



## LIBELLETTER

June 1995

### OHIO SUPREME COURT PROTECTS OPINION UNDER STATE CONSTITUTION

The Ohio Supreme Court held in May that statements of opinion which pass the "totality of circumstances" test are not actionable under the Ohio State Constitution. *Vail v. The Plain Dealer*, 72 Ohio St. 3d 279; 649 N.E.2d 182; 1995 Ohio LEXIS 1219 (1995). With this decision, the home state of *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), joins a growing list of state high courts holding that opinion is protected under state law and using the pre-*Milkovich* analysis to do so.

The Ohio court dismissed allegations of defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. The decision overruled an intermediate appellate court, which had reinstated the claims over a trial court's dismissal by using the *Milkovich* reasoning that the statements in question

(Continued on page 12)

### FOOD DISPARAGEMENT BILLS DEFEATED IN CALIFORNIA

#### ENACTED IN OKLAHOMA AND TEXAS

By James Grossberg, Seth Berlin  
and Thomas Newton

Legislation creating a new cause of action for disparagement of perishable food products has been rejected in California, but signed into law in both Texas and Oklahoma, raising the number of states with such laws to at least ten.

(Continued on page 13)

### U.S SUPREME COURT REAFFIRMS IMPORT OF INDEPENDENT APPELLATE REVIEW

Citing *Bose Corp. v. Consumers Union*, the United States Supreme Court in a unanimous opinion written by Justice Souter on the issue of exclusion of a gay, lesbian and bisexual group from the Boston St. Patrick's Day Parade, strongly reaffirmed the "constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court" in First Amendment cases. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, No. 94-749, slip op. at 18-20 (U.S. June 19, 1995).

The case concerned the question of whether or not the application of the Massachusetts public accommodations laws to the parade, and the consequent requirement that the parade sponsors not discriminate against the respondent-group ("GLIB") by excluding it from the parade because of disagreement with its message, violated the sponsors' First Amendment rights. The Supreme Court concluded that it does.

Of specific note to libel/privacy litigators is the discussion of independent appellate review. Rather we have chosen to reprint the relevant

(Continued on page 2)

### PRODIGY HELD "PUBLISHER" OF ANONYMOUS BULLETIN BOARD POSTINGS

By Michael Kovaka

The Prodigy online service must be treated as a "publisher" of allegedly libelous statements posted on its "Money Talk" bulletin board, a New York trial court ruled late last month. The ruling, by Supreme Court Justice Stuart L. Ainsworth, holds that Prodigy's decision to exercise editorial control over the content of its bulletin boards requires that the company be treated as if it had originated the postings. The ruling opens the way for a trial to determine whether the statements were false, and whether Prodigy exercised sufficient care in disseminating the statements over its computer network. *Stratton Oakmont, Inc. v. Prodigy Services Corp.*, No. 31063/94 (N.Y. Sup. Ct. May 24, 1995).

The case arose from messages posted last October on "Money Talk," a Prodigy bulletin board dedicated to stocks, investments and other financial matters. The postings were originated by an unidentified user and contained accusations of criminal fraud by Stratton Oakmont, Inc., a securities investment banking firm, and its president, Daniel

(Continued on page 17)

### CERT. SOUGHT: CORPORATIONS AS PUBLIC FIGURES

In the 21 years since *Gertz*, the judicial system has wrestled with the problem of defining plaintiff status in defamation suits. Perhaps nowhere has the analysis been more disparate and less intellectually and doctrinally consistent, than with respect to the corporate plaintiff. The recent filing of a certiorari petition with the Supreme Court in *McKnight, et. al v. American Cyanamid Co.*, No. 94-1472 (4th Cir. March 3, 1995), petition for cert. filed May 26, 1995, an unpublished, per curiam decision, in a non-media context, however, would place the corporate plaintiff issue squarely before the Court.

(Continued on page 15)

## U.S. SUPREME COURT REAFFIRMS IMPORT OF INDEPENDENT APPELLATE REVIEW

*(Continued from page 1)*

paragraph here: [ The Court notes that the respondents chose at the Supreme Court level to rest their case on the Massachusetts public accommodations law, accepting for purposes of this appeal, the lower court determination that there was no state action sufficient to support a First Amendment or Equal Protection claim against the government for its participation in the parade or their exclusion from the parade.]

"There is no corresponding concession from the other side, however, and certainly not to the state courts' characterization of the parade as lacking the element of expression for purposes of the First Amendment. Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). The 'requirement of independent appellate review...is a rule of federal constitutional law,' *id.*, at 510, which does not limit our deference to a trial court on matters of witness credibility, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989), but which generally requires us to 'review the finding of facts by a State court...where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts,' *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927). See also *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964)(opinion of Brennan, J.). This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. See *Bose Corp.*, *supra*, at 503. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that 'findings of fact...shall not be set aside unless clearly erroneous, 'we are obliged to make a fresh examination of crucial facts. Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct, our obligation is to 'make an independent examination of the whole record,'...so as to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression.' *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)(footnote omitted), quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)." Slip op. at 18-20.

The Court goes on to find that the parade did, indeed, have an expressive purpose. It rejected the Massachusetts state courts' determination that the lack of a coherent theme or message in the parade and, the willingness of the parade sponsors to let virtually any group march (having excluded only the Ku Klux Klan and ROAR, an anti-busing group, over the years) with no control over the banners, signs or other materials or speech of the marching groups, led to the conclusion that the parade was a form of public accommodation.

"To be sure, we agree with the state courts that in spite of excluding some applicants, the Council [petitioners] is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." Slip op. at 23-24.

While the state public accommodations law was not unlawful on its face, the application of that law to expressive speech "had the effect of declaring the sponsors' speech itself to be the public accommodation." Slip op at 29.

Analogizing the sponsors and their somewhat eclectic selection of parade participants to the selections made by newspaper op ed pages and cable operators, each of which makes selections of material for inclusion that they themselves do not generate, the Court concluded that this forced inclusion, albeit under the aegis of a public accommodations statute, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." Slip op. at 29-30.

The Court found respondent's participation in the parade was also expressive activity. GLIB was created for the purpose of marching in the parade, to evidence and celebrate gay and bisexual identity within the Irish community, and show support for those who were being excluded from the St. Patrick's Day parade in New York.

*(Continued on page 4)*

## MASS SUPREME JUDICIAL COURT: PARODY IN UNION ELECTION HAS NO CONSTITUTIONAL PROTECTION

By Laura R. Handman, William S. Adams and Edward J. Davis

The Massachusetts Supreme Judicial Court ("SJC") issued a 5-2 decision on June 13, 1995 side-stepping a potential conflict between free speech and workplace anti-harassment values, but leaving the path clear for an appeal to the United States Supreme Court on the extent of protection for parody of private figures.

The facts in *Bowman v. Heller*, Index Number 94-759, had squarely framed the issue of how workplace sexual harassment laws should be reconciled with the constitutional protection for speech. Few courts have addressed this issue in the context of a plaintiff's action for damages against a co-worker arising out of pure speech, but the SJC decision leaves the issue still unresolved.

The complaint in *Bowman* had been brought by a 60-year old female social worker for the Commonwealth of Massachusetts who was also a candidate for the presidency of an 8,700-member union local. Her co-worker, defendant David Heller, had actively campaigned in support of her political adversary. In the course of the campaign, Mr. Heller created photo-collages consisting of plaintiff's head and name, taken from her campaign postcards, pasted onto photographs of considerably younger, partially clad women in sexually explicit poses. Mr. Heller distributed photocopies of these to five co-workers. They in turn distributed them more widely in the office. Mr. Heller was the subject of disciplinary action as a result of the photo-collages.

Ms. Bowman first viewed the photo-collages after the campaign when her campaign manager provided her with copies of them. Claiming that Mr. Heller had intentionally and negligently caused her emotional distress, Ms. Bowman brought suit against Mr. Heller and the Commonwealth. Two years later she amended her complaint to add claims for sexual harassment and interference with her union election campaign under the Massachusetts Civil Rights Act

("MCRA"). By the time the case came to trial, she had settled with her employer.

After a bench trial, plaintiff prevailed on all counts. While the trial court recognized that plaintiff, as a candidate for union office, was a public figure under Massachusetts SJC precedent, *Materia v. Huff*, 394 Mass. 328 (1985), it held that the defendant had not sought to express an articulable message through the photo-collages and that they were therefore not subject to the protection afforded by *Huster Magazine v. Falwell*, 485 U.S. 46 (1988). In *Falwell*, the Supreme Court had barred an emotional distress claim brought by a public figure for non-factual statements made about him in parody, holding that the First Amendment protections applicable to libel claims apply equally to claims brought under the alternative rubric of emotional distress. The Massachusetts trial court also ruled against Mr. Heller on both the MCRA claims, awarding plaintiff a total of \$35,000.

On its own initiative, the Supreme Judicial Court transferred defendant's appeal from the Appeals Court. In support of plaintiff, nine amici filed briefs, chiefly arguing for a broad interpretation of the state civil rights statute.

