III*. The court examined whether it had specific jurisdiction over two of the defendants (the Ecology Center and Dr. Weil) based upon the allegations in plaintiff's Second Amended Complaint. (Plaintiff dropped Dr. Fliegel from the Second Amended Complaint.)

The only allegedly defamatory statement containing Dr. Weil's name was a newsletter. Dr. Weil filed an affidavit averring that he did not participate in the preparation or mailing of the newsletter and was not aware the newsletter was sent to Illinois. Because Dr. Weil had no knowledge that the newsletter was sent to Illinois, the court found that he did not "purposely avail" himself in Illinois and granted his motion to dismiss.

The court did, however, determine that it had specific jurisdiction over the Ecology Center. Plaintiff alleged the Ecology Center had mailed false and defamatory statements in the form of the newsletters to Illinois residents. The Ecology Center did not dispute that it intentionally sent the newsletters to Illinois addresses. Thus, the court found that the Ecology Center's mailings allegedly caused injury within Illinois.

The next battleground was venue. The Ecology Center sought to transfer the case to a Michigan court, whereas the plaintiff wanted to stay in Illinois. The court denied the motion, based largely upon consideration of judicial efficiency and deference to the plaintiff's choice of forum.

The Ecology Center also moved to dismiss the IDTPA claim on the grounds that plaintiff failed to plead it with particularity and had not sufficiently alleged a claim for injunctive relief. The court refused to categorically apply the heightened pleading standard of Rule 9(b) to an IDTPA claim. The court also determined that, even though plaintiff sought "economic harms," plaintiff's claims included irreparable harms that could not be remedied at law.

At this point, the Ecology Center is the only remaining defendant.

Brendan Healey and Lindsay LaVine are with Mandell Menkes LLC in Chicago.

Timothy J. Rivelli, Cherish M. Keller, W. Gordon Dobie, and William C. O'Neil of Winston & Strawn LLP represent Plaintiff Morton Grove Pharmaceuticals, Inc. Richard M. Waris, Amy J. Thompson, and James J. Sipchen of Pretzel & Stouffer, Chtd. and Edward J. Aucoin, Jr. of Hinshaw & Culbertson represent Ecology Center, Inc., Dr. Fliegel and Dr. Weil. Debbie L. Berman, Amanda S. Amert, Jennifer A. Hasch, and Wade A. Thompson of Jenner & Block LLP represent The National Pediculosis Association.

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Entertainment Law: Jury Rejects Quasi-Contract Claim For "Services" On *The Sopranos*

By Peter L. Skolnik

A New Jersey federal jury of seven women and one man took just 82 minutes to conclude that plaintiff Robert Baer had no reasonable expectation of monetary compensation for whatever assistance he gave series creator David Chase in 1995, when Chase was preparing the initial pilot script for *The Sopranos*. *Baer v. Chase*, No. 02-2334 (jury verdict Dec. 19, 2007) (Pisano, J.).

District Court Judge Joel Pisano had previously determined that Baer's "services" could be characterized as those of a "location scout, researcher and consultant"; but at trial the jury accepted Chase's position that in return for providing those services, Baer could only have reasonably hoped that Chase might help Baer – an aspiring screenwriter – to pursue a career in the television business. The jury's special verdict also found that Baer could not reasonably have expected compensation from *Chase* – rather than from Chase's then-employer, Brillstein-Grey Entertainment, with whom Chase was under contract to develop television series.

Background

Baer, a former municipal court judge who had recently retired from a New Jersey prosecutor's office, was introduced to Chase through a mutual friend in June 1995. Chase – a New Jersey native and already an established writer-producer (*The Rockford Files*, *Northern Exposure*, *I'll Fly Away)* – agreed to read and offer advice on the Jersey novice's first screenplay. A few months later, when Chase was developing the initial *Sopranos* pilot script for Fox Television, Baer offered to introduce Chase to some acquaintances who knew something about the Jersey mob, and to show Chase some mob-related locations in North Jersey.

Chase – who had previously written several TV episodes and feature scripts about the Mafia – spent three days with Baer in October 1995, listening to facts and true stories told by Baer's associates. Chase then returned to L.A. to complete the pilot script. When it was done, Chase sent copies to industry colleagues, and to Baer, inviting comments.

During 1996, Fox – and every other broadcast network – passed on Chase's initial script for *The Sopranos*; but in early 1997, HBO expressed interest as it expanded its push into original programming. Chase decided to re-write the pilot, and to find a real Mafia expert to help him better understand the mob's hierarchy and cash flow. He found such an expert in Dan Castleman, head of the Investigations Division of the Manhattan D.A.'s office. Castleman wasn't paid for his consulting services during the period when Chase was re-writing the *Sopranos* pilot, but went on to serve as the show's technical consultant during its entire run.

At about the same time Chase was beginning his HBO re-write in February 1997, Baer sent Chase a letter that included some flattering comments on the much-rejected initial pilot script Chase had sent him in late 1995. Baer's letter also asked Chase for a favor: to read Baer's recently-completed second script. Chase read it, found it both unsatisfying and a disappointing indication of Baer's lack of progress and commitment to screenwriting; he told Baer he didn't think much of the script. Baer never asked Chase for another favor. Indeed, Chase never heard from Baer again until mid-2002, when Baer sued him.

Pretrial Litigation

Baer filed suit against Chase and his loan-out company in May 2002, with a complaint alleging that "were it not for [his] enormous, but uncompensated efforts, it is a virtual certainty that the cultural icon known as *The Sopranos* would have never come to fruition." The complaint (as subsequently amended) asserted ten causes of action, including *inter alia* fraud, breach of fiduciary duty and misappropriation. But the suit was, in essence, one for breach of an alleged oral agreement.

According to Baer, in exchange for his "extensive contributions," Chase had promised to "take care of" Baer if *The Sopranos* succeeded – by compensating Baer for the "true value" of his role in "creating and developing" the series. In the initial conference with the Magistrate, Baer estimated his "true value" as half of Chase's earnings from *The Sopranos*.

Following a year of peculiar discovery (Baer took no

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depositions and served no interrogatories), in late 2003 defendants moved for summary judgment on all claims, which was granted by the District Court. *Baer v. Chase*, 2004 WL 350050 (D.N.J. Feb. 20, 2004). Baer's express and implied contract claims were dismissed for vagueness and lack of essential terms; his fraud claims were dismissed on the ground that Chase's supposed "promises" related solely to future events.

More significantly for the subsequent litigation, Baer's misappropriation claim was dismissed on the ground that in the absence of an enforceable contract, his supposed "ideas" for the show required, but lacked, sufficient "novelty": they consisted merely of public domain facts, real places, and true stories that Chase had been told not by Baer, but by Baer's associates. And Baer's quasi-contract claim – subject to New Jersey's six–year statute of limitations – was dismissed on the ground that while Baer filed suit in May 2002, his deposition testimony acknowledged that whatever his services, they had been completed in October 1995.

