



# LIBELLETTER

Reporting Developments Through July 23, 1999

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September 22-24, 1999  
 Hyatt Regency Crystal City Hotel  
 Arlington, Virginia

Registration Materials Have Been Mailed.

### California Supreme Court: Taping of Non-Confidential Conversation Can Be Intrusion

By Lee Levine and Tom Curley

The California Supreme Court has reversed an appellate court's dismissal of a civil action against ABC brought by a "telepsychic" who was secretly videotaped by a reporter posing as a co-worker.

The unanimous opinion, in *Sanders v. American Broadcasting Companies, Inc.*, 85 Cal. Rptr. 2d 909 (1999), held that the plaintiff could recover damages for invasion of privacy, even though the taping took place in a workplace where the plaintiff could be seen and overheard by co-workers.

The court's decision reverses an earlier victory for ABC. In 1997, a California Court of Appeal threw out a \$1.2 million judgment against ABC and the reporter, ruling that the state recognized no "sub-tort" of "the

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## Taping of Non-Confidential Conversation Can Be Intrusion

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right to be free of photographic invasion” under the circumstances. Because the plaintiff lacked a reasonable expectation of privacy in his workplace interactions with co-workers, the appeals court concluded that he could not properly pursue a claim for intrusion because his otherwise open interactions were recorded by a hidden camera.

### Conversation Not Confidential

At trial, the plaintiff pled a common law intrusion claim and a statutory claim under the state penal code, which generally prohibits the non-consensual recording of a “confidential communication.” The statutory definition of a confidential communication excludes those communications made in circumstances “in which the parties to the communication may reasonably expect that the conversation may be overheard or recorded.” 85 Cal. Rptr. 2d at 912.

The trial court ordered judgment for the defendants on the statutory claim after the jury determined that the conversation between the reporter and the plaintiff was not confidential because the parties reasonably expected that their co-workers may have been able to overhear the exchange. On the common law intrusion claim, however, the jury found for the plaintiffs. The Court of Appeal then held that the intrusion cause of action should be dismissed as well, concluding that the jury’s finding on the statutory claim — that there was no reasonable expectation that the communication would remain confidential — also precluded recovery at common law.

But the California Supreme Court disagreed, concluding that a common law intrusion claim is not automatically foreclosed under such circumstances. The “fact a workplace interaction might be witnessed by others on the premises” does not “necessarily defeat[], for purposes of tort law, any reasonable expectation of privacy the participants have against covert videotaping by a journalist.” *Id.* at 911.

## A Tele-Psychic Boiler Room

The *Sanders* case arose from a 1993 ABC *Prime-Time Live* investigation into the business of providing “psychic readings” over the telephone. To investigate allegations of possible consumer fraud in the industry, an ABC reporter obtained a job as a telepsychic with a California company. Wearing a tiny hidden camera in her hat, the reporter documented the activities of telepsychics in the company’s “telephone boiler room” — the large, open work area where up to 100 employees collectively took calls from the public.

The plaintiff in *Sanders* was filmed and recorded while speaking with the undercover reporter. ABC ultimately broadcast a six-second excerpt of the conversation in a story on the tele-psychic industry. Although all causes of action related to the broadcast itself were dismissed before trial, the plaintiff ultimately prevailed on a claim for intrusion upon seclusion by surreptitious photography. The jury awarded \$335,000 in compensatory and \$300,000 in punitive damages. In addition, the trial judge awarded some \$600,00 in attorney’s fees, an issue not addressed by the California Supreme Court in its June 24 opinion.

### Privacy Need Not Be Absolute

In California, as elsewhere, the intrusion tort has two basic elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to reasonable person. The court’s decision focused on the first element. At issue was whether the surreptitious taping could constitute an intrusion into a private sphere, given that the recording was made at a busy workplace and involved a conversation that could be overheard by co-workers.

The court’s analysis reaches at least two conclusions likely to be significant in the evolution of intrusion claims related to media newsgathering. First, the court explicitly rejected the contention that, as a matter of law, “an expectation of privacy, in order to be reasonable for purposes of the intrusion tort, must be of absolute or complete privacy.” *Id.* at 913. Instead, the court ruled that, in a “workplace to which the general

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## Taping of Non-Confidential Conversation Can Be Intrusion

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public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' co-workers." *Id.* at 911.

Relying on the Ninth Circuit's 1971 decision in *Dietemann v. Time, Inc.*, and on its own decision last year in *Shulman v.*

*Group W. Productions, Inc.*, the court held that "a person may reasonably expect privacy against electronic recording of a communication, even

though he or she had no reasonable expectation as to confidentiality of the communication's contents." *Id.* at 914. Justice Werdegar, author of the court's plurality opinion in *Shulman*, wrote for the unanimous court in *Sanders*. She concluded that "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Id.*

Whether a particular expectation of privacy is reasonable depends not only upon the setting in which the intrusion occurs, but also "must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." *Id.* at 915. Quoting *Dietemann* with obvious approval, the court explained that "[o]ne who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by

photograph or recording, or in our modern world, in full living color and hi-fi to the public at large." *Id.* at 914.

## No Per Se Workplace Privacy

By the same token, the court rejected "a doctrine of *per se* workplace privacy" that would, according to the defendants, "place a dangerous chill on the press' investigation of abusive activities in open work areas, implicating substantial First Amendment concerns." *Id.* at 919. Indeed, the court emphasized that "we do not hold or imply that investigative journalists necessarily commit a tort by secretly recording events and conversations in

offices, stores or other workplaces. Whether a reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding cir-

***She concluded that "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy . . . ."***

umstances." *Id.* at 911.

In this regard, the court explained that, where a "workplace is regularly open to entry or observation by the public or press, or the interaction that was the subject of the alleged intrusion between proprietor (or employee) and customer, any expectation of privacy against press recording is less likely to be deemed reasonable." *Id.* at 919.

## Offensiveness Becomes a Key Issue

Second, the court cautioned that it was not passing judgment upon whether the intrusion in *Sanders* was "highly offensive," only that the jury could conclude that a reasonable expectation of privacy existed in this particular workplace. "The scope of our review in this case does not include any question regarding the offensiveness element of the tort, and we therefore express no view on the offensiveness or inoffensiveness of defendants' conduct." *Id.* at 911.

Relying again on its decision in *Shulman*, the Court

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## Taping of Non-Confidential Conversation Can Be Intrusion

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seemingly encouraged a media entity defending against an intrusion claim to “attempt[] to show, in order to negate the offensiveness element of the intrusion tort, that the claimed intrusion, even if it infringed on a reasonable expectation of privacy was justified by the legitimate motive or gathering the news.” *Id.* at 919. Indeed, such language in both *Shulman* and *Sanders* suggests that, while the court has concluded that an expectation of privacy need not be absolute to be reasonable, plaintiffs may have difficulty establishing the “offensiveness” of surreptitious newsgathering techniques when the “motive” for their use is the reporting of information of important public interest.

While the *Sanders* court does not address the issue, other California courts have taken the position that the issue of “highly offensive” for purposes of the intrusion tort can, and even should, be dealt with initially by the court as a matter of law rather than simply submitted to the jury for determination. See, e.g., *SimTel Communications v. National Broadcasting Company*,

*Wilkins et al. v. National Broadcasting Company, Inc. et al.*, 71 Cal.App.4th 1066, 84 Cal.Rptr.2d 329 (1999), reported on page 5 of this *LDRC LibelLetter*, quoting from *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1483-1484, 232 Cal.Rptr.668, 678: “While what is ‘highly offensive to a reasonable person’ suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of ‘offensiveness’ which must be made by the court in discerning the existence of a cause of action for intrusion.”

The court also took pains in *Sanders* to explain that it was not adjudicating any “possible First Amendment defenses” that might be available, since “no constitutional issue was decided by the lower courts or presented here for our review.” *Id.* at 919.

*Sanders v. American Broadcasting Companies, Inc.* is reported at 85 Cal. Rptr. 2d 909, 978 P.2d 67, 99 Cal. Daily Op. Serv. 5020, and 1999 Daily Journal D.A.R. 6479.

*Lee Levine is a partner and Tom Curley is a summer associate at Levine Sullivan & Koch, L.L.P. The firm represented several media entities as amici curiae in the Sanders case.*

## UPDATE

### Ninth Circuit Affirms ABC Not Responsible for Tele-psyhic's Death

On June 8, 1999, the Ninth Circuit Court of Appeals affirmed the Central District of California's grant of summary judgment for ABC in another of the several suits arising out of an ABC *PrimeTime Live* hidden camera investigation of a tele-psyhic counseling service. *Kersis v. American Broadcasting Company*, No. CV-95-00848-JMJ (9th Cir. 1999).

The wrongful death suit, which was brought by the parents of Naras Kersis, a.k.a. Paul Highland, alleged that the ABC *PrimeTime Live* report caused Kersis' relapse into drinking and subsequent death, just two days before a California state jury completed its deliberations in his suit against the network. See *LDRC LibelLetter*, January 1997 at 5, June 1998 at 21. The substance of the suit was that ABC “caused Highland's death because it

surreptitiously videotaped him at work and then showed the tapes, which put him in a bad light.” *Slip op.* at 2.

The Ninth Circuit based its holding on the fact that the Kersises' failed to sufficiently draw a connection between ABC's actions and Highland's death. No evidence was produced “to show why Highland did whatever he did following the verdict he obtained against ABC, whether anything he did led to his death, or, for that matter, exactly what he died of.” *Slip op.* at 3.

When previously before the Ninth Circuit, the Kersises had apparently promised that they would produce something beyond the “bare assertions” in their complaint. As the three-judge panel wrote, however, “no fait nouveau has appeared.”

## NBC Not Liable for Recording at Outdoor Restaurant Says California Court

By Anne Egerton

A California appellate court has affirmed summary judgment for NBC in a "hidden camera" lawsuit involving claims of invasion of privacy, fraud, and illegal recording. *Wilkins et al. v. National Broadcasting Company, Inc. et al.*, 71 Cal.App.4th 1066, 84 Cal.Rptr.2d 329 (1999). The plaintiffs in *Wilkins* — represented by the same attorney who represents the plaintiff in *Sanders v. ABC*, Neville Johnson — have petitioned the California Supreme Court for review of the decision.

### "Hardcore Hustle"

The case arose from a 1994 three-part series on the NBC News program *Dateline NBC* concerning the "pay-per-call" industry. The first part of the series, entitled "Hardcore Hustle," reported on the then-growing practice of charging for 900 line-type services — sex lines, psychic lines, and the like — by using 800 numbers, which many people believed to be "toll-free."

In the course of NBC's investigation for the report, two *Dateline* producers responded to a "business opportunities" advertisement placed in *USA Today* by SimTel Communications, a company that leased and programmed 800 and 900 lines and sold them to investors. Posing as potential investors, the producers called and asked for information about SimTel's products. In a subsequent conversation, one of the producers told SimTel salesman Tom Scott that she was coming to California, and they agreed to meet to discuss SimTel's business.

The two *Dateline* producers met Scott for lunch on the outside patio of a Malibu restaurant. Scott brought with him to the lunch his boss, SimTel's sales manager, Steve Wilkins. The *Dateline* producers brought two people with them to the lunch. Neither Wilkins nor Scott asked who the two strangers were, what they did for a living, or whether they were interested in purchasing SimTel's products.

At the lunch, Wilkins explained how SimTel's 800 and 900 lines worked. Acknowledging that the 800 "entertainment lines" business relied on a loophole in the federal statute governing 900 numbers. Wilkins said, "There's always a little window of opportunity to, to milk something and then go on to the next thing, you know?" The *Dateline* producers videotaped the lunch meeting with hidden cameras. *Dateline* then used brief excerpts of the videotape in its "Hardcore Hustle" report.

### A Newsgathering Suit

In August 1995, SimTel, Wilkins, and Scott filed suit in Los Angeles Superior Court against NBC, *Dateline* anchor Jane Pauley, correspondent Lea Thompson, the two producers, NBC's owned-and-operated Los Angeles television station, and the restaurant where the videotaping had taken place. The plaintiffs alleged numerous claims, including common law intrusion, violation of California's "unlawful recording" statute (Penal Code section 632), fraud, defamation, false light, public disclosure of private facts, and intentional and negligent infliction of emotional distress.

SimTel dropped out of the case after several months, dismissing all of its claims with prejudice. Wilkins and Scott proceeded with the action, although they voluntarily dismissed all of their claims based on the content of the broadcast itself (including defamation and false light) except for one — public disclosure of private facts — apparently in an effort (unsuccessful, as it turned out) to block discovery into SimTel's business practices.

At the conclusion of discovery, the NBC defendants moved for summary judgment on all of Wilkins' and Scott's claims. Wilkins and Scott filed a cross-motion for summary judgment on their fraud claim. The court granted NBC's motion and denied the plaintiffs' cross-motion. The court also assessed

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## NBC Not Liable for Recording

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monetary discovery sanctions against Wilkins and Scott and their attorney for their refusal to answer questions at their depositions about SimTel's business methods.

### **No Intrusion, No Fraud**

Wilkins and Scott appealed. In a decision issued April 30, 1999, the California Court of Appeal unanimously affirmed the judgment. The court held that Wilkins and Scott could not recover for intrusion, because the video and audiotaping had taken place at a business meeting with four strangers in a crowded public place. The court noted that Wilkins had continued his business pitch while waiters stood at the table, and that Wilkins and Scott had admitted at their depositions that they had given the same information about SimTel's business to hundreds of other people. Citing *Dietemann, Miller v. NBC*, and the California Supreme Court's 1998 decision in *Shulman v. Group W Productions*, the court concluded that "[t]here was no intrusion into a private place, conversation or matter." The court also held, as a matter of law, that NBC's conduct was not highly offensive to a reasonable person.

The court also held that Wilkins and Scott could not prove the existence of a "confidential communication," required to establish a violation of the state unlawful recording statute. With respect to the fraud claim, the court in essence accepted, for the purpose of ruling on the motion, the plaintiffs' allegations (which NBC denied) that the producers had used false last names and had pretended to be married. The court held, nevertheless, that Wilkins and Scott could not prove justifiable reliance on any such misrepresentations, because they had admitted at their depositions that they would not have done anything differently had they known the producers' true names and marital status. The court rejected

Wilkins' and Scott's attempt, in declarations filed in opposition to the summary judgment motion, to recant their sworn deposition testimony. Citing *Deteresa v. ABC*, the court also held that there was no relationship between the plaintiffs and the producers sufficient to impose a legal duty on the producers to disclose that they were journalists and that they were videotaping the lunch.

Finally, the court affirmed the judgment for NBC on Wilkins' and Scott's claim for public disclosure of private facts. Essentially assuming for argument's sake that Wilkins' and Scott's names, likenesses, voices, and occupations were private facts, the court held that those facts as well as the broadcast itself were of legitimate public interest:

The broadcast demonstrated that legislators, regulators, and law enforcement persons expressed grave concerns about the 800 number loophole in the statute regulating 900 numbers, and the ability of pay-per-call providers like SimTel to profit from calls made by unsuspecting people believing that they were free.

The court also affirmed the award of discovery sanctions.

In early June, Wilkins and Scott filed a petition for review with the California Supreme Court. NBC filed an answer to the petition on June 23, the day before the California Supreme Court issued its decision in *Sanders v. ABC*. The petition for review in *Wilkins* remains pending.

*Anne Egerton is Senior Vice President of NBC Law Department, Burbank, California.*

## California Appellate Court Reverses Special Motion to Strike Under Anti-SLAPP Statute

In a case arising out of a videotape in which a police officer informs parents of the death of their son, the Court of Appeal for California's Second Appellate District on July 2, in a 2-1 ruling, affirmed in part and reversed in part a trial court's ruling in favor of the media defendants. *Marich v. QRZ Media*, (Cal. Ct. App. July 2, 1999). Plaintiffs were the parents of the young man who died of a drug overdose.

### **Trial Court Found SLAPP**

Defendants had won dismissal from the trial court on a special motion to strike. The statute requires defendants to prove that their activities were in furtherance of their free speech rights in connection with an issue of public interest and that plaintiffs had failed to show a probability of succeeding on their claims of invasion of privacy.

The appellate court agreed that the subject was one of public interest, and affirmed the trial court's finding that plaintiffs had failed to establish a probability of success on the invasion of privacy by disclosure of private facts but the court reversed the motion based on the intrusion claim, holding that the videotape demonstrated a prima facie case of invasion of privacy by intrusion as well as violation of Section 632, the eavesdropping statute.