Mr. Heller was represented on appeal by Harvard professor Alan Dershowitz, and supported by amici, led by General Media Publishing Group, Inc., publisher of *Omni* and *Penthouse* magazines, and Feminists for Free Expression (filing separately). Defendant and amici argued that the First Amendment barred plaintiff from recovering damages, whether for

sexual harassment or emotional distress, for a non-factual expression of opinion (in this case in the form of crude sexual parody), particularly when the subject is a candidate for union election where heated rhetoric is anticipated. We also argued that punishment of Mr. Heller's speech because it was, according to the lower court, degrading women, was not viewpoint neutral but favored an official orthodoxy in violation of the First Amendment. Finally, we argued that where the alleged harassing activity arises out of an isolated expression of speech -- expressed by caricatures, unaccompanied by any conduct in the context of a union election -- the speech cannot be punishable as sexual harassment, consistent with the First Amendment.

In a footnote to its decision, the SJC vacated the judgment below to the extent it was based on the MCRA, holding that defendant's acts did not constitute a "threat, intimidation or coercion" as required under the Massachusetts sexual harassment statute. It thus avoided addressing the conflict posed by this case of the extent to which the First Amendment limits workplace anti-harassment remedies for pure speech.

Instead, despite the finding of the lower court regarding plaintiff's public figure status and its own direct precedent, and despite the fact that the public figure status of plaintiff was not significantly briefed by any of the parties or amici, the Court found the union election was not a matter of public concern and, as a consequence, plaintiff was not a limited purpose public figure. The election of the

(Continued on page 4)

- \* **Rubin v. Coors: Supreme Court and Commercial Speech, p. 5**
- \* **Virginia Supreme Court on Misappropriation, p. 7**
- \* **Wiretap Violation: No Mandatory Damages, p.7**
- \* **ABC Fails to Quash N.Y. Criminal Trial Subpoena, p. 9**
- \* **Pennsylvania Isn't Always Trouble, p. 9**
- \* **Where Truth Was No Defense, p. 10**
- \* **Legislative Updates, p. 11**

## PARODY IN UNION ELECTION HAS NO CONSTITUTIONAL PROTECTION

*(Continued from page 3)*

president of the 8,700 member local, even one that represented state employees, was found by the Court to be no more of a public controversy than the election of the president of a social club or condominium association. The Court took no note of the fact that the material at issue was only circulated within the community concerned with the election.

Defendant's claim that his photo-collages were an attempt to "state that [the plaintiff's] statements during the campaign were ridiculous," was also discounted by the Court which instead relied on testimony by the defendant that he had not intended to influence the outcome of the election. Based on this testimony, the Court concluded that the photo-collages were not addressing a matter of public concern.

Having rejected plaintiff's public figure status, and with no matter of public concern at issue, the SJC concluded that the speech was not entitled to constitutional protection. Citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the SJC held that defendant's speech, about a private figure and a private matter, was subject to tort liability under state law.

The Court did not address any of the

requirements otherwise applicable in the case of private figure defamation, including the requirement that plaintiff show a false statement of fact made with fault. Nor did the SJC address the concern expressed in *Falwell* that an outrageousness standard permits too much subjective judgment by judge or jury.

The dissent argued forcefully that elections are the "absolute paradigm of a public controversy" and that plaintiff became a limited-purpose public figure when she voluntarily thrust herself into the campaign. It argued further that, even as a private figure, plaintiff would have no remedy for the non-factual caricatures. Notably, the author of the dissent in *Bowman*, (Nolan, J.), also dissented from the SJC's decision, unanimously reversed by the U.S. Supreme Court on June 19, 1995, that held that the St. Patrick's Day Parade was not expressive activity. The Supreme Court's findings that even expression without a message is protected by the First Amendment and that "orthodox expression," however well-meaning, cannot be imposed, suggest that this SJC decision would meet a similar fate in the Supreme Court.

While the Court's finding that the MCRA did not apply due to lack of coercion has perhaps left to another day the conflict between free speech and anti-harassment values, the decision leaves many grounds for an appeal to the United States Supreme Court. Of utmost importance for publishers particularly is a novel question that has not been addressed by the Supreme Court: whether *Falwell* should be extended to limit claims by private figures for intentional infliction of emotional distress for non-factual speech. The extent of *Falwell's* protection for non-media defendants is also posed. Finally, the refusal to find even limited purpose public figure status for a candidate for union election also raised a substantial issue of concern to publishers and others.

Mr. Heller plans to petition the United States Supreme Court for certiorari. An amicus brief in support of the petition is being considered.

*Laura R. Handman, William S. Adams and Edward J. Davis are from the firm Lankenau Kovner & Kurtz in New York and in Washington, D.C. They represented amici, led by General Media Publishing Group, Inc., in this case.*

---

## U.S. SUPREME COURT REAFFIRMS IMPORT OF INDEPENDENT APPELLATE REVIEW

*(Continued from page 2)*

Another point of significance to media counsel, is the Court's distinction between the sponsors of this parade and the cable system operators in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. \_\_\_\_\_ (1994). The Court rejected the respondent's argument that the sponsors of the parade, like a cable operator, are "merely 'a conduit' for the speech of participants in the parade 'rather than itself a speaker.'" Slip Op. at 33, citing the Brief for Respondent. A parade, the Court found, would be likely to be perceived as having chosen its participants, unlike cable, which the Court found had a long history of serving as a conduit for the speech of others, notably the broadcasters. Moreover, the parade sponsors held little of the franchised monopoly power of the cable system operators, such that denial of respondent's inclusion in their parade would effectively shut out their ability to speak.

Indeed, the state had failed to put forward a legitimate purpose for the provision as applied to expressive speech. As noted, the respondent's exclusion from the parade would not result in silencing it as a speaker. And the result of forcing pro-social speech, lacking in (or at least balanced) biases was clearly unacceptable under the First Amendment.

---



## PROTECTION OF COMMERCIAL SPEECH STRONGER AFTER SUPREME COURT REJECTS ATTACKS BASED ON POSADAS AND LaRUE

By Nory Miller

On April 19, the United States Supreme Court issued a unanimous opinion striking down a 60-year-old restriction on alcohol labeling enacted in the wake of Prohibition. *Robert E. Rubin v. Coors Brewing Company*, 1995 WL 227629 (U.S.). Shortly after the repeal of Prohibition, Congress enacted a statute setting out new federal rules governing the alcohol beverage industry. Among other requirements, manufacturers of distilled spirits and most wine were required to disclose alcohol content on the label of each bottle. In contrast, manufacturers of malt beverages such as beer and ale were forbidden to disclose the alcohol content of their beverages.

The government sought to defend the rule on the ground that disclosure of alcohol content on malt beverages would result in a strength war among manufacturers with each striving to produce a higher alcohol product, and in consumers choosing beer based solely on its alcohol content. After two trips to the 10th Circuit, the rule was found to be an unjustified restriction of commercial speech.

The Supreme Court affirmed on the ground that the government's regulatory scheme on the subject was so irrational that, even if there were some danger of strength wars, the labeling rule could not be expected to deter it.

One of the irrational aspects of the law was its requirement of alcohol content labeling on some products and prohibition of such labeling on others. Another was the government's interpretation of the law to permit advertising of alcohol content in states that did not prohibit such advertising but to permit labeling of alcohol content only in states that did not expressly require it. Thus, in many states manufacturers could advertise the amount of alcohol in their products, but could not place that same information on the product labels.

The Court also found that the regulation was not sufficiently tailored

to the government's asserted goal and that less restrictive means were available. Among those cited was one regulation that would impose no restrictions on speech whatsoever -- a limit on the alcohol content of beers -- and two that would impose less severe restrictions on speech -- a prohibition of marketing that emphasized high alcohol strength, and a prohibition on alcohol content labels for malt liquors only.

In reaching its conclusion, the Court rejected the government's attempts to glean a more favorable standard of review from *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) or *California v. LaRue*, 409 U.S. 109 (1972). The government relied on language in *Posadas* which it read to confer greater latitude on governments to regulate commercial speech related to "socially harmful activities" and to permit restrictions on speech promoting activities that the government had the power to ban altogether. Notwithstanding this language in *Posadas*, the Court adopted Coors' position that neither *Posadas* nor subsequent cases had created a lesser standard of review for certain types of commercial speech and that the standard promulgated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), applied to all commercial speech cases without exception.

The Court also rejected the government's argument, based on *LaRue*, that the Twenty-first Amendment gave the states greater latitude in regulating commercial speech about alcohol than available under the First Amendment in other areas. In upholding a prohibition of nude dancing in bars, *LaRue* had suggested that state regulations governing alcohol carried an added presumption of validity because of the Twenty-first Amendment. In *Coors*, the Court swept past the fact that the case concerned a federal regulation -- which garners no protection from the Twenty-first Amendment -- and stated

flatly that *LaRue* was not relevant because it did not involve commercial speech about alcohol but involved instead regulation of nude dancing in places where alcohol was served.

