



# LIBELLETTER

Reporting Developments Through June 22, 2001

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## LDRC Institute Project Teams with the Bench to Improve Everyone's Perspective

By Thomas Kelley

### *The LDRC Institute Initiative*

On Wednesday, November 15, 2000, the day after the DCS' annual breakfast meeting, the LDRC and the First Amendment Center of the Freedom Forum, presented its pilot program, "The First Amendment and the Criminal Justice System," to an assembled group of New York public high school students. The format was a "Fred Friendly" style hypothetical case study, in which judges, prosecutors, criminal defense lawyers, print and broadcast media and their legal advisors, are called upon to give spontaneous responses to questions based upon hypothetical facts designed to challenge their values. The program proved very useful and educational for the students, perhaps stimulating some to pursue careers in law or journalism, and at least showing all of them that the values that professionals in these fields build their lives upon frequently yield shades of gray rather than black and white.

In the wake of the success of this and another pilot

program, the LDRC leadership has challenged its media members and the members of the DCS to use the template established by the New York session and sponsor similar programs in their home towns. Even though the planners in the New York program provided DCS members in attendance with a training session and wonderful "how to" kit for interested sponsors, not many of us have been able to reach the critical mass necessary to get such a program rolling. In Denver, we found a way to harness the necessary energy by teaming up with another bar group interested in doing the same thing for lawyers.

### *Colorado Federal Bench/Bar/Schools*

The Federal Faculty of Advocates of the District of Colorado was established in 1997 at the behest of then Chief Judge Richard P. Matsch, to establish a mentoring program within the federal bar.

In the fall of 2000, the FFA wanted to sponsor a program to stimulate thought among federal practitioners on

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## Jump-Starting the LDRC Institute Project

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the lawyer's duty to his/her client (or the public, in the case of prosecutors) to represent their client's interest in the forum of public opinion (or, in the case of prosecutors, to inform the public) through the media and at the same time instill a greater awareness of the ethical responsibilities of lawyers in performing that function. There was also desire to address the sagging images of both the media and bar, each of which seems to be busy contributing to that process of erosion.

FFA leaders contacted me for to help enlist members of the media to participate in the conference. I responded that I would be delighted to do that, but would like them in return to use their influence with the federal bench and bar to assist with the LDRC/Freedom Forum program in the schools. I suggested that if the group was interested in improving the degenerating image of the bar, this would be an opportunity for both the bar and the media to improve their public regard through this visible demonstration of public service in the community.

Ultimately, we agreed that the high school program would be co-sponsored by the FFA, the LDRC, and the Freedom Forum. Although the LDRC and Freedom Forum would not be official co-sponsors of the seminar for the federal bar, they would receive credit for their contributions to that program. Like the school program, the FFA presentation would include a Fred Friendly formatted panel discussion, but the hypothetical would be modified to address the issues under discussion in other panels, issues that arose in the Nichols/McVeigh trials and in the JonBenét Ramsey investigation.

A strong panel was assembled for the school program to be presented on the morning of May 18, 2001, at East High School, which included judges, prosecutors, defense counsel and media.

The Program Moderator was Jay Ward Brown, Esq., Levine, Sullivan & Koch in Washington, D.C.<sup>1</sup>

We assembled a different but similar array of panel-

ists for the afternoon Fred Friendly program, which would also feature David Kendall, speaking of his challenges in representing the President before the media as well as in the well of the Senate, and two panels of persons involved in the McVeigh/Nichols trials (moderated by yours truly) and the Ramsey investigation.<sup>2</sup>

### *Enthusiasm and Success*

On May 16th, when everything was perfectly ready to go, East High School suffered a fire that closed the school and forced us to cancel that program. By that time, however, persons involved at the school and participants in the panel

were enthusiastic and anxious to reschedule next fall after the school is rebuilt.

The afternoon program for the Federal Faculty of Advocates, including the Fred Friendly panel moderated by Lee Levine, was a tremendous

success, as indicated by responses to evaluation questionnaires. In each of the rating categories, "topics, content, and speakers," the responses were predominantly "excellent." Here are some examples of some of the comments:

Interesting and stimulating afternoon! Thank you.

This was the best CLE I've been to in many years. I especially enjoyed the hypothetical segment.

The panels were all excellent.

The first [hypothetical] panel was extraordinary! Very good idea including members of the media.

Although the cancellation of the high school program was a disappointment, I have no doubt that the momentum we achieved will enable us to reschedule and get it done in the fall.

I suspect that other DCS members will find little dif-

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## Jump-Starting the LDRC Institute Project

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faculty identifying synergies such as we found in Denver. By capitalizing on the potential for joint sponsorship, we also contributed to another DCS objective: renewing and improving media/bar/bench relations. The organizations and committees identified by Rachelle Binn in her report of activities in the various states on the subject of media/bench/bar relations would be a great resource for identifying potential partners.

*Thomas Kelley is a partner in the Denver office of Faegre & Benson, and is President Emeritus of the Defense Counsel Section.*

### <sup>1</sup> Panelists were:

**Hon. John L. Kane, Jr.**, A senior judge in the United States District Court for the District of Colorado.

**Hon. Sandra I. Rothenberg**, Colorado Court of Appeals.

**Richard T. Spriggs, Esq.**, An Assistant United States Attorney and former Denver District Court judge during the 1990s.

**J. Wallace Wortham, Jr., Esq.**, Denver City Attorney.

**Daniel J. Sears, Esq.**, A well-known criminal defense attorney.

**Gary Lozow, Esq.**, A well-known criminal defense attorney.

**Chuck Green**, Currently a popular and sometimes controversial columnist for *The Denver Post*. He has held virtually every position on the editorial side of the newspaper during his thirty-year career, from reporter to Editor.

**Steve Grund**, News Director for KWGN-TV 2.

**Jim Benemann**, A news anchor for KUSA-TV 9.

**Sue Lindsay**, A courthouse beat reporter for *The Denver Rocky Mountain News* since 1977.

**Jeffrey A. Chase, Esq.**, A trial lawyer in Denver who has specialized in representing the news media.

<sup>2</sup> The FFA program was promoted with the following “bullets”:

- What can a criminal defense lawyer do to protect her client from the media?
- How far can she go to counter government leaks?
- Should counsel take the offensive against exploitation by tabloid journalists?
- How far are the media willing to go to get a leak or a scoop?
- Is there any way to stop or prevent leaks?
- Is it proper for a lawyer involved in a high profile case to negotiate a book deal before the case is concluded?
- Is it ever useful and appropriate for a lawyer involved in a criminal matter to “trade” information with the media?

- What can be reasonably expected from the media in avoiding pretrial disclosures that may threaten a fair trial?
- Do the litigants and the court have any effective remedies against prejudicial pretrial publicity?
- Should the court attempt to control attorneys’ speech?
- Should pretrial hearings ever be closed to the public?
- Is it proper for lawyers who are not involved in the case to appear on talk shows and give opinions on the merits or the performance of the judges or litigants?
- What is the role of cameras in the courts after the *Simpson* trial?

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## Deconstructing Bartnicki

### *“Matter of Public Concern” Exempt From “Intermediate Scrutiny”*

By Lee Levine

On May 21, the Supreme Court affirmed the decision of the United States Court of Appeals for the Third Circuit in *Bartnicki v. Vopper*, 121 S. Ct. 1753, Nos. 99-1687 & 99-1728, (2001) holding that the civil damages provisions of the federal and Pennsylvania wiretap statutes could not constitutionally be applied to the dissemination of the contents of an illegally intercepted cellular telephone conversation. The Court held that the First Amendment protected two Pennsylvania radio stations, the host of a public affairs program broadcast on those stations, and the chairman of a local citizens group from liability for disclosing the contents of a tape recording in which the president of a public school teachers union told a colleague that, if the Board of Education did not approve a three per cent pay increase, “we’re gonna have to go to their . . . homes . . . [t]o blow off their front porches.”

Justice Stevens wrote the opinion of the Court on behalf of six justices. Justice Breyer wrote a concurring opinion that was joined by Justice O’Connor, and Chief Justice Rehnquist dissented, joined by Justices Scalia and Thomas.

### *Three Significant Issues*

The case, the Court’s first involving a news media defendant in a decade, raised three significant issues that had drawn the attention and concern of the news media and its lawyers:

1. Whether the Court would apply the framework for First Amendment analysis it has appeared to favor in recent years — *i.e.*, a typically decisive dichotomy between “strict” and “intermediate” scrutiny of statutes affecting expression based on whether they are deemed to be “content based” or “content neutral” — to laws aimed directly at the dissemina-

tion of information, including press reports about matters of public concern;

2. Whether First Amendment protection for such expression is forfeited when the information disseminated is unlawfully acquired by someone other than the speaker; and
3. How the government’s interest in protecting individual privacy, especially from new and increasingly intrusive technologies, would fare when pitted against the First Amendment interest in the free flow of information about matters of public concern.

### *Levels of Scrutiny*

The petition for a writ of *certiorari* in *Bartnicki* was filed virtually simultaneously with petitions in two other cases that also adjudicated civil damages claims brought by persons who claimed that the disclosure of the contents of their cellular or cordless telephone conversations violated federal and state wiretap laws. In *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *vacated*, 68 USLW 3686 (U.S. May 29, 2001) (No. 99-1709), the D.C. Circuit held that a congressman could be held liable in damages for disclosing to the news media the tape of an illegally recorded telephone conference among members of the Republican leadership of the House of Representatives.

In *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5<sup>th</sup> Cir.), *cert. denied*, 69 USLW 3318, 3383 (U.S. May 29, 2001) (Nos. 00-691 & 00-849), the Fifth Circuit similarly held that a Dallas television station could be held liable under such statutes for, *inter alia*, disseminating to its viewers information derived from cordless telephone conversations of a local school official which had been unlawfully intercepted by his neighbor. In both cases, the courts of appeals had held that the statutes were “content neu-

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*[O]f the nine appellate judges that had addressed the issue, eight had concluded that the statutes were subject to only intermediate scrutiny.*

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## Deconstructing Bartnicki

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tral” — *i.e.*, their prohibitions on speech were not justified by reference to its content — and were therefore subject to only an “intermediate” level of First Amendment scrutiny.

In *Bartnicki* as well, the Third Circuit concluded that the federal and Pennsylvania wiretap statutes are “content neutral” because they base their prohibitions not on the content of an intercepted communication, but rather on the mere fact that it was unlawfully intercepted in the first place. Accordingly, the Third Circuit also subjected the statutes to “intermediate” scrutiny, asking only whether they “‘further[ ] an important or substantial governmental interest’” and whether their “‘incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.’” *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

The Third Circuit, therefore, had parted company with its sister circuits not in its method of constitutional analysis, but only in its application of the intermediate scrutiny doctrine. Specifically, the Third Circuit concluded that, although the general “interest in protecting privacy” of cellular telephone conversations constitutes a “significant state interest,” the “connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best” and the government had offered no evidence for its “unsupported allegation” that the statute is likely to prevent interceptions in the first place. 200 F.3d 109, 125-26 (3d Cir. 1999). Nonetheless, of the nine appellate judges that had addressed the issue, eight had concluded that the statutes were subject to only intermediate scrutiny.