While the case is at essence a review of a special motion to strike under the anti-SLAPP statute, salient portions of the opinion are devoted to the state of privacy law, reviewing the recent precedents of *Shulman v. Group W Productions*, 18 Cal.4th 200 (1998), *Wilson v. Layne*, 141 F.3d 111, 26 Media L. Rep. 1545 (4th Cir. 1998), cert. granted 67 U.S.L.W. 3321 (U.S. Nov. 9, 1998) (No. 98-83), judg. aff'd., 67 U.S.L.W. 4322, 1999 WL 320817 (U.S. May 24, 1999), and *Sanders v. American Broadcasting Companies, Inc.*, \_\_ Cal.4th \_\_ (June 24, 1999). As the majority opinion indicates, the essence of these cases is that "the news media does

not have unfettered rights to violate the privacy of individuals, even where the investigative story is of some legitimate public interest." *Marich* at 9. It should be noted that this is the first post-*Shulman* opinion to come out of the California courts.

### **"LAPD: Life on the Beat"**

The case arose out of the airing of a segment entitled "Final Act" on the television show "LAPD: Life on the Beat." The segment, which was approximately four minutes long, depicted members of the Los Angeles Police Department responding to a call from the Fire Department relating to a death investigation. Arriving at an apartment house, the police and the video crew enter the apartment where lay the body of Michael Marich. While the body of the deceased can be seen, the crew obscure the head of the deceased and any other identifying information.

The viewer is told that there is drug paraphernalia in the apartment and the manager indicates that the apartment had been noisy for the past three nights. The police, concluding that the deceased was an actor based upon a job application that they found in the apartment, speculate that Marich's death may have been accidental.

In the same segment, the police telephone Marich's parents. An officer speaks to the parents (although he does not identify them or their son by name) and explains that their son is dead of an apparent drug overdose. The parents' responses, while unintelligible, according to the majority opinion, "clearly register shock and anguish." *Marich* at 4.

The parents filed suit against the three media organizations responsible for the show: QRZ Media, Inc., MGM/UA Telecommunications, Inc. and Metro-Goldwyn-Mayer, Inc., alleging invasion of privacy by intrusion, invasion of privacy by disclosure of private facts, intentional infliction of emotional distress, and illegal eavesdropping and record-

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## California Court Reverses Motion to Strike

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ing of a telephone conversation. The defendants demurred and filed a special motion to strike under California's anti-SLAPP statute, Code of Civil Procedure § 425.16.

### *California's anti-SLAPP Statute*

Under California's anti-SLAPP statute, a court employs a two-step approach when ruling on a special motion to strike. The trial court must first "determine if the defense has met its burden of showing that the plaintiff's lawsuit arises out of the defendant's constitutionally protected actions." *Marich* at 3. If the defense meets this burden, the burden shifts to the plaintiff to establish "a probability that the plaintiff will prevail on the claim." *Id.*

In *Marich*, the defendants argued that the video tape segment qualified under subsection (e)(2) of § 425.16 as an "official proceeding" and was therefore entitled to protection as an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." The defendants also argued that the "consequences of drug abuse and the duties of law enforcement" were issues of "public interest" under subsection (e)(4). Ordinarily, a plaintiff would offer a declaration or affidavit to meet the burden of showing a probability that he or she would prevail. Because the plaintiffs did not do so in *Marich*, the only evidence before the court was the videotape itself. The trial court, after viewing the videotape, ruled,

"I couldn't hear one word or discern one word of the people at the other end of the line who may be the parents. . . . [T]his court makes a finding that nothing can be understood to have been overheard in the published [telephone] conversation. . . ."

*Marich* at 5.

## *Intrusion and Eavesdropping*

Citing *Shulman*, *Sanders*, and *Wilson*, the appellate court reviewed the plaintiffs' claims of publication of private facts, intrusion and violation of Section 632, California's wiretap statute, noting initially that Michael Marich's death by potential drug overdose was newsworthy for purposes of the anti-SLAPP statute.

Defendants argued that there could be no expectation of privacy in a telephone call from a police officer acting on official business. The appellate court agreed but distinguished that scenario from one in which the telephone call was recorded for later broadcast on a television program.

"The fact that the actual words spoken by the parents may not be discerned does not preclude the viewer from recognizing the anguish in response to the phone call. We conclude that the videotape demonstrates a prima facie case of invasion of privacy by intrusion as well as violation of section 632."

*Marich* at 10.

The ruling on the motion to strike was therefore reversed on the issues of intrusion and violation of Section 632.

### *Private Facts*

While agreeing that the story was newsworthy, the court found this issue more problematic. The court acknowledged that, under *Shulman*, "an invasion of privacy claim does not depend on whether the plaintiff's identity is known to all viewers. A claim can be stated if the publication contains sufficient factual details that friends of members of the family could identify the plaintiff." *Marich* at 11.

What proved fatal to plaintiffs' claims--because the court believed that prior knowledge of at least some of the facts would have been required to connect the telephone call to plaintiffs-- is that they failed to file an affidavit or declaration indicating what private facts may have been disclosed or show

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### California Court Reverses Motion to Strike

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that someone had been able to identify the plaintiffs from the videotape.

“To the extent that plaintiff’s cause of action is based upon the claim that private facts about them were disclosed, such as their reactions to their son’s death, the theory fails because the television program contains no specific information identifying them.”

It was plaintiffs’ burden to come forward with information showing that they were identifiable from the videotape and this they failed to do. The appellate court therefore affirmed the trial court’s finding that plaintiffs had failed to establish a probability of succeeding on this aspect of their claim.

#### ***Intentional Infliction of Emotional Distress***

Plaintiffs’ claim here was based on allegations that the videotape was created without their consent and broadcast “over their express objection, causing them to suffer severe emotional distress.” *Marich* at 11. Once again, the plaintiffs failed to supply the necessary evidence, either that they had ever objected to the broadcast or that the broadcast was directed at them. They also provided no evidence that they had suffered severe emotional distress.

The judgment on the motion to strike was reversed and remanded to the trial court.

#### ***The Dissent***

Justice Charles Vogel dissented on the issue of whether plaintiffs had established a probability of success on their intrusion and eavesdropping claims, disagreeing with the majority’s statement that “the videotape shows that plaintiffs’ responses ‘clearly register shock and anguish.’” *Marich* at 12.

For me, the fact that the videotape captures none of plaintiffs’ words, remarks, expressions, or any tonal indication of their emo-

tional reaction is dispositive to the issues raised on this appeal. That fact compels the conclusion that given the limited evidentiary record presented to the trial court, plaintiffs failed to establish a probability they would succeed on either their claim of intrusion into seclusion or violation of Penal Code section 632.

*Id.*

The dissent also found *Wilson v. Layne* to be irrelevant for the court’s purposes. In that case, as the dissent correctly noted, the central question was not the liability of the media for its actions but rather whether law enforcement officials could be held liable for alleged Fourth Amendment violations because the officials allowed the media to accompany them on the execution of an arrest warrant. Under *Miller v. National Broadcasting Co.*, 187 Cal.App.3d 1463 (1986), the court noted, the media are already liable for trespass and invasion of privacy based upon the unauthorized entry into a private individual’s home.

A petition for rehearing was filed on July 16. The court has until August 1 to rule on the petition. If no ruling is issued, the petition is deemed denied.

<p>If you have not yet received your registration materials for the</p>
<p><b>1999 NAA/NAB/LDRC Libel Conference</b></p>
<p>you can find them on the NAA website — <a href="http://www.naa.org">www.naa.org</a> or contact LDRC by phone — at 212.889.2306 or by email — at <a href="mailto:ldrc@ldrc.com">ldrc@ldrc.com</a></p>

## "Incidental Use" by Media to Promote News

By Bob LoBue

In *Linder v. Capital Cities ABC, Inc.*, No. A-6270-97T3 (App. Div. June 29, 1999), New Jersey's Appellate Division recently reaffirmed that the news media defense of "incidental use" in misappropriation-of-likeness cases is alive and well in New Jersey, notwithstanding a 1986 federal district court precedent that some plaintiffs had perceived as limiting the defense. The Appellate Division rejected an argument -- based almost entirely on the federal decision, *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904 (D.N.J. 1986) -- that because the plaintiff's image appeared only in a promotional spot for an upcoming news report on WABC-TV, and not in the news report itself, the station could be held liable for misappropriation of plaintiff's image for advertising and promotional purposes. The Appellate Division's decision should give comfort to media outlets in New Jersey that use photographs or video footage of people in public places as generic illustrations of news reports.

### Photo Not in Newscast

The *Linder* case concerned WABC-TV's use of video footage taken in a public place of the plaintiff, Kathleen Linder, to illustrate a promotional spot or "teaser" for an upcoming news report on new medical research regarding the dangers of smoking in the presence of infants. Although the footage of Linder showed her smoking in the presence of an infant, and therefore accurately illustrated the news report, the report was not specifically about Linder, nor was her image used as a part of the news report itself.

Both in the trial court and the Appellate Division, Linder acknowledged that if her image were used as part of the news report, she would have no cause of action for misappropriation. Nevertheless, relying on the *Tellado* case, Linder asserted that WABC-TV's use of her image in the teaser was unprotected because the image did not also appear in the

body of the news report. In *Tellado*, the court held that the plaintiff stated a claim for misappropriation against Time-Life based on its use of a photograph of the plaintiff, taken while he was a soldier in Vietnam, in a marketing flyer for a book on the history of the Vietnam conflict. The *Tellado* court based its decision, at least in part, on the fact that the photograph did not appear in the book itself.

The Appellate Division in *Linder* affirmed the trial court's dismissal of Linder's misappropriation claim on summary judgment. The court held that the incidental use doctrine does not require that the image used promotionally also appear in the body of the news report. The Court distinguished *Tellado* in part on the ground that *Tellado* dealt with a still picture in a print medium that "could be viewed at length" whereas a television teaser is a transient image. More importantly, the Court concluded that the purpose of WABC-TV's teaser was to inform viewers about a news report and therefore, as a matter of law, it was not for a predominantly commercial purpose and could not support a misappropriation claim.

### Cases in Accord

The decision in *Linder* is in accord with decisions of other courts, including the Second Circuit's decision in *Groden v. Random House, Inc.*, 61 F.3d 1045 (2d Cir. 1995) and the Oregon Supreme Court's decision in *Anderson v. Fisher Broad. Co.*, 712 P.2d 803 (Or. 1986). Those decisions extend the incidental use doctrine to instances where the media's promotional use of a person's image is not taken directly from the protected publication or broadcast but is a fair indication of its content.

*WABC-TV was represented by Bob LoBue, Doug Widmann, and Sheryl Stoessel of Patterson, Belknap, Webb & Tyler.*

## Indiana Reaffirms Actual Malice Required in Private Figure Cases of Public Concern

By James P. Fenton and Cathleen M. Shrader

In a much awaited ruling, the Indiana Supreme Court held that under the *Indiana* Constitution a private figure plaintiff must show actual malice where the alleged libel concerns a matter of public interest. In its first opinion on the subject, an Indiana Supreme Court majority warmly embraced a line of cases in the lower courts arising out of a twenty-five year old Indiana Court of Appeals decision adopting the *Rosenbloom v.*

*Metromedia*, 403 U.S. 29 (1971), standard in private figure cases. This reaffirms Indiana's place among an extremely tiny minority of

states (the others being Alaska, Colorado, and New Jersey) which have rejected the negligence standard in such cases and which require plaintiffs to show actual malice. See *Journal-Gazette Co., Inc. v. Bandido's, Inc.*, No., 57S03-9709-CV-495, 1999 WL 418697 (Ind. June 23, 1999).

For the Fort Wayne *Journal-Gazette*, it means the reversal of a \$985,000 libel verdict based upon a copy editor's imprecise word choice in a sub-headline in which the newspaper stated that a restaurant had been ordered closed because health investigators found "rats," whereas the Board of Health and the text of the news article itself reported more generically that "evidence of rodents" was found. The Indiana Supreme Court also affirmed that where such a poor choice of words is not shown to be anything more than inadvertent or careless, liability cannot follow.

### An 11-year Saga

This eleven-year saga began in 1988 when a re-

porter for the *Journal-Gazette* was assigned to cover the closing of a popular Mexican-style restaurant by the local Board of Health. Among the various health code violations the board noted was "evidence of rodents." After gathering the facts, the reporter wrote a story about the closing, duly noting in the body of the story that health inspectors had found "evidence of rodents."

From the hands of the reporter, the story went to a copy editor. After reading and editing the story, the

copy editor wrote a sub-headline to run under the main headline stating that the restaurant had been closed. Instead of using the term "rodents" or

"evidence of rodents," the subheadline stated that "rats" were found in the restaurant. From the copy editor's desk, the story went to her supervisor, then to the managing editor, and finally to the page proof editor. None noticed that the word "rats" did not appear in the story itself.

Hours after publication, lawyers for both sides met in an attempt to remedy the inaccuracy. On the next day, a story ran apologizing for the error in the sub-headline. Although counsel for Bandido's expressed satisfaction with the retraction, after hiring new attorneys, Bandido's demanded a headline retraction. When the newspaper refused, litigation was initiated.

### Indiana's Aafco Standard

In 1990, a court granted summary judgment for the paper finding that Bandido's had not presented sufficient evidence of actual malice. At that stage,

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***[I]mposing legal liability only when the news media engage in conduct with actual malice in matters of public or general concern protects the rights and values embodied in the First Amendment to the fullest extent.***

## Indiana Reaffirms Actual Malice Required

(Continued from page 11)

both the trial court and the appeals court (which found there were facts in dispute, reversed and sent it back for trial) assumed that Bandido's was a private figure, and held, based on *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580 (Ind. Ct. App. 1974), that since the matter involved was one of public interest, the restaurant was required to show actual malice.

In *Aafco*, a divided three-judge panel adopted the private figure/public concern test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), in an opinion issued six months after the U.S. Supreme Court issued its opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz* effectively overruled *Rosenbloom* and held that the First Amendment did not require a private individual to show actual malice, even on a matter of public concern, but left it to each individual state to decide which test to apply in such a case.

After the matter was remanded to the trial court, and in the course of a two-week trial, the jury was instructed by the trial court that Bandido's was a limited purpose public figure, and Bandido's did not object to that instruction. After hearing the evidence, a jury awarded the restaurant \$985,000, finding that the newspaper had published the inaccurate word "rats" in the sub-headline with actual malice.

On appeal, the paper argued that as a public figure Bandido's was required to show actual malice, but that even if Bandido's was a private individual (as Bandido's claimed on appeal), the same result would follow under *Aafco*. The Court of Appeals agreed. Ten months later, the Indiana Supreme Court decided to hear the case, casting doubt on whether that court would adopt or overrule *Aafco*.

### *Aafco* Reaffirmed

On June 23, 1999, any doubts as to the vitality of *Aafco* were put to rest. Finding no pressing need to change the law enunciated by the lower courts, the Indiana Supreme Court, in a majority opinion authored by Justice Frank Sullivan, confirmed that *Aafco* is the

law of Indiana. The controversial nature of the ruling is evident not only in the narrow 3-2 majority which this point commanded, but also in Chief Justice Randall Shepard's scathing dissent in which he predicts that most injured plaintiffs attempting to seek redress for libel in Indiana will be "toast." *Bandido's, supra*, at \*25.

The majority opinion justified its endorsement of *Aafco* as consistent with both a strong commitment to the protection of speech and expression and the notion that liability should not depend on the status of the plaintiff. This conclusion followed from the belief that both private and public figures are equally interested in protecting their reputations, that there is little practical disparity in each group's access to the media, and the notion that citizens, public or private, assume the risk of public comment when they become involved in matters of public concern.

Although it adopted a rule which is very protective of the Indiana press, the majority had strong words for those protected by the ruling:

[We] think that the news media bear a heavy moral responsibility not to invade the private lives of private citizens with respect to their private affairs. And when they do, they not only damage their own reputations, but undermine support for their First Amendment protections. But moral responsibility is not in this context identical to legal liability. In our view, imposing legal liability only when the news media engage in conduct with actual malice in matters of public or general concern protects the rights and values embodied in the First Amendment to the fullest extent.

*Bandido's, supra*, at \*5.

### "Fair Index" Rule for Headlines

In addressing the issue of whether the paper published the word "rats" with actual malice, the Indiana Supreme Court adopted another minority rule in construing headlines with the articles they describe. Following at least four other states, Indiana adopted the

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## Indiana Reaffirms Actual Malice Required

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“fair index” rule which insulates from liability an allegedly defamatory headline if it fairly indicates the substance of an accurate article to which it refers. Although Justice Boehm believed that the word “rats” was a fair index corresponding to “evidence of rodents,” the other members of the majority disagreed, finding that the headline implied that the restaurant was closed solely because the board discovered rats, which would not be a fair index of the article.

Even though the majority concluded that rats was not a “fair index” of a story the court did conclude that the use of the word “rats” was substantially true. In a graphic discussion of rodents (the “order rodentia”), namely rats, mice, and their other gnawing and (sometimes) disease carrying brethren, the court took note of the fact that the words rat and rodent are often used interchangeably.