In previous cases, the Court has repeatedly held that the Twenty-first Amendment does not change the calculus for determining the constitutionality of state regulation of alcohol, outside of the Commerce Clause context. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (establishment clause); *Craig v. Boren*, 429 U.S. 190, 206 (1976) (equal protection clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (due process clause); *Dep't of Revenue v. James Beam Co.*, 377 U.S. 341 (1964) (export-import clause). Even in that context, the federal government's rights under the Commerce Clause have frequently been found to outweigh a state's rights under the Twenty-first Amendment. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984); *324 Liquor Corp v Duffy*, 479 U.S. 335 (1987); *Bacchus Imports, Ltd v Dias*, 468 U.S. 263 (1984).

In *Coors*, however, the Court stated more expressly than ever before that it has no intention of applying *LaRue* outside the context of nude dancing regulation. The extent of the Court's distancing itself from the larger questions raised by *LaRue* is less clear. Its refusal to address the position taken in *LaRue* suggests that the Court has concluded the Twenty-first Amendment does not provide states more leeway to encroach on individual rights when regulating alcohol than when regulating anything else. Nonetheless, the Court did not issue such a definitive statement. It merely distinguished one case from another in one sentence in one footnote.

In addition, at least one aspect of *Posadas* was embraced by the Court. The Court held specifically that governments may legitimately regulate commercial speech for purposes other than preventing consumers from being

(Continued on page 6)

### PROTECTION OF COMMERCIAL SPEECH

*(Continued from page 5)*

misled. Justice Stevens, in a strong concurrence, challenged this position, arguing that the commercial speech doctrine should apply only when the government acts to prevent misleading speech or to protect consumers from incomplete information. Under other circumstances, he wrote, speech should receive full First Amendment protection. A majority of the Court, however, appears to maintain that truthful, non-misleading commercial speech may be prohibited or restricted, if the test promulgated in *Central Hudson* is met.

The Supreme Court promises to clarify further precisely which aspects of *Posadas* and *LaRue* retain force next Term. On May 1, the Court granted certiorari to *44 Liquormart, Inc. v. Rhode Island*, Docket No. 94-1140, limiting the question presented to: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages." Several lower courts have upheld such restrictions. The Supreme Court has approached the precise question only once - dismissing, for want of a substantial federal question, the appeal of a state court decision upholding a prohibition of price advertising of alcoholic beverages in a state that permitted alcohol advertising generally. See *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio 2d 361, 433 N.E.2d 138, appeal dismissed, 459 U.S. 807 (1982).

*Nory Miller is an attorney with Jenner & Block, Washington D.C., which represented Coors Brewing Company before the Supreme Court.*

### REGISTRATION FORMS HAVE GONE OUT FOR THE NAA/NAB/LDRC BIENNIAL LIBEL/PRIVACY CONFERENCE

THE CONFERENCE WILL BE HELD SEPTEMBER 20-22, 1995  
AT THE RITZ-CARLTON TYSONS CORNER IN McCLEAN,  
VIRGINIA

PLEASE SIGN UP EARLY - SPACE IS LIMITED!

FOR FURTHER INFORMATION CONTACT RENE MILAM OF  
THE NEWSPAPER ASSOCIATION OF AMERICA AT (703) 648-  
1065

### THE LDRC ANNUAL DINNER

Presenting LDRC's *William J. Brennan, Jr. Defense of Freedom Award*  
to

### JUSTICE HARRY A. BLACKMUN

LDRC is truly honored to be able to invite all of you to spend this  
evening with  
Justice Blackmun as our esteemed guest.

PLEASE NOTE NEW DATE, TIME AND LOCATION:  
THURSDAY EVENING, NOVEMBER 9, 1995 at 7:30 P.M.

THE ANNUAL DINNER HAS MOVED -

• New Night: Thursday  
• New Location: The Sky Club Atop the Metropolitan Life Building

© 1995 Libel Defense Resource Center  
404 Park Avenue South, 16th Floor  
New York, New York 10016

Executive Committee: Harry M. Johnston III (Chair); Peter C. Canfield;  
Robert Hawley; Chad Milton; Margaret Blair Soyster; P. Cameron DeVore (ex  
officio)

Executive Director: Sandra S. Baron  
General Counsel: Henry R. Kaufman  
Associate General Counsel: Michael K. Cantwell  
Staff Assistant: Melinda E. Tesser

### LDRC LibelLetter Committee:

Peter Canfield (Chair)  
Richard Bernstein  
Jim Borelli  
Robert Dreps  
Julie Carter Foth  
Richard Goehler

Rex Heinke  
Adam Liptak  
Nory Miller  
Madeleine Schachter  
Charles Tobin  
Stephen Wermiel

## USING A NAME FOR ADVERTISING PURPOSES IN VIRGINIA IS ACTIONABLE EVEN IF THE USE CONVEYS TRUTHFUL INFORMATION

By Conrad M. Shumadine

The Virginia Supreme Court held in *Town & Country Properties, Inc. v. Riggins*, 457 S.E.2d 350, 1995, WL 232911 (1995) that the right to print truthful information is not the right to use truthful information for advertising purposes. Affirming a jury verdict granting compensatory and punitive damages, the court ruled that the use of the name and photograph of former Redskins football star John Riggins in a flyer advertising the sale of Mr. Riggins' former home was actionable for trover, common law conversion and a violation of Virginia Code section 8.01-40(a) prohibiting the use of any person's name "for advertising purposes or for the purposes of trade" without written consent. The court had no difficulty in concluding that the use of Mr. Riggins' name in the flyer was for advertising purposes.

The facts of the case are straightforward. Mr. Riggins and his wife were divorced in 1991. Pursuant to the property settlement, Mrs. Riggins obtained the marital home. She became a licensed real estate broker and decided to sell the marital home. She arranged for the printing and distribution of the flyer. Mr. Riggins never consented to the use of his name or likeness.

Mrs. Riggins and her real estate firm argued that the publication of a truthful fact could not be a basis for liability under the

(Continued on page 8)

## DENIAL OF DAMAGES IN WIRTAPPING CASE IS WITHIN DISTRICT COURT'S DISCRETION

The Court of Appeals for the Fourth Circuit has ruled that a federal district court has discretion to deny damages in an action brought under 18 USC 2520(c)(2) of the 1986 Electronic Communications Privacy Act, the "Federal Wiretap Statute," in lieu of awarding the statutory minimum of \$10,000 damages. *Nalley v. Nalley*, 63 U.S.L.W. 2745 (CA4 May 17, 1995) (No. 94-1439). The non-media case arose after the then-Mrs. Nalley anonymously received a tape recording of a telephone conversation between her husband and his mistress. The husband and his mistress brought the action against Mrs. Nalley under the Electronic Communications Privacy Act for intentionally disclosing the contents of a telephone conversation, "knowing or having reason to know that the information was obtained through [an unauthorized] interception." 18 USC 2511(1)(c).

Section 2520(c)(2) states that "the court may assess as damages whichever is the greater of--(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000." The plaintiffs conceded that they suffered no actual damages, but sued for the minimum statutory damages of \$10,000 each and for punitive damages. The District Court

found Mrs. Nalley's violation to be *de minimis* and refused to award damages. Plaintiffs appealed contending that although the statute uses the permissive verb "may," the term can still be given a mandatory construction.

After analyzing the context of the statutory language to determine whether Congress intended to grant discretionary power to the district courts, including the fact that Section 2520(c)(1) includes the mandatory term "shall" which contrasts with the permissiveness of "may," the Court of Appeals held that "the change in the relevant language of Section 2520 from the mandatory to the permissive verb indicates that Congress intended to confer upon district courts the discretion to decline to award damages in applying Section 2520(c)(2)." *Id.* at 2746.

Plaintiffs also argued that 18 USC 2511, which provides that "any person who . . . intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)," mandates that some amount of damages must be awarded if a violation of

the statute has been established. The court disagreed, holding that "[s]ince the wife was subjected to suit under the statute, the disjunctive mandate of Section 2511 is satisfied, moving the question back to whether the district court had discretion under Section 2520(c)(2) not to award damages to plaintiffs." *Nalley*, at 2746.

Although arising in a non-media context, the case strengthens the split between the 4th and 7th circuits on the issue of whether Section 2520 permits courts to disallow damages. As was reported in the "Special Report on Federal Law of Electronic Eavesdropping" in the 1994-95 LDRC 50-State Survey, written by Stuart F. Pierson and Dorothy B. Fountain, p. clixiii, the 7th Circuit has held, in *Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1990), that courts have no discretion to withhold damages and consequently granting a windfall to those who initially violated the statute by intercepting the communication. Meanwhile, along with *Nalley*, the United States District Court for the Eastern District of North Carolina held, in *Shaver v. Shaver*, 799 F.Supp. 576 (E.D.N.C. 1992), that the court did in fact have the discretion to withhold a damages award where the statutory violations were *de minimis* and the defendant was unemployed and had no assets.