### *Strict/Intermediate Framework Abandoned*

Especially when viewed in this context, the Supreme Court’s abandonment of the strict/intermediate scrutiny

framework in *Bartnicki*, the one case of the three that the Solicitor General urged the Court to hear on its merits, is significant. To be sure, the Court agreed with the Government that both the federal and Pennsylvania statutes are “content-neutral law[s] of general applicability.” Slip op. at 10. Nevertheless, this conclusion did not lead the Court, as it had all three circuits to have considered the issue, to apply intermediate scrutiny. Rather, Justice Stevens wrote that even where, as here, a statute is content-neutral, a “naked prohibition against disclosure is fairly characterized as a regulation of pure speech” and not the kind of “regulation of conduct” that warrants only intermediate scrutiny because it constitutes a generally applicable law that has an incidental impact on speech. *Id.* at 11.

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*A prohibition on “the publication of truthful information seldom can satisfy constitutional standards,”*  
*Justice Stevens noted.*

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A prohibition on “the publication of truthful information seldom can satisfy constitutional standards,” Justice Stevens noted, reaffirming the so-called “*Daily Mail* principle” — *i.e.*, “‘if a newspaper lawfully obtains truthful information

about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.’” *Id.* at 12 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102-03 (1979)).

The Court applied this standard to assess the constitutionality of the wiretap statutes as applied to the facts of the *Bartnicki* case. Neither Justice Stevens speaking for the Court, nor Justice Breyer in his concurring opinion, purport to subject these laws to “intermediate scrutiny” or to attach any constitutional significance to the fact that they were deemed to be “generally applicable” and “content neutral.”

### *Unlawfully Acquired Information*

Instead, Justice Stevens proceeded to address what it described as “a narrower version” of a question “raised”

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## Deconstructing Bartnicki

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but not resolved in *New York Times Co. v. United States*, 403 U.S. 713 (1971), and *Florida Star v. B.J.F.*, 491 U.S. 525, 535 n. 8 (1989) — *i.e.*, “whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” Slip op. at 13 (quoting *Florida Star*). According to Justice Stevens, the “narrower” question before the Court in *Bartnicki*

is this ‘Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on a defect in the chain.’ *Id.* at 13 (quoting *Boehner v. McDermott*, 191 F.3d at 484-85 (Sentelle, J., dissenting)).

The answer, Justice Stevens wrote, is “clear” — “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.” *Id.* at 20. In other words, while unlawful conduct by an interceptor or perpetrator of illegal conduct may or may not “justify” punishing his “own use of information that he or she has unlawfully acquired,” it does not follow “that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving” the asserted governmental interests. *Id.* at 14. Rather, to overcome the First Amendment in the latter circumstance, the government carries the heavy burden of showing a “need . . . of the highest order.” *Id.* at 12 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. at 103).

### “Privacy” and the Daily Mail Principle

Having answered the relevant portion of the question famously reserved in *New York Times Co. v. United*

*States* and in *Florida Star* the Court undertook to apply the *Daily Mail* principle to the two interests asserted by the government in support of the statutes’ constitutionality: “first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted.” Slip Op. at 14. It held that neither justified application of the statute to the expression at issue in *Bartnicki*, but for very different reasons.

The first interest, the Court concluded, simply did not rise to the level of a “need of the highest order.” *Id.* at 16. Rather, Justice Stevens observed, the “normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.” *Id.* at 14. Thus, if the sanctions that presently attach to a violation” of the prohibition on interception contained in wire-tap laws “do not provide sufficient deterrence, perhaps those sanctions should be made more severe. *Id.*

In any event, in the Court’s view, “it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.” *Id.*

The second asserted interest, the Court emphasized, raised significantly different issues. “Privacy of communication,” Justice Stevens noted, “is an important interest,” rendered more important still where “the fear of public disclosure of private conversations might well have a chilling effect on private speech.” *Id.* at 17. In this context, the Court indicated that the case “present [s] a conflict between interests of the highest order — on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech.” *Id.* at 2. Applying the *Daily Mail* principle under such circum-

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*The answer, Justice Stevens wrote, is “clear” — “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”*

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stances — *i.e.*, where an articulated governmental interest is indeed of the “highest order” — required, as it had in analogous circumstances in *Florida Star*, a more finely tuned consideration of the competing interests as presented in the context of the case before the Court.

### *Stevens and Breyer Diverge in Emphasis*

It is here, however, that Justice Stevens’ opinion, ostensibly written for the Court, and Justice Breyer’s concurring opinion, written for himself and Justice O’Connor, appear to diverge, at least in their emphasis. For Justice Stevens, “[i]n this case, privacy concerns give way when balanced against the interest in publishing matters of public importance.” *Id.* at 18-19. While the statutory prohibition on the disclosure of unlawfully intercepted communications may properly be enforced to punish “disclosures of trade secrets or domestic gossip or other information of purely private concern,” Justice Stevens wrote for the Court, it may not constitutionally be applied in a manner that “imposes sanctions on the publication of truthful information of public concern.” *Id.* at 18.

Analogizing to the common law jurisprudence that has cabined the reach of the privacy torts, Justice Stevens asserted that “[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy” and, as a result, the “right of privacy does not prohibit any publication of matter which is of public or general interest.” *Id.* at 19 (quoting Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890)). In *Bartnicki*, therefore, where the information disseminated was “unquestionably a matter of public concern,” and the defendants “were clearly engaged in debate about that concern,” the Court held that plaintiffs’ privacy interest was required to yield to the First Amendment.

Although he and Justice O’Connor purported to join

in Justice Stevens’ opinion, and not simply in the judgment, Justice Breyer’s concurring opinion appears to calibrate the competing interests much more finely. For Justice Breyer, as for Justice Stevens, when there are interests of the highest order “on both sides of the equation,” *id.* at 2 (Breyer, J., concurring) (quoting *Turner Broadcasting Sys. v. FCC*, 520 U.S. at 227 (Breyer, J., concurring in part)), some “balancing” is required.

In Justice Breyer’s view, however, that “balance” appeared to be influenced by his suggestion that the competing privacy interest was not only important, it was of constitutional dimension. According to Justice Breyer, while the “statutes directly interfere with free expression in that they prevent the media from publishing information,” they also “directly enhance private speech” by encouraging “conversations that otherwise might not take place.” *Id.* at 1-3.

Under such circumstances, where “important competing constitutional interests are implicated,” Justice Breyer concluded, as he had in several other recent cases involving claims of competing First Amendment rights, that “[w]hat this Court has called ‘strict scrutiny’ — with its strong presumption against constitutionality — is normally out of place.” *Id.* at 2 (citing *Turner Broadcasting Sys.*, 520 U.S. at 227 (Breyer, J., concurring in part); *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

Instead, Justice Breyer assessed “whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences.” *Id.* And, he added, “despite the statutes’ direct restrictions on speech,” the First Amendment “must,” as a general matter, “tolerate laws of this kind because of the importance of these privacy and speech-related objectives.” *Id.* at 3.

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*Although he and Justice O’Connor purported to join Justice Stevens’ opinion, and not simply in the judgment, Justice Breyer’s concurring opinion appears to calibrate the competing interests much more finely.*

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## Deconstructing Bartnicki

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### *Breyer Applied is Mixed Message*

Applying his balancing test in *Bartnicki*, however, Justice Breyer concluded that “the statutes, as applied in these circumstances, do not reasonably reconcile the competing constitutional objectives,” but rather “disproportionately interfere with media freedom.” *Id.* at 4. On the one hand, the “broadcasters here engaged in no unlawful activity” and, on the other, the plaintiffs, whom he described as “‘limited public figures,’” had little or no “‘legitimate interest in maintaining the privacy’ of a conversation that raised ‘a significant concern for the safety of others.’” *Id.* at 4-5.

Despite the fact that the media defendants did not disseminate the content of the recording for several months after the threats were allegedly made, Justice Breyer concluded that “that fact cannot legitimize the speaker’s earlier privacy expectations. Nor should editors, who must make a publication decision quickly, have to determine present or continued danger before publishing this kind of threat.” *Id.* at 5.

Justice Breyer’s views in this regard appear to be difficult to reconcile with the majority opinion he purports to join. Despite Justice Stevens’ rather explicit holding that “privacy concerns give way when balanced against the interest in publishing matters of public importance,” *id.* at 18-19 (majority opinion of Stevens, J.), Justice Breyer asserted that the “Court does not create a ‘public interest’ exception that swallows up the statutes’ privacy-protecting general rule.” *Id.* at 6 (Breyer, J., concurring).

Rather, according to Justice Breyer, the Court only “finds constitutional protection for publication of intercepted information of a special kind” and only in circumstances in which “the speakers’ legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high.” *Id.* at 6.

In this regard, Justice Breyer sends something of a mixed message. First, he characterized the “information publicized” as involving “a matter of unusual public concern, namely a threat of potential physical harm to others,” and indicated that the “Court’s holding does not imply a significantly broader constitutional immunity for

the media” than a right to disseminate such information. *Id.* at 1. Yet, he elsewhere purports to exempt from the scope of constitutional protection only those “situations where the media publicizes truly private matters,” such as “sexual relations between [a] famous actress and rock star” and other “‘intimate private characteristics or conduct.’” *Id.* at 5-6 (citation omitted).

Where Justice Breyer ultimately would draw the line between protected and unprotected speech, however, and regardless of whether that line is co-extensive with the protected “matters of public importance” identified by Justice Stevens, it appears clear that he, and presumably Justice O’Connor as well, believe that “the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual’s interest in basic personal privacy.” *Id.* at 6. Whether that “flexibility” is limited to the legislatures’ power to enact “better tailored provisions designed to encourage, for example, more effective privacy-protecting technologies,” or whether it encompasses as well the power to impose sanctions on the dissemination of unlawfully acquired information that does not rise to an otherwise undefined level of “unusual public concern,” remains to be seen. *Id.* at 7.

### *The Dissent*

In dissent, the Chief Justice was plainly moved by the prospect of invasions of privacy arising from new technologies that “permit millions of important and confidential conversations to occur through a vast system of electronic networks.” Dissent at 1 (Rehnquist, C.J., dissenting). Accordingly, the Chief Justice would have permitted Congress and state legislatures to address the problem through the “content neutral” and generally applicable statutes at issue, statutes that survived the “intermediate scrutiny” he concluded was all that the First Amendment demanded. *Id.* at 8-9.

In the Chief Justice’s view, the statutes’ prohibitions on the disclosure of unlawfully intercepted communications is no more extensive than necessary to serve the

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asserted governmental interest in “drying up the market” for them:

Were there no prohibition on disclosure, an unlawful eavesdropper who wanted to disclose the conversation could anonymously launder the interception through a third party and thereby avoid detection. *Id.* at 11.

The dissenters thus rejected Justice Stevens’ conclusion that the *Daily Mail* principle must be applied regardless of whether the statute at issue is “content based” and regardless of whether the information was unlawfully acquired by someone other than the defendant before the court. According to the Chief Justice,

[t]hese laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular telephones.” *Id.* at 8-9.

Under these circumstances, the Chief Justice asserted, “the *Daily Mail* cases cannot bear the weight the Court places on them.” *Id.* at 15.

### *Back to the Future*

Not surprisingly, the *Bartnicki* decision both answers a number of previously unresolved constitutional questions and raises several new ones. Six justices appear to be firmly of the view that “intermediate” scrutiny is not the appropriate mode of constitutional analysis for laws that directly prohibit the dissemination of information, even when those laws are “content neutral” and ostensibly of “general applicability.” In addition, six justices have now rejected the notion that the press and public

forfeit their First Amendment right to disseminate information they have lawfully acquired simply because someone else obtained it illegally.