Citing cases which have held that the choice of arguably interchangeable words such as “rape” for “second degree assault” and “swindle” for “defraud,” cannot give rise to legal liability, the court found that “rodent” and “rat are used interchangeably and that had the paper reported “evidence of rodents” in the headline instead of “rats,” the “sting” would have been the same: “Either way, readers would have perceived Bandido’s as an unsanitary, dirty restaurant.” *Id.* at \*12.

Despite its finding that the verdict in favor of Bandido’s could not stand given the substantial truth of the publication, the majority did not rest its decision on that basis, but went on to examine whether the conduct of the *Journal-Gazette* constituted reckless disregard for the truth. After analyzing the facts which Bandido’s claimed supported a finding of actual malice, the majority found none of them persuasive, despite the dissent’s characterization of them as “smoking guns.” The fact that the paper “may have exhibited an ‘irresponsible and uncaring attitude’ in meeting its goal of accuracy or that there may have been serious quality concerns could not, standing alone, support a finding of actual malice, reinforcing the rule that the mere fact that a falsehood is published cannot by itself

establish actual malice.

Similarly, the fact that the paper may have been aware that the copy editor in question had written inaccurate headlines in the past or may have been warned that restaurant inspection reports could be improperly interpreted this was held to be insufficient evidence of actual malice, since such evidence revealed nothing as to the paper’s state of mind at the time the article was published.

### *The Dissents*

In dissent, Chief Justice Shepard decried the majority’s decision as one in which “pretty much every citizen loses” and described the decision to treat public and private citizens equally as hardly “a matter of state pride.” *Bandido’s, supra*, at \*24. The Chief Justice also cited Justice Sullivan’s examples of actionable defamation (fabricated or imaginary statements) as compelling reasons why the majority rule would effectively deny relief to a legitimately injured plaintiffs, since such instances are not common.

Justice Brent Dickson’s lengthy dissent analyzed the constitutional arguments for and against adopting the *Aafco* standard. Citing authorities from the Magna Carta to John Marshall, he concluded that although the Indiana Constitution recognizes and protects the freedom of the press, a private individual’s interest in protecting his or her reputation, an interest specifically protected by the Indiana Constitution, demands that nothing more than the negligence standard be imposed in such cases.

Of the four states that uniformly follow the *Rosenbloom* standard, three of those states have within the last five years reaffirmed their adherence to this minority view which is highly protective of the press. This may give some comfort to counsel in other states who may wish to urge their own state supreme courts to hold that the *Rosenbloom* standard should govern as a matter of state constitutional law and public policy.

*James P. Fenton of Elibacher Scott, P.C. and Cathleen M. Shrader along with John D. Walda of Barrett & McNagny, both in Indiana, represented the Journal-Gazette Company, Inc in this matter.*

## Early Summary Judgment Can Work in Libel

By Jill M. Vollman

Recently, two media entities in Ohio escaped lengthy and expensive discovery and trial by obtaining early summary judgment dismissals in libel cases. The strategy worked even though the media had not gotten it quite right in either case and both reports were about serious charges.

In May, an Ohio trial court dismissed a defamation claim filed against a Toledo television station before the plaintiff even was permitted to take a deposition or conduct any other discovery. In *Saferin v. Malrite Communications Group, Inc.*, Case No. CI0199802404 (Lucas Cty), the plaintiff alleged that the station falsely accused him of criminal conduct based upon charges that were brought against his company for insurance fraud.

The station filed its motion for summary judgment immediately after being served with Saferin's complaint and asked the court to dismiss the defamation claim based upon the substantial truth of the broadcast. Attached to the motion were supporting affidavits from the station's news director and reporter of the story testifying that no malice or ill will was involved and that the reporter believed the report to be accurate based upon what he understood from Saferin's court appearance when he entered the plea (Saferin submitted the transcript of that court proceeding to the court).

Saferin did petition the court for extra time to respond to the motion so that he could conduct depositions and other discovery of the station and its employees. The station, however, successfully argued that any such discovery was unnecessary and an infringement on its First Amendment rights. The court agreed that no discovery was warranted until after it had decided whether the case had any merit.

Similarly, summary judgment was entered in favor of CM Media on the basis of the fair report privilege, after only minimal paper discovery. In *Faour v. CM Media, Inc.*, Case No. 97CVC-12-11088 (Franklin Cty.), suit was filed in Columbus, Ohio based upon a newspaper article reporting on a city council meeting and council letter regarding the revocation of the liquor licenses of several local establishments for allegedly selling alcohol to minors and other violations.

Plaintiff asserted that city council, and subsequently the newspaper, falsely accused him, because his business did not serve alcohol and was not involved in the unseemly conduct described in the article. The newspaper argued that the article was privileged because it was an accurate report of public record information, and no evidence of actual malice was present to defeat the privilege.

The court entered a summary judgment dismissal only a month after CM Media filed its motion, which contained discovery responses, copies of the subject article and public records upon which the article was based, and the affidavits of the publisher and reporter, again resulting in significant savings of litigation costs.

While this strategy is not always possible, as these two cases demonstrate, its successful use can halt discovery or keep it to a minimum, and keep the issues focused on the law, instead of getting caught up in irrelevant factual disputes.

*The media defendants in these two cases were represented by Susan Grogan Faller and Jill Meyer Vollman of Frost & Jacobs LLP.*

## St. Martin's Press Win in New Hampshire A Jury Gives Sweep to Book Publisher and Author

By William Chapman and James P. Bassett

On June 15, 1999, after deliberating almost nine hours, the jury in *Robert K. Gray v. St. Martin's Press, Incorporated and Susan B. Trento* returned verdicts in favor of the defendants after a 10-day trial in the United States District Court for the District of New Hampshire. The jury decided that the plaintiff had not been defamed by four statements in *The Power House: Robert Keith Gray and the Selling of Access and Influence in Washington*, a critical portrayal of the plaintiff's career as a highly prominent and influential lobbyist written by Susan Trento and published by St. Martin's Press.

The case was filed in June 1995 and challenged eight statements in the 400-page book. It included counts for defamation, false light invasion of privacy, and intentional infliction of emotional distress. The court dismissed four statements on summary judgment and also ruled that the plaintiff was a limited purpose public figure. The case went to trial only on the defamation count and over the following statements:

- "As others were cleaning out their desks, looking for jobs, briefing their successors, and preparing to leave the White House, Gray was busy dictating his memoirs to his White House secretary."
- "... at Gray and Company he [Mr. Gray] stage-managed impressive-sounding calls. A reporter would walk in and he would instruct his executive assistant to come in and announce that there was a call from the White House. Totally fabricated. Absolutely. They would come in and they would say, 'Mr. Gray, Mr. Meese is on the phone,' and he would pick up a dead line or a line that was set up by the executive assistant, carry on a conversation of four or five short rapid sentences as though he was

in constant communication and hang up. And then, of course, the reporters, dazzled, would then report that a White House phone call came in,' explained one Gray and Company executive."

- "One Gray and Company executive in a position to know said that Gray and Company was making payments to Zeller."
- "And the Gray and Company employees in Spain were to be convinced that the office was used as a money laundering operation for the Reagan administration's private intelligence network."

### *The In Limine Motion*

On the eve of trial, the court ruled that Virginia law governed all the substantive issues in the case, including damages. At the time of publication of *The Power House* in 1992 the plaintiff was a long-time resident of Virginia as was Ms. Trento.

The court also granted a defense motion *in limine* that the plaintiff could not recover some \$400,000 he allegedly incurred to fund losses of a lobbying and public relations company he started after publication of the book. The decision was based largely on the Virginia rule that a new business may not recover lost profits because they are too speculative.

The court, however, refused to grant a defense motion *in limine* to preclude the plaintiff from recovering some \$8 million of lost compensation following his resignation from Hill & Knowlton. The defendants argued that there was no evidence the four statements in suit had caused the plaintiff's resignation because he admitted at deposition he had voluntarily resigned. The court left it to the jury to decide whether the four statements had, in effect, created a situation where the plaintiff had no choice but to re-

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## St. Martin's Press Win

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sign.

### *Malice: Sources and a Pre-Pub Letter*

The plaintiff's case against Ms. Trento was that she lacked sources for the statements in suit, that some of her sources were so hostile toward the plaintiff that she could not have believed them, and that her sources were not knowledgeable as to the statements in suit and that she could not have relied on them.

As against St. Martin's Press, the plaintiff focused on a confidential book proposal Ms. Trento had submitted several years before publication of the book. The plaintiff had obtained a copy of the proposal from another publisher, and his then-attorney had written to St. Martin's asserting that 20 statements, among others, in the proposal were false and defamatory. St. Martin's General Counsel had responded that he had reviewed the 20 statements with Ms. Trento and concluded that the proposal was "well-sourced."

Nevertheless, plaintiff argued, based on his attorney's pre-publication allegations of inaccuracies in the book proposal, that St. Martin's knew that the proposal was riddled with errors and gratuitous defamatory statements and, thus, that Ms. Trento was a corrupt and irresponsible journalist who could not undertake the project.

### *Defense Theme*

The defense theme was that the plaintiff's career as a Washington lobbyist epitomized the political and cultural changes that had taken place in Washington over the plaintiff's four-decade career. As Ms. Trento stated in the introduction to *The Power House* and the defendants noted in their opening statement:

This book is about what Washington has become. Why does nothing get done in Washington? Why does government seem not to under-

stand or care about the problems of the citizenry?

\* \* \*

Today many Americans feel removed from their government. People feel that their governmental institutions no longer understand their problems, and even if they did, are powerless to solve them.

\* \* \*

Gray's story demonstrates how corporate, government, international and private powers can be marshalled for their own purposes and profit, often at the expense of the public good.

### *Testimonial Rulings*

The plaintiff's trial strategy, in part, was striking. He did not call Ms. Trento or any editor or other employee of St. Martin's to try to prove actual malice. Rather, relying on *Fed. R. Civ. P. 32*, he read portions of their discovery depositions. Although the defendants had objected on the ground that the witnesses all were available to testify live, the court read rule 32 as giving the plaintiff the right to read the depositions regardless of the witness' availability.

The court, again over the defendants' objection, also permitted the plaintiff to testify about information Ms. Trento's sources gave her. In discovery, the plaintiff had requested all of the interview transcripts Ms. Trento had relied upon in publishing the four statements in suit. In his direct examination, the plaintiff was permitted to comment on portions of the transcripts that he claimed were at odds with the statements in suit.

Of note, during the defendants' case the court ruled that outside counsel who had vetted the manuscript could not testify about one of the reasons he approved the second statement in suit. When the plaintiff had worked in the Eisenhower Administration, according to his then assistant, he set up a lighting system that he could activate and pretend to take calls from the President. This was reported in the book as an example of the plaintiff's self-promotion.

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### St. Martin's Press Win

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Because of its similarity to the second statement in suit about the plaintiff faking phone calls, counsel had considered it in vetting the second statement. The defense argued, unsuccessfully, that the evidence went to state of mind. But the court, while never fully explaining its reasoning, may have been influenced by *Fed. R. Evid.* 404(b).

Consistent with the trial court's practice, the jury received copies of the charge for reference in its deliberations. The trial judge later told counsel that the jury had interpreted the instructions very literally and had followed them to the "t" in sifting through the evidence on each of the statements.

The jury was given special verdict questions that required it to answer as to each statement *and* each defendant:

- (1) whether the plaintiff had proved by a preponderance of the evidence the elements of publication, falsity, defamatory meaning, and "of and concerning;" and
- (2) whether he had proved actual malice by clear and convincing evidence.

Had the jury answered for either defendant both those questions in the affirmative, it then would have considered the amount of damages the statement had caused. Happily, the jury answered the two questions in the negative as to each statement and each defendant.

*William Chapman and James P. Bassett with Orr & Reno in Concord, New Hampshire represented the the Defendants. in the trial of this matter.*

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### Hearst Wins Pennsylvania Libel/False Light Trial: Jury Finds No Harm From Publication

*Private Figure/Public Concern  
Must Prove Actual Malice*

By Jack M. Stover

On June 23, 1999, a ten-person Federal Court jury returned a defense verdict in favor of The Hearst Corporation as publisher and Robert Trebilcock as writer in an unusually large and complex defamation/false light-invasion of privacy case in the United States District Court for the Middle District of Pennsylvania. Tried before Judge Yvette Kane of the Middle District bench, the case had entered its fourth trial week when the jury determined that the plaintiffs were not harmed by the publication at issue. The court entered a defense verdict.

#### **Background of the Case**

In March 1997, Stephen E. Paul, a neurosurgeon, and Mary Elizabeth Paul, his wife, filed a suit in the Court of Common Pleas of Bradford County, Pennsylvania, which was subsequently removed to the Middle District Court. The suit named The Hearst Corporation, doing business as *Redbook* Magazine, and Robert Trebilcock as Defendants. The plaintiffs alleged causes of action for defamation and false light-invasion of privacy as well as a derivative consortium claim for Mary Paul.

The suit arose out of an article which appeared in the May 1996 edition of *Redbook* titled "BAD MEDICINE: The Doctors Who Could Cost You Your Life." The article discussed in part doctors who encountered serious professional problems during their careers but who continued to practice because of the system which protected these problems from disclosure to the patients. The article primarily focused on a South Carolina woman who

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had received substantial care from such a physician.

The article also contained a sidebar with a headline which read as follows:

Shouldn't someone have known? Despite new safeguards, it can take many years before questionable doctors come before review and, if charges are substantiated, have their licenses revoked or restricted. Is the profession still protecting its own more than its patients? These cases of doctors' wrongdoing, taken from Court records, might make you wonder.

The sidebar contained brief paragraphs about six specific doctors. The paragraph about Stephen Paul contained several sentences which read as follows:

Stephen E. Paul, M.D. When Dr. Paul left Holyoke, Massachusetts, for Georgia in 1987, five malpractice suits were pending against him for botched bone graft-spinal fusions. Five years later, Dr. Paul left Georgia, following suspension of his hospital privileges and allegations of a drinking problem. He adamantly denied the charges, but he entered an alcohol rehabilitation program and today practices in Pennsylvania.

The suit generally alleged that the published information concerning Dr. Paul was false and defamatory and that the article placed Paul in a false light. Plaintiffs presented evidence of alleged special damages in excess of \$2 million, arising out of claims that Dr. Paul lost his neurosurgical position with the Guthrie Clinic in Sayre, Pennsylvania, as a result of the publication of the article and out of an alleged inability to obtain a new position as a result of publication of the article. Plaintiffs also sought substantial but unliquidated amounts for general damages including loss of reputation, emotional distress, humiliation as well as spousal consortium. In addition, plaintiffs sought a punitive damage award.

## Defense of the case

Defendants asserted that plaintiffs could not prove that the statements concerning Dr. Paul in the article or the context in which the article portrayed Dr. Paul were false, that plaintiffs were required to meet the actual malice standard under *New York Times v. Sullivan*, that the publication of the article was protected by the fair report privilege, and that plaintiffs could not prove that they were harmed in any way by the publication of the article.

Defense of the action included an extensive discovery effort in Massachusetts, Georgia, Virginia, Minnesota and Pennsylvania to obtain background information on Stephen Paul, ultimately requiring the scheduling of 63 depositions for production of documents and 65 in-person depositions. Because a substantial amount of information involved treatment of patients and evaluations of patient care undertaken by Dr. Paul, significant peer review issues existed in the case from its inception.

The case was tried in Harrisburg beginning on June 1 and extending through the verdict on June 23, 1999. Testimony from 54 witnesses was presented at trial and 184 exhibits were presented and admitted. A special verdict form was provided to the jury containing seven questions, four relating to liability, one to the fair report privilege, one to causation and one to amount of damages. The jury found in favor of the plaintiffs on the four issues of liability and the issue of abuse of the fair report privilege but found against the plaintiffs with respect to causation.

## Actual Malice Standard Ruled Applicable to Matter of Public Concern

Defendants asserted the applicability of the actual malice standard on two grounds: (1) because the *Redbook* article addressed a matter of public concern under Pennsylvania law and (2) because Dr. Paul was a limited purpose public figure premised on Paul's insertion of himself into a public controversy.

Pennsylvania law includes clear appellate prece-

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## Hearst Corporation Prevails

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dent that a medical practitioner's professional history relating to patient care, malpractice, credentials, licensing and related issues is a matter of public concern. Likewise, Pennsylvania law, following *Gertz v. Robert Welch, Inc.* and its progeny, clearly holds that the actual malice standard applies where the plaintiff is a limited purpose public figure. Pennsylvania law is less defined with respect to an instance involving a matter of public concern where the plaintiff is not a public figure.

In pretrial rulings, Judge Kane determined that, under Pennsylvania law, proof of actual malice by clear and convincing evidence is required where "the plaintiff is a private figure but complains of statements that are a matter of public concern." The court subsequently determined that Dr. Paul was not a limited purpose public figure. The court thus applied the actual malice standard in a case in which the court determined that Dr. Paul was a private figure but also determined that the subject matter of the challenged article was a matter of public concern.