**TOWN & COUNTRY PROPERTIES, INC. v. RIGGINS**

*(Continued from page 7)*

First Amendment. The court disagreed. The court held that Mr. Riggins had a property interest in his name and likeness and that the Constitution did not authorize the use of his name for advertising purposes. Whatever right the public may have had to identify the home as Mr. Riggins' former home did not grant his ex-wife the right to appropriate his name to merchandise the property.

What is significant about the opinion is what it did not hold. It did not hold that *any* mention of the fact that the home was formerly owned by Mr. Riggins would be actionable. Mr. Riggins' name was so much larger than anything else on the flyer, the use for advertising purposes was obvious and required little analysis.

The more difficult issue, which was not addressed by the court, is how to distinguish when a name is used for advertising purposes. It is customary for real estate brokers to refer to former owners, especially prominent former owners, and one of the reasons for such references is to consummate a sale. If that type of comment and nothing more was held to be for advertising purposes, serious constitutional difficulties would seem apparent. However, since the use of Mr. Riggins' name for advertising purposes seems so clear from the facts, the case may stand for nothing more than the unsurprising proposition that a person's property interest in his name remains protectable and is not subject to unrestricted commercial use in the face of a statute expressly precluding the use of a name for advertising purposes.

*Conrad M. Shumadine is a partner with Willcox & Savage, P.C., in Norfolk, Virginia.*

**DID YOU ORDER THE 1995-96  
LDRC 50-STATE SURVEYS:**

**MEDIA PRIVACY AND  
RELATED LAW, due out shortly  
and  
MEDIA LIBEL LAW, due out  
in October?**

**IF NOT, PLEASE  
CONTACT LDRC  
IMMEDIATELY TO PLACE  
YOUR ADVANCE ORDER!**

**LDRC WOULD LIKE TO THANK  
OUR SUMMER INTERNS FOR  
THEIR CONTRIBUTIONS TO  
THIS EDITION OF THE  
LIBELLETTER :**

**John Maltbie, Brooklyn Law  
School, and Sarah Edenbaum,  
Brendan Healey and  
William Schreiner, Jr., all from  
New York University  
Law School**



## OUT-TAKES IN CAMERA: ABC ORDERED TO SUBMIT TAPES OF ALLEGED MURDERER'S INTERVIEW

### Finds Shield Law Concerns "Less Than Compelling"

A Westchester, New York, County Court judge has ordered ABC to hand over all original video and audio recordings of an interview with alleged serial killer Richard Caputo for in camera review, finding that the prosecution had met its burden under the New York Shield Law. The interview, conducted by ABC News PrimeTime Live in conjunction with Caputo's surrender on March 9, 1994 after more than 20 years in hiding, was argued by the prosecution to be "necessary" and "critical," as required by the statute, as containing both the only admissible confessions Caputo has made regarding his alleged crimes, and reflections on his state of mind at that time.

Although ABC had been able to quash the Grand Jury subpoenas on the ground that the State's showing met all but the "critical or necessary" prong of the Shield Law test, *Matter of Grand Jury Subpoenas*, 161 Misc. 2d 960, Judge Lange found that at the trial stage the People had satisfied the remaining prong due to the State's increased burden of proof. *In Re Subpoena Duces Tecum to American Broadcasting Companies, Inc. (People v. Caputo)*, N.Y.L.J., June 8, 1995, at 37 (Westchester County Court June 7, 1995). Judge Lange put particular emphasis on the fact that at trial, in

addition to proving commission of the crime itself, the District Attorney must disprove beyond a reasonable doubt the defendant's psychiatric defense because former Penal Law Secs. 25.00 and 30.05 (L.1965), would apply to a 1974 crime. Under the old law the defense of not criminally responsible as a result of mental disease or defect is an ordinary defense rather than an affirmative defense as in current law. Pointing out that because "this may well be the last trial in this State in which the prosecution will have to disprove an insanity defense beyond a reasonable doubt," Judge Lange reasoned that, "[i]t is unlikely that the peculiar and compelling circumstances of this case will ever be duplicated, or that the determination here will be a precedent for infringement of the rights of professional journalists guaranteed in this State by the Shield Law." *In Re Subpoena* at p.37.

On a disturbing note, however, addressing ABC's concerns over disclosure, which echo the "Statement in Support" of the Shield Law (L.1990 c.33, McKinney's 1990 Session Laws of New York, Memoranda, Vol.2 p.2331-2332), Judge Lange went on to state that "[t]he nature of the highly competitive business of television journalism has changed since the enactment of the Shield Law five years

ago . . . [i]n the present environment, and particularly on the facts of this case, an argument that journalists will be drawn into the criminal justice system merely because they have reported on a crime, is less than compelling." *In Re Subpoena* at 37. In support of this statement Judge Lange points out that Caputo "clearly volunteered himself for a two-hour interview that was recorded with his consent for broadcast purposes," thus not jeopardizing the relationship of trust between journalists and confidential sources. In addition, the judge felt that the nature of the story—the surrender and confession of an alleged serial killer after twenty years on the run—was so "big" that "it is inconceivable that any professional journalist would be deterred from reporting a similar story in the future with full confidence that their unpublished material would be secure." Further, Judge Lange notes that ABC "chose to be [a] participant in the story," by interrogating and videotaping a murder suspect, essentially assuming a "role traditionally exercised by the government and its agents." *In Re Subpoena* at 37.

Counsel for ABC is awaiting the results of the in camera review before taking further action.

### IT AIN'T ALL BAD IN PENNSYLVANIA

Pennsylvania is relatively infamous for the hostile treatment the press has received. But we are here to say that one can get positive results in media litigation in Pennsylvania. Two LDRC members recently did. While there are unfortunately no citable opinions as a result of these good decisions, the briefs on the issues are available.

**\*\* "Kings Bench" Jurisdiction and the Access Claim:** When a Common Pleas Judge closed a pretrial suppression hearing in a highly-publicized attempted murder trial, lawyers from Buchanan Ingersoll, joined by Reed Smith Shaw & McClay, obtained so-called "Kings's Bench" jurisdiction from the Pennsylvania Supreme Court. "King's Bench" jurisdiction gives the Supreme Court the power to intervene at any stage of any judicial proceeding in the Commonwealth of Pennsylvania. The Court accepted this extraordinary jurisdiction and without full briefing on the issues. The Court then ordered the trial court to conduct no proceedings closed to the public or the news media without full prior compliance with Press-Enterprise.

**\*\* Deposition of Counsel Denied:** In a series of rulings, a Pennsylvania Common Pleas Judge granted various defendant discovery motions and denied two discovery motions from the plaintiff. Contending that outside counsel, Robert Raskopf (then of Townley & Updike, now of White & Case, which is a co-counsel to defendants on the litigation of this matter), who had reviewed the article at issue prior to publication, had also participated in the decision to publish and the editorial decision-making, the plaintiff sought his deposition. Defendants, of course, argued that the communications were privileged; that defendants had not asserted reliance of counsel as an affirmative defense and thus Raskopf's counsel was not relevant in the case. The court agreed, albeit without opinion. In addition to ruling entirely in defendants' favor on the various discovery issues, the court granted three sanctions motions. A good day in Pennsylvania!

## WHEN TRUTH IS NO DEFENSE

In a troubling application of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* principles, the Rhode Island Supreme Court held truth to be an insufficient defense in the non-media slander case of *Johnson v. Johnson* 634 A.2d 1212 (1995). As Justice Weisberger, acting chief justice of the Rhode Island Supreme Court, writing for the court noted: "The case at bar is somewhat unique in respect to defamation cases, since there is a finding by the trial justice that the statement is essentially truthful."

The state supreme court nonetheless upheld the part of the verdict awarding compensatory damages after finding that the slander was beyond the purview of federal constitutional protection and governed wholly by Rhode Island law. The operative law in the case was Rhode Island's G.L. 9-6-9 1956 (1985 Reenactment), which states that "In every action or proceeding, civil or criminal, for libel or slander, . . . the truth, unless published or uttered from malicious motives, shall be sufficient defense to the person charged," as well as Article I, Section 20 of the Rhode Island Constitution.

Although the Rhode Island Supreme Court looked to certain U.S. Supreme Court opinions for limited guidance, it indicated that the statute in question was not subjected to a full federal constitutional attack on appeal because: "Although defendant raises a number of constitutional issues relating to the First Amendment of the Constitution of the United States, these issues were not raised below and consequently cannot be considered for the first time on appeal." That proves to be unfortunate.

In *Johnson v. Johnson* it was not too difficult to divine the malicious motives of defendant Clifford Johnson. He had been married to Carole Johnson in the 1960s and then resumed his relationship with her in the 1980s. When Carole

again left Clifford for another man and then locked him in a bitter court battle after alleging a common-law marriage, he called her a "whore" in front of 50 to 75 people in a restaurant. Although the Rhode Island Superior Court judge found that accepted definitions of "whore" "fit the plaintiff, there's no question about it," the trial judge also found that defendant had acted with common-law malice and awarded compensatory damages of \$5,000 and punitive damages of \$20,000. Defendant appealed, asking for a new trial on the issues of compensatory and punitive damages.