Nevertheless, there is little reason to believe that either the interceptor of a protected communication, or a reporter who collaborates actively with such an unlawful actor, can look to the First Amendment to protect their subsequent dissemination of the illegally obtained material, even if it is of public concern. And, although six justices held that the First Amendment’s solicitude for the dissemination of at least some information of “public importance” outweighs a competing governmental interest in protecting individual privacy, uncertainty continues to surround how to measure the quantum of “public importance” necessary to warrant constitutional protection in the face of a privacy challenge.

That said, it is likely that Congressman McDermott, who played no role in the interception of the communication at issue in *Boehner*, will be held on remand to the D.C. Circuit to have been constitutionally

protected when he disseminated it to the press. Although Justice Stevens noted that the defendants in *Bartnicki* did not know who intercepted the telephone call at issue there and therefore had no dealings with him, that fact appears to have played no significant role in the Court’s constitutional analysis and should not be sufficient to yield a different result in *Boehner*, where Congressman McDermott only met the interceptors there after they had committed their crime.

Conversely, now that the Supreme Court has denied *certiorari*, it appears that at least a portion of the claims advanced in *Peavy* will be the subject of further litigation in the trial court. Indeed, in footnote 5 of the Court’s opinion, Justice Stevens noted that, unlike the defendants in *Bartnicki* and *Boehner*, the plaintiff in *Peavy* had alleged that the media defendants there “in fact participated in the interceptions at issue.” *Id.* at 6

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*[U]ncertainty continues to surround how to measure the quantum of “public importance” necessary to warrant constitutional protection in the face of a privacy challenge.*

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## Deconstructing Bartnicki

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n.5. Although the Court in *Bartnicki* did not expressly hold that such “participation” strips a media defendant of constitutional protection for its subsequent dissemination of unlawfully acquired information, its decision not to address the issue at all will likely make it difficult for the *Peavy* defendants to raise it effectively.

### *Constitutional Mischief: Restricting One Speaker to Aid Another*

Finally, in at least one potentially significant respect, the *Bartnicki* decision contains the seeds of constitutional mischief. Specifically, although Justice Stevens characterized the competing privacy interest in *Bartnicki* as one of the “highest order,” and recognized that “the fear of public disclosure of private conversations might well have a chilling effect on private speech,” *id.* at 17, the Court’s opinion wisely refrained from characterizing it as a *constitutional* interest grounded in the First Amendment.

Justice Breyer, however, strongly suggested that he deemed the asserted governmental interest in “fostering private speech” to itself be of constitutional dimension, a determination that effectively recast the task before the Court in *Bartnicki* as deciding whether the statutes “strike a reasonable balance between their speech-restricting and speech-enhancing consequences.” *Id.* at 2 (Breyer, J., concurring). For their part, the dissenting justices squarely asserted that the statutes survived intermediate scrutiny in part because they “further the First Amendment rights of the parties to the conversation.” *Id.* at 14 (Rehnquist, C.J., dissenting).

This notion, with its roots in cases such as *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985), and *Turner Broadcasting Systems, Inc. v. FCC*, is an affirmatively dangerous perversion of the First Amendment. The speech and press clauses are phrased in the negative — as prohibitions on the enactment of laws “abridging the freedom of speech or of the press” — for a reason. Simply put, a representative democracy does not trust its governors,

no matter how well-intentioned, to sacrifice the First Amendment rights of some in order to further the speech-related interests of others.

In cases such as *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court understood this fundamental tenet of First Amendment jurisprudence and embraced it. In those cases, the Court recognized that, when the legislature asserts that it should be free to make laws affecting expression because there are asserted constitutional interests on “both sides” of the issue, the First Amendment does not leave the courts simply to determine whether a reasonable “balance” has been struck. Rather, the Constitution forbids Congress from legislating in the name of free expression at all when it does so in a manner that affirmatively restricts the rights of any citizen to speak the truth about a matter of public concern.

In *Bartnicki*, therefore, Justice Stevens was undoubtedly correct when he concluded that the interest of citizens in communicating privately is an important one. Congress is certainly free to punish the conduct engaged in by the interceptors of cellular telephone calls in order to vindicate that interest. It is also free to enact legislation enhancing the punishments to be visited upon such persons or to require the manufacturers of cellular phones to utilize the most effective privacy-protective technologies available. And, the users of cellular telephones have a First Amendment (and a Fourth Amendment) right to be free from *government* interception of their private communications.

By the same token, however, they have no *constitutional* right to be free from the dissemination of their communications by private parties, and they surely have no First Amendment *right* to have the government coerce others to be silent on their behalf. As Justice White explained in *Tornillo*, “[r]egardless of how beneficent-sounding the purposes of controlling” speech may be, in this context, as in all others, we must “remain intensely skeptical about those measures” that would “make the government the censor of what the people may read and know.” 418 U.S. at 259-60 (White, J., concurring). One

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## Deconstructing Bartnicki

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can only hope that, if and when the Court revisits this issue again, it will heed that advice.

*Lee Levine represented the media defendants in the Supreme Court in the Bartnicki case along with Jay Ward Brown, Audrey Billingsley, and Thomas Curley of Levine Sullivan & Koch, L.L.P. Sole practitioner Thomas Goldstein represented respondent Jack Yocum. Petitioners Gloria Bartnicki and Anthony Kane were represented by Jeremiah Collins of Bredhoff & Kaiser, and the United States was represented by then-Solicitor General Seth Waxman.*

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## UPDATE: High Court Remands Wiretap Case for Review in Light of Bartnicki

### *Congressman Vows to Pursue His Claim, Attempting to Distinguish Cases*

On May 29, the U.S. Supreme Court vacated and remanded for review another wiretap case in light of its recent similar decision in *Bartnicki v. Vopper*, 121 S. Ct. 1753 (U.S. 2001), see p. 2). The remanded case involves a Republican congressman's challenge to a Democrat's alleged disclosure of an illegally intercepted telephone call. *McDermott v. Boehner*, 2001 U.S. LEXIS 4001 (May 29, 2001).

The *Boehner* case was originally dismissed by a federal judge in 1998, only to be revived in 1999 by a D.C. appellate court. McDermott appealed to the U.S. Supreme Court, which elected to hear *Bartnicki* first.

In *Bartnicki*, the Justices ruled 6-3 that a radio host could not be sued for airing a telephone conversation that had been legally obtained by the radio host, although it was illegally taped by others.

In *Boehner*, the Supreme Court vacated the D.C. appellate court's decision that had revived the lawsuit, ordering the lower court to resolve the case under the *Bartnicki* ruling.

### *Facts of McDermott v. Boehner*

Rep. John Boehner, R-Ohio, sued Rep. Jim McDermott, D-Wash., after McDermott allegedly disclosed a 1996 phone call that had been illegally intercepted and recorded by a Florida couple who gave McDermott a copy of the tape. The recorded conversation revealed House GOP leaders, including Boehner, discussing the ethics investigation of then-Speaker of the House Newt Gingrich, R-Ga. Boehner contends that after McDermott received the copy of the tape, he gave copies to three newspapers — *The New York Times*, *The Atlanta Journal-Constitution*, and *Roll Call* — which ran stories about it.

Despite the seemingly daunting *Bartnicki* ruling, a story on the Freedom Forum web site ([www.freedomforum.org](http://www.freedomforum.org)) reports that McDermott plans to pursue the case, attempting to distinguish his situation from *Bartnicki* by arguing that McDermott allegedly had a "responsibility" as a public official not to disclose the tape to the media.

## Supreme Court: Courts May Review Punitive Damage Awards *De Novo*

By Theodore J. Boutrous, Jr, Thomas H. Dupree, Jr, and Sonja R. West

The Supreme Court of the United States last month held that appellate courts must conduct a “thorough, independent review” of the district court’s determination of the constitutionality of punitive damage awards. The ruling in *Cooper Industries v. Leatherman Tool Group*, No. 99-2035, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001), will protect defendants by ensuring that both state and federal courts of appeals strictly enforce the constitutional limits on punitive damage awards.

### *Proper Standard of Review*

The dispute in *Cooper Industries* centered on the proper standard of review an appellate court should employ in reviewing the district court’s holding that a punitive damage award is not unconstitutionally excessive under the Court’s decision in *BMW of North America v. Gore*, 517 U.S. 559 (1996). Whereas the defendant argued for a *de novo* standard, the plaintiff urged the Court to adopt an abuse of discretion standard. The Court, in an 8-1 decision authored by Justice John Paul Stevens, agreed with the defendant that *de novo* review was the proper standard.

The Court reiterated that, while states enjoy broad discretion in authorizing and limiting permissible punitive damage awards, the Due Process Clause imposes substantial limits on that discretion. The Court noted that it had repeatedly enforced such limits in a variety of contexts to prevent states from imposing “grossly excessive” penalties on tortfeasors. For example, in *BMW*, the Court held that the Due Process Clause bars punitive damage awards that are “grossly excessive” in light of the nature of the defendant’s conduct, the disparity between the award and the actual harm suffered by the plaintiff, and the difference between the award and the civil penalties imposed in comparable cases.

In *BMW* and elsewhere, the Court explained, it had

not deferred to the trial court’s determination, but instead had “engaged in an independent review of the relevant criteria” used to determine whether a punishment passes constitutional muster. This type of rigorous appellate review ensures that the *BMW* standards “will acquire more meaningful content through case-by-case application” and “helps to assure the uniform treatment of similarly situated persons that is the essence of law itself.” Consequently, the Court concluded, an appellate court should not simply rubber-stamp a jury’s assessment of punitive damages or a trial judge’s ruling upholding the punishment, but should conduct its own independent review as to whether the Constitution permits the amount of the award.

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*The ruling will protect defendants by ensuring that both state and federal courts of appeals strictly enforce the constitutional limits on punitive damage awards.*

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### *Not “Fact” Finding*

Although the plaintiff had urged the Court to treat the jury’s punitive damage award as a finding of “fact” warranting deference on appeal, the Court rejected this approach. It explained that punitive damages differed from compensatory damages in that “[a] jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.” Thus, the Seventh Amendment — which limits the re-examination of “facts” tried by a jury — was not implicated and *de novo* review was appropriate.

The significance of *Cooper Industries* lies in its emphasis on appellate courts’ important role in reining in excessive jury verdicts. Indeed, after holding that a *de novo* standard should be employed on remand, the Court went on to suggest that had the Ninth Circuit conducted an independent examination of the punitive damage award at issue — rather than deferring to the lower court’s judgment — it may well have reached a different result and struck down the award as unconstitutional.

### *Impact on Libel Awards*

*Cooper Industries* may have a substantial impact on libel cases by ensuring strict review of the size of punitive

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damage verdicts and by influencing the future contours of the *de novo* standard that has long applied on issues such as “actual malice” under *New York Times v. Sullivan*, 376 U.S. 254 (1964). Indeed, the *de novo* standard adopted in *Cooper Industries* is closely related to the *de novo* standard that governs liability issues under *Sullivan*.

Prior to *Cooper Industries*, of course, it was settled under *Sullivan* and its progeny that verdicts in libel cases would receive independent review on appeal of liability issues such as whether there was “actual malice.” The size of a punitive damage award, however, was viewed by most courts to be controlled primarily by state law and to be subject only to what the Supreme Court once called “the gentle rule that they not be excessive.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

It was not until the Court’s 1996 decision in *BMW v. Gore* that it became clear that there was a federal due process limit on the size of punitive damage awards. Following *BMW*, courts began to consider such constitutional boundaries, and in one of the first cases remanded by the Supreme Court for further review in light of *BMW*, the Tenth Circuit, relying by analogy on *Sullivan*, held that appellate courts must conduct a *de novo* review under *BMW* to determine whether a punitive damage award violates the Due Process Clause. See *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 101 F.3d 634 (10th Cir. 1996). But other courts, like the Ninth Circuit, rejected that approach and continued to apply extremely deferential standards of excessiveness review to punitive damage verdicts, including in First Amendment cases.