The court also specifically required a showing of actual malice by clear and convincing evidence to prove false light-invasion of privacy and to prove any claim for punitive damages. These pretrial holdings by the court were consistent with prior Pennsylvania precedent.

### ***Fair Report Privilege Ruled Applicable***

Defendants asserted that the fair report privilege under Pennsylvania law protected the publication of the article, particularly as it applied to Dr. Paul. Defendants produced evidence showing that information presented in the article appeared in records relating to court proceedings commenced by Dr. Paul and in certain administrative matters relating to him.

The court accepted the defense argument that the privilege applies where the information in the challenged publication appears in official records, even where the reporter has not examined the official

records. In this regard, the court determined that the ruling of the United States Court of Appeals for the Third Circuit in *Medico v. Time, Inc.*, interpreting Pennsylvania law, was controlling. The court, however, limited its general ruling in one respect: where the information appears in records developed in a court case but not filed with the court, it may not be used for applying the privilege. After ruling that the privilege applied to the case, the court reserved to the jury the issue of whether the information contained in official records was fairly and accurately summarized in the published material.

### ***Evidence Supporting the Jury's Causation Determination***

During trial, the defense presented an extensive compilation of information supporting the defense position that the contested article did not cause any harm to Dr. Paul. This evidence included factual testimony on Dr. Paul's professional career problems, the reasons his last employment was terminated, the number and specifics of malpractice actions which had been brought against him, the content of his file in the National Practitioners' Data Bank, his licensing application, and the lack of meaningful efforts to seek alternative positions.

In addition, the defense presented expert testimony from a physician employment consultant and from a hospital administrator involved extensively with credentialing and privileging of physicians. This testimony was offered to demonstrate to the jury that the article would not impact employment, credentialing or privileging in any future job search by the plaintiff. Finally, the defense presented extensive graphic evidence of prior widely disseminated information concerning Dr. Paul, including an October 5, 1994 article from *The Boston Globe* which featured Dr. Paul.

### ***Peer Review Privilege Overcome***

Because the case involved extensive inquiry into various medical malpractice actions, substance abuse

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## Hearst Corporation Prevails

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allegations, patient complaints and professional evaluations of patient care, questions regarding the applicability of the peer review privilege were unavoidable. Notably, the court required discovery disclosure pursuant to a confidentiality order of normally protected materials and subsequently permitted utilization of the materials at trial, apparently accepting a limitation on the applicability of the privilege under the Pennsylvania Peer Review Protection Act that materials are protected only in cases where healthcare providers are defendants. The materials and information at issue were intrinsic to the presentation of the defense case, including lack of causation.

### *New Litigation Technology Utilized*

The defense team utilized extensive trial graphics, including digitized exhibits and videotape deposition clips projected on monitors and a large screen. The utilization of these technologies permitted immediate and graphically enhanced presentation of key documents to witnesses and the jury.

Use of digitized documents permitted enlargement, scrolling for reading purposes, multiple color highlighting and rapid pagination to focus attention on portions of documents in the defense case. The technologies were particularly applicable to such documents as prior publications, court records and medical records. Use of digitized clips from videotape depositions permitted immediate and graphic portrayals of prior inconsistent testimony for impeachment purposes.

The technologies employed during trial included the use of multiple media components such as a computer projector, multiple computer monitors, an ELMO™ unit and a VCR. Digitized materials were saved directly to the computer hard drive and were accessed by scanning of computer bar codes. The software used at trial was Trial Director™ and Document Director™.

### *Current Status of the Case*

Following entry of judgment for defendants, post-trial motions have been filed by the plaintiffs.

*The Hearst Corporation and Robert Trebilcock as defendants were represented by the Harrisburg office of Buchanan Ingersoll Professional Corporation and specifically by attorneys Jack M. Stover, Jayson R. Wolfgang, Leonard H. MacPhee and Matthew C. Browndorf.*

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## Federal District Court Interprets Pennsylvania Law *Defamation Per Se as Applied to a Corporate Plaintiff*

By Carl Solano, Jennifer DuFault James, and Wendy Beetlestone

The common law of slander long has required a plaintiff to prove that he or she incurred "special harm" or "special damages," in the form of actual pecuniary loss, as a result of a defamatory statement, unless that statement falls within the four categories of slander "*per se*": criminal conduct, loathsome disease, business misconduct, and serious sexual misconduct. A plaintiff alleging slander *per se* need not plead or prove such special damages. To what extent does that exception apply when the plaintiff is a corporation?

A federal district court in Pennsylvania recently expressed "serious reservations" about whether the exception applies at all to corporations. While setting out interesting ideas on the issue, the case ultimately fell on the proposition that a corporate entity may not maintain an action for slander *per se* under Pennsylvania law unless it first proves general reputational harm.

In *Syngy, Inc. v. ScottLevin, Inc.*, No. 97-CV-6109, 1999 U.S. Dist. LEXIS 8249 (E.D. Pa., June 7, 1999), Judge Anita Brody of the United States District Court for the Eastern District of Pennsylvania entered summary judgment for the defendants on a claim for slander *per se*, finding that the corporate plaintiff had failed to offer proof of reputational harm resulting from the spoken statement at issue. She also entered summary judgment for the defendants on claims of commercial disparagement and libel, holding that the corporate plaintiff had failed to offer proof of requisite pecuniary loss on those claims.

### **Competitors Sue**

The plaintiff, Syngy, Inc., brought suit against Scott-Levin, Inc. and its vice-president, Leonard Vicciardo, under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), with pendent state law claims for commercial disparagement and defamation. Both parties provided software to the pharmaceutical industry, and the remarks allegedly made by the defendants in-

cluded oral statements and a written portion of a slide show presentation to a client common to both parties.

After disposing of the Lanham Act and commercial disparagement claims, the court turned to the defamation claim and focused on whether the plaintiff had offered sufficient proof of special harm as required by Pennsylvania's defamation statute, 42 Pa. C.S. § 8343(a)(6), whether the plaintiff had pleaded defamation *per se* so as to relieve it of the requirement of proving special damages, and whether the plaintiff nevertheless was required to prove "general damages" (reputational harm) even where pleading defamation *per se*.

### **"Defamation Per Se"**

The district court skirted the arcane distinctions among "slander *per se*," "slander *per quod*," "libel *per se*," and "libel *per quod*" that the Pennsylvania Superior Court (Pennsylvania's intermediate appellate court) had so carefully parsed in *Agriss v. Roadway Express, Inc.*, 483 A.2d 456 (Pa. Super. 1984) (apparently eviscerating *per se* and *per quod* distinction in Pennsylvania libel cases, but retaining them for slander cases). Rather, the district court in *Syngy* referred generally to "defamation *per se*" without any distinction between slander and libel.

The Pennsylvania Supreme Court has never spoken on whether a plaintiff alleging defamation (either slander or libel) *per se* must prove general (reputational) harm, but the Pennsylvania Superior Court has addressed the issue on several occasions. In *Walker v. Grand Central Sanitation, Inc.*, 634 A.2d 237 (Pa. Super. 1993), appeal denied, 651 A.2d 539 (Pa. 1994), the Superior Court followed Section 621 of the RESTATEMENT (SECOND) OF TORTS to require a showing of general harm in cases of slander *per se*. Where slander is not *per se*, special harm still must be alleged. In *Agriss*, the Superior Court held that in cases of both libel *per se* and libel *per quod*, plaintiffs need not prove special harm but still must prove general or reputational damages.

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## Defamation Per Se as Applied to a Corporate Plaintiff

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### *Slander Per Se Required Damage*

The single oral statement to which Synygy objected was a statement to a Synygy customer (evidenced by a later internal e-mail from the defendant's files) that Synygy had changed file specifications for another customer and then blamed the defendant for the problem — a statement that the court said might fall within the slander *per se* category of business misconduct statements. The district court relied on *Walker* and concluded that its analysis of prior Pennsylvania decisions was “persuasive and convincing.”

Curiously, the court did not discuss the relationship between the requirement that the plaintiff show general harm to reputation and the constitutional rule under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that a defamation plaintiff must prove “actual harm.” Nevertheless, the court did hold that the statement was not actionable because Synygy had failed to prove any damage to its reputation caused by the statement at all, so that there was a lack of general reputational harm.

### *Libel Per Quod Special Harm*

The written statement about which Synygy complained was a single slide in a slide show shown by the defendant that, nine slides after quoting (without attribution) a Synygy (then known as Simulate, Inc.) marketing brochure, linked the word “simulate” with an “intent to deceive.” This time, the district court concluded that the statement did not constitute “defamation *per se*” because it was not defamatory of plaintiff on its face. The court then granted summary judgment to the defendant on the ground that Synygy had failed to prove special damages.

The court's conclusion that such proof was required is difficult to reconcile with the rule announced in *Agriss*, a libel case which, as noted above, eviscerated that distinction between libel *per se* and libel *per quod*: “a plaintiff in libel in Pennsylvania need not prove special damages or harm in order to recover; he may re-

cover for any injury done his reputation and for any other injury of which the libel is the legal cause.” The district court in *Synygy* did not cite to *Agriss* in this part of its opinion, however, and therefore did not explicitly attempt to square with *Agriss*.

### *Per Se Categories and Corporations*

An insight into the *Synygy* court's reasoning may be found in a footnote to its discussion of the defamation claim. In that footnote (number 11), the district court expressed “serious reservations about whether the doctrine of defamation *per se* is appropriately applied to corporate entities.”

In support of these doubts, the court relied almost exclusively on *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068 (W.D. Ky. 1995), quoting that case for the proposition that: “Businesses do not have personalities that are hurt so intangibly. If a business is damaged, the damage is usually reflected in the loss of revenues or profits.”

The district court in *Synygy* took that argument a step further, arguing that a corporation “cannot be embarrassed or humiliated. A corporation's analogue to humiliation would be damage to reputation — an injury that should translate into a pecuniary loss. If a corporation cannot point to loss of revenues or profits, for what are we compensating it?”

The district court then concluded that the “rule of defamation *per se* as it applies to corporations [as plaintiffs] has outrun its reason.” The district court in *Synygy* did not cite any Pennsylvania law to support this statement.

The *Synygy* court recognized the “dearth of cases on the issue of whether disparaging words about a corporation are actionable *per se*” and did not explicitly rest its holding on the theories espoused in the footnote.

While the district court's analysis of the original basis for defamation *per se* as being categories of insults uniquely personal in nature and not transferrable to a corporation is intriguing and, certainly to defamation defendants, appealing, its lack of foundation in prior Pennsylvania case law makes its future

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## Defamation Per Se as Applied to a Corporate Plaintiff

(Continued from page 22)

viability questionable. In addition to the fact that the court's comments on the issue are pure dicta, Pennsylvania state courts have shown a special reluctance to allow federal courts applying Pennsylvania defamation law to creatively interpret or expand upon that law. The Pennsylvania Superior Court in *Agriss* specifically noted that "It is time to exert state control over the 'per se' concept, if only because it is primarily our responsibility, not the federal courts', to say what a plaintiff in defamation must plead and prove under Pennsylvania law."

### Reconsideration and the Third Circuit

Syngy has filed a motion for reconsideration and the case has been reassigned to another judge in the Eastern District of Pennsylvania, Hon. Norma Shapiro. As of the date of this publication, the motion for reconsideration had not yet been fully briefed. A decision by the United States Court of Appeals for the Third Circuit

that was handed down on the same day that Syngy filed its memorandum in support of its motion for reconsideration may be relevant to that motion.

In *Beverly Enterprises, Inc. v. Trump*, 1999 U.S. App. LEXIS 14206 (3d Cir., June 28, 1999), the Court of Appeals considered a defamation action that included claims of slander *per se* that were brought by an individual and a corporation. In affirming dismissal of the complaint (on the ground that the slander alleged by plaintiffs did not fall into any of the *per se* categories, and that plaintiffs had failed to allege special harm), the Court of Appeals in *Beverly Enterprises* did not question or even address whether the corporate plaintiff could bring an action for slander *per se*, and its analysis of whether the alleged defamatory statements were slander *per se* did not include an indictment of a business entity's ability or right to do so.

*Carl Solano is a partner, and Jennifer DuFault James and Wendy Beetlestone are associates, at Schnader Harrison Segal & Lewis LLP in Philadelphia, Pennsylvania.*

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## UPDATE

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### Gallagher Sentenced to Probation in Chiquita Litigation

In the latest and hopefully final development in a series of cases surrounding controversial articles written by former *Cincinnati Enquirer* reporter Michael Gallagher about Chiquita Brands International's business practices, Gallagher was sentenced on July 16 to five years probation and 200 hours of community service for using stolen voice mail messages. In September, he pleaded guilty to felony charges of unlawful interception of communications and unauthorized access to computer systems in connection with an investigative series of articles on Chiquita for *The Cincinnati Enquirer*.

As part of a plea agreement, Gallagher was reported to have identified George Ventura, a former Chiquita lawyer, as the source who gave him the access

codes to Chiquita's voice mail system. However, in his Sentencing Memorandum, while Gallagher accepted responsibility for improperly accessing Chiquita's voice mail, he "vigorously disputes those claims that he revealed or 'gave up' a source in cooperating with the State in this matter." Last month, Ventura was sentenced to two years probation and 40 hours of community service. He had unsuccessfully tried to assert Ohio's Shield Law to prevent Gallagher from identifying him as the confidential source.

In other developments, on July 19, Chiquita's civil defamation claim against Gallagher, filed in federal court, was dismissed by agreement without prejudice.

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## **“John Doe” Lawsuit Dismissed for Lack of Personal Jurisdiction Motion to Quash Subpoena is Granted in Favor of AOL**

On June 24, Judge Thomas Horne of the Twentieth Judicial Circuit of Virginia granted defendant “John Doe”’s motion to dismiss a libel suit against him and Doe’s accompanying motion to quash a subpoena compelling America On Line to produce information that would identify the “John Doe.” Doe allegedly defamed Allegheny County State Superior Court Judge Joan Orié Melvin on Doe’s website. *Melvin v. John Doe*, No. 21942 (Cir. Ct. June 24, 1999). The suit was dismissed on grounds of insufficient service of process and lack of personal jurisdiction. The subpoena fell with the lawsuit.

The case arose over the posting on a website entitled “Grant Street 1999.” John Doe apparently accused the judge of lobbying on behalf of an attorney seeking a judgeship. John Doe wrote,

Shame on Orié-Melvin . . . . This is exactly the kind of misconduct by our elected officials that the residents of Allegheny County will not stand for anymore . . . and a good reason why judges should be held accountable for their actions and remembered at the polls at retention time.

Orié-Melvin asked the court to issue a subpoena duces tecum directing that America On Line produce “[a]ll documents which identify the individual or entity who owns, leases or subscribed to open the website’ where the alleged defamatory material was published.”

The court employed a two-step analysis for determining whether jurisdiction was proper. Under the first prong, the court determined that the requirements of the Virginia Long Arm statute had been met by virtue of a tortious act or omission committed in the Commonwealth, in this case the

publication of the statement on a USENET server in Virginia (AOL’s server hardware).

But it was under the second prong--the “minimum contacts” requirements of the Due Process Clause of the 14th Amendment-- that plaintiff’s claim failed. In what may be characterized as a “passive website” analysis, the court found that

[t]he fact that America On Line, a Virginia corporation with its principal place of business in Loudoun County, may offer subscribers the opportunity to engage in an open and continuous forum for communication throughout the world does not, consistent with due process, open the Courts of Commonwealth to actions such as the one under consideration.

*Melvin v. John Doe* at 3.

In its analysis, the court stated that there were no allegations that Doe worked, lived, or had any relationships in or with the Commonwealth of Virginia, noting that “[t]he effects of the posting . . . are more aptly to be felt in Pennsylvania than in Virginia.

**LDRC would like to thank our summer interns — Lara Schneider, Cardozo Law School, Class of 2000; Ashley Clymer Bashore, Columbia Law School, Class of 2001 and Patricia Stewart, Columbia Law School, Class of 2001 — for their contributions to this month’s *LibelLetter*.**



## Another Texas Interlocutory Appeal *Opinion and Public Figure Analysis are Winners*

By Ryan C. Wirtz

On June 16, 1999, in a 55-page opinion, the San Antonio Court of Appeals reversed a Texas district court and rendered judgment in ABC's favor in a case brought by Peter, Richardson, Christopher and Laura Gill, who had sought \$1.4 billion in damages for a March 1995 broadcast. *American Broadcasting Companies, Inc. v. Gill et al.*, Civ. No. 04-97-00838-CV (Tex. App. — San Antonio, June 16, 1999).

This decision represents yet another instance where the Texas interlocutory appeal statute worked to afford an appeal which proved successful for a denial of summary judgment below.

In the opinion, the appellate court offered sound and noteworthy rulings on Texas law of opinion and on the public figure status of corporate players who would prefer less limelight.