*Johnson v. Johnson* involved a "private" plaintiff and "private" defendant. While starting with an understanding from *Gertz* that liability must be contingent on some degree of fault, the Court finds the more recent case of *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1983) modified the law. Citing the plurality opinion, buttressed by the concurrences of Justices Burger and White, the Rhode Island Supreme Court reads it to hold that with respect to matters not of public concern an award of damages is subject only to state law. Because the matter was judged not to be of public concern, the court was free to apply G.L. 9-6-9.

The Court overturned the punitive damages award, however, noting that under Rhode Island law punitive damages are disfavored and only awarded with a great deal of caution and within narrow limits. Defendant's statements, which were true and made "under enormous provocation," did not meet the rigorous standard.

In upholding the verdict for compensatory damages against the oft-cuckolded Clifford Johnson, the Court also noted that Johnson's anger, though perhaps understandable, was determinative: "Unfortunately, his unrestrained vituperation would, under Rhode Island law, support a judgment for compensatory damages."

## OKLAHOMA TORT REFORM LEGISLATION

By Robert D. Nelon

On May 23, 1995 the Oklahoma legislature approved, and two days later the Governor signed, legislation touted as a reform of Oklahoma tort law regarding damages, especially punitive damages. According to local media accounts, the legislation was the result of negotiations between representatives of the business community, the plaintiffs' trial bar, and the leadership of the Oklahoma legislature. The legislation had substantial bipartisan support and was endorsed by Governor Frank Keating.

The legislation, S.B. 263, as adopted is divided into three parts. The first part provides that a defendant may make an offer of judgment not later than ten days before trial. The plaintiff may accept the offer, reject the offer, or counteroffer within ten days. If the plaintiff rejects the offer and fails to win a judgment equal to or greater than the defendant's offer, the defendant is entitled to recover "reasonable litigation costs and reasonable attorneys fees" incurred between the date of the offer and the date of the verdict. If the plaintiff makes a counteroffer, and it is rejected by the defendant within the ten days allowed by the statute, then the plaintiff may recover his "reasonable litigation costs and reasonable attorneys fees" incurred between the filing of the counteroffer and the date of the verdict if the plaintiff wins a judgment greater than the counteroffer.

The offer of judgment process applies to all civil actions, but there are some

special provisions which pertain to actions for wrongful death, personal injury, and employment discrimination where the claim for relief or the offer of judgment exceeds \$100,000. This part of the legislation will be codified as Okla. Stat. tit. 12, § 1101.1.

The second part of the bill relates to punitive damages. It establishes three categories of punitive damages and defines the factors (such as the seriousness of the hazard to the public arising from the defendant's conduct; the defendant's awareness of the hazard; the profitability of the misconduct to the defendant; the financial condition of the defendant; and, in the case of a business organization, the number and level of employees involved in causing or concealing the misconduct) which are to be considered in determining whether to award punitive damages.

The first category of punitive damages requires clear and convincing proof that the defendant has recklessly disregarded the rights of others; punitive damages are limited to \$100,000 or the actual damages, whichever is higher. The second category requires clear and convincing proof that the defendant has acted intentionally and with malice toward others; punitive damages are limited to \$500,000, twice the amount of actual damages, or the increased financial benefit derived by the defendant as a direct result of the misconduct, whichever is greater. The third category requires clear and convincing proof the defendant acted intentionally and with malice toward

others *plus* a finding by the court that beyond a reasonable doubt the defendant acted intentionally and with malice toward others and "engaged in conduct life-threatening to humans;" punitive damages can be awarded without limitation.

Any punitive damage awards in the second category must be reduced by the court "by the amount it finds the defendant or insurer has previously paid as a result of all punitive damage verdicts entered in any court of the State of Oklahoma for the same conduct by the defendant or insurer." Punitive damages are considered in a separate proceeding after the jury has found liability and made an actual damage award. This part of the legislation repeals the current punitive damages statute; it will be codified as Okla. Stat. tit. 12, § 9.1.

The third part of the legislation immunizes from civil liability any act or omission of a volunteer acting in good faith and within the scope of the volunteer's function on behalf of a charitable or not-for-profit organization. A volunteer is not immune from liability for gross negligence or wanton misconduct. The third part of the bill will be codified as Okla. Stat. tit. 76, § 31. All three parts of the legislation apply to actions filed after the effective date of the Act.

*Robert D. Nelon is with the firm of Andrews Davis Legg Bixler Milstein & Price in Oklahoma City, OK.*

## PUBLIC DISCLOSURE LAW ENACTED IN LOUISIANA

Louisiana has enacted a statute prohibiting courts from ordering records sealed or discovery limited if the information sought to be protected relates to a public hazard. Trade secrets or other confidential research, development, or commercial information are exempt from this new prohibition. The statute, intended to amend Louisiana's Code of Civil Procedure Article 1426, also renders void and unenforceable, as contrary to public policy, any portion of an agreement or contract that conceals information relating to a public hazard.

Any substantially affected person or any "representative of the news media" has standing to contest any order or agreement that violates the new statute. The law applies prospectively only. It does not apply to court actions already filed, orders already issued, or contracts already contracted prior to its effective date.

*\*\* Mary Ellen Roy is with the firm of Phelps Dunbar in New Orleans, Louisiana*

**Editor's Note:** We have seen reference to similar provisions under discussion in other jurisdictions. You may wish to review the "tort reform" bills in your state to determine if an equivalent "open files" issue has surfaced. Obviously, the regular industry advocates of tort reform are not in favor of these proposals, but they would certainly appeal to your investigative and consumer reporters, among others.

## OHIO SUPREME COURT PROTECTS OPINION UNDER STATE CONSTITUTION

(Continued from page 1)

were capable of being proven false and thus were actionable.

The statements in question -- published in the defendant's newspaper during the 1990 election season -- appeared in a column headlined, "Gay-basher takes refuge in the closet" on the op-ed page, with a picture of the columnist and the word "commentary" written under his name. The columnist wrote that the plaintiff, a candidate for the Ohio State Senate, "doesn't like gay people," and "has added gay-bashing to the repertoire of right-wing, neo-numbskull tactics she is employing." The column characterized some of the plaintiff's comments as an "anti-homosexual diatribe" and said "Vail wouldn't be the first candidate to latch onto homophobia as a ticket to Columbus." 1995 LEXIS 1219 at 2.

The court reasserted that "expressions of opinion are generally protected under Section 11, Article I of the Ohio Constitution as a valid exercise of freedom of the press." 1995 LEXIS 1219 at 5. The court added that this holding from *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986), the companion case to *Milkovich*, was still valid even after *Milkovich*. "Regardless of the outcome in *Milkovich*, the law in this state is embodied in *Scott*." 1995 LEXIS 1219 at 7. (emphasis added)

The court then turned to its actual analysis of the statements in the case before it, using the totality of the circumstances test it had used in *Scott* to determine if the column could be protected as fact or opinion. This test (cited from *Ollman v. Evans*, 750 F.2d 970, (D.C. Cir. 1984), cert. denied, 471 U.S. 1127, also discussed in Justice Brennan's dissent in *Milkovich*, 497 U.S. at 24, 110 S. Ct. at 2708) consists of weighing the specific language used, whether the statement is verifiable, the general context of the statement, and the broader social context in which it appeared.

The first part of the court's test under *Scott* -- the context in which the

article appeared -- pointed toward the statements being viewed as opinion. By appearing on the op-ed page, under the words, "Forum" and "Commentary," the court said, the average reader would be alerted that what follows is "distinguished from a news story which should contain only statements of fact or quotes from others, but not the opinion of the writer of the story." 1995 LEXIS 1219 at 9.

The court then found that the context of the statements themselves made them likely to be seen as opinion. Since the column was sarcastic and written by a known opinionated columnist, the court found it passed as opinion on the second part of the test.

The statements also passed the court's analysis of the specific language used, with the court concluding that the language "lacks precise meaning and would be understood by the ordinary reader for just what it is -- one person's attempt to persuade public opinion." 1995 LEXIS 1219 at 10. On the final part of the test -- whether or not the statements are verifiable -- the court found that "the author did not imply that he has first-hand knowledge that substantiates the opinions he asserts," and therefore the statements were not verifiable. 1995 LEXIS at 11. Since the statements passed each section of the test, the court held that they were protected as opinion, and reinstated the trial court's dismissal of the plaintiff's complaint. 1995 LEXIS at 12.

Interestingly, the Ohio Supreme Court did not attempt a dual analysis of the statements at issue under the federal and state constitutions, as the New York Court of Appeals did in *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, cert. denied, 111 S. Ct. 2261 (1991). In *Immuno A.G.*, the court considered a defamation case based upon a letter to the editor appearing in a scientific journal. On remand from the Supreme Court immediately after *Milkovich*, the New York court first found that the statements in question would pass the new test -- the statements in the letter were not provably false by

the plaintiff and thus were not actionable. The court then went on to analyze the letter to the editor under the New York State Constitution's protection of speech and used a pre-*Milkovich* case to do so.