### *Builds on Bose*

*Cooper Industries* should put an end to such deferential review. In doing so, it builds on Supreme Court precedent regarding when appellate courts should take

an independent and active approach to reviewing cases involving important constitutional considerations, such as cases involving libel claims.

In *Bose Corp. v. Consumers Union of United States, Inc.*, a 1984 defamation case, the Supreme Court held that it was proper for the appellate court to perform an independent review of the evidence behind the trial court’s finding of “actual malice.” The Court concluded that in cases in which there is a claim of denial of First Amendment rights, reviewing courts are not bound by the conclusions of lower courts but rather should reexamine the record to determine whether the judgment is constitutional. 466 U.S. 485 (1984); see also *Harte-*

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*[T]he combined force of the First Amendment and the Due Process Clause should mandate a particularly rigorous standard of review for punitive damage awards in defamation cases*

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*Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989) (citing *Bose* and explaining that a finding of “actual malice” is a reviewable question of law).

The *Bose* Court relied on past decisions in concluding that “in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Id.* at 499 (quoting *Sullivan*, 376 U.S. at 284-86). The Court explained that this rule of independent review “assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact.” *Bose* 466 U.S. at 501. (Justice Stevens, who wrote the opinions in *Cooper Industries* and *BMW*, also wrote the opinions for the Court in *Bose* and *Harte-Hanks*.)

Although the Court has yet to decide the proper approach to punitive damage awards in a defamation case, the combined logic of *Cooper Industries* and *Bose* — and the combined force of the First Amendment and the Due Process Clause—should mandate a particularly rigorous standard of review for punitive damage awards in such cases. The Court has expressed concern in the past

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that unwarranted and unrestrained punitive damage awards in speech cases “create [ ] serious hazards to protected freedoms,” *Sullivan*, 376 U.S. at 277-78, and run the unique risk that “jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship,” *Gertz*, 418 U.S. at 350.

*Cooper Industries* also raises questions about the jury’s prerogative to calculate the amount of a punitive damage award. By refusing to characterize this determination as a question of fact, the Court suggested that this calculation may properly be made by a judge rather than by jurors.

### *Total Wealth May Not Be Relevant*

The ruling may benefit defendants in an additional way: by limiting a plaintiff’s ability to invoke the defendant’s wealth and profits as a reason for imposing a large punitive award. The Court suggested that the district court erred to the extent it premised the award on the defendant’s gross profits when those profits did not result from the defendant’s alleged wrongdoing. This aspect of the Court’s ruling will enable corporate defendants to argue that before evidence of their supposed wealth and profits may be admitted, the plaintiff must make a threshold showing of relevance by linking those profits to the challenged conduct.

Over the past decade, the Supreme Court has steadily been building a punitive damages jurisprudence that recognizes the constitutional limits on such awards. By guaranteeing an independent review by the court of appeals, *Cooper Industries* will further insulate defendants from the arbitrary and grossly excessive punishments sometimes inflicted by inflamed or capricious juries.

*Mr. Boutros is a partner and Mr. Dupree and Ms. West are associates in the law firm of Gibson, Dunn & Crutcher, which filed an amicus brief in support of the prevailing party in Cooper Industries and represented the defendant in the Continental Trend case mentioned in this article.*

## *Cheers* Actors Settle Right of Publicity Case

George Wendt and John Ratzenberger, the actors who played “Norm” and “Cliff” on the *Cheers* television series, have settled a lengthy right of publicity court battle against Paramount Pictures and Host International Inc. (“Host”), according to a June 19 Associated Press story. The settlement follows the U.S. Supreme Court’s refusal on October 2 to hear the case regarding whether licensed animatronic robots based on the copyrighted “Norm” and “Cliff” characters violated the actors’ right of publicity, letting stand a Ninth Circuit ruling that allowed the case to go to trial. *Paramount Pictures v. Wendt*, 99-1567, 2000 U.S. LEXIS 4886 (See 10/00 *LibelLetter* at 22).

The settlement, the terms of which were not disclosed, leaves open the question of whether producers who create television characters or the actors who play them own the rights to familiar television and film characters.

The actors’ suit claimed that Host violated their rights of publicity when it created bars in international airports based on a *Cheers* theme that included two life-sized robots named “Hank” and “Bob.” Host had been granted a license to create the international bars resembling the *Cheers* set by Paramount Pictures Corp., owner of the copyright and trademark for *Cheers* and all of its characters.

The Supreme Court’s denial of *cert* was the latest maneuver in a long dispute, during which the federal trial court twice dismissed the case and the Court of Appeals twice reinstated it, most recently remanding it in 1997. At that time, the Court of Appeals ruled that federal copyright law did not necessarily override California’s right of publicity law, and that a jury should decide whether the robots resembled the characters portrayed by the actors.

Rehearing and rehearing *en banc* was denied by the Ninth Circuit in December of 1999, with a strong dissent by Judge Kozinski, joined by Judges Kleinfeld and Tashima. *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284 (9th Cir. Cal. 1999) (See 1/00 *LibelLetter* at 31).

## California Court Allows Suit by Little League Team and Coaches to Stand Over Report on Sex Offender Coach

### *Publishing Team Picture Violated Their Privacy*

By Robin Bierstedt

The California Court of Appeal recently held that Time Warner could be held liable for the publication of truthful, public information that was lawfully obtained — in this instance, a Little League team photograph. *M.G. v. Time Warner, Inc.* (Cal. Ct. App. 4th Dist. 2001) *Sports Illustrated* and an HBO television program, *Real Sports*, used the photograph to illustrate stories about the presence of child molesters in youth sports leagues.

Both stories featured Norman Watson, a convicted child molester who used his positions as a Little League umpire and head coach to gain access to his victims. Watson was pictured in a team photo with his players and two assistant coaches. The assistant coaches and eight of the players — four of whom were actually molested by Watson — are the plaintiffs in the case.

Watson's molestation of Little League players had received extensive media coverage before either the SI article or HBO broadcast appeared. The news reports described Watson's crimes and his association with the Little League team, and some specifically identified the team by name and mentioned that his victims included members of his Little League team.

The suit, which includes as defendants Watson and the Little League, alleges all four privacy causes of action (public disclosure of private facts, intrusion, false light and misappropriation) as well as infliction of emotional distress causes of action against the SI and HBO defendants. All ten plaintiffs claim that the publication of the team photos by SI and HBO wrongfully "uncovered [their] heretofore private and confidential identities."

Time Inc. and HBO filed an anti-SLAPP motion to strike the complaint, which was denied. The Court of Appeal affirmed, holding that plaintiffs' privacy claim

was viable on at least two grounds: public disclosure of private facts (for the players who were molested) and "false light" (for the players who were not molested). The central ruling in the case was that it was a "private" fact that plaintiffs played on a Little League team coached by Watson. As the Court of Appeal alarmingly concluded, "the record supports plaintiffs' contention that their membership on Watson's Little League team was a private fact first publicly disclosed by Time Warner."

Time Warner apparently equates 'private' with 'secret' and urges any information not concealed has been made public. But the claim of a right of privacy is not 'so much one of total secrecy as it is of the right to *define* one's circle of intimacy — to choose who shall see beneath the quotidian mask.'

The court also rejected for purposes of this preliminary motion Time Warner's argument that the use of the photograph was newsworthy. Citing both the state policy of protecting the identity of victims of sex crimes and the fact that in the SI and HBO reports the identities of the Little League players were otherwise masked (absent specific consent given to use names), the court held that the plaintiffs had made out a prima facie case that their identities were not newsworthy.

The Time Warner defendants are now petitioning the California Supreme Court for review.

*Robin Bierstedt is Vice President and Deputy General Counsel of Time Inc. Time Warner was represented by Bob Vanderet and Neil Jahss of O'Melveny & Myers, Paul Gardephe of Time Inc., and Laurence Tribe of Harvard University.*

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*The central ruling in the case was that it was a "private" fact that plaintiffs played on a Little League team coached by Watson.*

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## First Amendment Not Gone with the Wind

By Gregg D. Thomas, James B. Lake and Rachel E. Fugate

A trial judge's order halting distribution of a book violated the First Amendment, a federal appeals court has ruled.

"The Wind Done Gone" was scheduled for publication this spring when Judge Charles A. Pannell, Jr., a United States District Judge in Atlanta, ordered the presses stopped. Judge Pannell found that the book infringed the copyright on Margaret Mitchell's classic "Gone With The Wind." Houghton Mifflin Company, publisher of the banned book, had argued that "The Wind Done Gone" by Alice Randall was protected commentary on the iconic work "Gone With The Wind." Although agreeing "The Wind Done Gone" contained transformative elements, Judge Pannell found that the Mitchell Trust, which owns the copyright to "Gone With the Wind," was likely to succeed on the merits of its copyright infringement action and entered a preliminary injunction prohibiting publication of the book.

### *Debate and Amici in Media*

Judge Pannell's order immediately sparked controversy and debate within the media industry. As owners of countless copyrights, media institutions understood the Mitchell Trust's reasons for bringing the lawsuit and the Trust's economic interest in protecting intellectual property. On the other hand, as publishers of news, editorials, commentary, criticism, and parody, the media also saw the importance of protecting freedom of speech.

When Houghton Mifflin appealed to the Eleventh Circuit, a number of media entities sided with free speech and filed amicus curiae briefs challenging Judge Pannell's order. Amicus briefs were filed by The New York Times Company, Dow Jones & Company, Inc., Media General, Inc., and Cox Enterprises, Inc.; PEN American Center, American Booksellers Foundation for Freedom of Expression, Freedom to Read Foundation, Washington Lawyers' for the Arts, The First Amendment Project, and The National Coalition Against Censorship; and Microsoft Corporation.

### *Ruled From the Bench*

On May 25, three Eleventh Circuit judges heard arguments in the case and ruled from the bench that Judge Pannell's order violated the First Amendment. In a brief two-page opinion, the Eleventh Circuit ruled in favor of the First Amendment, finding that the injunction represented "an unlawful prior restraint in violation of the First Amendment." Although the panel's full opinion has not been issued, the briefs in the case and the order dissolving Judge Pannell's injunction suggest that the court of appeals might have focused upon the difference between mere copying and transformative use of an earlier work.

Houghton Mifflin had argued that Randall's book was a political and social commentary about racism in the antebellum south. The vehicle for this commentary undoubtedly was the American classic "Gone With The Wind," but Randall did much more than simply repackage the earlier book. Houghton Mifflin asserted that "The Wind Done Gone" was a parody and an attempt to debunk the classic's sometimes racist and stereotypical portrayal of African-Americans. Because Randall's book was a parody and commentary, Houghton Mifflin argued, the book was her speech and, therefore, protected by the First Amendment in a way that a mere photocopy of "Gone With the Wind" would not be.

The Mitchell Trust has filed an Emergency Petition for Rehearing and Rehearing En Banc. Houghton Mifflin filed a response to the emergency petition on June 8, 2001.

Suntrust Bank is represented by William B.B. Smith, Ralph Ragan Morrison, Anne Moody Johnson, Jones Day Reavis & Pogue, Atlanta, Georgia. Houghton Mifflin Company is represented by Miles J. Alexander, Joseph M. Beck, Jerre B. Swann, W. Swain Wood, Kilpatrick Stockton, Atlanta, Georgia.