### ***The RTC Debate***

In 1992, a significant public debate arose over whether the Resolution Trust Corporation ("RTC") had adequately pursued officers, directors, and other insiders who contributed to the collapse of savings and loans across the country. In the midst of this public controversy were the Gills. Gill Savings Association ("GSA") was founded in the mid-1970's, and by the end of 1986, GSA reported an annual net loss in excess of \$100 million and a negative net worth of \$85.9 million. Christopher and Peter Gill resigned their officer and director positions in April 1987, federal regulators placed the savings and loan in conservatorship two years later, and by mid-1990, GSA was closed. The subsequent payment of federal deposit insurance cost taxpayers \$1.4 billion.

In the wake of GSA's failure, the RTC launched an investigation of GSA's former officers, directors, and other insiders. Ultimately, in an internal "authority to sue" memorandum top officers of the

RTC recommended a civil lawsuit against the Gills and others believed to be responsible for GSA's failure. This recommendation was approved by the Assistant to the Chairman of the RTC, but the suit against the Gills was never filed.

On March 2, 1995, after an investigation lasting nearly a year, ABC aired a *Day One* news program segment that focused on why the RTC had recovered so little from the officers, directors, and other insiders at failed savings and loan institutions in Texas. In particular, the *Day One* program questioned why the RTC never pursued a lawsuit against the Gills when the RTC's own internal documents indicated such a suit was warranted, had merit, and could recover millions.

### ***A Multi-Count Complaint***

In June of 1995, three months after the *Day One* program aired, Christopher Gill, his wife Laura, and his brothers Richardson and Peter, sued ABC for defamation, invasion of privacy, and trespass. The Gills later added additional defamation claims, as well as claims for tortious interference with contractual and fiduciary relationships, and abuse of process arising out of ABC's news investigations.

ABC moved for summary judgment on all of the Gills' claims based in part upon defenses arising under the free speech clauses of the United States and Texas Constitutions. ABC's motion for summary judgment was denied, and ABC perfected an interlocutory appeal of that ruling pursuant to section 51.014(a)(6) of the Texas Civil Practice & Remedies Code.

### ***Newsgathering Won On Evidence, Not Constitution***

The Gills had asserted numerous causes of action based upon conduct allegedly occurring dur-

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## Another Texas Interlocutory Appeal

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ing ABC's investigation. These included trespass, abuse of process, and tortious interference.

Although ABC contended that the actions during the newsgathering process that allegedly gave rise to these claims were absolutely protected under the First Amendment, the court chose not to ground its holdings on this defense or on ABC's alternative argument that the Gills were merely disguising their defamation cause of action as something else. Rather, all three of these causes of action were dismissed by the San Antonio Court of Appeals based on evidentiary defenses raised by ABC.

### *Libel: Opinion Absolutely Privileged*

With the collateral causes of action behind it, the court turned its full attention to the defamation claim. This claim was based on one statement promoting the March 2, 1995, *Day One* broadcast, thirty-eight statements made in the broadcast, and fifty-six statements made (or questions posed) during the newsgathering process. ABC defended these statements as true, but alternatively argued that some were protected opinion and none were published with actual malice. Of these ninety-five statements and questions, the court found not one to be false.

ABC scored an important victory for Texas jurisprudence on the opinion defense. In *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989), the Texas Supreme Court had held that statements of opinion are absolutely privileged. One year later, however, the United States Supreme Court handed down *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 19-20 (1990), and it became unclear whether opinions would be afforded absolute constitutional protection in Texas. In fact, the Gills questioned whether this aspect of *Carr* survived *Milkovich*.

The San Antonio Court of Appeals specifically

addressed this issue, holding that the *Carr* holding rested not only upon the First Amendment, but also upon the guarantee of free speech contained in Article I, Section 8 of the Texas Constitution. Therefore, the *Carr* holding was not dependent upon or impacted by the scope of protection afforded statements of opinion by the First Amendment. Accordingly, the Court held that, regardless of *Milkovich*, ABC's expressions of opinion are afforded absolute protection under the Texas Constitution.

### *Bankers Were Public Figures*

ABC also was successful with its actual malice argument. ABC had urged that the Gills were public figures. The San Antonio Court of Appeals applied the three-part test enunciated in *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433 (5th Cir. 1987), where the court held that a libel plaintiff will be deemed a limited-purpose public figure if (1) he or she has more than a trivial or tangential role (2) in a controversy that is sufficiently public to be discussed and the resolution of which will likely be felt beyond its immediate participants, and (3) the alleged defamation is germane to the plaintiff's participation in the controversy.

Chris Gill's status as a public figure was not seriously in doubt. He served as chief executive officer of GSA and often appeared in the press. He even engaged in a public effort to prevent the passage of the 1986 Tax Reform Act, sending letters to congressional leaders, governors, and the President.

But the issue of Richardson and Peter Gill's public figure status was not nearly as black-and-white. In fact, the court found that, unlike their brother, Richardson and Peter Gill did not actively seek publicity. Nevertheless, as officers, directors and insiders of the institution that lost the second largest amount of money in Texas, the court held that Richardson and Peter "voluntarily engaged in activities that necessarily increased their risk of ex-

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## Another Texas Interlocutory Appeal

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posure and injury to their reputations" and had far more than a trivial or tangential role in the public controversy surrounding the RTC's performance in Texas. Even though they attempted to avoid the limelight they could not avoid being public figures.

### *No Libel by Omission or Implication*

The court also held that, contrary to the Gills' allegations, ABC was not under a legal obligation to present a "balanced" view of the rise and fall of GSA, of the S&L crisis, or of the Gills. ABC's omission of information the Gills thought should have been included, including information consistent with their view of the issues, was no evidence of actual malice but, rather, was a protected exercise of editorial control and judgment.

After dispensing with the Gills' defamation

claims based on statements made in the *Day One* broadcast, the court turned to the Gills' claim that the broadcast "as a whole" was defamatory. As with the statements made in the broadcast, the court rendered judgment in ABC's favor on this theory, holding that a series of statements is not, and cannot be, actionable when no statement within the series is actionable. In this way, the court rejected the Gills' contention they had been defamed "by implication" and became the third intermediate court of appeals in Texas to apply the holding of *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995), an employment defamation case, to the media.

*Ryan C. Witz is an associate with Jackson Walker LLP. Chip Babcock, Frank Vecella, and Alan Greenspan of Jackson Walker LLP represented ABC in this lawsuit.*

## Texas Court of Appeals Reverses Denial of Summary Judgment *Unsalaries "Freelance Deputy Sheriff" is Public Official*

By Peter D. Kennedy

In an unpublished opinion issued June 24, 1999, the El Paso Court of Appeals reversed the denial of a summary judgment sought by The Hearst Corporation's *Midland Reporter-Telegram* and rendered a take-nothing verdict in favor of the newspaper. (*The Hearst Corporation v. Tucker*, No. 08-98-00148-CV (Tex. App. - El Paso June 24, 1999)). This ruling extends what has become a remarkable and far-reaching series of media-friendly decisions rendered under Texas' interlocutory appeal procedure, which permits media defendants (and their sources) immediately to appeal the denial of summary judgment motions that raise constitutional defenses or statutory

privileges. See Tex. Civ. Prac. & Rem. Code 51.014(a)(6).

### *An Insert Challenged*

*The Midland Reporter-Telegram* distributed with its January 19, 1996 edition a loose-leaf paid political pamphlet supporting Mike Kaufman, who was challenging the incumbent Midland County Sheriff in the Republican primary. The pamphlet, which was not written or edited by *The Reporter-Telegram*, drew attention to the incumbent Sheriff's relationship with Ronald Ray Tucker, a private citizen who had participated as an unsalaried commissioned peace officer in controversial

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## Texas Court of Appeals Reverses Denial of Summary Judgment

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“reverse sting” operations.

Reverse stings had drawn criticism in Texas and elsewhere as “entrepreneurial law enforcement:” drug operations where law enforcement officers pretend to sell, rather than buy, drugs, and then seize the cash brought by the drug dealers to consummate the transaction. Tucker had participated in earlier sting operations for a percentage of the seized cash, and had helped the incumbent Midland County Sheriff organize his own reverse stings.

Kaufman’s campaign pamphlet called Tucker “a free-lance deputy sheriff,” “a mercenary,” and “a convicted criminal.” The day after *The Midland Reporter-Telegram* endorsed Kaufman for Sheriff, Tucker sued both Kaufman and *The Midland Reporter-Telegram* for libel, claiming that all three characterizations of him were false.

### Summary Judgment Denied

*The Midland Reporter-Telegram* sought summary judgment on grounds of substantial truth and a lack of actual malice, but the trial judge denied the motion. *The Midland Reporter-Telegram’s* editor offered an affidavit explaining that the paper had neither written nor edited Kaufman’s political pamphlet, and that the paper was unaware that any statement in the pamphlet were false or doubted their truth. The Plaintiff offered in opposition an affidavit from an ex-employee who claimed (without explaining how) that the newspaper did, in fact, edit political articles. The ex-employee offered no evidence, however, that the newspaper knew any fact in the Kaufman pamphlet to be false.

In denying summary judgment, the trial court pointed out the apparent contradiction in the affidavits — did the newspaper edit political articles or not? — but did not explain how editing a pamphlet, even if it had been done, proves knowledge that the

content was false. Other than the ex-employee’s affidavit that the newspaper “edited” political articles, Tucker had offered no proof at all that the newspaper knew any of the statements about him were false. If not for the Texas interlocutory appeal procedure, however, the case may have ended up in further expensive discovery and a trial.

### Reversed

In reversing the trial court, the El Paso Court of Appeals held as a matter of law that Tucker was a public official, citing a string of Texas cases that had found salaried law enforcement officials to be public officials. The Court of Appeals did not further explain its reasoning in applying this doctrine to the volunteer cop Tucker.

The record showed, however, that while Tucker had not been paid a salary during his “reverse sting” days, he *had* received shares of seized drug money seized by the government, he had held a series of peace officer commissions permitting him to carry a weapon and to act as a peace officer during the stings. Significantly, Tucker had plead guilty to a charge of “official misconduct,” (the basis for the “convicted criminal” statement), an offense that cannot be committed by a private citizen. Finding not a “scintilla” of evidence of *The Midland Reporter-Telegram’s* actual malice, the Court of Appeals rendered judgment for the paper, avoiding a trial and subsequent appeal.

*Pete Kennedy is a partner with George & Donaldson, L.L.P., and represented The Hearst Corporation d/b/a The Midland Reporter-Telegram on appeal with partner David H. Donaldson, Jr.*

## Emphasis, By Itself, Does Not Create a Defamatory Innuendo

By Rex S. Heinke, Heather L. Wayland, and Wendy E. Pearson

In a decision filed May 26, 1999, the California Court of Appeal held that emphasizing an accurate and truthful statement of fact by highlighting in yellow did not by itself create a defamatory innuendo. *Smith v. Maldonado*, 1999 Cal. App. LEXIS 530, 99 Daily Journal DAR 5037. This was an issue of first impression.

### *The Colma Card*

Appellants Donald Smith and Thomas Atwood were failed applicants for a permit to operate a card room in Colma, California.

During the permit application process, appellants' attorney was indicted on criminal charges for allegedly bribing a California legislator to prevent an opposing applicant from acquiring the gaming registration. On July 6, 1996, an article accurately reporting these facts appeared in the *Los Angeles Times*. On July 7, 1996, respondents Ron and Helen Maldonado sent the article to thirty-five Colma residents.

Although respondents did not rearrange, edit, add to, or change the article, they highlighted the paragraph that mentioned appellants by name. The court states that while the precise manner in which statements were "highlighted" was not in the record. It believed them to have been marked with a yellow marking pen.

The highlighted paragraph read: "The target was Montgomery, a politically connected attorney representing restaurateur Don Smith and golf course owner Thomas Atwood. The men were seeking a potentially lucrative franchise to operate a card room in Colma, a tiny community south of San Francisco."

Appellants filed a libel complaint claiming that by distributing the newspaper article with the paragraph mentioning appellants highlighted, respondents implied that appellants were involved in their lawyer's alleged criminal activities. The trial court granted respondents' motion for summary judgment reasoning that the highlighting of one paragraph of a true and accurate newspaper article did not alter the truthfulness of the article or amount to an independent editorial comment.

### *Emphasizing the Truth*

The Court of Appeal agreed with the trial court. The court explained that if appellants' reasoning were followed, a person would be exposed to liability for simply emphasizing a truthful statement if any third party could interpret the emphasis as having a defamatory innuendo. The court was not prepared to extend the reach of the tort of defamation to such an extent.

According to the court, a truthful and accurate statement of fact cannot be rendered defamatory by merely repeating it with greater emphasis. The court summarized, "[if] a statement is true, shouting it from the rooftops or publishing it everywhere on giant billboards cannot change its essential truth, as long as the statement itself remains unchanged." *Smith v. Maldonado*, 1999 Cal. App. LEXIS 530, \*19.

In the instant case respondents merely emphasized the truth. Any innuendo that appellants were involved in their attorney's alleged bribery was drawn from true facts described throughout the entire article. The court explained that respondents did not change the meaning of the article by highlighting one section of an article, which they distributed in its entirety without editorials or commentary. If the article itself cannot be understood as having a defamatory innuendo, then the highlighting of one of its paragraphs cannot result in such an innuendo.

According to the court, a contrary result would have a troublesome impact on all forms of speech. Not only might distribution of accurate news reports be discouraged, but writers and public speakers more generally would be wary of emphasizing truthful and accurate facts.

Furthermore, the court worried that numerous subjective interpretations would result. For instance, "courts in libel cases would have to consider the distinctive effects of underlining, italicization, typeface, and the size, style or color of print used; courts in slander cases would be compelled to analyze the effects in variations in vocal tone, inflection, timbre, volume, and pitch." *Id.* at \*21 Finally, the court feared that future

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### Emphasis Does Not Create Innuendo

courts would have to consider the subjective intent of those doing the emphasizing.

Therefore, the court concluded, merely emphasizing an accurate and truthful fact cannot by itself create a defamatory innuendo. Only if such a fact is "substantially changed" by editing or rearranging words, removing language from the original, adding new language, or repeating or reproducing the statement in a different context, may the accurate and truthful statement be capable of a defamatory innuendo.

*Rex Heinke is a partner at Gibson, Dunn & Crutcher in Los Angeles where Heather Wayland works as an associate and Wendy Pearson is a summer associate.*

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### Libel Suit Based on Religious Dispute Dismissed *The Man Who Did Not Give a Get*

In a defamation case involving an allegedly defamatory notice posted by the governing body of an Orthodox Jewish community about one of its members, a New Jersey district court granted defendants' motion to dismiss based on the Establishment Clause of the First Amendment. *Klagsbrun v. Va'Ad Harabonim of Greater Monsey*, slip. op., No 97-3134 (D.N.J. Jun. 14, 1999).

Relying on *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevic*, 426 U.S. 696 (1976), for the proposition that First Amendment principles preclude intrusive inquiries into religious doctrine,

the court dismissed the complaint for lack of subject matter jurisdiction.

Mr. Klagsbrun, who never granted his wife a *get* (a religious divorce) and who could not affirmatively prove that he got special permission to get remarried himself, went and did so; he was subsequently shunned by his community. The court, prohibited from determining such things as whether Mr. Klagsbrun engaged in bigamy *within the meaning of the Orthodox Jewish faith*, would have been unable to resolve the factual disputes pertaining to the defamation claims before it.

The court consciously followed the "neutral principles" approach espoused by the Third Circuit in *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78 (3d Cir. 1996), cert. denied, 519 U.S. 1058 (1997), under which "civil courts have no jurisdiction over, and no concern with, spiritual matters and the administration of a religious organizations affairs that do not affect the civil or property rights of individuals," *Klagsbrun v. Va'Ad Harabonim of Greater Monsey*, slip. op., No 97-3134 (D.N.J. Jun. 14, 1999).

The court reasoned that because the plaintiffs' defamation claims raise inherently religious issues, it would not be possible to apply neutral principles to resolve these claims. The court rejected the plaintiffs' attempt to distinguish between issues of fact and those involving "competing theological propositions," holding that "the Establishment Clause is implicated whenever courts must interpret, evaluate, or apply underlying religious doctrine to resolve disputes involving religious organizations."

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## LDRC 50-STATE SURVEYS

The LDRC 50-State Survey 1999-2000: **Media Privacy and Related Law** has been shipped. If you have not received your order or would like to order additional copies please contact us.

Order and pay before October 1, 1999 and save \$25 on your copy of the LDRC 50-State Survey 1999-2000: **Media Libel Law**. If payment is received after October 1, the price per Survey will increase to \$150 per copy.

The LDRC 50-State Survey 1999: **Employment Libel and Privacy Law** is on hand and ready for shipment.