By holding that opinion is protected under the state constitution, Ohio becomes one of a number of jurisdictions to utilize pre-*Milkovich* tests and doctrine. See, e.g., *Maynard v. The Daily Gazette*, 1994 WL 385497 (W. Va. 1994), *Wheeler v. Nebraska State Bar*, 244 Neb. 786, 508 N.W.2d 917 (Neb. 1994), *NBC Subsidiary v. The Living Center*, 1994 WL 328565 (Colo. 1994), *Ward v. Zelikovsky*, 1994 WL 275341 (N.J. 1994), *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994), and *Immuno A.G.*, supra.

There were three concurring opinions in *Vail v. The Plain Dealer*. Justice Douglas, reaffirming the key role played by *Scott v. News-Herald*, wrote that as clear opinions, "the comments enjoy absolute protection from allegations of defamation." 1995 LEXIS 1219 at 12. Justice Wright, in the second concurrence, stressed the decision's "stated underpinnings -- Section 11, Article I of the Ohio Constitution." 1995 LEXIS 1219 at 13.

Justice Pfeifer, however, only concurred in the majority's judgment. Pfeifer wrote that *Milkovich* was a rejection of the totality of the circumstances test used in *Scott v. News-Herald* and, furthermore, the wording of the Ohio Constitution (which includes the phrase, "being responsible for the abuse of that right [to free speech and press]") offers less, not more, protection to speech than the First Amendment. Therefore, he argues, Ohio should reject its pre-*Milkovich* doctrine and follow the *Milkovich* test. Indeed, applying the test himself, Pfeifer would still hold the statements unactionable because, as he reads them, they are incapable of being proven true or false. 1995 LEXIS at 18.



## FOOD DISPARAGEMENT BILLS DEFEATED IN CALIFORNIA

*(Continued from page 1)*

On May 9, the California Senate Judiciary Committee voted 5-3 against a bill to create a new cause of action for producers and shippers of perishable food. SB 492, sponsored by Sen. Jim Costa (D-Hanford), would have created a new civil cause of action for any producer or shipper of perishable food against anyone who makes or publishes a statement that a food product is unsafe for human consumption. The next day, a companion bill, AB 558 sponsored by Assembly member Tom Bordonaro (R-Pismo Beach), was withdrawn from a scheduled hearing before the California Assembly Judiciary Committee. The California Newspaper Publishers Associations ("CNPA") was joined in opposition to the bills by the Consumers Union, National Resources Defense Council ("NRDC"), American Civil Liberties Union and others. (The background of the proposed California legislation is discussed in the March 1995 LDRC LibelLetter, at 5).

Meanwhile, also in May, Oklahoma and Texas joined the group of states that have enacted agricultural product disparagement statutes. The Oklahoma statute, signed by the Governor on May 2, affords a cause of action to producers of perishable agricultural food products against anyone who disparages such products, when "the disparagement is based on false information which is not based on reliable scientific facts and scientific data and which the disseminator knows or should have known to be false."

The Texas agricultural product disparagement legislation, signed by the Governor on May 9, takes effect on September 1, 1995. A person disseminating statements may be held liable under the Texas statute if "the person knows the information is false and the information states or implies that the perishable food product is not safe for consumption by the public." Falsity is determined by "whether the information was based on reasonable and reliable scientific inquiry, facts, or data." Like the Oklahoma statute, the

Texas statute allows for damages "and any other appropriate relief." The Texas statute also exempts labelling or marketing information that indicates that a product is organically grown, or grown without using a chemical, drug or synthetic additive. The Texas legislation, which was enacted three months after it was introduced, had previously passed the House in 1993, but was rejected by the Texas Senate at that time. Other states with similar statutes include Alabama, Arizona (discussed in the May 1995 LibelLetter, at 10), Florida, Georgia, Idaho, Louisiana, Mississippi, and South Dakota. Similar legislation is pending in Illinois, Nebraska, Ohio, Pennsylvania, and South Carolina. States that have considered and rejected such legislation include Delaware, Colorado (where the Governor vetoed the bill, stating that such a statute "would make us look like a bunch of dorks"), Iowa, North Dakota, Washington, and Wyoming.

Florida's statute was amended in May to authorize treble damages against a defendant who "intentionally disparages . . . products for the purpose of harming those producers." In addition, Alabama is considering legislation to amend its existing statute in a number of respects: (1) to extend its coverage so that animals are expressly included; (2) to amend the definition of disparagement to include "rumor"; (3) to authorize liability for statements that the product or its "growing, harvesting, catching, or taking would endanger or threaten to endanger the continued existence of any species or the critical habitat of any species"; and (4) to extend the statute of limitations for lawsuits authorized by the statute from one to two years. The Alabama bill was amended in committee to exempt from liability the "publication or reporting of [such] disparagement."

Instrumental to the California bill's defeat was a written analysis prepared by the Senate Judiciary Committee staff (with substantial input by CNPA) challenging the bill's constitutionality.

The staff analysis (copies of which are available from LDRC) concluded that the bill runs afoul of the constitutional "of and concerning" and falsity requirements.

Before the California Senate committee, CNPA testified that the California bill would substantially inhibit public debate on food safety issues and the reporting of those issues by the press. For example, CNPA pointed out, anti-cholesterol activist Phil Sokolof — and any newspaper that published his statements claiming that consumption of two-percent low-fat milk is a health risk and should be avoided — would be subject to suit by milk producers.

CNPA also argued before the committee that the bill would violate the constitutional requirement that a plaintiff prove a statement is "of and concerning" the plaintiff — i.e., that the plaintiff be identified in the speech at issue. In addition, the California bill, like a number of other proposed and enacted food disparagement statutes, defined "false statement" as one that is not based on "reliable scientific fact." Representatives of the scientific community testified before the committee that it is difficult, if not impossible, to establish what is a reliable scientific fact since science, by its very nature, is diverse, fluid and ever-changing.

The California legislation was sponsored by the Western Growers Association, whose members produce about half of the fresh fruits and nuts consumed in the United States. A representative for Western Growers said the bill was necessary because producers and shippers of perishable agricultural food products are much more vulnerable to suffering acute economic damage from disparagement of their product than are providers of ordinary consumer products. Western Growers asserted that the ALAR scare in Washington, allegedly prompted by the 60-Minutes segment "A is for ALAR," caused \$500 million in damages to Washington apple

*(Continued on page 14)*

**FOOD DISPARAGEMENT BILLS DEFEATED IN CALIFORNIA**

*(Continued from page 13)*  
 producers.

Apple growers in Washington sued CBS and the NRDC for trade libel as a result of the "A is for ALAR" broadcast. Even though CBS' statements were not "of and concerning" any of the plaintiffs, the district court denied summary judgment on that issue. The court later granted summary judgment to defendants on the ground that plaintiffs could not meet their burden of proving falsity, given the lack of agreement in the scientific community over the health risks associated with ALAR. Both

decisions are on appeal to the United States Court of Appeal for the Ninth Circuit. CNPA and over forty other media entities have filed an amicus brief in support of CBS.

Voting in favor of the California bill were Sen. Cathie Wright (R-Simi Valley), Sen. Tim Leslie (R-Carnelian Bay) and Sen. Henry Mello (D-Watsonville). Voting against the bill were Committee Chairman Charles Calderon (D-Whittier), President Pro Tem Bill Lockyer (D-Hayward), Sen. Hilda Solis (D-El Monte), Sen. Jack O'Connell (D-Santa Barbara), and Sen.

Tom Campbell (R-Stanford).

*This article was contributed by James Grossberg and Seth Berlin of Ross, Dixon & Masback (Irvine, California and Washington, D.C.), which authored the media amicus brief in the appeal of Auvil v. CBS "60 Minutes", and Thomas Newton, General Counsel/Legislative Advocate of the California Newspaper Publishers Association.*

**Product Disparagement Statutes Enacted**

State	Cite
Alabama	ALA. CODE §§ 6-5-620 to 625 (Supp. 1993)
Arizona	ARIZ. REV. STAT. ANN. § 3-113 (1995)
Florida	FLA. STAT. § 865.065 (1994)
Georgia	O.C.G.A. § 2-16-1 to §2-16-4
Idaho	IDAHO CODE § 6-2001 to 2003 (1993)
Louisiana	La. R.S. §3:4501 to 4504
Mississippi	MISS. CODE ANN. § 69-29-2(7-10) (1994)
Oklahoma	OKLA. STAT. tit. 2, § 3010-3012 (1995)
South Dakota	S.D.C.L. Ch. 20-10A
Texas	TEX. CIV. PRAC. & REM. CODE ANN. §4-96 (1995)

**Product Disparagement Statutes Pending**

- State
- Illinois
- Nebraska
- Ohio
- Pennsylvania
- South Carolina

**State Legislatures Currently in Session**

- |               |                |                  |
|---------------|----------------|------------------|
| Alabama       | Michigan       | Ohio             |
| California    | Nevada         | Pennsylvania     |
| Delaware      | New Hampshire  | Rhode Island     |
| Louisiana     | New Jersey     | Wisconsin        |
| Maine         | New York       | Washington, D.C. |
| Massachusetts | North Carolina |                  |

## CORPORATIONS AS PUBLIC FIGURES

(Continued from page 1)

The case, which comes out of the Fourth Circuit, with its particularly narrow and rigid view of the public figure definition as it applies to the corporate plaintiff, first arose out of a contractual dispute between two pharmaceutical companies. Mylan Pharmaceuticals, dissatisfied with the marketing efforts of American Cyanamid on behalf of Maxzide, Mylan's hypertension medication, sued Cyanamid in the United States District Court for the District of West Virginia. Mylan asserted five causes of action, including breach of contract and breach of implied covenant of good faith.