Baer appealed. The Third Circuit affirmed summary judgment on all but the quasi-contract claim. *Baer v. Chase*, 392 F.3d 609 (3d Cir. 2004). In his opposition to summary judgment, Baer argued that he had misspoken during his deposition; that his February 1997 letter (which Chase had produced in discovery) in fact constituted his "final service" – rendering his claim timely. The district court had rejected the ploy on the basis of the "sham affidavit" doctrine, which generally prohibits reliance, during opposition to summary judgment, on an affidavit that contradicts deposition testimony.

But the Third Circuit took the occasion to explore what it viewed as the somewhat uncertain contours of the doctrine, and concluded that a contradictory affidavit could be credited when it was corroborated by independent evidence in the record. Here, according to the court, the February 1997 letter provided such corroboration. In an opinion that placed much of its logic into two long and convoluted footnotes, it ordered the district court on remand to consider Baer's affidavit and his February 1997 letter, holding that the letter would "at least at this time … serve as the 'last service rendered'" for purposes of the statute of limitations. But it also invited the district court to "com[e] to a conclusion contrary to ours."

Chase filed again for summary judgment, submitting additional affidavits to demonstrate that Baer's letter conferred no benefit and constituted no service. The district court agreed, and once again dismissed the quasi-contract claim as untimely. *Baer v. Chase*, 2005 WL 1106487 (D.N.J. Apr. 29, 2005).

Baer returned to the Third Circuit, in an appeal that did little more than debate what the Circuit had meant in its two earlier footnotes which, according to Judge Pisano, had "confused the matter." A divided panel reversed the district court again, 177 Fed. Appx. 261 (3d Cir. 2006), granting summary judgment to Baer on the statute of limitations issue, and leaving its dissenting member to "empathize with" the district judge's "predicament (and soon to be frustration)" caused by "our troublesome footnotes."

It had become clear that although Baer's "ideas" had been rejected as the basis for a *misappropriation* claim, he continued to believe they remained in the case as a "service" rendered in quasi-contract. Similarly, against a body of case law that often speaks of entitling a quasi-contract plaintiff to recover in restitution the "benefit received by the defendant," Baer believed he could seek discovery into Chase's earnings from *The Sopranos*, and then offer a jury expert testimony that would attribute some portion of those earnings to Baer's "ideas" and other services. Accordingly, once Baer's quasi-contract claim survived,

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Chase moved to limit the services it might encompass, and the damages it might yield.

The district court granted both prongs of defendants' motion. *Baer v. Chase*, 2007 WL 1237850 (D.N.J. Apr. 27, 2007). It agreed with defendants that under New Jersey law – which had adopted the standard established by the Second Circuit in *Nadel v. Play-by-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000) – "novelty" is as necessary to a property-based quasi-contract claim like Baer's as it is to a misappropriation claim. The court accepted, too, defendants' reliance on the conclusion reached by Professor Candace S. Kovacic's comprehensive *Proposal to Simplify Quantum Meruit Litigation*, 35 Am. U. L. Rev. 547 (1986) – that when a defendant has requested services (as Chase had here), his benefit or gain should be measured by the reasonable market value of the plaintiff's services, since that is the cost he has avoided.

Baer's services had a market value of zero, since the television industry doesn't pay for services like Baer's during the period when pilot scripts are being written.

Thus, the district court held that the assistance for which Baer might recover was limited to his services as a "location scout, researcher and consultant," and he would be required to establish "what others in the entertainment industry would pay Baer (or someone else) for those or similar services." Nevertheless, because Baer continued to trot out different formulations under which his supposed "ideas" could be presented to a jury, defendants successfully moved *in limine* for explicit preclusion of trial evidence concerning each of the ideas Baer had identified. *Baer v. Chase*, 2007 WL 4165385 (D.N.J. Nov. 20, 2007).

The Trial

Baer's case emphasized (i) an assumption that Chase would compensate him; (ii) the supposed importance of the locations he showed Chase and of the introductions he arranged for him, and (iii) Chase's failure to pay. His expert John Agoglia, former president of NBC Enterprises, testified that the market value of Baer's services was about $95,000. Astonishingly, although it was the only thing that had permitted Baer's quasi-contract claim to survive summary judgment, Agoglia also testified – on *direct* – that he attributed no value to Baer's February 1997 letter.

The defense case urged that Baer had provided modest services in the hope that by scratching Chase's back, Chase might return the favor by helping Baer pursue a screenwriting career. Chase did so, reading and commenting on the only scripts Baer ever wrote, but never being asked for further career help. The defense emphasized that Baer had rejected monetary compensation three times, and could not have reasonably expected to be paid by Chase – who Baer knew to be a salaried employee of Brillstein-Grey.

Chase also contrasted Baer's nominal help with the extensive assistance Chase's true mob expert, Dan Castleman, had provided while Chase was re-writing the *Sopranos* pilot. Finally, Chase introduced both fact and expert testimony – through, respectively, Kevin Reilly (now President, Entertainment, of Fox Broadcasting) and Jake Jacobson (former head of business affairs for Paramount's network television division) – establishing that Baer's services had a market value of zero, since the television industry doesn't pay for services like Baer's during the period when pilot scripts are being written.

Following five days of testimony and less than an hour and a half of deliberations, the jury returned a special verdict. Under a "preponderance of the evidence" standard, the jury found that although Baer reasonably expected some compensation, he had established neither (i) a reasonable expectation of monetary compensation, rather than a hope of future career opportunities through Chase, nor (ii) a reasonable expectation of compensation by *Chase*, rather than by Brillstein-Grey or some other entity.

Baer has appealed the no-cause judgment, the order granting defendants' motion that eliminated his "ideas" claim and limited his damages to market value, and the order granting defendants' motion *in limine* and delineating the specifically-precluded "ideas."

Peter Skolnik, David Harri, Michael Norwick and Matthew Savare of Lowenstein Sandler PC represent David Chase and DC Enterprises, Inc. Robert Baer represented himself pro se, along with solos Harley Breite and Michael Kasanoff.

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Newspaper Did Not Violate Illinois Right Of Publicity

By Damon Dunn

A claim under the Illinois Right of Publicity Act against a newspaper was dismissed with prejudice by the Illinois Circuit Court in Oliver v. Ibgui, et al., No. 07 L 3782 (December 7, 2007) (Kelly, J.). The plaintiffs, a spa operator named Marcus Oliver and his corporation, Olivemark, Inc., sued Pioneer Newspapers along with its advertiser, a competing spa named Pascal Pour Elle. Pioneer had published Pascal's "A Letter To Markus Oliver And His Clients" under the heading "Paid Advertisement."

Background

Plaintiffs alleged that the advertisement violated their rights of publicity under the Illinois Right of Publicity Act (the Act). The Act supplants Illinois common law rights of publicity and provides: "A person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent." 765 ILCS § 1075/30. Pascal's advertisement was illustrated by a photograph of Oliver and paid tribute to Oliver as a retiring competitor. The advertisement also stated that several of Oliver's former employees were now working for Pascal and generally described Pascal's services.