*Gregg D. Thomas is the head of the media department at Holland & Knight LLP. James B. Lake is an associate in the media department at Holland & Knight LLP. Rachel E. Fugate is an associate in the media department at Holland & Knight LLP.*

## “Wind Done Gone”: Oral Argument in the Eleventh Circuit

*Peter Canfield, Dow Lohnes & Albertson, Atlanta, Georgia, attended the oral argument before the Eleventh Circuit, which led to the ruling. He has written on highlights from that argument.*

The Eleventh Circuit panel that heard Houghton Mifflin’s appeal of the injunction against publication of Alice Randall’s “The Wind Done Gone” obviously entered the May 25 oral argument with their short order vacating the injunction already prepared.

But while the order stressed First Amendment grounds for overturning the injunction (it began: “It is manifest that the entry of a preliminary injunction in this copyright case was an abuse of discretion in that it represents an unlawful prior restraint in violation of the First Amendment.”), questions about copyright, not the First Amendment, dominated the argument.

The following are notes of the bench’s questions/comments (some quotations, most paraphrases):

- Eleventh Circuit Judge Stanley F. Birch, Jr. (to Houghton Mifflin counsel Joe Beck of Kilpatrick Stockton): Is there a copyright law that talks about a sequel being equivalent to a derivative work?
- And again by Judge Birch (as Beck was answering): Address as soon as you can why the district court got the copyright issue wrong.
- Eleventh Circuit Judge Stanley Marcus (to Beck): Tell me in particular why the district court abused its discretion, particularly since we are here on an interlocutory appeal from a preliminary injunction.
- Judge Birch (to Beck): Is it your position that characters cannot be copyrighted?
- Judge Birch (in response to Beck’s statement that the case was being portrayed as a false collision between the First Amendment and the Copyright Clause): Both arise out of the licensing act in England.
- Judge Marcus (to Mitchell Trust counsel Rick Kurnit of Frankfurt Garbus Kurnit Klein & Selz): About *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The Supreme Court says in *Campbell* that a work that adds something new, that alters the original work with new meaning, is transformative. Does not this book add something new and original in the form of social commentary? A profoundly new cultural and social perspective? And if true why not entitled to protection?
- Judge Birch (to Kurnit): How do you define a sequel?
- Judge Birch (to Kurnit): This is a parallel (as opposed to a sequel). Typically a sequel appeals commercially to people who like the characters and want to see what they do later on.
- Judge Marcus (to Kurnit): Doesn’t the artist here completely recast the characters and tell the tale from the perspective of a slave and profoundly alter ...
- Judge Marcus (to Kurnit): Aren’t the characters recast in a very different way?
- Judge Birch (to Kurnit): Help me. [After remarking that it was difficult to reread *Gone With The Wind* without recalling the vivid imagery of Vivien Leigh as the movie version of Scarlett O’Hara]. When you have something like that, it seems to me it’s akin to a public figure. Reached a dimension greater than its parts? In order to criticize — and bring down if you will — isn’t it necessary to take and identify clearly [from *Gone With The Wind*]. Somewhat of a judgment call re: what taking is necessary to effective criticism?
- Judge Birch (to Kurnit): What is pure criticism?
- Judge Birch (to Kurnit): The idea of Scarlett is not protectible under copyright law. Here the expression of Scarlett is not copied.
- Judge Birch (to Kurnit): Talk to me about why injunctive relief was an appropriate remedy.
- Judge Marcus (to Kurnit): How does publication of this book interfere with any sequel?
- Seventh Circuit Judge Harlington Wood, Jr., sitting by designation (to Kurnit): If they appeal to same market, would it really affect the market for the sequel?
- Judge Marcus (to Beck): Isn’t the parody at issue in *Campbell* a whole lot different and easier because there you are dealing with short songs where here you have two works of fiction? Is *Campbell* transformable given the different context?
- Judge Birch (to Beck): Does the Copyright Clause immunize the novel *Gone With the Wind* against fair comment or criticism?
- Judge Birch (after looking at the other judges): The Court has decided it will enter an order forthwith right now vacating this injunction. A more comprehensive order will follow. This order will be available within the next 15 minutes.

## Publication of Non-Profit Media Watch-Dog Group Deemed Commercial Speech

By David A. Schulz and Wesley R. Powell

In an opinion loaded with one alarming conclusion after the next, Judge Denny Chin of the Southern District of New York on May 24 refused to dismiss a complaint for libel, tortious interference and a number of other causes of action asserted against two non-profit media watch-dog groups and several individuals. The court concluded that the statements challenged by the World Wrestling Federation had been made by the defendants for fundraising purposes, and therefore should be treated as mere “commercial speech” subject to reduced First Amendment protection, even though the statements were made in the context of public debate about issues of general concern. *World Wrestling Federation Entertainment, Inc. v. Bozell*, 2001 WL 561241 (S.D.N.Y. May 24, 2001). By declaring the advocacy speech at issue to be commercial speech, Judge Chin substantially extended the boundaries of that doctrine and along the way reached a number of other unusual and disturbing conclusions.

### *Plaintiff's Claims*

The case stems from the media frenzy surrounding the recent trial and conviction of fourteen-year-old Lionel Tate for first-degree murder in the death of a six-year-old girl in Florida. Tate’s lawyer, James Lewis, had argued (in court and in the media) what became known as the “wrestling defense” — that Tate was a professional wrestling fan and was simply mimicking wrestling moves he had seen on television when he accidentally killed the girl.

Tate’s case and the deaths of three other children prompted the Media Research Center (“MRC”) and Parents Television Council (“PTC”) to criticize publicly professional wrestling organizers, including The World Wrestling Federation Entertainment (“WWFE”). The MRC and PTC are non-profit organizations that seek “to bring political balance to the nation’s news media and responsibility to the entertainment media” through, among other methods, monitoring television programming and denouncing what they view as inappropriate programs. 2001 WL

561241 at \*2. The organizations’ Chairman, Brent Bozell, is a nationally-syndicated conservative columnist.

The MRC’s and PTC’s criticism of WWFE grew into a national campaign to educate both their own members and those corporations that sponsor WWFE television programs about the very violent content of the shows. In response, WWFE sued the two organizations, Bozell, another PTC officer and John Lewis (Tate’s attorney). Its blunderbuss complaint alleges thirteen causes of action, including defamation; false description, trademark dilution and related claims under the Lanham Act; copyright infringement; tortious interference with existing contractual relations; tortious interference with prospective business relations; trade libel; and conspiracy.

The basis for these claims is the allegation that defendants had repeatedly stated that WWFE, and specifically its television show “WWF SMACKDOWN!,” caused the deaths of four children, including Tate’s victim, by enticing children to mimic wrestling moves. *Id.* at \*3. The complaint also alleges that the defendant organizations falsely took credit for convincing a large number of advertisers to withdraw support for WWFE programming because of its violent content and its association with these deaths. *Id.* The complaint alleges that the defendant organizations published these messages in a number of ways, including “Action Alerts” sent by e-mail to their members, fundraising letters to members, articles posted on their websites, newsletters, fundraising videotapes sent to current and prospective members, newspaper advertisements, letters to politicians, Bozell’s syndicated column, and speeches delivered at shareholder meetings of a number of corporate sponsors of WWFE’s programs.

### *Court's Sweeping Analysis of Commercial Speech*

On defendants’ motion to dismiss, Judge Chin concluded that he must consider, as a threshold matter, the extent to which the First Amendment offered defendants any defense to WWFE’s claims, particularly its defamation and Lanham Act claims. Critical to this analysis, in the court’s view, was a threshold determination of whether the statements were “commercial speech” and therefore “not subject to the most rigorous [constitutional] scrutiny, as compared to, for exam-

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## Publication of Non-Profit Media Watch-Dog Group Deemed Commercial Speech

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ple, claims based on political speech.” *Id.* at \*5, quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n. 5.

The court acknowledged that defendants’ statements were not “pure commercial speech,” *i.e.* that which “does no more than propose a commercial transaction,” because the challenged PTC and MRC statements deal with an issue of public concern — the extent to which the WWFE exposes children to violence. *Id.* at \*6, quoting *Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). But the court found other aspects of defendants’ speech to be substantially commercial in nature, including that many of the statements were made in connection with fundraising activities by the non-profit organizations, and were made “to champion themselves and to raise [their] profile.” *Id.*

In finding the challenged speech to be merely “commercial speech,” Judge Chin purported to apply the definition of commercial speech found in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). The *Bolger* three-part test addresses the “forum” of the speech (in an advertisement or elsewhere), the motivation for the speech (economic or otherwise) and the content of the speech (product-specific or not). In Judge Chin’s view the challenged statements

(1) were contained in materials that effectively amounted to “advertisements” — because they were geared toward fundraising;

(2) were made with an economic motive — raising money and defendants’ profiles; and

(3) referred to specific products — both plaintiff’s “WWF SMACKDOWN!” and defendants’ various “services and programs.”

Accordingly, the court found that

“[t]he combination of these characteristics —

the goals of making money and self-promotion — support the WWFE’s allegation that defendants’ speech is commercial, notwithstanding the fact that their speech discusses public issues,” and thus the speech at issue “may only be entitled to ‘reduced [First Amendment] protection.’”

2001 WL 561241 at \*7, quoting *Dun & Bradstreet*, 472 U.S. at 758 n. 5.

The opinion’s expansion of the boundaries of commercial speech to include traditional forms of political and social policy advocacy because one purpose included raising the funds needed to spread the word of the organizations’ advocacy is deeply disturbing, and its facile analysis of the *Bolger* factors would seem to apply equally to the advertisement at issue in *New York Times v. Sullivan*. The opinion also

elides the fact that many of the challenged statements were made in the context of traditional advocacy pieces, including letters to politicians, editorials, and the like, separate and apart from any fundraising. *Id.* at \*3. The Court drew no distinction between such public advocacy pieces and statements directly related to fundraising.

The potential sweep of this analysis is chilling. If the motives of fundraising and self-promotion alone can transform advocacy into commercial speech, a host of political and social groups are susceptible to the same analysis. Like defendants, most political candidates and political and social organizations publish materials geared toward fundraising and self-promotion. Moreover, like defendants here, many of these individuals and organizations target commercial enterprises in their advocacy pieces. Would the court extend the commercial speech doctrine to include a political candidate’s statements at a fundraising din-

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*If the motives of fundraising and self-promotion alone can transform advocacy into commercial speech, a host of political and social groups are susceptible to the same analysis.*

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Judge Chin apparently attempted to address such concerns by stating that defendants' fundraising efforts involved the promotion of "products" or "services" as defined in *Bolger*. But this, too, appears an insufficient basis for a commercial speech-finding. By all evidence, the only thing defendants were "selling" were memberships in non-profit organizations that exist to engage in political action (e.g., lobbying Congress, urging companies not to do business with purveyors of violence) and social and cultural criticism (e.g., publishing articles and letters critical of television content). Nothing in the opinion indicates that defendants sold any service or program separate from its political and social messages.

### *Other Alarming Analyses*

Attaching the "commercial speech" label to defendants' statements led the court to several additional conclusions, all flowing from its view that less scrutiny must apply to "commercial speech." Thus, for example, the court refused to dismiss claims for tortious interference without any consideration of the significance that liability was premised upon defendants exercise of their First Amendment rights, or any discussion of *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982), and its progeny. 2001 WL 561241 at \*12.