Cyanamid, in turn, brought four counterclaims. One was a claim for defamation brought against Mylan and Roy McKnight, then Mylan's Chairman and CEO, as a third-party counterclaim defendant, for statements made concerning Cyanamid's alleged contract breaches which were reported by various media organizations.

The District Court granted summary judgment as a matter of law on several claims, including the defamation claim, and the jury denied relief to all parties on the remainder. *Mylan Pharmaceuticals, Inc. v. American Cyanamid Co.*, No. 90-0120-C(S) (N.D.W.Va. July 27, 1993). Both parties then appealed to the Court of Appeals for the Fourth Circuit which affirmed the dispositions below on all counts but one, the defamation claim. Applying the Fourth Circuit's two-part test for limited-purpose public figures the Court of Appeals reversed the lower court solely on the defamation count.

The Fourth Circuit test requires the existence of a pre-existing public controversy about the material alleged to be defamatory, and the nature and extent of the plaintiff's participation in the controversy must be sufficient to justify public figure status. The panel found that no public controversy existed because the allegedly defamatory statements arose from "a purely private contractual dispute . . . [and] dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could affect

the public." *Mylan Pharmaceuticals, Inc. v. American Cyanamid Co.*, No.94-1472 (4th Cir. March 3, 1995), slip op. at 7.

#### Looking for Guidance

The petition for certiorari filed on May 26, 1995 urges the Supreme Court to provide guidance in this area of contention. The petition begins by pointing out that the lack of guidance has created three different paths from which courts can choose.

The first entails rejecting the *Gertz* analysis altogether because the public/private figure distinction simply cannot be applied to corporations. Courts using this analysis have based their reasoning on the belief that corporations do not possess equivalent reputational interests as individuals, as well as operating in a much more public sphere. Under this analysis, the determinative factor if a corporation is to be held to the actual malice standard becomes whether a corporation's activities involve the public interest, rather than whether the corporation meets the *Gertz* public figure criteria. See, e.g., *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F.Supp. 947, (D.C.Cir. 1976); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476 (Minn. 1985). A more recent example of a court eschewing the *Gertz* test in favor of a public interest inquiry can be found in *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.D.2d 417 (N.J. 1995). See LibelLetter, May 1995.

At the other extreme, the petition states, "some courts have held that there is no cognizable difference between a corporation and a natural person which would justify any greater protection for defamatory speech about corporate affairs." *Petition* at 13. In this class of cases the reputational interests of corporations are viewed on a par with private individual expectations and therefore no distinction can be made between individuals and corporations that would weaken a corporation's protection against defamatory speech. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Continental Cablevision, Inc. v.*

*Storer Broadcasting Co.*, 653 F.Supp. 451 (D.Mass. 1986); *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814 (N.D.Cal. 1977); *Vegod Corp. v. American Broadcasting Cos.*, 603 P.2d 14 (Cal. 1979) (in bank), cert. denied, 449 U.S. 886 (1980).

Lastly, the petition states, "other courts have struck a middle course, asserting that they were adhering to a *Gertz* public/private figure analysis in the corporate plaintiff context, but nonetheless distinguishing between corporate defamation plaintiffs and natural person." *Petition* at 14. Additional consideration may be given to the nature of the industry involved--for example, whether the plaintiff is in a highly regulated industry--or to the amount of advertising engaged in by the corporation.

But because there are no established standards the result is often a seemingly ad-hoc determination of public figure status. Compare, e.g., *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491, 1497 (11th Cir. 1988) (corporate (and individual) libel plaintiffs held public figures because they "thrust themselves into [a] position of prominence by voluntarily entering a strictly regulated, high-profile industry in which there were few major participants," thus "invit[ing] public scrutiny, discussions, and criticism"); with, *Blue Bank Ridge v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989) (holding that bank is not public figure and noting that "regulated businesses should be treated no differently from other members of the community"). Compare also, e.g., *Steaks Unlimited Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) (advertising held to have invited public attention and comment and constituted a voluntary injection into a "matter of public interest") with *Golden Bear Distributing Systems, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 952 (5th Cir. 1983) (holding that the fact of advertising does not render a business a public figure).

The results as the petition makes clear, are "inconsistent, conflicting and

(Continued on page 16)

## CORPORATIONS AS PUBLIC FIGURES

(Continued from page 15)

inevitably unpredictable decisions about a matter as to which guidance from [the] Court is sorely needed." *Petition* at 16.

#### The All-Purpose Public Figure

Against this conflicted backdrop, the petition argues that Cyanamid should be treated a general purpose public figure, or, in the alternative, as a limited purpose public figure. Beginning by quoting from Cyanamid's annual report, which boasts of the company's size and power, the petition states that "[g]iven its size, its prominence and its corporate power, it is inexplicable why Cyanamid was not held to possess 'such pervasive fame or notoriety that [it] becomes a public figure for all purposes and in all contexts.'" *Petition* at 18, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Further, the petition points out that in contrast to the Fourth Circuit's narrow public figure analysis, the Fifth Circuit, among other jurisdictions, has adopted a three-part test to determine the public figure status of a corporate defamation plaintiff, that would qualify Cyanamid as an all-purpose public figure. The test, articulated in *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993), cert. dismissed, 114 S.Ct. 1587 (1994), is based upon (i) the "notoriety of the corporation to the average individual in the relevant geographical area"; (ii) "the nature of the corporation's business"; and (iii) "the frequency and intensity of media scrutiny that a corporation normally receives." 998 F.2d at 1329-30. Applying the facts of the case, the petition argues that "there can be no doubt that [Cyanamid] would have been found an all-purpose figure in these jurisdictions." *Petition* at 19.

In addition, the petition compares Cyanamid to other individuals whom courts have found to be all-purpose public figures. For example, petitioners point to *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967), which held a well-known football coach to the actual malice standard, and *Ryan v. Brooks*, 634 F.2d 726, 728n.2 (4th Cir. 1980), which held a telephone company executive to be an all-purpose public figure, in order to show

that finding Cyanamid, a multi-billion dollar publicly held corporation, to be a private figure for defamation purposes, simply does not make sense. *Petition* at 19-20.

#### Limited Purpose Public Figure

In the alternative, the petitioners argue that at the very least, Cyanamid should be treated as a limited purpose public figure. In reaching its decision, the Court of Appeals applied a two-part inquiry under which; "[f]irst, a 'public controversy' must exist giving rise to the alleged defamation", and "[s]econd, the nature and extent of the plaintiff's participation in that controversy must be sufficient to justify 'public figure' status." *Mylan Pharmaceuticals, Inc.*, No. 94-1472 slip op. at 6.

The Fourth Circuit, with its narrow view of public controversy, see, e.g., *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681 (4th Cir. 1989), found Cyanamid to be a private figure based solely on its finding that no public controversy existed; the allegedly defamatory statements arose from "a purely private contractual dispute . . . [and] dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public." *Mylan Pharmaceuticals, Inc.*, No. 94-1472 slip op. at 7. The Court also limited the impact that Cyanamid's wide advertising campaign could have had on the case by stating, "the subject of dispute (the adequacy of Cyanamid's marketing efforts) was not part of Cyanamid's promotional efforts." *Mylan Pharmaceuticals, Inc.*, No. 94-1472 slip op. at 7.

The cert petition views this approach as not only "abandon[ing] *Gertz's* command that a plaintiff's access to the media and assumption of increased risk of defamatory criticism be taken into account on the question of public figure status, but also improperly constrict[ing] the definition of 'public controversy' for purposes of the limited figure analysis." *Petition* at 21.

Referring to the record, the petitioners argue that it is clear from the

repeated coverage in various media that there was a high level of public interest in the contractual dispute between Mylan and Cyanamid. Further, the petition states that a wider controversy existed concerning the relative merits of hypertension medication, in general, as well as the particular marketing techniques that Cyanamid utilized in this case. *Petition* at 22.

In concluding, the petitioners state that "[f]irst, the statements at issues directly concerned Cyanamid's conduct in marketing and promoting Maxzide—the very marketing and promoting as to which and through which Cyanamid vigorously, successfully, and in every sense publicly drew attention to and fostered public reliance on itself," and second, that by "defining the only relevant controversy here as 'a purely private contractual dispute' between Mylan and Cyanamid, the Fourth Circuit decision also conflicts with the weight of legal authority concerning how closely an alleged defamation must relate to a particular public controversy in order to justify limited public figure status", pointing out that "[c]ases generally require no more than that the alleged libelous statement not be 'wholly unrelated' to an ongoing public controversy." *Petition* at 25-26.