Pioneer moved to dismiss the Publicity Act claim on three grounds. First, Pioneer argued that Olivemark lacked standing because the Act only conferred a right of publicity upon individuals and Oliver had not alleged that he transferred his property right to Olivemark. Second, Pioneer argued that selling advertising space did not constitute a "commercial use" of Oliver's identity by Pioneer, as opposed to the advertiser. Third, Pioneer argued that Pascal's letter enjoyed First Amendment protection because it inextricably intertwined newsworthy speech with commercial speech and Oliver's photograph was germane to the protected content.

Plaintiffs countered that corporations were juristic persons and the Act often used the terms "individual" and "person" interchangeably. Plaintiffs also contended that Pioneer published the advertisement pursuant to a contract and the resultant advertising revenue qualified as a commercial use. With respect to the constitutional privilege, Pascal argued that the photograph was not expressive text and that paid advertisements are not deserving of full First Amendment protection.

Judge Daniel J. Kelly of the Cook County Circuit Court ruled from the bench at the close of argument. First, the Court agreed with Pioneer that the corporation did not have a right of publicity, finding that the legislature intended that the right was an individual right. The Court next ruled that the Act does not impose liability on a newspaper for publishing paid advertisements, notwithstanding the revenue derived from placing the advertisement.

the Act does not impose liability on a newspaper for publishing paid advertisements

The Court observed that this appeared to be a question of first impression. Nevertheless, the Court believed that it would stretch the limits of public policy to extend the Act to encompass this situation. The Court also concluded that Pioneer did not use Oliver's identity for a commercial purpose because that use was the province of the entities that created and placed the advertisement with Pioneer. Finally, the "Paid Advertisement" label operated to further remove Pioneer from realizing any commercial benefit from the advertisers' depiction of Oliver. Accordingly, the Court struck the claims against Pioneer with prejudice. The order reads in relevant part: "The Court finds that the Act does not impose liability on a newspaper that publishes a paid advertisement, because it is not a commercial use by the newspaper."

Given the finding that the Act did not apply to Pioneer, the Court did not decide the constitutional question. The Pascal Defendants orally moved to join Pioneer's motion on the right of publicity claim and received partial relief with the dismissal of Olivemark's claim. They may raise the First Amendment privilege on their own behalf at a subsequent point in the litigation. Since the case continues against the Pascal Defendants, the Plaintiffs have reserved their right to appeal the rulings in favor of Pioneer once all claims are resolved.

Damon E. Dunn and Michell L. Wolf-Boze of Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago represented Pioneer Newspapers, Inc. Oliver and Olivemark, Inc. are represented by Hall Adams of the Law Offices of Hall Adams, LLC. The Pascal Defendants are represented by Clarissa C. Grayson of LaRose & Bosco, Ltd.

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Paris Court Rejects Attempt to Enjoin Release of Book About Cecilia Sarkozy

Divorce, or the Beginning of Private Life

By Jean-Frederic Gaultier

In a decision given on January 11, 2008, the Paris Court proved efficient and concerned about finding a balance between freedom of speech and the right to privacy.

Cecilia Sarkozy, recently divorced from French President Nicolas Sarkozy, claimed that the book "Cecilia" written by journalist Anna Bitton should be removed from the shelves on the grounds of an invasion of her privacy. The court rejected this claim finding that a prohibition, even a temporary one, would be "*obviously disproportionate.*" The book quotes Cecilia making several unflattering comments about her former husband, including calling him a "womaniser," and "a man who loves no one, not even his children."

Efficiency

The privacy judge worked as swiftly as the divorce judge. "Cecilia S." had a request filed on 9 January 2008 to have this matter heard via fast-track interim proceedings ("*référé*"). The request was granted the same day, the trial (French style) took place on 10 January 2008, the decision was handed down on 11 January 2008, and reported in the press the same day.

Balance of Free Expression & Privacy

Pursuant to Article 9 of the *Code Civil*, "*Everyone has the right to the respect of his right to privacy. Without prejudice to compensation for harm suffered, the court may prescribe any measures, such as sequestration, impounding and others, appropriate to preventing or putting an end to an invasion of personal privacy; in the event of urgency, such measures may be provided for by interim order.*"

Privacy matters are deemed to be urgent, with the result that this test is often met. "Personal privacy" or "intimacy" is the core of private life. There is no definition, and case law remains quite unpredictable. Health is usually part of the intimacy, personal feelings as well. It remains unclear in respect of wealth or family roots, some contradictory decisions having been rendered in this respect. Case law developed a third test on the grounds of Articles 8 and 10 of the European Convention on Human Rights: sequestration or impounding may be ordered in interim proceedings in order to prevent irreparable harm.

The decision given on January 11 rejected the claim mainly on the grounds that Cecilia S. failed to prove irreparable harm.

The court stated that most of the book is dedicated to subject matters that are part of privacy "by nature": family life, marital life, love affairs, and personal feelings. The court further considered that some of these may also be part of intimacy, in particular the personal feelings the author attributed to Cecilia S.

Invasion of privacy may, however, be legitimate when it is in the public interest. The court considered that the divorce of a President is of interest for the public as it could have some political impact. The court also reminded that the boundaries of one's private life are in one's own hands, and that Cecilia elected to make her private life public: Cecilia S. publicly claimed she was a "*political individual*", and that her duty as a spouse was to help her presidential husband;

- *she gave several interviews about topics similar to the ones reported in the book;*
- *several articles had been published about her private presidential life, without complaints from her about this;*
- *while still married to the President, she and her husband publicized their private life, and thus created public interest.*

Lastly, the court explains why impounding the book, even temporarily, would be disproportionate in view of this past attitude:

- *the book does not deal with post-presidential divorce information;*
- *the book is already on the shelves, and several articles Cecilia S. does not complain about already reproduce part of it;*

the journalist who wrote the book interviewed Cecilia S. many times, took down notes in front of her, informed her of her intention to publish a book, etc., again without Cecilia S. complaining: and the book does not undermine Cecilia S.' status.

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Paris Court Rejects Attempt to Enjoin Release of Book About Cecilia Sarkozy

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Cecilia S. announced she would appeal. In addition, as already indicated, the decision was given via interim proceedings ("*référé*"). It therefore has no bearing on the merits, where Cecilia S. may well succeed if she decides to follow this route.

Prohibition of a book remains very exceptional in France, and the decision handed down by the Paris court confirms this. The decision is however quite unusual in some respect. It is (or was?) admitted that love affairs of politicians are not in the interest of the public. As the court puts it, the situation is likely to be different when a politician decides to put his private life in the public domain and thus "creates public interest."

Jean-Frederic Gaultier is a partner with Clifford Chance in Paris.

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Dutch Journalist, Jailed for Refusing to Reveal Source, Wins Claim Before ECHR

The Netherlands Violated Journalist's Article 10 Rights

By Christien Wildeman

In a recent judgment the European Court of Human Rights reaffirmed the protection for journalists' sources under Article 10 of the European Convention on Human Rights. *Voskuil v. The Netherlands*, Application no. 64752/01.