In considering the Lanham Act claims advanced by WWFE, Judge Chin equally ignored that defendants' use of WWFE's marks was for editorial purposes. Thus, the court found that a "dilution by tarnishment" claim had been asserted under Section 43(c), even though there was no suggestion that the WWFE marks had been used by defendants on inferior goods or services that would diminish the value of the marks. Rather, a claim was held to have been stated simply because the defendants' criticisms themselves portrayed the WWFE products as "unwholesome or shoddy." A false description claim under Section 43 (a), which requires a misrepresentation in a commercial advertisement or promotion, was found to be properly alleged because the challenged statements were made

to "increase PTC fundraising." Judge Chin found a claim to be stated because the WWFE was disparaged to promote "defendants' own product."

### *Follows P & G v. Amway*

Judge Chin also embraced a highly problematic approach to defamation law that was recently articulated by the Fifth Circuit in *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 556 (5<sup>th</sup> Cir. Feb. 14, 2001). Citing the recent *P&G* decision, the court held that a public figure libel plaintiff challenging commercial speech need not satisfy the "actual malice" fault standard, because commercial speech is sufficiently durable to withstand a lower level of scrutiny. This approach was advanced some years ago in *dicta* in *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 939 (3d Cir. 1990), but was explicitly rejected in *National Life Insurance Co. v. Phillips Publishing, Inc.*, 793 F.Supp. 627, 647 (D.Md. 1992), and until now had gained little attention.

Acknowledging that the Second Circuit has never held that such reduced scrutiny applies to commercial speech defamation claims, Judge Chin also held that plaintiff had sufficiently alleged actual malice to survive a motion to dismiss even under the usual analysis. However, his apparent willingness to eliminate the actual malice standard in commercial speech defamation cases represents yet another alarming use of the commercial speech doctrine to chip away established constitutional protections for speech. See "A New Battleground in the Clash of Ownership and Free Expression," 2001 *LDRC Bulletin* 2001, No. 2 (April 2001) (collected essays on commercial speech).

### *Falsity of the Statements At Issue*

Equally troubling is the court's ready acceptance of plaintiff's contention that the alleged defamatory statements are susceptible to proof of falsity, when the gist of the challenged statements appear to be non-actionable opinion. Plaintiff recasts a number of the statements as claiming that the deaths of four children directly resulted

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from their attackers' specific exposure to the program "WWF SMACKDOWN!," and argues that this claim is provably false because "WWF SMACKDOWN!" did not air until after three of the deaths at issue and, therefore, could not possibly have caused those deaths. But that is not what the actual statements said.

Although the distinction did not seem significant to Judge Chin, the defendants' statements were more general and opinion-based. As set out in the court's opinion, one typical statement was that

four children aged 4 to 6 years old have had their lives tragically cut short by peers who were emulating wrestling moves they learned by watching programs like "WWF SMACKDOWN!"

Obviously, this statement does not directly blame "WWF SMACKDOWN!" for any specific death. Moreover, a suggestion that such wrestling shows cause teenagers to mimic behavior that resulted in specific deaths would itself appear to be non-actionable — an expression of personal belief that could never be proven true or false.

Defendants' statements that WWFE is guilty of "sheer arrogance and irresponsibility" and that WWFE has ignored "news reports of four children having killed four children copycatting what they watched on television" are typical of the statements Judge Chin quite surprisingly said could support a claim for defamation.

### *Still Further Issues*

Defendant James Lewis, lawyer to Tate, separately moved to dismiss in part on the ground that the court lacked personal jurisdiction over him, since he is a Florida resident with no contacts in the Southern District of New York. Lewis argued that New York's long-arm statute for tort claims, CPLR §302(a)(2) and (3), did not apply because it specifically excludes from its reach non-domiciliaries accused of defamation. Amended to preclude the types of claims reflected in the *Sullivan* verdict against *The New York Times*, the

New York statute prohibits the assertion of personal jurisdiction over non-residents in defamation claims, even if the defamatory action took place in New York. CPLR § 302(a)(2).

However, invoking the portion of the statute conferring jurisdiction over out-of-state tortfeasors who transact business in New York, CPLR § 302(a)(1), the court found that Lewis's statements were sufficiently related to the transaction of business in New York to confer jurisdiction. Lewis had availed himself of "New York's unique resources in the entertainment industry," in that he appeared on television shows produced and aired in New York and in a PTC fundraising video distributed in New York and elsewhere. The judge concluded that these appearances could amount to the "transaction of business" in New York, despite the specific statutory rejection of long-arm jurisdiction over defamation claims.

Plaintiffs are represented by Kirkpatrick & Lockhart (Eugene R. Licker in New York and Jerry S. McDeritt in Pittsburgh). Defendant James Lewis is represented by Michael J. Quarequo in Fort Lauderdale; all other defendants are represented by Thomas A. Leghorn of Wilson, Elser, Moskowitz, Edelman & Dicker LLP in New York and Robert J. Sparks, Jr. of Herge, Sparks & Christopher in McLean, Virginia.

*David A. Schulz and Wesley R. Powell are with the Media Law Practice Group at Clifford Chance Rogers*

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## Texas Case Tests Standard for Parodies

by **Jim Hemphill**

A Texas state trial court judge has denied a defense summary judgment motion in a libel case brought by a judge and a district attorney over a parody published in a Dallas alternative newsweekly. The ruling paves the way for an interlocutory appeal in the case, *Isaacks v. New Times* (No. 99-20910-158, District Court of Denton County, Texas, 158th Judicial District).

The *Isaacks* case raises the question of how a public-official plaintiff can establish actual malice when the article at issue is an admittedly fictional parody or satire. It also involves issues of how a reasonable reader would interpret such an article and what evidence is sufficient to raise a fact question as to constitutional malice.

### *Parody Targeted Post-Columbine Hysteria*

The parody, published in the November 11, 1999, edition of the *Dallas Observer*, told the fictional story of a six-year-old girl from the small town of Ponder, Texas (in Denton County, north of Dallas/Fort Worth) who was reportedly jailed after writing a book report on the classic children's work "Where the Wild Things Are." The article satirically suggested that school officials were worried that the book incited children to "think dangerous thoughts."

The piece included outrageous, fictional quotes from several actual persons, including then-Gov. George W. Bush, as well two elected Denton County officials, district attorney Bruce Isaacks and juvenile court judge Darlene Whitten. District Attorney Isaacks was attributed the fictional quote, "We've considered having her certified to stand trial as an adult, but even in Texas there are some limits." Judge Whitten was quoted as saying, "Any implication of violence in a school situation, even if it was just contained in a first-grader's book report, is reason enough for panic and overreaction."

The parody came in the wake of a real-life incident

in which a 12-year-old boy from Ponder actually was held in juvenile detention for five days after writing an assigned Halloween essay; the boy wrote a story — intended to be humorous — about shooting his classmates and teacher. The incident received virtually worldwide attention, and many news stories quoted both Isaacks (whose office requested the detention) and Judge Whitten (who ordered the boy detained). The parody in the *Dallas Observer* described this incident as background for its fictional story of the six-year-old girl. (A copy of the article is available online at <http://www.dallasobserver.com/issues/1999-11-11/news2.html>).

The *Observer* ran the fictional, satirical article as political commentary over what it saw as post-Columbine "panic and overreaction." The article's author and primary editor, as well as the editor — in chief, all testified in deposition that they intended the article to be obviously fictional and never thought that any reader would believe it to be true. The article was not labeled as parody and ran in the "News" section of the newspaper.

### *Article Aftermath*

After the article was published, both the *Observer* and the public officials mentioned in the article received e-mails from citizens expressing their outrage at the jailing of a six-year-old girl for writing a book report. It is not yet clear whether any of these correspondents actually read the entire article, or if they read only portions (or heard about it from other sources). Thus far, no testimony in the case has been taken from any person who believed the story to be real after reading the entire article.

Judge Whitten and District Attorney Isaacks demanded a retraction and apology. In the next issue, the *Observer* clarified that the article was fictional, in a manner consistent with the original parody. "Here's a clue for our cerebrally challenged readers who thought the story was real: It wasn't. It was a joke. We made it up," the paper said.

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## Texas Case Tests Standard for Parodies

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Unsatisfied, Isaacks and Whitten filed a libel suit in Denton County. The county's judges all recused themselves sua sponte, presumably due to the plaintiffs' status as fellow court officers, and the case was assigned to the Hon. Bob McCoy, a state trial judge in Tarrant County (Fort Worth).

### *Judge Adopts Strict Actual Malice Standard*

After conducting basic paper discovery, the defendants (New Times, Inc. and Dallas Observer, L.P., the paper's parent entities, as well as reporter Rose Farley, managing editor Patrick Williams, and editor-in-chief Julie Lyons) moved for summary judgment on two grounds: (1) that a reasonable reader would understand the article's references to the plaintiffs to be fictional satire or parody, rather than statements of fact, and (2) that because the defendants did not intend that readers interpret the article as fact, they did not act with constitutional actual malice.

The plaintiffs argued that actual malice in this case was, in effect, automatic. Since the accepted standard is knowledge of falsity or reckless disregard for the truth, and since the defendants knew the article was "false" (in that they made it up), actual malice logically was proven, the plaintiffs maintained.

Judge McCoy ruled in favor of the defense on this point. In his order on defendants' first motion for summary judgment, entered on December 30, 2000, the judge held that to show actual malice, the plaintiff

must prove that the Defendants intended the reasonable reader to interpret as actual, literal statements of fact those portions of the November 11, 1999, article that Defendants contend are parody or satire, taking into account the article as a whole.

However, the judge also ruled that the plaintiffs had not had an adequate opportunity to take discovery on this issue, so he denied defendants' motion. He also ruled that there is a fact issue as to whether a reasonable

reader would interpret the article as fictional parody or satire.

### *Court Denies Second Motion For Summary Judgment*

After the ruling on defendants' first motion, plaintiffs deposed the individual defendants. There was no testimony that any of them intended or thought that readers would be fooled by the article. The plaintiffs also deposed a local talk radio host who testified that he initially thought the article was factual and expressed outrage on the air for a few minutes, but he finished reading the piece during a commercial break and realized it was fictional, stating this during his show several times.

Defendants filed a second motion for summary judgment, solely on the issue of actual malice. The motion contended that there was no evidence that would support a jury finding that they intended to deceive readers into thinking the article was true, which is the standard that the court had adopted for actual malice.

However, the court denied defendants' second motion as well. Although the grounds for the denial are not recited in the court's order (dated May 29, 2001), at oral argument the judge mentioned the fact that the article was published without a disclaimer in the paper's "News" section. The judge also observed that the plaintiffs would have a difficult time proving actual malice at trial by clear and convincing evidence (a standard that does not apply at the summary judgment stage in Texas).

### *Interlocutory Appeal Is the Next Step*

From the beginning of the case, the parties and the court have recognized that this matter includes legal issues for which there are no direct precedents in Texas law. Because interlocutory appeals are allowed in libel cases when First Amendment defenses are raised, it has been understood by all that regardless of which side prevailed at the summary judgment stage, an appeal would

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## Texas Case Tests Standard for Parodies

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follow.

Defendants filed a notice of appeal after their first summary judgment motion was denied, then asked the Court of Appeals to stay proceedings until the second summary judgment motion was decided. The appellate court agreed. Although as of this writing defendants have not filed their notice of appeal from the denial of their second motion – and thus no appellate timetable has been established – an appeals notice and motion to consolidate with the earlier, stayed appeal will be filed by mid-June, with briefing likely to commence in August. The appeal will be heard by the Court of Appeals for the Second District of Texas, located in Fort Worth.