## Amazon.com Seeks Declaratory Judgment Authorizing Use of *The New York Times* Best-seller Lists

On June 3, 1999, Amazon.com filed a complaint in the United States District Court in the Western District of Washington, seeking a declaratory judgment that its use of the *New York Times* best-seller lists on its website does not represent copyright infringement, trademark infringement, or misappropriation of the newspaper's lists. *Amazon.com v. The New York Times*, No. C99-0897 WD (Judge William L. Dwyer).

The controversy began on May 17 when Amazon.com, a leading bookseller that operates exclusively over the Internet, began offering a 50% discount off the list price of books that appeared on the *New York Times* weekly best-seller lists. To promote its discount, Amazon.com posted a reference to the promotion on its web site homepage which links to a list of all the books on the *Times* best-seller lists. Initially, Amazon.com arranged the books in order of sales volume, and since the list is available to the industry well before publication, actually updated the rankings several days prior to official publication by the *Times*.

### *The New York Times: Cease and Desist*

On May 28, the *New York Times* sent a letter demanding that Amazon.com cease and desist unauthorized use of the best-seller lists by June 2, alleging that Amazon.com's action constituted copyright and trademark infringement as well as misappropriation. The *Times* claimed that the lists were original works created by "a unique statistical weighing process," and therefore Amazon.com's unauthorized use of these lists constituted copyright violation and misappropriation of the lists for Amazon.com's competitive advantage, diverting users from the official *Times* site and adversely affecting the *Times*' ability to license the list. The *Times* also claimed trademark infringement, arguing Amazon.com's use of their name in its promotions falsely suggested sponsorship by the *Times*.

### *Amazon Adds Disclaimer*

In response, Amazon.com did alter their web site by adding a disclaimer of affiliation, listing the books on the best-seller lists alphabetically instead of by sales volume, and waiting to update the rankings until after the *Times* had published them. However, Amazon.com also filed a complaint seeking a declaratory judgment that the site as altered did not infringe any of the *Times*' rights outlined in their letter.

Specifically, Amazon.com denies trademark or copyright infringement, arguing that references to the *Times* on their web site are unlikely to cause confusion since they are made with full disclaimer and without use of the *Times*' logo, and that the best-seller lists do not constitute an original work of authorship. In any case, Amazon.com claims that all references to the *Times* constitute fair use of any *Times* trademarks or copyrights.

In addition, Amazon.com claims they did not misappropriate *New York Times* property because Amazon.com is not in direct competition with the *Times*, and their conduct does not reduce the newspaper's incentive to produce the best-seller lists.

As of this publication, the *Times* had not filed a response to Amazon.com's complaint. The parties are currently in settlement discussions.

## What's In a Name? *Costanza v. Seinfeld*

By Elizabeth A. McNamara and Carolyn K. Foley

In an action that could have been a plot line in a *Seinfeld* episode, New York State Supreme Court Justice Harold Tompkins recently dismissed a suit alleging three privacy claims and one libel claim brought by a man named Michael Costanza against the creators and distributors of the television sitcom *Seinfeld*. *Costanza v. Seinfeld*, No. 119288-98

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**Costanza v. Seinfeld**

*(Continued from page 31)*

(N.Y. Sup. Ct. June 21, 1999).

**“The Real Seinfeld”**

Before turning to litigation against the show, the plaintiff, Michael Costanza, had written a book embracing his alleged association with *Seinfeld*. His book -- called “The Real Seinfeld, as told by The Real Costanza” -- sought to document his friendship with Jerry Seinfeld and convince the public that *Seinfeld’s* “George Costanza” character was, in fact, based on plaintiff and his life.

The book recounted how plaintiff met Jerry Seinfeld in 1974 when both were students at Queens College and included a catalogue of alleged similarities between Michael and George:

“George is bald. I am bald; George is stocky. I am stocky. ...George’s high school gym teacher called him ‘Can’t-Stand-Ya.’ So did mine . . . . George has a thing about bathrooms and parking spaces. So do I . . . . George is sexually right-handed, and must sit on the right of his dates in order to have free access to make a pass. So am I locked into this approach.”

In the book, plaintiff also claimed that Jerry Seinfeld had left a message on plaintiff’s answering machine in 1989, saying “I’ve named my best friend on [*Seinfeld*] after you.” And the book revealed that plaintiff, a struggling actor, actually appeared on an episode of *Seinfeld* called “The Parking Space.” Not coincidentally, the book was published in May of 1998, the same month as the air-

ing of the final *Seinfeld* episode.

**Little Success? Try Litigation**

It appears that neither plaintiff’s appearance on *Seinfeld*, nor his book led to much success. Thus, plaintiff next tried litigation. Accompanied by a press barrage, plaintiff commenced suit against the show in October of 1998 -- 5 months after the airing of the last episode and 9 years after plaintiff first learned about the “George Costanza” character.

The suit included claims for common law invasion of privacy, false light invasion of privacy and misappropriation of name or likeness for purposes of “advertising or trade” in violation of

New York Civil Rights Law, Sections 50, 51. Because New York does not recognize any common law right of privacy, Justice Tompkins quickly disposed of those claims.

Turning to the statutory privacy claim, the court, citing *Hampton*

*v. Guare*, 195 A.D.2d 366 (1st Dep’t 1993) (the *Six Degrees of Separation* case), held that because the “television program was a fictional, comedic presentation, [i]t does not fall within the scope of trade or advertising” as those terms are used in Sections 50 and 51. Significantly, Justice Tompkins also held that the statutory claim was barred by the statute of limitations: “This type of case must be brought within one year of when a person learns of the improper use of his name or likeness.”

**A “Flagrant Opportunist”**

The suit also included a libel claim that arose not from the television show, but from the

*(Continued on page 33)*

***Finally, in an ending similar to the ending of a typical George Costanza plot-line, plaintiff’s case was not only dismissed, but both plaintiff and his lawyer were sanctioned, \$2500 each.***



### *Costanza v. Seinfeld*

*(Continued from page 32)*

publication of plaintiff's book. At the time his book was published in May of 1998, the book, and plaintiff's claim to be "the real Costanza," received significant press coverage. Before publication of plaintiff's book, *Seinfeld* co-creator, Larry David, had been widely understood to be the inspiration for the George Costanza character.

Accordingly, when Mr. David was asked to comment on the publication of plaintiff's book — and his claim to be the "real Costanza" — Mr. David characterized plaintiff as a "flagrant opportunist," contending that Mike Costanza "barely knew Jerry less than a year." Citing his 24-year friendship with the actor, the plaintiff argued that David's comments branded him a "liar."

However, Justice Tompkins adopted defendants' argument that the comments were meant, in context, to convey Mr. David's opinion of plaintiff's motives in publishing the book. Accordingly, he dismissed the claim as a non-actionable statement of opinion.

Finally, in an ending similar to the ending of a typical George Costanza plot-line, plaintiff's case was not only dismissed, but both plaintiff and his lawyer were sanctioned, \$2,500 each, for continuing to press the suit even after defendants had put plaintiff on notice — by letter to counsel citing legal authority — that his suit lacked any merit. In Justice Tompkins words, "Essentially, plaintiff was informed that his case was based on nothing. While a program about nothing can be successful, a lawsuit must have more substance."

*Elizabeth A. McNamara and Carolyn K. Foley of Davis Wright Tremaine LLP represented the defendants in the Costanza v. Seinfeld, et al. litigation described above.*

### California "Son of Sam" Law Withstands First Amendment Scrutiny Court Finds Law Not Overinclusive

On May 27, 1999 the California Court of Appeal, Second Appellate District, ruled that California's "Son of Sam" law does not violate the First Amendment. *Keenan v. The Superior Court of Los Angeles County*, 1999 Daily Journal D.A.R. 5119 (Cal. Ct. App. May 27, 1999).

The decision stands in contrast to a decision issued by the United States Supreme Court in 1991 in *Simon & Schuster Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991) in which the Supreme Court found New York's "Son of Sam" law to violate the First Amendment.

The "Son of Sam" law was enacted in New York in response to the realization that David Berkowitz, more popularly known as the "Son of Sam," stood to profit from his killing spree by selling the rights to his story. The law that was enacted ensures that victims of criminal activity are the first to receive compensation for their pain and suffering. New York's statute was enacted in 1977. California enacted a similar statute in 1986.

#### *The Sinatra Kidnap Sold*

The issue in *Keenan* was the sale of the movie rights to the story of the 1963 kidnapping of Frank Sinatra, Jr.. One of Sinatra's kidnapers, along with a Los Angeles reporter and the parent news organization, sold the rights to "Snatching Sinatra" to Columbia Pictures sometime in 1998.

Sinatra's lawyers objected and demanded Sinatra's "beneficiary interest" under Civil Code section 2225 ("California's Son of Sam law"). The beneficiary interest is an involuntary trust fund that is set up out of the proceeds of the sale of materials based on a felony conviction. The trust continues for five years after the payment of the proceeds to the convicted felon or five years after the date of conviction, whichever is later.

*(Continued on page 34)*

## “Son of Sam” Law Withstands Scrutiny

(Continued from page 33)

In *Keenan*, when Columbia refused to turn over any of the proceeds, Sinatra filed suit. A week later, he sought and was granted a preliminary injunction against any payments to Keenan until the action was resolved. Keenan demurred and sought to dissolve the preliminary injunction, alleging that Section 2225 violated his free speech rights and the constitutional prohibition against ex post facto legislation.

The court rejected Keenan’s argument and directed him to answer Sinatra’s complaint. Keenan next filed a petition for writ of mandate, asking the appellate court to issue orders to dissolve the preliminary injunction. The court granted early review and issued an order to show cause and set a hearing date.

### The First Amendment

The appellate court engaged in an extensive review of New York’s “Son of Sam” law and the case that ultimately made its way to the Supreme Court, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). In that case, the United States Supreme Court found New York’s Son of Sam law to be underinclusive (because it applied only to payments related to speech) and overinclusive by virtue of applying to

works on any subject, provided that they express the author’s thoughts or recollections about his crime, however tangentially or incidentally . . . . In addition, the statute’s broad definition of ‘person convicted of a crime’ enables the [State] to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused of convicted. . . .

*Keenan* at 5121.

Because the New York law was not narrowly tailored to achieve what the court conceded was a compelling state interest, the Supreme Court found the law inconsistent with the rights afforded under the First Amendment.

The California court refused to address underinclusiveness, misreading the Supreme Court’s decision. On

considering overinclusiveness, it reached a different conclusion from the Supreme Court’s. Because the California law prohibited a felon from profiting from his crimes “only when he sells the ‘story of a felony for which [he] was convicted’, the court implicitly found that the statute was narrowly tailored to serve the State’s compelling interest in “depriving criminals of the profits of their crimes, and in using these funds to compensate victims.” *Keenan* at 5121.

The court apparently distinguished the California law from the New York law based on the definition of a convicted felon: “someone who has been ‘convicted of a felony, or found not guilty by reason of insanity of a felony.’” *Id.* In contrast, the New York statute “enable[d] the [State] to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted . . . .” *Id.* The court did not consider whether, as a First Amendment matter, speech about one’s life cannot constitutionally be considered the “fruit of crime.”

### Ex Post Facto

Keenan also argued that the application of the “Son of Sam” law to his story about the kidnapping violated the ex post facto prohibitions by imposing a punishment that didn’t exist in 1963. The court rejected this argument, relying on *Collins v. Youngblood*, 497 U.S. 37 (1990), for the proposition that the ex post facto prohibition applies to “penal legislation that ‘punishes as a crime an act previously committed, which was innocent when done,’” “penal legislation that ‘makes more burdensome the punishment of a crime, after its commission,’” and “penal legislation that ‘deprives one charged with crime of any defense available according to law at the time when the act was committed.’” *Keenan* at 5122. The court found that section 2225 was not “penal legislation” but rather was a statute “enacted to accomplish a ‘legitimate governmental purpose’ unrelated to punishment.” *Id.*

The appellate court found that Keenan’s demurrer was properly overruled and his petition was denied. The order to show cause was vacated and the stay was dissolved. Sinatra was awarded costs on the writ proceed-

## ***Life Without Shame: Cable Ruling on Indecency Relies on Broadcast Precedent for Definition***

By Marc Apfelbaum

### ***Overview***

The Second Circuit recently upheld the right of a cable operator to decline to carry programming on leased access channels that the cable operator found to be indecent under community standards. *Loce and Richter d/b/a Life Without Shame v. Time Warner Cable*, No. 97-9301 (2d Cir. June 14, 1999). Under the 1984 Cable Act, cable operators are required to provide a certain number of channels for unaffiliated programmers ("leased access channels") and are generally stripped of all editorial control over the content of those channels.

### ***Cable Act Amendments***

Under the Act, such channels must also generally be provided to all subscribers. In 1992, in amendments to the Act, Congress restored to cable operators some editorial control over these channels, but only to the extent of permitting them to decline to carry programming they consider to be "in conflict with community standards in that it is lewd, lascivious, filthy or indecent".

In 1996, a splintered Supreme Court upheld these amendments against a challenge by leased access producers, who claimed that the statute violated their First Amendment rights. *Denver Area Educ. Telecom. Consort., Inc. v. FCC*, 116 S.Ct. 2374 (1996). The court rejected that argument, with seven Justices upholding the 1992 amendments, but producing no majority opinion. In *Loce*, the plaintiffs, producers of an access show called "Life Without Shame", brought a challenge against Time Warner Cable's decision not to telecast three episodes of their program on systems in Rochester and Syracuse, New York. Two of the three episodes were taped in strip clubs and had a high degree of sexual content, including numerous scenes in which *topless dancers fondle their breasts and genitalia and simulate sexual activity and masturbation, all to the accompaniment of crude and profane commentary*. The third episode, called "A Tribute to Violence", had

some sexual content, but largely focused on graphic and continuous depictions of violence (with some footage of real, not staged, events), including scenes of a woman's throat being slit and then being beaten with a meat tenderizer, a lion eating a man while his family watched helplessly, a suicide by gun shot, and a Kung Fu fight between amputees.

The Second Circuit decision affirmed the district court, and upheld the right of Time Warner Cable to decline to telecast all three shows. Drawing on cases dealing with the ability of government to ban or limit indecency on broadcast media, however, the Second Circuit seemed to base its decision regarding the "Tribute to Violence" episode on the fact that show also contained some sexual content and a good deal of sexual innuendo, in addition to its graphic depictions of violence. The case leaves unanswered the question of the extent to which cable operators can decline to telecast on leased access channels material they find to be offensive but that does not contain any sexual content.

### ***The Parties' Positions***

In *Loce*, plaintiffs claimed that Time Warner Cable's decision to decline to telecast three episodes of their "Life Without Shame" program violated their First Amendment rights, arguing that Time Warner Cable's actions amounted to state action. Plaintiffs also argued that, in any event, Time Warner had acted unreasonably and in violation of the Act by declining to telecast the three episodes. Plaintiffs argued that the "Tribute to Violence" episode, in particular, could not be "indecent", because that term applies only to the "depiction of 'sex-related' materials."

In response, Time Warner Cable argued that, assuming it was constitutional for Congress to strip cable operators of editorial control over leased access channels in the first place, Congress clearly had the right to restore all or part of that editorial control to them. And, in choosing to use that restored editorial

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## Life Without Shame

*(Continued from page 35)*

control, cable operators were acting as private entities, not state actors. Time Warner Cable also argued that its decisions to decline to telecast all three episodes, including "A Tribute to Violence", were consistent with the statute, because it reasonably determined that those programs were "indecent" within the meaning of the Act.

As to the meaning of "indecent" as used in the amendments, Time Warner Cable argued that the court need not, indeed should not, look solely to the cases construing "indecent" in the context of whether government bans or limits on indecent programming carried by broadcasters infringed their First Amendment rights. Time Warner Cable argued that because Congress was restoring editorial control to private parties who are themselves protected by the First Amendment, Congress was not limited to definitions of indecency developed in the broadcast cases, where the issue is whether government has the power to restrict the editorial rights of private parties.

Time Warner Cable further argued that in the 1992 Amendments, Congress used "indecent" in its everyday dictionary sense, meaning "grossly unseemly or offensive to manners or morals" and did not require a sexual component. Thus, Time Warner Cable had the right to conclude that all three episodes of *Life Without Shame* at issue in the case were indecent, including "A Tribute to Violence".

### *The Court's Opinion*

The Second Circuit agreed with Time Warner Cable that it was not a state actor in exercising its restored editorial rights, and that plaintiffs therefore had no First Amendment claim. In deciding whether Time Warner Cable had complied with the statute in finding the three "Life Without Shame" episodes "indecent", however, the court seemed to believe that it was constrained to draw upon the indecency case law from the broadcast context.

Using the definition developed in those cases, the court easily determined that the first two episodes,

which had strong and explicit sexual content, were indecent. As for "A Tribute to Violence", the court stressed that, like the other two episodes, it contained commercials for strip clubs and the like. The court also noted that the commentary depicting the scenes of violence was filled with sexual innuendo, and that the woman whose throat is slit "is wearing a partial see-through bikini." The opinion leaves unanswered what the result would be as to a similar show that dispensed with the sexual banter or where the victims of violence were less scantily clad.