In 2000 the Amsterdam Court of Appeal, in the notorious trial against Mink K., ordered the detention of Koen Voskuil, a journalist of the daily newspaper Sp!ts, in order to compel him to reveal the identity of his source which he refused. After his release Voskuil lodged an application against the Netherlands with the European Court of Human Rights. The long-anticipated judgment was pronounced on November 22, 2007.

Background

In March 2000 the Court of Amsterdam convicted three people of arms trafficking, including the well known organized crime figure Robert Mink Kok, known as "Mink K." In the criminal investigation, the Amsterdam police had stated that an arsenal of weapons had been found by chance: the caretaker of a building in Amsterdam had contacted the police when water was leaking from one of the flats in the building, whose occupants were absent. With the aid of two locksmiths, the police had gained entry to the flat and in the subsequent search for the source of the leak, the weapons had been found. The accused lodged an appeal against the judgment of the Court.

On September 12 and 13, 2000 the daily newspaper *Sp!ts* published two articles, written by journalist Koen Voskuil, in which doubts were expressed about coincidences allegedly involved in the finding of the weapons. The September 13th article quoted an unnamed policeman of the Amsterdam force as commenting in respect of the flooding: "That is what we made out of it. Sometimes you just need a breakthrough in an investigation."

Subsequently, Voskuil was summoned to appear as a witness for the defense in the appeal proceedings on September 22, 2000. When asked to reveal the identity of his source Voskuil invoked his right of non-disclosure. After having deliberated, the Court of Appeal considered that if the statement made by the police officer to Voskuil was correct, this might affect the conviction of the accused and it also affected the integrity of the police and judicial authorities.

Subsequently, the Court ruled that the interests of the accused and of the integrity of the police and the judicial authorities outweighed Voskuil's interest in protecting the identity of his source. However, Voskuil remained silent, upon which the Court ordered his immediate detention for a maximum of 30 days.

At the next hearing on October 9, 2000, Voskuil once again refused to reveal the identity of his source. Upon this, the Court decided to lift the order for his detention. It considered that for a number of reasons Voskuil's article was implausible. This being the case, Voskuil's detention no longer served a purpose. On October 30th the criminal proceedings continued and the Court heard Voskuil, seven other journalists who had published similar articles, two plumbers and a caretaker.

After his release, Voskuil lodged an application against the Netherlands with the European Court of Human Rights.

ECHR Judgment

The Court found it clear that there had been an interference with Voskuil's rights under Article 10 of the Convention. The question was whether this interference could be considered "necessary in a democratic society," as Article 10 of the European Convention on Human Rights prescribes.

Before answering this question the European Court of Human Rights stressed the importance of press freedom.

> *Since 1985 the Court has frequently made mention of the task of the press as purveyor of information and "public watchdog". Protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of*

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Dutch Journalist, Jailed for Refusing to Reveal Source, Wins Claim Before ECHR

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> *journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention* ***unless it is justified by an overriding requirement in the public interest.*** *Voskuil (¶ 64)*

The Dutch Government argued that it was necessary for Voskuil to identify his source to 1) secure a fair trial for the accused; and, 2) to guard the integrity of the Amsterdam police. However, the Court found the first reason invalid. The Amsterdam Court of Appeal was not prevented from considering the merits of the charges against the three accused; at the hearing of October 30, 2000 it was apparently able to substitute the evidence of other witnesses for that which it had attempted to extract from Voskuil. As for the second reason, the Court took the view that in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed.

The Court was struck by the lengths to which the Netherlands authorities were prepared to go to learn the source's identity. Such far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing from coming forward and sharing their knowledge with the press in future cases.

Thus the government's interest in knowing the identity of the source was insufficient to override Voskuil's interest in protecting it. The Court concluded that there has been a violation of Article 10 of the Convention. Furthermore, the Court found that the Netherlands had violated Article 5 of the Convention (the right to liberty and security), since the detention procedure prescribed by law had not been followed.

Statutory Protection of Sources

For some years, the Dutch Association of Journalists has advocated for statutory protection for journalists' sources. At the start of 2007 Minister of Justice Hirsch Ballin opposed the idea because he was of the view that a statutory provision would not add anything to current legal practice. In the meantime, however, he changed his mind and has announced that he wants to lay down the journalistic right of non-disclosure in law.

Christien Wildeman is a lawyer with Kennedy Van der Laan in Amsterdam.

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ECHR Strengthens Protection For Journalists And Their Sources In Landmark Case Involving EU Whistleblowers

Police Raid of Reporter's Home Violated Article 10

By Christoph Arhold

In a major ruling by the European Court of Human Rights ("ECHR") upholding the freedom of the press, journalist Hans-Martin Tillack has won his long legal battle to protect his sources in the European Commission's Anti-Fraud Office ("OLAF"), after a Belgian police raid on his home and office and the seizure of his working materials. *Tillack v Belgium*, Case 20477/05 Nov. 27, 2007. (The authentic language of the judgment is French. An English version is not yet available and quotations from the judgment are our own translation.)

This was the crucial last act in an important series of cases on protection of journalists and the liability of the EU Institutions.

Background

In 2002 Mr. Tillack, who was then the German magazine *Stern's* Brussels-based EU correspondent, wrote a series of articles on fraud and mismanagement in the Community Institutions which criticized OLAF's investigation of these problems, relying on leaked internal OLAF documents.

OLAF tried unsuccessfully to identify the source of the leak, and also issued press releases which implied that Mr. Tillack might have used bribery to obtain the documents. Mr. Tillack complained to the European Ombudsman, who in November 2003 condemned OLAF for accusing him of bribery on the basis of nothing but rumor and hearsay - a claim by the then spokesman for the European Commissioner responsible for OLAF to have heard a vague suggestion to that effect from a former colleague who refused to confirm this.

In November 2003 Mr. Tillack published an article on OLAF's Director-General, which apparently spurred OLAF into taking more decisive action. As it could not silence Mr. Tillack itself, its officials consulted with Belgian officials in January 2004 on possible coordinated action, and in February 2004 OLAF forwarded the Belgian judicial authorities reports which accused Mr. Tillack of bribing Commission officials to obtain confidential EU documents and helped them to breach their duty of confidentiality.

The grounds for the accusations were the same rumor and hearsay which the European Ombudsman had already condemned OLAF for using. OLAF asked the authorities to launch investigations immediately in order to safeguard the evidence in Mr. Tillack's possession (hinting - falsely - that he was about to leave Europe for a US assignment). Obviously OLAF's real goals were to put an end to the articles and identify its whistle-blower - it would be able to do this once Mr. Tillack's materials became part of the Belgian authorities' file on the "bribery case", as OLAF or the Commission could then obtain access to the file as a *partie civile* (the victim of an offense).

On March 19, 2004 at 7.00 am, the police raided Mr. Tillack's home in Brussels, took him into custody (holding him incommunicado for some 12 hours) and sealed or seized virtually all his archives, working documents, computers and mobile phones at his home and office, and – as a matter of course - his bank statements.