Although arising in a non-media context, the effects of a decision by the Supreme Court, given the conflicting interpretations among the lower courts, for our media members as well as our defense counsel members are likely to be important and we will continue to provide you with any information or updates in the future.

A copy of the petition for certiorari is available from LDRC.

Mr. McKnight and Mylan Pharmaceuticals are represented by Cahill Gordon & Reindel of New York, and Fusco & Newbraugh of West Virginia.

For the Massachusetts high court analysis of the public figure issue, see p. 3 of this issue, "Mass Supreme Judicial Court: Parody in Union Election Has No Constitutional Protection".



## PRODIGY HELD "PUBLISHER"

(Continued from page 1)

Porush. Stratton Oakmont and Porush responded with a \$200 million suit advancing numerous causes of action including a claim for libel per se against Prodigy.

In February, following limited expedited discovery, the plaintiffs moved for partial summary judgment on the issues of (1) whether Prodigy was a "publisher" of the allegedly libelous statements; and (2) whether the Board Leader in charge of "Money Talk" acted as Prodigy's agent for purposes of the suit. The court's May ruling granted summary judgment in favor of the plaintiffs on both points, finding that Prodigy acted as a "publisher", and that the "Money Talk" Board Leader was Prodigy's agent and that Prodigy therefore could be held liable for his actions.

In holding that Prodigy was a "publisher" of the "Money Talk" postings, the Court applied an analysis recognizing that computer services are most likely to fall into one of two traditional classifications applicable to those who disseminate information to the public: "distributors" or "publishers." "Distributors" generally choose the material they distribute, but lack control over the content of that material. In the print publication context, they are the newsstands, the bookstores, the libraries. "Publishers" traditionally exercise direct control over the content of the publications they disseminate. In the print context, they hire or contract with writers, commission or select material, and edit (and often "fact-check") meticulously.

With control over content comes legal responsibility. Because "publishers" exercise editorial control, they are accountable for what they publish as if it had originated with them. Because "distributors" select the publications they distribute, but don't control their content, they are responsible for defamatory material they disseminate only if they know, or have reason to know, of the defamatory nature of the material.

Prodigy lawyers relied on *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), in arguing that Prodigy was merely a "distributor" of the "Money Talk" postings. The court in *Cubby* deemed CompuServe a "distributor" of user-generated messages posted on its "Rumorville USA" journalism bulletin board. Key to the court's ruling in *Cubby* were the facts that CompuServe exercised no editorial control over "Rumorville USA," and that the bulletin board was managed by a separate company acting independently from CompuServe.

The *Stratton Oakmont* court distinguished the suit against Prodigy from *Cubby* on both counts. First, the court concluded that, unlike CompuServe in *Cubby*, Prodigy had assumed control over the content of its bulletin boards. For instance, the court found that Prodigy (1) had instituted content "Guidelines" for user postings; (2) had employed a software screening program to identify and eliminate postings containing offensive language; and (3) had utilized Board Leaders, whose duties included enforcing the content guidelines and operating an "emergency delete function" capable of removing objectionable user postings from the service.

Prodigy insisted that its practices regarding content management had evolved away from a policy of editorial control by the time the challenged messages were posted, but the court found insufficient evidence of such a change.

As the court saw it, Prodigy's decision to regulate content was guided by a desire to "attract a market it perceived to exist consisting of users seeking a 'family-oriented' computer service." Having made that decision, the court held, Prodigy had to accept both the benefits and burdens flowing from its choice.

Prodigy has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions, and in fact do spend time censoring notes. Indeed, it

could be said that Prodigy's current system of automatic scanning, Guidelines, and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this is exactly what Prodigy wants, but for the legal liability that attaches to such censorship.

The court also purported to distinguish *Cubby* on the ground that the Board Leader who controlled "Money Talk" was acting under the control and direction of Prodigy, rather than operating independently. Although the Board Leader's contract with Prodigy specifically disclaimed any agency relationship, the court ruled that the Board Leader was an agent of Prodigy due to the degree of control the computer service exercised over his actions.

According to the court, evidence showed that Prodigy performed a "management function" with respect to the activities of the Board Leader. Under their contract with Prodigy, the Board Leader was required to follow Prodigy's content Guidelines, prepare monthly reports to Prodigy, and follow any additional procedures provided by Prodigy. The court also placed special emphasis on a warning contained in a technically-oriented "Survival Guide" supplied to all Board Leaders admonishing them as follows: "IF YOU DON'T KNOW WHAT SOMETHING IS OR WHAT IT'S SUPPOSED TO DO, LEAVE IT ALONE UNTIL YOU CAN ASK."

Despite this discussion, a comparison of the *Stratton Oakmont* and *Cubby* decisions offers little clear guidance as to when a bulletin board manager will be deemed to be acting independently of a computer service rather than as an agent. The non-agency relationship in *Cubby* shared striking similarities with the arrangement that led to a finding of agency in *Stratton Oakmont*. The *Cubby* court found that the arrangement between CompuServe and its bulletin board manager included an agreement by the manager to

(Continued on page 18)

## PRODIGY HELD "PUBLISHER"

(Continued from page 17)

"manage, review, create, delete and otherwise control the contents of the [bulletin board] in accordance with the editorial and technical standards and conventions of style as established by CompuServe." CompuServe's contract with the manager in *Cubby* also called for CompuServe to train the manager to run its bulletin board and reserved CompuServe's right to remove text from the bulletin board for noncompliance with its standards.

The *Stratton Oakmont* decision leaves for trial the issues of whether the statements in question were false and defamatory and whether Prodigy acted with the proper degree of care in allowing the statements to appear on "Money Talk." Given the difficulty of monitoring and evaluating the flow of postings on an active bulletin board, it remains to be seen whether Prodigy can be held liable under any standard of care that might apply to the statements at issue in the case.

In the meantime, attorneys for Prodigy say New York law would permit interlocutory review of the court's ruling and the company currently is considering whether to file an appeal.

*Michael Kovaka is an attorney with the firm Dow, Lohnes & Albertson in Washington D.C. and Chair of the LDRC Cyberspace Committee.*

## BEYOND PRODIGY: BEYOND BORDERS

By Charles Glasser

While commercial on-line Internet providers such as CompuServe and Prodigy have made headlines by being the target of libel suits, American and Canadian universities are soon to join the list of "cyberlibel" defendants, if a British physicist has his way.

Dr. Lawrence Godfrey, a former lecturer at the National Research Council in Canada, claimed to have been libelled in electronic messages posted through various university accounts last year. Godfrey's purported legal theory appears to appeal to republication: "A radio station would be responsible if a caller in one of their phone-in shows made a libellous comment," Dr. Godfrey was quoted in the London Telegraph. "I believe universities should be responsible in the same way if libellous remarks are made by users of their computer networks."

Godfrey told the London Daily Telegraph that he plans to issue writs in England against North American universities that carry postings distributed via USENET. In contrast to bulletin boards that are solely accessible to members of commercial service providers such as Prodigy and America OnLine (e.g. "Money Talk", the situs of the alleged tort in *Oakmont v. Prodigy*), USENET is a constantly circulating "newsfeed" subscribed to by thousands of universities and smaller Internet

providers. The USENET "feed" is made up of more than 5,000 different subject boards ranging in topic from Elvis Sightings to Bio-Medical Research.

Most of the USENET boards are unmoderated, meaning that any and all messages posted to the board are reproduced in their entirety, and accessible to more than 3,000,000 readers daily. In a few instances, USENET carries moderated boards, but it has no active role in the editing process of moderation. Messages sent to moderated boards are instead directed to a moderator's computer before distribution on USENET. After editing, the moderator then passes the messages along to USENET for global distribution.

Some universities, concerned about the liability that might attach by being considered a "publisher" rather than a passive carrier, decided as long ago as 1993 not to carry any moderated boards. According to the Electronic Frontier Foundation, several of these universities decided to drop moderated boards altogether from the USENET feed that they would release to their own subscribers, for fear of the liability that Prodigy is now facing.

Dr. Godfrey settled his case against the author of the allegedly defamatory material about him after an early June hearing before the Queen's Bench. The author, fellow physicist Phillip Hallam-Baker, had posted notes distributed in

Britain by USENET, which concerned Godfrey's employment history in the field of high energy physics research.

The High Court of Justice decision (reported at Queen's Bench Division 1993 G2819) allowed the settlement which requires the defendant to pay into court an undisclosed amount of money, as well as judicially determined legal fees. The plaintiff has claimed that Hallam-Baker never pled justification.

So far, no North American universities have been served with notice from Dr. Godfrey's barristers, who surely face a complex set of choice of law and personal jurisdiction questions.

*Charles Glasser (NYU '96) is an intern at LDRC and a Summer Associate at the New York law firm of Townley & Updike.*