### *Conclusion*

When, and if, the issue arises whether graphic violence alone can constitute indecency within the meaning of the cable leased access provisions, the courts should not feel compelled to follow the definition of indecency developed in the broadcast cases. The broadcast indecency cases very much depend upon the presence of state action. The issue in those cases is the extent to which government may restrict the editorial freedom of broadcasters to telecast what they wish. The more broadly the courts construe the term "indecent", the greater the intrusion on private parties' First Amendment rights.

The context in the Cable Act cases is the opposite. There, government has stripped cable operators of their editorial control over a portion of their systems. (Whether that action itself violates the First Amendment remains open to question.) In the 1992 amendments, Congress restored some measure of editorial control, tied to the concept of indecency. As the Second Circuit has now clearly held, cable operators employing that discretion are not state actors, but private parties exercising editorial control. In construing "indecent" in this context, the more broadly the courts construe the term, the lesser the intrusion on private parties' editorial rights and First Amendment freedoms. Recognizing this important distinction, courts should not unquestioningly follow the broadcast cases, but should develop a separate and distinct line of authority that best effectuates Congress's purposes in enacting the 1992 Cable Act amendments.

## Military Judge Shoots down Subpoena For Outtakes in Bennett Court Martial

By James M. Lichtman

For the second time this year, a military court has quashed a subpoena seeking outtakes from the press in a criminal matter. The first time was in February, when the judge presiding over the court martial of two Marine aviators in Camp Lejeune, South Carolina, quashed prosecution subpoenas issued to CBS and *Rolling Stone Magazine*. The defendants were the pilot and the navigator on a training flight in the Italian Alps that severed a ski lift and killed 20 people; the subpoenas that were quashed sought outtakes from a *60 Minutes* report and a *Rolling Stone* article about the incident, including unbroadcast and unpublished portions of interviews with the pilot himself. (See *LDRC Libel-Letter* February 1999 at 21).

### *Dateline Reports*

In April, a second military judge proved surprisingly sensitive to the First Amendment interests supporting the reporters' privilege, quashing a subpoena to NBC for outtakes sought by both the prosecution and the defense in the ongoing court martial of Marine Staff Sergeant Arthur G. Bennett. Last January, *Dateline NBC* ran a report on the shocking allegations that Bennett had sexually assaulted a number of underage victims, had faked his death to avoid a court martial by setting a trailer on fire in Nevada with an unidentified body inside, and had then moved to a small Utah town where he lived with his family under an assumed identity.

Bennett already has received a 45-year sentence in Utah after pleading no contest to felony sexual abuse charges, and he faces capital murder, sexual assault, kidnapping, and arson charges in Nevada. Bennett's court-martial involves a variety of charges, including sexual misconduct and desertion.

The *Dateline* report contained interviews with a number of individuals, including two of Bennett's

alleged victims (whose faces were not shown and whose names were not revealed), the police detectives who investigated Bennett's case, and Bennett himself. The subpoena, which, pursuant to military procedure, was issued by the prosecution on behalf of both the prosecution and defense, demanded "[a]ll unedited videotapes related to the Arthur G. Bennett story," including "any on-camera interviews" with the above individuals.

The defense argued that it needed the tapes to impeach the witnesses against Bennett, pointing to purported inconsistencies between the statements that two of those witnesses had made to *Dateline* and statements they made later. The prosecution argued that it expected to find admissions by Bennett in the outtakes of his interview -- for example, that he had been present at the trailer fire in Nevada -- that they could not otherwise obtain.

### *Finds Qualified Privilege Applies*

NBC's motion to quash was heard by Military Judge Lt. Col. John F. Blanche in Las Vegas, Nevada. In a transcribed bench ruling, Judge Blanche first rejected defense counsel's contention that there is no qualified reporter's privilege under *Branzburg*. He applied the following three-part test to balance the First Amendment rights of the press with the government's and the defendant's fair trial rights:

- *One*: Does the requested video tape footage contain information which is highly material and relevant.
- *Two*: Is the requested video tape footage necessary or critical to either the government or the defense's cases; and
- *Three*: Is this information available from any other available sources.

As to the first part of this test -- whether the

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## Military Judge Shoots down Subpoena

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material is highly material and relevant -- the court was swayed by the inability of either the defense or the prosecution to articulate precisely what statements it expected to find in the outtakes, explaining that "[a]bsent this articulation, the court would couch these requests as being speculative, at best." The court noted also that the subject of the interviews was "the recollection of events that may have happened years before the interview was actually conducted."

Addressing the second factor, the court held that the subpoenaed outtakes were not necessary or critical to either the prosecution or the defense. Although the prosecution asserted that it did not have any other direct evidence of intent, the court held that such direct evidence is rare in a criminal case, and that the government could attempt to carry its burden with the available circumstantial evidence.

The court also rejected the defense's contention that it needed the outtakes in order to impeach the witnesses that spoke to *Dateline*: testimony by the same witnesses at the Article 32 investigation (the military counterpart of a grand jury proceeding), and their prior sworn statements to investigators, provided a sufficient source of impeachment material. The availability of this testimony and these interviews also led the court to rule that the third part of the test -- whether the subpoenaed information is obtainable from other available sources -- was not met.

The court thus held that neither the prosecution nor the government was able to overcome the qualified privilege for the news media under the First Amendment. The court also noted that NBC had offered to produce the broadcast footage of the *Dateline* report on Staff Sergeant Bennett, along with an authenticating affidavit. It stated that "this is a fair proposal, and will

adequately serve the ends of justice in this case, ensuring that both the government and the accused receive a fair trial."

*James M. Lichtman is Litigation Counsel for NBC, and represented NBC in this matter.*

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## UPDATE

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### A Bump on the Way to the Court of Appeals

#### *Michigan Judge Rules (once again) That Subpoenas Can't Be Used Against the Press*

On June 23, Michigan Circuit Court Judge Lawrence Glazer ruled once again that prosecutors could not use investigative subpoenas against the Michigan media. This ruling is the latest to come out of the ongoing battle between Michigan prosecutors and the press over the coverage of the riot that broke out after Michigan State University lost in the NCAA Final Four tournament on March 27. See *LDRC LibelLetter*, April 1999 at 26, May 1999 at 31.

Judge Glazer iterated the position that he had taken when Ingham County prosecutors first presented the notion of an investigative subpoena to Judge Glazer in April of this year--that the media is exempt from this kind of subpoena when engaged in newsgathering. "I think I said last time that this was a bump on the way to the Court of Appeals. I've since discovered that it's an oval track." While Judge Glazer denied the prosecutors' first motion, the Michigan Supreme Court overturned that ruling, indicating that prosecutors could attempt to use an investigative subpoena. When the case came before the East Lansing District Court, Judge David Jordon ruled in favor of the prosecutors. The media then appealed once again to Judge Glazer.

Prosecutors are expected to appeal Judge Glazer's ruling.

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## UPDATE

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### Petition For Writ of Certiorari Filed Over Liability For Publication of Intercepted Calls

By David J. Bodney

On June 30, 1999, a *Petition for Writ of Certiorari* was filed in the U.S. Supreme Court in a case involving the constitutionality of the Louisiana Electric Surveillance Act (LSA-R.S. 15: 1302, et seq.). Specifically, the Petition presents the question whether the First Amendment protects newspapers from liability under state "wiretapping" law when they accurately report information of public concern that a source — not a newspaper — acquires by unlawful interception. *Central Newspapers, Inc. v. Johnson*, 722 So.2d 1224 (La. Ct. App. 1998), *petition for cert. filed*, 68 U.S.L.W. 3021 (U.S. June 30, 1999) (No. 99-42)

Central Newspapers, Inc., publisher of *The Alexandria Daily Town Talk*, filed this petition in the wake of a decision of the Louisiana Court of Appeal holding that the Louisiana Act "does not unconstitutionally impinge on any freedom of the press protections." Indeed, the Court of Appeal found that "the protections against public disclosure of allegedly illegal interceptions . . . are not only constitutional but are even more important than the protections of legally obtained wiretaps in the federal statute." On April 1, 1999, the Louisiana Supreme Court denied CNI's Application for Writ by a 4-3 vote.

#### **Reporting on a Press Conference**

The CNI case arose from a November 6, 1996 press conference in Bunkie, Louisiana called by Carol Aymond, Jr., an attorney who had campaigned unsuccessfully against Michael Johnson for the District Judgeship in Avoyelles Parish, Louisiana.

At the press conference, Aymond revealed that he had obtained a tape recording of a telephone conversation between Johnson and McKinley Keller suggesting, the taped conversation contained evidence of corruption and possible vote-buying. Aymond played the recording of the telephone conversation at the November 6 press conference and distributed transcripts to the news media. *The Alexandria Daily Town Talk* and the *Avoyelles Journal* published news articles about the press conference, which included portions of the tape aired by Aymond.

Johnson and Keller each filed suit in the 12th Judicial District Court, Parish of Avoyelles, against Aymond and the newspaper publishers, seeking damages under the Louisiana

Electronic Surveillance Act. Neither suit alleged that the newspapers had any involvement in preparing the unlawful tape recording. Rather, the suits asserted that CNI violated the Act by publishing the contents of the communications revealed at the press conference.

In its *Petition for Writ of Certiorari*, CNI argues that the case presents an important question of First Amendment Law otherwise reserved by the Court for decision. *See Florida Star v. B. J. F.*, 491 U.S. 524, 535 n. 8 (1989) (preserving question of First Amendment protection for publication of information of public concern unlawfully acquired by a source). That question arises in the compelling context of a report on a matter of grave public concern: evidence of alleged corruption by a member of the judiciary. Hence, the case brings into sharp relief the compelling public interest in ensuring the integrity of the judiciary and the important role of a free press in reporting such matters.

#### **Pending Related Cases**

At present, there are at least two decisions interpreting the constitutionality of the analogous federal wiretap statute's prohibition on disclosure of unlawfully intercepted communications (as applied in similar circumstances): *Boehner v. McDermott*, 1998 WL 436897 (D.D.C. July 28, 1998) (D.C. Cir. No. 98-7156) (decision pending); *Bartnicki v. Vopper*, (3d Cir. No. 98-7156) (decision pending regarding constitutionality of federal wiretap statute and parallel Pennsylvania act).

As commentators have recently noted, such wiretap statutes cannot withstand constitutional scrutiny. Rex S. Heinke and Seth M.M. Stodder, "Punishing Truthful, News-worthy Disclosures: the Unconstitutional Application of the Federal Wiretap Statute," *ENTERTAINMENT LAW JOURNAL* (Volume 19, No. 2, 1999). Such statutes unconstitutionally permit the government to punish those who disclose news-worthy information lawfully obtained — despite decades of constitutional jurisprudence to the contrary.

The Supreme Court's decision whether to accept this *Petition* is expected in October 1999.

*David J. Bodney is a partner at Steptoe & Johnson LLP, Phoenix, Arizona, and appears as counsel to CNI in the Petition.*

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## UPDATE

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### *The Knoxville News-Sentinel Wins a Round on Prior Restraint*

The Tennessee Court of Appeals finally has allowed *The Knoxville News-Sentinel* to publish details about the quarter of a million dollars of taxpayer money spent on legal work in the case of murder suspect, Thomas D. "Zoo Man" Huskey. In an order released July 9th, the three judge panel agreed that parts of the documents, which show how some of the money was allotted, "are of legitimate in-

terest to the public." *Huskey v. The Knoxville News Sentinel*, CCA No. 03C01-9905-CR-00211 (Tenn. Ct. Crim. App. July 9, 1999). See also *LDRC LibelLetter*, November 1998 at 27; February 1999 at 23; June 1999 at 19.

The controversy began in 1998 when the newspaper obtained sealed time sheets from a confidential source

concerning the appointed lawyers' work on Huskey's case. The newspaper ultimately spent more than a year trying to publish the information as it battled an injunction against publication and a temporary restraining order.

The attorneys for Huskey have until July 16th to appeal the decision to the Tennessee Supreme Court.

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### *Cert Granted: U.S. Supreme Court to Review United States v. Playboy*

On June 22, the United States Supreme Court granted certiorari in *United States v. Playboy*, 30 F. Supp. 2d 702 (D.Del. 1998), cert. granted, 67 U.S.L.W.3772 (U.S. June 22, 1999) (No. 98-1682). The question presented is whether Section 505 of the 1996 Telecommunications Act violates the First Amendment and whether the three-judge panel in the United States District Court for the District of Delaware had jurisdiction to dispose of the United States' post judgment mo-

tions under Federal Rules of Civil Procedure 59(e) and 60(a). See *LDRC LibelLetter*, January 1999 at 29.

Section 505 requires cable operators to scramble video and audio for all households of "sexually explicit adult programming or other programming that is indecent" and only when transmitted on channels "primarily dedicated to sexually oriented programming." The Third Circuit granted a permanent injunction barring enforcement of Section 505 (and the respective FCC regu-

lations), ruling that strict scrutiny was the applicable standard of review because Section 505 was a content-based restriction on speech. The court acknowledged that although Section 505 had a content-neutral objective of preventing signal bleed, it was triggered only in response to certain types of adult programming and only on certain channels.

Section 505 was ultimately held to be unconstitutional because it was not the least restrictive means of serving the government's purpose.

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### *Author and Wife Sentenced to Probation Over TWA Wreckage Theft*

On July 16, 1999, James Sanders, author of a 1997 book alleging that a missile brought down TWA Flight 800, and his wife, Elizabeth, a former TWA flight training supervisor, were sentenced to probation for conspiring to steal a piece of seat fabric from the plane's wreckage and aiding and abetting in the theft of the wreckage. James Sanders was sentenced to three years probation and 50 hours of community service. His wife received one year probation and 25 hours of com-

munity service. The couple was convicted of the crime on April 13, 1999. *U.S. v. Sanders*, No. 98-CR-013 (E.D.N.Y. April 13, 1999). Terrell Stacey, a former TWA pilot who had actually procured for the Sanders the piece of seat fabric from the hangar where the jet's remnants were being reassembled, had earlier pled guilty to a misdemeanor in the case.

In August 1997, the Sanders failed to convince the judge in their case

that their conduct in obtaining the fabric was protected by a First Amendment newsgathering privilege. James Sanders had charged in his book, "The Downing of TWA Flight 800," that residue from the stolen seat fabric was similar to missile fuel. Government investigators have maintained that the residue found on the seat cushions was glue used to hold the plane's seats together, and that the jet most likely exploded due to a mechanical malfunction.

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## Supreme Court Exempts State Entities From Federal Intellectual Property Suits

By Jeffrey I. D. Lewis

In a series of end-of-term decisions, the Supreme Court effectively immunized the States from suit for violation of federal laws including those governing intellectual property. In three decisions handed down on June 23, each decided by a vote of 5-4, the Supreme Court invalidated federal laws allowing the states to be sued for false advertising, *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board*, No. 98-149 (June 23, 1999) ("*College Savings*"); patent infringement, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531 (June 23, 1999) ("*Florida Prepaid*"); and federal labor standards, *Alden v. Maine*, No. 98-436 (June 23, 1999) ("*Alden*"); and on June 24 it remanded an additional patent case, *Regents of the University of California v. Genentech, Inc.*, No. 98-731 (June 24, 1999) ("*Genentech*"), for reconsideration in light of the previous day's decisions. In a subsequent action by the Fifth Circuit, a closely-watched copyright case against the University of Houston was remanded for further consideration in light of the Supreme Court's decisions. *Chavez v. Arte Publico Press*, No. 93-2881 (5th Cir. July 12, 1999) (in banc) ("*Chavez*").

The effect of the Supreme Court's actions is that states may infringe intellectual property and then avoid any suit other than its domestic procedures for claiming damages, *i.e.*, those arising under each state's law. The Supreme Court's decisions, rendered at a time when states are increasingly engaged in commercial activities, seemingly extends the veil of sovereign immunity to an entire host of state-affiliated agencies and organizations well beyond its classic origins, thereby giving the states an advantage over their commercial competition.

### *The Constitutional Framework*

The Eleventh Amendment to the Constitution prevents suits against the sovereign states. Three years ago, the Supreme Court in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), held that the Eleventh Amendment superseded Congress' ability to assert jurisdiction over the states under Article I of the Constitution, *e.g.*, to promote interstate commerce and protect the rights of inventors and authors. However, the Court also stated in *Seminole Tribe* that the Fourteenth Amendment allows Congress to enact laws to prevent deprivation of property by the states. The Fourteenth Amendment provides:

"No State shall . . . deprive any person of . . . property, without due process of law . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

Accordingly, if property is at stake and Congressional action is appropriate to prevent state-caused property deprivation, then Congress may grant federal courts the authority to review state action by abrogating the state's immunity.