Belgian Court Actions

On his release from custody (without charges - indeed, he has never been charged with any offense), Mr. Tillack petitioned the Belgian examining magistrate for the lifting of the seizure measures, arguing that the investigation violated a journalist's right under Article 10 of the European Convention on Human Rights to protect his sources. The examining magistrate, however, refused to acknowledge a breach of Article 10.

At that time Belgium had no legislation which protected press freedom, though it has since hastily adopted such legislation. Mr. Tillack challenged the order by a petition to the *Chambre des mises en accusation*, which confirmed the order and its reasoning in September 2004. He then appealed to the *Cour de Cassation*, Belgium's Supreme Court, which rejected the appeal in December 2004 despite an opinion by the *Avocat Général* (court prosecutor) which stressed the authorities' failure to evaluate the evidence provided by OLAF before ordering the searches and seizures. As all national remedies had been exhausted, Mr.

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ECHR Strengthens Protection For Journalists And Their Sources In Landmark Case Involving EU Whistleblowers

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Tillack's final recourse against the Belgian authorities was an application to the ECHR.

European Community Court Actions

In a further effort to protect his sources effectively, Mr. Tillack asked the European Court of First Instance ("CFI") for interim measures to prevent OLAF from obtaining the information and documents held by the Belgian police. (The CFI has jurisdiction for direct actions against Community acts. Its decisions can be appealed to the European Court of Justice ("ECJ"). Acts by EC institutions can only be directly challenged before these Courts.)

As interim measures are contingent on a pending main action, Tillack also sought the annulment of OLAF's decision to complain to the Belgian authorities under Article 230(4) EC, which allows challenges to decisions that directly alter the legal situation of an individual. As it was uncertain whether OLAF's decision qualified as such an act, he also filed under Article 288(2) EC Treaty for damages for injury resulting from OLAF's false accusations. All these actions were dismissed by the CFI in October 2004, Case T-193/04 R, *Tillack v. Commission,* [2004] ECR II-3575, and, following an appeal, by the European Court of Justice ("ECJ") in April 2005, Order in Case C-521/04 P (R), *Tillack v Commission,* [2005] ECR I-3103.

Both Courts considered the action for annulment inadmissible and the action for damages unfounded, for the same reason: the Belgian authorities had conducted the raids at their own discretion. They reasoned that as OLAF's reports were not legally binding on the Belgian authorities, they did not constitute challengeable acts, and as the Belgian authorities had discretion in reacting to them, there was no direct causal link between OLAF's false accusations and the injury resulting from the raid.

This reasoning seems to open up a dangerous gap in effective legal protection, as it meant that OLAF escaped liability for its false accusations, although the Belgian courts had ruled that the national authorities' actions were justified because they had a duty to cooperate with an EU Institution such as OLAF.

ECHR Action Against Belgium

Before the ECHR the Belgian authorities continued to argue that the information they had received was "*precise and serious*," in particular because it "*was provided by OLAF, an office with an excellent reputation engaged in the fight against corruption. As OLAF had carried out an internal investigation before sending the reports, the examining magistrate had no reason to believe that the matters reported were nothing but unsubstantiated facts and allegations*." However, the seven judges of the ECHR (including the Belgian Judge Françoise Tulkens) did not accept these arguments. They unanimously found that Belgium had violated Article 10 of the Convention, and awarded Mr. Tillack €10,000 for non-pecuniary injury and €30,000 for costs and expenses.

The ECHR first recalled the essential role of the free press in a democratic society and the fact that the protection of journalists' sources is a basic condition for press freedom. Interference with this fundamental right can only be justified if it is "*necessary in a democratic society*", and this is only the case when the interference aims to serve a higher social need and is proportional to the pursued legitimate objective, and when the motivation given by the national authorities to justify the measure is relevant and sufficient." ECHR judgment, ¶60.

These conditions were not fulfilled here. As the ECHR observed, it was evident when the searches took place that their purpose was to identify Mr. Tillack's sources in OLAF, for OLAF's benefit. *Id.*, ¶'s 63-64. The Court emphasized that a "*journalist's right not to reveal her or his sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution, even more so in the applicant's case, where he had been under suspicion because of vague, uncorroborated rumors.*" *Id.*, ¶65.

It did not matter that these rumors were spread by OLAF. The ECHR therefore considered that although Belgium's arguments were "*relevant,*" they could not be considered "*sufficient*" to justify the searches.

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Florida Court Quashes Subpoena to Part-time Freelance Reporter in High School Teacher-Student Sex Case

By Corinne R. Simon

A Florida circuit court granted a motion to quash a subpoena that sought a reporter's testimony and notes related to an article on the alleged affair between a local female teacher and her former student.

In what appears to be the first written opinion to hold a part-time, freelance reporter meets the statutory definition of a "professional journalist," Jacksonville Circuit Judge Daniel Wilensky on January 25, 2008 applied the state shield law and quashed the subpoena in the teacher's divorce case. *In Re: The Marriage of Scott Porter, Husband, and Jennifer Porter, Wife*, Case No. 2006-DR-001723, (Fla. Cir. Ct. Jan. 25, 2008) (Wilensky, J.).

Background

Folio Weekly is an alternative newsweekly that publishes investigative articles and commentary about the people, issues, and events in northeast Florida. On November 20, 2007, the newsweekly's cover-story, "School for Scandal: An Alleged Affair Between A Teacher At Fleming Island High School And A Student Yields Big Rumors But Little Punishment," reported on the alleged affair between Jennifer Porter, a local female high-school teacher and her former student.

At the time, Ms. Porter had been engaged for more than a year in a hotly-contested divorce proceeding and custody battle over her children. Her alleged affair with a former student was well-known in the local community. Less than a month later, Ms. Porter issued a subpoena to Susan Clark Armstrong, the author of the article, commanding her to appear for deposition and to bring her notes.

Florida's shield statute that provides "[a] professional journalist [with] a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news." Fla. Stat. § 90.5015. The statute defines a professional journalist as "a person regularly engaged in collecting,…writing,… reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper…or news magazine."

In most cases in Florida that have addressed the shield law, the parties issuing the subpoena have conceded the reporter is a professional journalist for purposes of the statute's protection. Instead, they have focused their arguments on the three-part test by which they can overcome the qualified protection, or on the narrow exception provided by the statute for cases when the reporter is an eyewitness to a crime.

Motion to Quash

However, at the Jacksonville hearing, Ms. Porter's attorney focused on Ms. Armstrong's status as a part-time, freelance reporter in arguing she did not qualify at all for protection under the statute. According to the attorney, Ms. Armstrong could not be "regularly engaged in … reporting…for [her] livelihood" if she only earned a few thousand dollars a year for her work.

In making its decision, the court considered the fact that Ms. Armstrong had worked as a freelance reporter for Folio Weekly for more than a decade, during which time she had authored dozens of investigative and features stories for the newsweekly. Ultimately, the court held Ms. Armstrong was a professional journalist under the statute.

Corinne R. Simon, Holland & Knight, LLP, represented Folio Weekly and Ms. Armstrong in this matter. Barry L. Zisser, Zisser, Robison, Brown, Nowlis & Maciejewski, P.A. and Marla K. Buchanan, Rogers Towers, P.A., represented Ms. Porter in this matter.