*Jim Hemphill is a partner in Austin's George & Donaldson, L.L.P. He represents the defendants in Isaacks v. New Times along with his co-counsel, Steve Suskin of Phoenix, Arizona. The plaintiffs are represented by Michael J. Whitten, a partner in Denton's Griffen, Whitten, Jones & Reib. (Mr. Whitten is married to Judge Whitten, one of the plaintiffs in the case.)*

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## Trial Court Explains Dismissal of Libel Case on Liddy's Watergate Theory

### *Appeal Pending Before Fourth Circuit*

It was reasonable for talk show host and former White House official G. Gordon Liddy to conclude that the goal of the DNC office break-in which led to the Watergate scandal was to retrieve photos of prostitutes, according to a written opinion by the federal judge who dismissed a \$5.1 million libel case against Liddy in February. Federal district court judge, J. Frederick Motz, also wrote that allowing a retrial in the case would stifle public discussion of the motives behind the break-in, contrary to the spirit of the First Amendment.

Motz issued his opinion, *Wells v. Liddy*, 135 F.Supp. 2d 668 (D. Md. 2001), to justify his dismissal after trial ended in a hung jury (see *LDRC LibelLetter*, March 2001, at 2). The case is now pending before the 4th Circuit Court of Appeals. No. 01-1266 (4th Cir.).

For several years, Liddy has asserted that the Watergate break-in was undertaken to retrieve photos of prostitutes whose services the Democratic Party allegedly used to entertain guests. Liddy has claimed that the photos of the prostitutes were in the desk of DNC secretary Ida Wells. Wells claimed that Liddy also has said that Wells coordinated the prostitute's liaisons, but Liddy denied making such statements.

### *Back and Forth*

The appeal of the dismissal will mark the second time that the Fourth Circuit has dealt with the case. In 1999, the appeals court reversed Motz's initial grant of summary judgment, in which he ruled that Wells was a "involuntary public figure" who had not shown actual malice. The Fourth Circuit held that Wells was a private figure who had to show only negligence. *Wells v. Liddy*, 186 F.3d 505, 28 Media L. Rptr. 1779 (4th Cir. 1999) (reversing 1 F.Supp. 2d 532, 26 Media L. Rep. 1779 (D. Md. 1998)), *cert. denied*, 528 U.S. 1118 (2000).

Motz then ordered that the case be moved to the federal district court in Washington, D.C., No. JFM-97-946 (memorandum and order, Dec. 1, 1999), but that court vacated the transfer order and sent it back to Motz. 115

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## Trial Court Explains Dismissal of Libel Case on Liddy's Watergate Theory

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F.Supp. 2d 1 (2000).

The case finally went to trial before Motz in the U.S. District Court in Baltimore, Md., in mid-January. The three-week trial included testimony of Wells, Liddy and several other players in the events surrounding Watergate. But after seven hours of deliberations, the nine-member jury said that it was hopelessly deadlocked.

After dismissing the hung jury, Judge Motz once again dismissed the case on Feb. 1. "Having carefully considered all of the evidence, I do not believe a reasonable jury could find Mr. Liddy was negligent in making the statements at issue," Motz said in his bench ruling.

### *Justifying Second Dismissal*

Motz expanded on his reasoning in the written opinion, issued on March 19.

"I recognize that my granting of Liddy's motion for judgment as a matter of law might be seen to be at odds with the Fourth Circuit's ruling since I am finding that Wells's evidence fails to meet the lower standard of negligence the parties agree (in light of the Fourth Circuit's ... holding that Wells is not an involuntary public figure) applies to her compensatory damage claim," he wrote. "However, I am now ruling after the establishment of a trial record that is fuller and more clarifying than was the record on summary judgment."

Motz then explained that Wells had failed to show "sufficient evidence from which a reasonable jury could find that Liddy failed to take reasonable steps in accessing the truth of his allegedly false statements." While noting that Liddy's main source for the allegations involving Wells — disbarred attorney Phillip Macklin Bailly — has a history of mental illness, the opinion then recited eight different sources (i.e. documents, books, statements by various figures in the scandal) of which Liddy was aware and which could have formed a reasonable basis for him to confirm his allegations. The last of these was a letter written at the time, but never sent, by Wells to a friend in which she expresses her nervousness over being subpoenaed in the Watergate investigation.

"In sum," Motz wrote, "the record is replete with facts that Liddy could reasonably believe support Bailey's statements about the contents of Wells's desk. This is not to say, of course, that what Bailey said was true or that the call girl theory is accurate. That is not the question. The dispositive point is that Wells had the burden of proving that Liddy lacked a reasonable basis for expressing the allegedly defamatory remarks about her, and the evidence was insufficient to sustain that burden."

### *"Serious First Amendment Concerns"*

Motz finished his opinion by noting that by attempting to stop discussion of the "prostitution theory" of Watergate, Wells's claims "raise serious First Amendment concerns."

"[W]hatever the truth may be," Motz wrote, "one thing should be certain: free debate about important public issues must be tolerated, provided that the debate (when it potentially damages the reputations of private persons) does not exceed the bounds of reason."

The opinion continues by quoting, without citing the source, a *Washington Post* editorial regarding the hung jury: "Courts are a capricious venue for arguments about history. . . . Conspiracy theorizing generally is better addressed in the public arena by rigorous confrontation with facts."

"It is the pursuit of those questions, however, that the First Amendment protects," Motz concluded. "To make that protection real, this litigation must come to an end."

Liddy was represented by John B. Williams, Michael R. Carithers, Jr., Mary C. Cronin and Kerrie Hook of Collier, Shannon, Rill & Scott in Washington, D.C., and Ty Cobb and Douglas Nazarian of Hogan & Hartson in Baltimore. David M. Dorsen of Wallace, King, Mawaro & Branson in Washington, D.C., and Larry S. Greenberg of Bethesda, Md., represented Wells.

## Trial Court Rules in Favor of Media on New Indiana Anti-SLAPP Statute

By Dan Byron

A recently enacted Indiana Anti-SLAPP statute has received its first definitive ruling by an Indiana trial court. The case was brought in LaPorte Superior Court by a pro se plaintiff, Jean Poulard, who asserted a libel claim against the *Michigan City News-Dispatch* and related parties for a news article and two editorials written by the paper involving actions of the Michiana Shores Town Council and the plaintiff who was its former president. *Poulard v. News-Dispatch Publishing Company, Inc. et al.*, LaPorte Superior Ct. 2, Cause No. 46D02-0004-CP-080 (Indiana Ct. LaPorte County, May 22, 2001).

### *Reporting Public Meeting*

The articles criticized actions of the town council and reported on activities that occurred at public meetings. One of the articles stated that the plaintiff and others commenced arguing, with the plaintiff raising his voice in close proximity to those engaged in the debate. This resulted in the calling of police “to quiet the rantings of the former town council president.” In the article the plaintiff’s behavior was criticized by the current town council president as being disruptive and verbally abusive.

Counsel for the media defendants brought a motion to dismiss and for summary judgment against the libel claims premised upon the new Anti-SLAPP statute, Ind. Code §§ 34-7-7-1, *et seq* on the basis that the acts of the newspaper and its reporters met the requirements of the Act, *i.e.*, that their acts were in furtherance of their rights of free speech in connection with public issues or issues of public interest and that they acted in good faith with a reasonable basis in law and fact. Following discovery by the plaintiff in the form of interrogatories, requests for production of documents, and depositions, the parties submitted briefs with the defendants supplying a series of affidavits covering their investigation and reporting of the stories.

### *Media Wins Under SLAPP Statute*

Following a hearing on the motion, Judge Steven King ruled in favor of the media defendants in a 19-page opinion citing a number of undisputed material facts and finding, as required, that the statute applies to the media as well as to others, that the acts of the media were made in furtherance of their right of free speech in connection with a public issue and that each of the statements made or reported by the media defendants related to the governmental and/or political machinations of the Town of Michiana Shores or events that occurred at a government forum. The court went on to note that the media defendants met all the required elements of the statute, *i.e.*, that they also acted in good faith and with a reasonable basis in law and fact.

Finally, the court noted that the statute permits defendants to recover reasonable attorney fees and costs and reserved ruling in that regard pending the filing of a request for a hearing on fees and submission of appropriate affidavits supporting such fees and costs. The plaintiff has until June 22 to file its appeal. In the meantime, counsel for the media will be filing their motion for fees and costs.

*Daniel Byron and Jennifer Perry of McHale, Cook & Welch, P.C., Indianapolis, Indiana, represented the media defendants in this matter.*

LDRC would like to thank Summer interns — Nicholas Hatzis, Columbia Law School, JSD, Class of 2001; Nancy Clare Morgan, Columbia Law School, Class of 2003; and Katherine Vogeles, Georgetown Law School, Class of 2003 — for their contributions to this month’s *LDRC LibelLetter*.

## Developer and “Car Czar” is Public Figure

On May 11, the Court of Appeals of Ohio affirmed the grant of summary judgment of a libel case brought against *Cleveland Magazine*. *Kassouf v. Cleveland Magazine City Magazines, Inc.*, 2001 Ohio App. LEXIS 2118 (2001). Agreeing with the trial court that plaintiff James Kassouf, a Cleveland developer who was under city contract to impound vehicles and was called by some the city “parking czar,” was a limited purpose public figure, the appellate court held that Kassouf failed to show actual malice.

The suit originated over a 1995 article that Kassouf said painted him as an “infamous, anti-American foreign political figure.” The article, entitled “Impounded,” profiled Kassouf’s business and development activities in Cleveland and summarized his indictments by a federal grand jury for filing false tax returns, attempted tax evasion and obstructing the IRS.

### *The Public Figure Ruling*

A major factor behind the court’s categorization of Kassouf as a limited purpose public figure was the court’s review of more than 100 *Cleveland Plain Dealer* articles, included by the defense as exhibits. The articles spanned 14 years and covered Kassouf’s life in Cleveland, describing everything from controversy around city contracts for impounded vehicles, to Kassouf’s legal woes over a long IRS investigation and domestic violence and assault charges, to the bombing of Kassouf’s parking lots.

Kassouf argued that though the media covered some of his business activities, he was not a notorious or well-known figure to people within Cleveland or Trumbull County. Kassouf’s arguments fell on deaf ears, though, and the court — quoting one of the compiled articles that began, “if you drive a car in this town, you know the name Kassouf” — agreed with the trial court that Kassouf was a limited purpose public figure as a matter of law and thus required to show actual malice.

### *No Actual Malice*

The court further held that Kassouf had not shown actual malice, noting that he had “failed to produce any

evidence from which a jury could find that actual malice had been established. It is not enough,” the court continued, “that appellant believes that the statements contained in the article are false; rather, appellant must prove, through clear and convincing evidence, ‘actual malice’ on the part of appellees.”

Lawyers for the magazine also argued that because author Miller had relied on federal indictments and an affidavit filed by a federal agent in writing “Impounded,” the article was protected by the fair report privilege, and the trial court had granted summary judgment on that ground, as well. Though the fair report issue was before the appellate court for review, the court affirmed the summary judgment grant based solely on its finding of a lack of actual malice and explicitly decided not to address fair report.

There was also a statute of limitations question brewing in the trial court. Kassouf originally filed the defamation suit on November 22, 1996, then dropped and refiled in November 1998. Defense attorneys argued Kassouf missed the statute of limitations deadline by a few weeks to object to the article in the November 1995 issue. The trial court denied that ground for summary judgment, and though defense argued it on appeal, the appellate court did not address the issue in its opinion.