At issue in the June 23 cases was Congress' ability to regulate states' activities. *Alden* was a labor cause of action, which is not classic property deprivation, but instead arose under Article I legislation. The other two decisions concerned an ongoing dispute between College Savings Bank, a New Jersey company, and Florida Prepaid, a state-created entity, concerning tuition prepayment programs which they both marketed and sold. In two separate lawsuits filed in the District of New Jersey, College Savings Bank sued Florida Prepaid concerning the tuition program, in one case College Savings Bank asserted its patent on the program and in the other it alleged Florida Prepaid engaged in false advertising in viola-

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tion of Section 43(a) of the Lanham Act.

### *The College Savings False Advertising Case*

Congress enacted the Trademark Remedy Clarification Act (TRCA) to allow suits against states in federal court for, *inter alia*, Lanham Act violations. The district court in *College Savings*, however, rejected TRCA and held that Florida Prepaid was immune from a federal suit. The Third Circuit affirmed. On appeal, College Savings Bank argued that Florida Prepaid is not immune because (i) it was engaged in interstate commerce, (ii) Congress enacted TRCA under authority of the Fourteenth Amendment and it allowed suit against Florida Prepaid, and (iii) TRCA served as an invitation to sovereign states to waive their immunity from suit which Florida Prepaid did by engaging and continuing to engage in activities regulated by the Lanham Act.

In holding that Congress did not properly enact TRCA, the Supreme Court found that false advertising is not a "property" right. As a consequence, TRCA was not properly enacted under the Fourteenth Amendment's right to protect against property deprivation -- neither a right to be free from false advertising by a business competitor nor the right to be secure in one's business interests qualified as property under the Fourteenth Amendment. Accordingly, the expansion of false advertising laws to abrogate a state's sovereign immunity under TRCA was deemed inappropriate.

### *Implied Waiver Overruled*

The majority then considered whether without TRCA a suit could still be maintained against Florida Prepaid because it was engaged in interstate commerce and therefore had "impliedly" or "constructively" waived its immunity from suit.

The standard for an "implied" or "constructive" waiver of sovereign immunity was set out by the Supreme Court in *Parden v. Terminal R. Co. of Ala. Docs Dept.*, 377 U.S. 184 (1964), where the Supreme Court held that Alabama had waived its sovereign immunity under the Federal Employers' Liability Act by engaging in common carrier railroad services in interstate commerce. Stating that since *Parden* the Court has consistently and substantially narrowed the situations where such a waiver could exist and that the "constructive-waiver experiment of *Parden* was ill-conceived," the Court in *College Savings* expressly overruled *Parden*.

### *The Dissent*

The principal *College Savings* dissent was written by Justice Breyer and joined by Justices Souter, Stevens and Ginsburg (Justice Stevens also wrote a short, separate dissent). It stated that a state waives its sovereign immunity against suit in federal court when it engages in a federally regulated commercial activity, since it could withdraw from that commercial activity to maintain its sovereignty. The dissent supported *Parden* and would apply it to find a waiver thereby allowing suit. The dissent also would hold that College Savings Bank had a property interest in its advertising which was being deprived by Florida Prepaid's false advertising, and that TRCA is valid because it was "necessary and proper" for Congress to abrogate a State's sovereign immunity to protect this property.

The dissent also set out its continuing disagreement with the *Seminole Tribe* decision, stating that "Congress does possess the authority necessary to abrogate a State's sovereign immunity where 'necessary and proper' to the exercise of an Article I power." According to the dissent, there is no support for *Seminole Tribe's* holding that Congress cannot enact legislation under Article I to abrogate a state's sovereign immunity for federal question

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cases that can be found in the constitutional text or surrounding debates, and the cases relied upon by the *Seminole Tribe* majority to support that proposition related to the inability of the courts — not congress — to find jurisdiction under Article I.

The dissent also stated that since sovereign immunity is a common law doctrine which was modified by the "new American Nation" in establishing the dual sovereignty of the state and federal governments, Article I can grant Congress the ability to enact federal legislation abrogating a state's sovereign immunity. The dissent stated that the *Seminole Tribe* decision restricts Congress' ability to enact economic legislation needed for the future.

### The Patent Case

The related patent case, *Florida Prepaid*, concerned the Patent and Plant Variety Protection Remedy Clarification Act ("the Patent Remedy Clarification Act"), which was enacted to expressly abrogate the states' sovereign immunity from patent suits. Both the district court and the Federal Circuit held that the Patent Remedy Clarification Act allowed a patent lawsuit to be maintained against a state. The Supreme Court however, reversed, holding that Florida had not expressly consented to suit or impliedly waived its immunity. The Court also held that the PRCA failed to meet the requirements for abrogating states' sovereign immunity.

The court stated that Congress' ability to enact legislation pursuant to the Fourteenth Amendment is remedial, *i.e.*, Congress must identify conduct violating the substantive provisions of the Fourteenth Amendment (property deprivation by the states) before it can enact legislation to cure that violation.

The Supreme Court indicated that it is only appropriate to enact federal legislation to regulate property deprivation by a state when the state does

not provide a remedy or only provides an inadequate remedy for infringement. The Court recognized that patents are a form of property and indicated that there was no reason why Congress might not legislate against deprivation of property without due process under the Fourteenth Amendment, if a remedy is needed.

In enacting the Patent Remedy Clarification Act however, Congress barely considered whether a federal remedy was needed or whether there were state remedies available for patent infringement. The Supreme Court noted that "Congress came up with little evidence of infringing conduct on the part of the states," and that "the Federal Circuit in its opinion identified only eight patent-infringement suits prosecuted against the states in the 110 years between 1880 and 1990." Statements in the legislative history for the Patent Remedy Clarification Act indicated that there was little evidence of massive or widespread violation of patent laws by states. Accordingly, because it was not clear that Congress was righting a deprivation of property by the states, the legislation was insufficient.

Moreover, the majority noted, the State of Florida provided both a legislative remedy through a claims bill and created a judicial remedy through a takings or conversion claim. Any future legislation that would abrogate state immunity from federal suit for patent infringement must be predicated upon a legislative record showing that there is no due process remedy available for seeking compensation from a taking.

### The Dissent

The dissent by Justice Stevens began by noting that patent law is a federal question, and that the "Constitution vests Congress with plenary authority over patents and copyrights." Since 1800 exclusive jurisdiction over patent cases has resided in federal courts. A patent "infringement litigation often raises difficult technical issues that are unfamiliar to the average trial judge. That consideration . . . pro-

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vided support for the congressional decision in 1982 to consolidate appellate jurisdiction of patent appeals in the Court of Appeals for the Federal Circuit" (footnotes omitted).

Justice Stevens' dissent, however, noted that many states did not have effective remedies for patent infringement thereby justifying Congress' enactment of the Patent Remedy Clarification Act. Moreover, the dissent recognized that the "strong federal interest" in the uniformity of patent laws be maintained by having federal, and not state, courts consider patents as well as their scope and validity. For that reason too the dissent would support abrogation of state sovereign immunity to allow for federal jurisdiction over state patent infringement.

The dissent maintains that it "is quite unfair for the Court to strike down Congress' Act based on an absence of findings supporting a requirement this Court has not yet articulated." The legislative history of the Patent Remedy Clarification Act indicated that it was being enacted because of the *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Chew v. California*, 893 F.2d 331 (Fed. Cir. 1990), decisions, which required a "clear statement" that state sovereign immunity would be abrogated for enforcement of the patent laws.

### The Alden Case

The *Alden* case did not concern intellectual property rights, but it too involved a state's sovereign immunity. In *Alden* employees of the State of Maine filed a suit under the Federal Fair Labor Standards Act of 1938, which gave the employees a cause of action in state, as well as federal, courts. Plaintiffs initially sued in federal court for overtime pay and liquidated damages, but that was dismissed on sovereign immunity grounds. They then brought the same action in state court, but the trial court dismissed the suit on sovereign immunity

grounds.

The Supreme Court affirmed the dismissal, finding that Congress did not have the right to abrogate a state's sovereign immunity in its own courts. "[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"; even where the suit is tried in state court.

### The Genentech Case

Fresh on the heels of the three June 23 decisions, on June 24 the Supreme Court granted a *writ of certiorari* in *Genentech*. Genentech, Inc. filed a declaratory judgment action against the Regents of the University of California, asserting that the University's patent — Genentech had an apprehension of suit as part of an ongoing series of lawsuits between Genentech and the University — was invalid, unenforceable and non-infringed. The district court dismissed the case for lack of jurisdiction, holding that the Patent Remedy Clarification Act was an unconstitutional attempt to abrogate California's sovereign immunity under *Seminole Tribe*. On appeal, the Federal Circuit reversed the district court because the University had waived its immunity and consented to the suit. The Supreme Court remanded the *Genentech* case for reconsideration by the Federal Circuit in light of *College Savings*.

### The Chavez Case

On July 12, 1999, the Fifth Circuit, which had been reviewing *en banc* a three-judge panel's decision in *Chavez*, remanded the case to the panel for further consideration in light of the Supreme Court's *College Savings* and *Florida Prepaid* decisions. As explained in the original, three-judge panel's decision, the plaintiff in *Chavez* "asserts that the University of Houston infringed her copyright by continuing to publish [more copies than were authorized of] her book without her consent and violated the Lan-

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ham Act by naming her, also without her permission, as the selector of plays in another book it published." 157 F.3d 282, 284-85 (5th Cir. 1998).

The Fifth Circuit first decided *Chavez* in 1995, holding that the district court was correct in not dismissing the case because the University was not entitled to sovereign immunity, relying on cases such as *Parden*.

"Until the Supreme Court determines otherwise, we must conclude that Congress is authorized expressly to compel states to waive sovereign immunity from private suits in federal court under the narrow circumstances found in *Parden*, i.e. when the states opt to conduct business for profit in areas where Congress conditions participation upon waiver from immunity."

59 F.3d 539, 546-47 (5th Cir. 1995). It therefore found that the express abrogation of state sovereign immunity enacted by Congress for copyright and trademark issues granted the federal courts jurisdiction to hear *Chavez*.

The Supreme Court granted certiorari and remanded the 1995 decision for reconsideration in light of *Seminole Tribe*. In the subsequent three-judge panel decision, issued in April 1998 and revised in October 1998, the Fifth Circuit found that sovereign immunity did bar the action, with Judge Wisdom dissenting.

The 1998 majority opinion, written by Judge Jones and joined by Judge Garza, concluded that *Parden* had effectively been overruled by subsequent Supreme Court decisions with one small exception.

"The Supreme Court's precedents had already expressly overruled several implications of *Parden* even before *Seminole* was

decided. We believe *Parden* remains viable precisely to the extent found 'unremarkable' in *Seminole* -- that a state may waive its Eleventh Amendment immunity from suit." 157 F.3d at 287 (footnotes omitted).

In its decision, the majority recognized copyright as a property right protectable against states, but it also stated "the Supreme Court noted the absence of case law authority over the past 200 years dealing with enforcement of copyrights in federal courts against the states." 157 F.3d at 288. However, the majority also noted a dichotomy -- it is Article I that creates the property interest known as a copyright, so holding that a copyright is property which a state can deprive a citizen of is an enforcement of Article I. "If it rests on the uniqueness of the property interest created by federal law, which is the source of *Chavez*'s copyright, then it is a direct end-run around *Seminole*'s holding that Article I powers may not be employed to avoid the Eleventh Amendment's limit on the federal judicial power." 157 F.3d at 289.

Judge Wisdom's dissent begins by noting that he has "thought about this case a great deal -- rarely with any feeling of satisfaction." 157 F.3d at 291. His view was that Congress acted properly in abrogating state immunity for copyright and trademark cases. It seemingly was important to Judge Wisdom's analysis that *Parden* only apply "when the state is engaged in non-core functions" and that "[p]ublishing for profit is outside of the state's core governmental functions." 157 F.3d at 295. But Judge Wisdom then noted that

"[t]he language used to waive state's sovereign immunity in the copyright and trademark laws is written as an absolute, not as a condition. On their face, these provisions are the type of unilateral abrogation of sovereign immunity using Article

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I powers that were condemned in *Seminole*. To conclude that these laws provide clear notification to the States as to which activities will result in the loss of sovereign immunity is troubling. The Court has been clear that a waiver will not be found lightly. There is not a narrow waiver like that at issue in *Parden* when Congress provided that any entity operating an interstate railroad would be subject to suit in federal court." *Id.*

However, Judge Wisdom also indicated that patents, copyrights and trademarks are all property and that they are all protectable under the Due Process Clause. 157 F.3d at 296.

### Conclusion

In both *College Savings* and *Florida Prepaid*, an agency affiliated with the State of Florida was engaged in interstate commercial activities. In *Genentech* an agency affiliated with the State of California was arguably engaged in the development of commercial technology and patent enforcement. In each of these instances, the state-affiliated agency was engaging in a classic "business" that is regulated by federal law, but apparently the state-affiliated agency is immune to either the enforcement of federal intellectual property laws or, as set out in *Alden*, substantive federal law. Indeed, *Alden* makes clear that Congress cannot create a cause of action pursuant to Article I which is binding on the state even for enforcement in its own courts. And as the *Chavez* case made clear, the situation is unsettled for copyrights, although presumably the courts will follow the pattern of finding sovereign immunity to bar federal actions.

Seemingly, there is no remedy left to an aggrieved intellectual property owner short of suing a state in its own courts for property deprivation or

seeking a private remedy bill in the state legislature, if there is a substantive law that can be enforced.

In a separate dissent in the *College Savings* case however, Justice Stevens may well have given an answer to the problem the Court created. That dissent challenged the notion that "Florida Prepaid is an 'arm of the state' of Florida" entitled to sovereign immunity, noting that sovereigns of the 18th Century "did not then play the kind of role in the commercial marketplace that they do today." Although the issue was not properly before the Supreme Court in these cases, because, *inter alia*, *College Savings Bank* had not challenged whether Florida Prepaid was entitled to sovereign immunity, the issue of whether state-sponsored entities engaging in commercial activities are entitled to sovereign immunity may well be litigated in a future lawsuits. No doubt, in the next wave of intellectual property suits against states, the notion of what is a sovereign will be litigated.

It may be that Congress will choose to address the issue of protecting intellectual property from state infringement by enacting new legislation, based upon the new requirement for underlying factual findings, for each area of intellectual property. To do so, however, Congress would have to, for instance, define "false advertising" as a property right. On the other hand, Congress may be able to address the issue by enacting legislation defining which state entities are, or are not, entitled to the veil of sovereign immunity. If it were to do so, and if that legislation withstood scrutiny by the Court, then this might be a vehicle to restrict state-sponsored intrusions into the commercial arena which are now immune from federal suit.

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## Failure to Release Public Records Leads to Jail Time for Florida School Board Member

A Florida school board member was suspended from her job and spent seven days in jail after a jury convicted her of violating the state's Public Records Act. A public officer who knowingly violates the Act can be suspended, removed, or impeached from office and is guilty of a misdemeanor of the first degree. In Florida, that means up to a year in prison and a \$1,000 fine.

Vanette Webb learned that the hard way. In May, Webb, an Escambia County school board member, was convicted of violating the Act when she failed to release public records to a parent. According to court documents, the parent requested virtually every record Webb made or received in connection with the school board.

Webb's attorney, Laura Whiteside, says that Webb is not against the release of public records. In fact, Webb has used the Public Records Act on several occasions to get information from Escambia County. In this case, says Whiteside, the requested documents contained confidential information about students. Whiteside has also said that the superintendent, not Webb, should have been responsible for releasing the records.

County Judge Patricia Kinsey did not agree. She sentenced Webb to 11 months and 15 days in jail, fined her \$1,000, and ordered her to pay \$45 per month in supervision costs. The judge later suspended all but 30 days of the sentence and has since disqualified herself from the case. Judge Kinsey's disqualification order calls Webb's failure to provide the records "an intentional abuse of power by an elected public official who misused her office to prevent a political opponent from obtaining public documents."

On May 21st, County Judge William White freed Webb on \$2,000 bond, pending appeal, and suspended the rest of Webb's sentence. Webb served only seven days of her 30-day jail term.

The suspended sentence came the same day that

Florida Governor Jeb Bush suspended Webb from office. Bush stated that the conviction constituted "misfeasance, malfeasance, and/or neglect of her duties." Gov. Bush has since appointed Webb's replacement. If Webb does not resign, she may face a trial before the Florida Senate.

According to the Brechner Center for Freedom of Information at the University of Florida, about 100 public officials and employees in Florida have been prosecuted for public records violations. In twelve of those prosecutions, the official was either convicted or found guilty of open government law violations. Eleven officials, including a judge, were either suspended or removed from office for the violations.

Webb is the first person in Florida history to serve time in jail for violating the state's Public Records Act, according to the Brechner Center and Whiteside. Whiteside indicated that there are several controversies surrounding the case and maintains that Webb correctly followed the law. Webb is currently seeking a new trial.

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