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Summary Judgment for the CIA Reversed on JFK Assassination FOIA Request

CIA Directed to Search its Files for Documents

By Kwamina Thomas Williford

The D.C. Circuit reversed a lower court decision denying access to CIA records of President John F. Kennedy's assassination investigation, finding several of the trial judge's reasons insufficient to withhold the documents under the Freedom of Information Act. *Morley v. Central Intelligence Agency*, No. 06-5382 (D.C. Cir. Dec. 7, 2007) (Henderson, Rogers, Tatel, JJ.).

Background

For more than three and a half years, journalist Jefferson Morley has fought for records pertaining to deceased undercover CIA operations officer George Joannides. Joannides allegedly played a role in an anti-Castro organization believed to have had contact with assassin Lee Harvey Oswald in the months prior to the assassination.

many of the CIA's conclusory explanations for the withholding of documents were insufficiently detailed

Critics have charged that the CIA's actions to block access to these documents are a brazen attempt to circumvent the John F. Kennedy Assassination Records Collection Act of 1992 (JFK Act). The JFK Act was supposed to drive the full disclosure on the fiercely debated subject and suppress public doubt and confusion surrounding the assassination. The JFK Act mandates the immediate review, and release, of all government records related to President Kennedy's assassination.

Notwithstanding the JFK Act, the CIA declined to search its operational files and records it already has provided to the National Archive and Records Administration (NARA). The CIA also withheld information about its internal personnel rules and practices on the basis that there was no public interest in their disclosure sufficient to justify the administrative burden of searching for them. The CIA further withheld inter-agency correspondence on the basis that the documents were part of the deliberative process privilege. In addition, the CIA withheld files containing biographical information on the basis that the documents were personal in nature.

The federal district court agreed with the CIA's reasoning for withholding the documents pursuant to FOIA. That court granted the agency's motion for summary judgment. Morely appealed.

D.C. Circuit Court Decision

On appeal, in addition to challenging the district court's reasons under FOIA for withholding documents, Morely further challenged the district court for not holding that the JFK Act also required the disclosure of documents related to JFK's assassination. But the D.C. Circuit agreed with the district court that FOIA was the appropriate statute for determining whether Morely was entitled to documents. The appeals court held, however, that FOIA required the CIA to search its operational files because they were the subject of an inquiry central to a congressional intelligence committee investigation, and therefore the files were not exempt from FOIA disclosure.

Moreover, the appeals court reasserted FOIA's policy of "full agency disclosure," holding that just because copies of records were transferred to the a third party under the JFK Act does not obviate the CIA's duty to produce documents that are responsive to a FOIA request.

The appeals court held further that many of the CIA's conclusory explanations for the withholding of documents were insufficiently detailed, especially with regard to internal personnel rules and biographical information. The appeals court instructed that, on remand, the CIA must show specific facts to warrant withholdings under FOIA.

But the appeals court upheld the sufficiency of the CIA's explanations for withholding other categories of documents related to security clearance procedures, intelligence activities or sources withheld under the National Security Act, and internal agency guidelines and techniques for law enforcement investigations and prosecutions. In these instances, the CIA had provided sufficient detail to demonstrate the particularized harm expected from the production of this information.

Kwamina Thomas Williford is an associate in the D.C. office of Holland & Knight LLP. James H. Lesar represented Jefferson Morley in this matter.

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D.C. Circuit Holds Department of Defense Records Exempt Under FOIA

Advice on Terror Trial Commissions Exempt from Disclosure

In a 2-1 decision, the D.C. Circuit Court held that Department of Defense ("DOD") records concerning the establishment of terrorist trial commissions are exempt under the Freedom of Information Act ("FOIA"). *National Institute of Military Justice v. U.S. Dept. of Defense*, 2008 WL 108734 (D.C. Cir., Jan. 11, 2008) (Henderson, Tatel, Williams, JJ.). The court found that although the records contained advice from nongovernmental lawyers, they were still "intra-agency" documents within the meaning of Exemption 5 of the FOIA.

Background

Soon after the September 11 terrorist attacks, the Bush Administration sought to establish a means of trying suspected terrorists. To this end, President Bush issued a Military Order that established military commissions to try non-citizens that were suspected of terrorism. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

As the DOD promulgated the regulations governing the military commissions, it sought the advice of nongovernmental lawyers on proposed regulations. According to the DOD, these individuals were told that their advice would never be released publicly. Although the DOD specifically sought the advice of certain individuals, none of them received compensation.

In 2003, the National Institute of Military Justice ("NIMJ") made a FOIA request for the documents the DOD had received on the military commissions. The district court found that the records did fall under the FOIA, but that they were exempt under Exemption 5. Exemption 5 covers "matters that are ... inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

D.C. Circuit's Decision

The NIMJ's main argument on appeal was that the records were not intra-agency within the meaning of Exemption 5. Judge Henderson, writing for the majority, analyzed this argument by first examining D.C. Circuit precedent. In *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the court of appeals held that documents from the Department of Justice to senators about judicial nominees fell under Exemption 5. The court found that Exemption 5 applied because one of its purposes is to protect those in an advisory role to an agency though they fall outside of the agency itself.

Judge Henderson next looked to *Formaldehyde Institute v. Department of Health & Human Services*, 889 F.2d 1118 (D.C. Cir. 1989). There the court extended Exemption 5 to nongovernmental parties that had submitted a report for the Centers for Disease Control. In *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), the court held that former Presidents Reagan and Bush were exempt even though they were not "agencies."

Next, Judge Henderson examined Supreme Court precedent to define the boundaries of Exemption 5. In *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), the Supreme Court acknowledged that there existed a "consultant corollary" to Exemption 5. This corollary is justified because documents prepared by those outside the agency are used the same way an internally prepared document would be. Taking together these cases, the majority found that records "submitted by non-agency parties in response to an agency's request for advice – are covered by Exemption 5." *NIMJ*, 2008 WL 108734 at *3.

NIMJ argued that *Klamath* did not support exempting these records from the FOIA for two reasons. First was that the Supreme Court had stressed that the words interagency and intra-agency be given "independent vitality" and thus documents from nongovernmental individuals outside the agency cannot be exempt. Judge Henderson countered that argument by explaining that it was "common sense" to allow documents prepared by disinterested outside parties, where such documents were used as if prepared by the agency's own personnel.

NIMJ's second argument was that *Klamath* had overruled *Ryan* and *Public Citizen*. The court however found that these cases had not been overruled because the focus of the Supreme Court's concern in *Klamath* was only whether consultants were acting out of their own self-interest. In the present case, all parties agreed that the nongovernmental lawyers who submitted records to the DOD were disinterested.

Finally, the court of appeals offered some policy reasons for

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D.C. Circuit Holds Department of Defense Records Exempt Under FOIA

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allowing the records to be exempt. In order for an agency to receive the best possible advice from those outside it, it must be able to keep the information they submit private. Furthermore, although the lawyers were unpaid, the DOD had made a formal solicitation to them, as opposed to a general solicitation in the Federal Register for comments, which would not be exempted.

Dissent

Concerned that the majority was overreaching in finding that the records fell under Exemption 5, Judge Tatel wrote a dissenting opinion. He began by acknowledging that the issue of whether the records were exempt was a close one, but that he felt the records should not be exempt. One reason why was that there was no formal relationship as the lawyers were unpaid and there was no contract between them and the DOD. This, he felt, took away from the view of these nongovernmental parties as consultants to the agency.

Judge Tatel went on to point out that when dealing with FOIA requests, the exemptions should always be narrowly construed. The Supreme Court in *Klamath* had demanded this when it stressed that "independent vitality" must be given to the words interagency and intra-agency. Judge Tatel found that exempting the types of records that the DOD had is contrary to what "intra-agency" means.

Finally, Judge Tatel pointed out that although he felt it was good policy to keep confidential these types of records so that an agency could receive the best possible information, Congress, in writing Exemption 5, had made the decision not to allow these records remain secret.

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City Commissioner's Memorandum Outlining Alleged Public Corruption Is A Public Record

By Sanford L. Bohrer and Scott D. Ponce

A Florida city commissioner who wrote a file memorandum documenting what he was told about alleged public corruption must produce the memorandum to *The Miami Herald*, a Florida appellate court ruled. *Miami Herald Media Company v. Sarnoff*, 2007 WL 4409780 (Fla. 3d DCA Dec. 19, 2007) (Green, Shepard, Cortinas, JJ).

The Third District Court of Appeal in Miami held that the memorandum containing "alleged factual information about possible criminal activity" was a public record, and took the unusual step of ordering immediate production of the document notwithstanding the filing of any motions for rehearing.

Background

A former city official contacted City Commissioner Marc Sarnoff and asked Sarnoff to attend a meeting to discuss the city's affairs. After the meeting, Sarnoff prepared a memorandum summarizing what the former official told him during the meeting. The memorandum contained what the appellate court described as "factual information about possible criminal activity."

The Miami Herald learned of the existence of the memorandum, and requested that Sarnoff produce a copy of the document under Florida's public records law. Sarnoff refused, and filed a declaratory judgment action seeking a determination of whether the memorandum was a public record. *The Herald* simultaneously filed suit under the public records law seeking to compel Sarnoff to produce the memorandum.

The trial judge sided with Sarnoff, finding that Sarnoff wrote the memorandum merely to refresh his memory in the event he was later asked to testify regarding what was discussed during his meeting with the former official.

Memo a Public Record

The appellate court reversed on an expedited basis, finding in a unanimous opinion that the memorandum was a public record because Sarnoff attended the meeting in his official capacity, discussed official city business, and prepared the memorandum to formalize and perpetuate what he learned at the meeting. The appellate court also found that unlike preliminary drafts or notes that are used to subsequently create a final document, the memorandum was the final record and evidence of what Sarnoff learned at the meeting.

Sanford L. Bohrer and Scott D. Ponce of Holland & Knight LLP in Miami represented The Miami Herald before the trial and appellate courts.

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FCC Proposes $1.4 Million Fine Against ABC for *NYPD Blue*

The FCC this week proposed a $1.4 million fine against ABC for a brief nude scene in the popular police drama *NYPD Blue*. Notice of Apparent Liability for Forfeiture, *In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Nos. EB-03-IH-0122 and EB-03-IH-0353 (FCC Jan. 25, 2008).

Background

NYPD Blue was broadcast by ABC from 1993 to 2005. The episode at issue originally aired on February 25, 2003 at 9:00 P.M. In the scene a female police detective is surprised when her boyfriend's young son walks in on her in the shower. In the FCC's clinical description "[o]nly a small portion of the side of one of her breasts is visible. Her pubic area is not visible, but her buttocks are visible from the side." The camera then switches to a young boy, who eventually encounters the naked woman in the bathroom. Both are startled by the encounter and as the boy leaves "the camera shows the woman facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area." The episode drew numerous complaints to the FCC from viewers.

The FCC analyzed the complaints pursuant to its statutory power in 18 U.S.C. § 1464, which "prohibits the broadcast of obscene, indecent, or profane programming." The Commission uses three factors to determine whether a complained of program is indecent: "(1) the explicitness or graphic nature of the material; (2) whether the material dwells on or repeats at length depictions or descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience."

FCC Finding

Despite ABC's argument to the contrary, the FCC found that the buttocks are a sexual organ. Thus the FCC found the program was an explicit and graphic depiction that was "patently offensive as measured by contemporary community standards" because this "sexual organ" was shown in full display on camera several times.

Attempting to show that the community was not offended, ABC pointed out that they had actually received few complaints and the show maintained high ratings. The FCC countered these arguments by first explaining that it had received many complaints and further, that the high number of viewers only increased the likelihood that children were watching the program.

> ***the program was... "patently offensive as measured by contemporary community standards"***

The Commission found that the second factor indicated indecency because the camera pans several times to the woman's buttocks. Thus, the material in question was "dwelled upon and repeated."

Finally, the Commission found that because the camera repeatedly shows the woman naked and from different angles (though never from the front), and shows an encounter between her and a young boy, the scene was "titillating and shocking."

Finding the material to be indecent, the Commission proposed a fine of $27,500 per station that aired the program before 10:00 P.M. and had received complaints. ABC's warning that aired before the show did not mitigate the fine because the FCC felt that viewers are constantly changing the channels and do not necessarily see the warning.

Commissioner Deborah Taylor Tate wrote separately to express her view of the current state of indecency law. She concisely stated that the law allows a broadcaster to air indecent programming only between the hours of 10:00 P.M. and 6:00 A.M. and that this mandate is "neither difficult to understand nor burdensome to implement."

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OPEN Government Act Restores Promise of FOIA

by James C. Ho

Christmas came a few days early this year for advocates of open government when, on December 18, Congress passed the first major reform of the Freedom of Information Act in over a decade. Just hours before the beginning of the new year, the President quietly signed into law the Openness Promotes Effectiveness in our National Government Act. The OPEN Government Act reflects years of perseverance of two longstanding champions of FOIA, Senators Patrick Leahy (D-Vt.) and John Cornyn (R-Tex.).

Background

FOIA offers every American one simple promise: the right to know what your government is doing. Under that law, our government is based on a presumption in favor of disclosure. Openness must sometimes give way to competing values, such as individual privacy or national security. But the people have a fundamental and presumptive right to know, and the burden is on the government to prove otherwise – not the other way around.

As good government advocates across the political spectrum have long realized, however, the promise of FOIA has not always been fulfilled.

When first signed into law by a reluctant President Lyndon Johnson on July 4, 1966, FOIA required all federal agencies, "upon request," to make agency records "promptly available to any person," unless the record is specifically exempted by law. Individuals could seek injunctive relief against recalcitrant agencies in federal district court, where government lawyers would have the burden to justify the decision to withhold documents.

But the law contained noticeable weaknesses. It imposed no consequences if an agency failed to comply with a request for documents; no deadlines on agencies to respond to such requests; and no limits on how much an agency could charge requestors. Congress amended FOIA in 1974 in response to these concerns, and again in 1986 and 1996. But important gaps remain.

Recovery of Attorney Fees

For example, under the 1974 amendments, any person can now seek to recover the costs of attorney fees from the government, in the event that an agency forces the requestor to go to court, and the court subsequently rejects the agency's basis for nondisclosure. This was an important development, because unlike other causes of action, there are no money damages for winning one's FOIA claim – and thus no compensation available to pay for one's attorney fees.

But federal agencies have since uncovered a loophole that allows them to effectively avoid reimbursing citizens for attorney fees at will, notwithstanding the express language and underlying spirit of FOIA. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the U.S. Supreme Court, by a 5-4 vote, announced a new principle of law for determining when a party may recover attorney fees under federal statute.

It is well established that a party may seek recovery under an attorney fee statute when the government loses a lawsuit on the merits or agrees to a settlement enforced by consent decree. Under *Buckhannon*, however, the government does not have to pay attorney fees absent a "judicially sanctioned change in the legal relationship of the parties" (emphasis added).

That means that any government agency can effectively nullify FOIA's attorney fee provision simply by refusing to disclose documents, forcing the requestor to file suit, and then relinquishing the documents moments before a court enters judgment against the agency. An agency may thereby moot the litigation, and avoid payment of fees, even if it is clear that it would not have disclosed the documents but for the lawsuit – because under these circumstances, the requestor will not have received any "judicially sanctioned" form of relief.

The late Chief Justice William Rehnquist himself acknowledged these risks. As he explained in his majority opinion in *Buckhannon*, "fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." As noted, monetary damages are not available under FOIA. Justice Antonin Scalia likewise observed that the *Buckhannon* ruling will "sometimes den[y] fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment."

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Thus, as Senator Cornyn testified before a House committee on May 11, 2005, "the *Buckhannon* ruling effectively taxes all potential FOIA requestors. As a result, many attorneys could stop taking on FOIA clients – and many FOIA requestors could stop making even legitimate and public-minded FOIA requests – rather than pay what one might call the Buckhannon tax."

He supplemented his testimony with various incidents in which courts suspected government agencies of exploiting this loophole but were nevertheless required to deny attorney fees under *Buckhannon*. *See, e.g., Landers v. Department of Air Force*, 257 F. Supp. 2d 1011 (S.D. Ohio 2003).

Yet despite this evidence, Justice Department lawyers vociferously denied the existence of any *Buckhannon* effect throughout negotiations with Capitol Hill. A Department representative even testified against the need for any change in law.

The OPEN Government Act eliminates the *Buckhannon* tax. Under section 4 of the Act, the agency may now be required to pay attorney fees if, by filing suit, the requestor secures a judicial order, an enforceable written agreement or consent decree, or "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."

Agency Deadlines and Penalties

The 1974 amendments also imposed a 10-day deadline (expanded to 20 days in 1996) on agencies to prepare at least an initial response to any request for documents. But the deadlines have always lacked teeth.

In fact, according to a survey by the National Security Archive, 53 of 57 federal agencies reported backlogs in processing. At least 12 agencies admitted holding requests that have been pending for more than 10 years. The oldest unprocessed FOIA request has languished at the State Department since 1987.

When it was first introduced by Senators Cornyn and Leahy in 2005, the OPEN Government Act would have imposed dramatic consequences for agency tardiness. Any agency failing to respond within the 20-day period would be denied the opportunity to assert any exemption under FOIA (except under limited circumstances such as endangerment to national security or disclosure of personal private information protected by the Privacy Act of 1974) unless the agency could demonstrate, by clear and convincing evidence, good cause for failure to comply with the time limits. This enforcement mechanism was inspired by similar provisions under Texas law – and by the desire, in Senator Cornyn's words, to "bring a little Texas sunshine to Washington."

As enacted, the OPEN Government Act imposes more modest sanctions for agency tardiness. The 1974 amendments placed important limits on the fees that agencies may charge requesters for the costs of searching, reviewing, and duplicating documents. Under Section 6 of the OPEN Government Act, agencies are further restricted from imposing such fees if they fail to comply with the statutory deadlines without cause. This legislation marks the first time that agencies will suffer consequences of any kind for failing to meet deadlines under FOIA. (The provision takes effect at the end of 2008.)

Improving FOIA Administration

The Act also provides important updates to various provisions of FOIA, in light of changes in technology and government administration.

In particular, section 3 of the Act codifies a definition of the term "representative of the news media" for purposes of FOIA's privileged fee status for media requestors. The definition recognizes the growing influence of the Internet, and gives bloggers and other Web-based publishers, for the first time, an opportunity to take advantage of FOIA's fee waiver provision.

Section 9 makes clear that FOIA applies even when the government subcontracts recordkeeping functions to private contractors.

Other provisions of the OPEN Government Act are designed to further improve the administration of FOIA in a variety of ways. For example, Section 7 of the Act requires all agencies, by the end of this year, to establish individualized tracking numbers for all FOIA requests that will take longer than 10 days to process, and to put into place a telephone or Internet service to allow citizens to track the status of their requests.

The Act requires each agency to designate a chief FOIA officer, at the Assistant Secretary level or higher, to strengthen political accountability for FOIA compliance –

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thereby codifying into law similar provisions of an executive order issued by President Bush on December 14, 2005.

It also improves agency disclosure requirements regarding compliance with FOIA, including disclosure of the ten oldest active requests pending at each agency and other statistical information concerning agency response time and delay.

Finally, the Act also establishes a new Office of Government Information Services, within the National Archives and Records Administration, to review and improve FOIA compliance policies across the executive branch, and to recommend further changes to Congress and the President. In addition, the new office may serve as a FOIA ombudsman and mediate disputes between requestors and agencies as an alternative to litigation, including the issuance of advisory opinions. (Recent press reports indicate, however, that the Administration may be attempting to locate the new office in the Justice Department, which defends the federal government in FOIA suits, rather than the National Archives.)

Conclusion

The OPEN Government Act offers renewed hope that the spirit of openness that motivated the original drafters of FOIA will, at long last, become a reality. It is also a shining demonstration that bipartisanship can still thrive, even in today's partisan Washington. As Senators Cornyn and Leahy explained in a joint op-ed announcing their effort in March 2005: "Openness in government is not a Republican or a Democratic issue. Any party in power is always reluctant to share information, out of an understandable – albeit ultimately unpersuasive – fear of arming its enemies and critics. Whatever our differences may be on the various policy controversies of the day, we should all agree that those policy differences deserve as full and complete a debate before the American people as possible." There is real cause for hope that the OPEN Government Act will help improve the quality of that debate.

James C. Ho is of counsel and a member of the Media and Entertainment practice group of Gibson, Dunn & Crutcher LLP. He previously served as chief counsel to Senator John Cornyn and played a critical role in drafting the OPEN Government Act.

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