The court stated that summary judgment is favored for First Amendment reasons and cited *Liberty Lobby* in the opinion, which was written by Judge Robert A. Nader. The panel also included presiding Judge William M. O’Neill and Judge Judith A. Christley.

The May ruling marks Kassouf’s second defeat in appellate court over a defamation claim this year: the dismissal of his libel suit against Cleveland mayor Michael White was affirmed by the Court of Appeals of Ohio, Eighth Appellate district, on March 2. Kassouf sued White for calling Kassouf “almost a felon” and referring to one of his properties as a “flophouse.”

Cleveland City Magazines, Inc. was represented by David L. Marburger and Rebecca C. Lutzko of Baker & Hostetler L.L.P.’s Cleveland office. Attorneys Randil J. Rudloff and Deborah S. Durniok of Guarneri & Secrest in Warren, Ohio, represented Kassouf.

## Texas Appellate Court Upholds the Ability of a Source for a News Story to Use the Texas Interlocutory Appeals Statute

By Robert P. Latham

The continuing saga of former Houston City Controller Lloyd Kelley's litigation against KTRK Television in Houston has produced another appellate court opinion favorable to the station, as well as to a source used for KTRK's news broadcasts. *Dolcefino v. Randolph*, No. 14-00-00602-CV slip op., June 7, 2001 (Tex. App.—14th Dist.).

Kelley, who was elected City Controller in 1995, ran unsuccessfully for re-election in November 1997. In the summer of 1997, KTRK Television and its investigative reporter, Wayne Dolcefino, received information from an employee in the City Controller's office, Larry Homan, regarding, among other things, Kelley's work habits as City Controller.

To investigate the information provided by Homan, KTRK conducted surveillance of Kelley at various public places during business hours. One surveillance tape showed Kelley and Cynthia Randolph, a member of his executive staff, spending a workday afternoon at "Splashtown," a local water park, accompanied by Kelley's children and another child.

### *Dolcefino v. Randolph I*

The surveillance led to a series of broadcasts in August 1997 regarding Kelley. Kelley and his executive assistant, Randolph, sued KTRK, its reporter and various employees, over these broadcasts. KTRK's initial motion for summary judgment was denied, and KTRK took advantage of the Texas interlocutory appeal statute to appeal the denial of its summary judgment motion. In *Dolcefino v. Randolph*, 19 S.W.3d 906, 913-16 (Tex. App.—Houston [14th Dist.] 2000, writ denied), the Houston Court of Appeals held that the series of broadcasts was substantially true and rendered judgment for KTRK.

### *Dolcefino v. Randolph II*

Meanwhile, back in the trial court, Kelley and Randolph amended their petition after the denial of KTRK's first motion for summary judgment and added as a defendant Larry Homan, the Controller's office em-

ployee who had spoken to Dolcefino. In addition, Kelley also added a claim alleging that in conversations with another City Controller's office employee, Jerry Miller, during KTRK's investigation, reporter Dolcefino had made defamatory statements regarding Kelley. Finally, Kelley added a wiretapping claim based on KTRK's newsgathering and surveillance.

The KTRK defendants filed a second motion for summary judgment on these claims that was also denied by the trial court. Again the KTRK defendants, as well as Larry Homan, invoked their statutory right to appeal from the denial of the motion for summary judgment.

In its most recent opinion, the Houston Court of Appeals reversed and rendered judgment for the KTRK defendants and for Homan. The court found that the wiretapping claims brought by Kelley were barred by the statute of limitations — finding that Kelley had not asserted such claims until more than two years after the alleged "wiretapping" had taken place, that Kelley had not specified such a wiretapping claim in any petition filed within two years of the actions complained of, and that his petition asserting the wiretapping claim did not relate back to his previous petitions.

In reversing and rendering judgment for Larry Homan and in reversing and rendering judgment for the KTRK defendants on the issue of the alleged statements made to Jerry Miller, the court helped to establish precedent which should prove to be very favorable to media defendants.

### *The Interlocutory Appeal by the News Source*

Perhaps most importantly, the court found that Homan, as the source of a news broadcast, did have a right to appeal the denial of his motion for summary judgment under the Texas interlocutory appeal statute. The Texas statute grants an interlocutory appeal from an order that:

denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person

(Continued on page 30)

## Source for a News Story Entitled to Use Texas Interlocutory App. Statute

(Continued from page 29)

whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution or Article 1, Section 8 of the Texas Constitution, or Chapter 73.

Tex. Civ. Prac. & Rein. Code Ann. § 51.014 (a)(6). The court found that this statute entitled Homan to appeal, even though he is not a member of electronic or print media, because his summary judgment motion was based in whole or in part upon a defense arising under the First Amendment and that the claim brought against him was based on a “communication” by Homan that “appeared in or was published by the electronic or print media.” The court held that the interlocutory appeal statute does not require that Homan “personally appear in or be quoted in the news broadcast” in order to have a right to an interlocutory appeal. Thus, the court found that it had jurisdiction over Homan’s appeal and that Homan’s motion for summary judgment should have been granted because Kelley had not presented any evidence of actual malice on the part of Homan.

### *Presumed Damages Can be Rebutted as a Matter of Law*

In their motion for summary judgment in the trial court on reporter Dolcefino’s alleged statements to source Jerry Miller (the “Miller claims”), the KTRK defendants alleged that there was no fact issue regarding the essential elements of a libel claim. The appellate court agreed that Kelley and Randolph did not come forward at summary judgment with evidence raising a genuine issue of fact as to these elements.

In so doing, the court included an important analysis at footnote 18 of the opinion, in which the court highlighted that the KTRK defendants had conclusively negated any damages resulting from the statements at issue. With their motion for summary judgment, the KTRK defendants had submitted an affidavit from Jerry Miller stating that Miller did not repeat any of reporter Dolcefino’s alleged statements to anyone and that his opinion and perception of Kelley and Randolph did not change in any way based on anything that the reporter ever said to him. The court found that even in

libel *per se* cases, where damages are presumed, summary judgment should still be granted when it can be shown that there is no genuine issue of fact as to whether the alleged defamatory statements have *in fact* caused the plaintiff any damage. In other words, damages in libel *per se* cases are a rebuttable presumption, not a conclusive presumption.

Kelley and Randolph have indicated that they will file a motion for rehearing.

*Bob Latham is a partner in the Houston and Dallas offices of Jackson Walker L.L.P., which represented the KTRK defendants in the Kelley litigation.*

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## Reversing Itself, Alabama Supreme Court Grants Interlocutory Review Of Summary Judgment Denial in Defamation Case

By Jay Brown

Proving that it pays to ask, the Alabama Supreme Court has reversed itself and agreed to hear an interlocutory appeal from a lower court order denying a radio station's motion for summary judgment in a defamation case. Although a decision on the merits is not likely until late this year or early next, the development underscores the importance of taking advantage of procedures for interlocutory review where available. *Richard Matthew Coulter v. Paul Finebaum et. al.*, No. CV-99-01395 (Jefferson Cir. Ct., May 30, 2001).

### *Sports Talk Provokes Claims*

Paul Finebaum, a sports journalist and host of a radio talk show on WERC in Alabama, is known for his criticism of college athletic recruiting practices at the University of Alabama and elsewhere. After a caller to his program complained about the cozy relationships some sports journalists seem to have with coaches and athletic recruiters, Finebaum commented on the lack of professional objectivity that such relationships engender. As one example, Finebaum offered his assessment of a broadcast by Matt Coulter, another sports talk radio host, which he had just heard:

Oh, they're vultures. . . . Reg, you would be amazed at how many football coaches suck up to these guys. . . . [Y]ou'd be amazed at how close some of them are in proximity to where we're talking right now and the reason they do is simple — so these people will go on their shows and talk about what great coaches they are, what great — I heard a program this morning that was easily the most embarrassing 30 or 40 minutes of radio I have ever heard in my entire life. . . . It was by Matt Coulter, and I can't remember the other clown, and it, I mean, these two guys slobbered over each other, I mean, I really thought they were going to start performing oral sex on one another, it was so sickening.

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*[T]he development underscores the importance of taking advantage of procedures for interlocutory review where available.*

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Coulter sued Finebaum and WERC, alleging defamation, outrage, and invasion of privacy, all based on the contention that Finebaum's listeners would have understood his commentary to be an allegation that Coulter is homosexual.

### *Summary Judgment Denied*

Defendants' moved for summary judgment, arguing that (i) the statement when considered in context was incapable of a defamatory meaning; (ii) the statement constituted non-actionable opinion or rhetorical hyperbole; (iii) plaintiff was incapable of meeting his burden of proving by clear and convincing evidence that the defendants intended the defamatory implication he alleged was conveyed by the statement; (iv) that the so-called "Falwell principle" required dismissal of his tag-along causes of action, and (v) that, in any event, plaintiff could not prove the essential elements of his tag-along causes of action.

The trial judge, who refused to listen to a recording of the challenged broadcast even after a cassette and cassette player were proffered at argument by defense counsel, rejected the defendants' motion in its entirety on the ground that an unspecified disputed issue of material fact existed. The trial judge nevertheless granted the defendants' request for certification of the questions for interlocutory appeal pursuant to Alabama Rule of Appellate Procedure 5. Under this Rule, upon a trial judge's certification that appellate resolution of controlling questions of law would materially advance termination of the litigation, the Alabama Supreme Court may, but is not required to, grant interlocutory review.

### *And Appeal*

On first application, defendants pointed out to the court not only that resolution of the issues presented would likely terminate the litigation immediately, but also that all but one of the grounds on which they had moved for summary judgment presented pure questions of law and that the facts

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## Alabama Sup. Ct. Grants Interlocutory Review Of Summary Judgment Denial in Defamation Case

*(Continued from page 31)*

relevant to the final issue, absence of actual malice, were not in dispute. What is more, defendants noted, two of the issues — whether a public figure plaintiff must prove by clear and convincing evidence that the defendant intended the alleged defamatory meaning and application of the *Falwell* principle — were questions of first impression in the Alabama Supreme Court.

The Alabama Supreme Court, by a 5-4 vote, rejected the petition for interlocutory appeal, which meant that defendants faced an imminent trial in what was likely to be a hostile venue — *i.e.*, a Crimson Tide venue. While Alabama's procedural rules do not expressly provide a method for seeking reconsideration in this circumstance, the defendants concluded that they would hardly be worse for asking, and they filed an application for reconsideration.

### *Reconsider Please, . . .* *Citing Texas and* *LDRC*

First, defendants argued, the trial judge's abdication of his obligation to review the challenged broadcast was an error of constitutional dimension that infected every aspect of his ruling on the motion for summary judgment. In the face of the trial judge's failure even to attempt to determine whether the challenged broadcast constituted speech protected by the First Amendment, the Alabama Supreme Court's refusal to exercise its discretionary power of interlocutory review compounded the injury to defendants' constitutional rights.

Noting that the First Amendment was intended to protect the speech of those who — like Paul Finebaum — espouse unpopular or controversial viewpoints, defendants argued that, in the face of an attempt to impose liability on speech about a matter of public concern, the constitutional interests at stake necessarily tipped heavily toward defendants the balancing test that the Alabama court otherwise employs in deciding whether to grant review. Correction by the appellate court of the trial judge's errors after trial would be too late, defendants urged, because one of the

principal harms the First Amendment is intended to avoid — self-censorship of speech to avoid the prospect of onerous legal proceedings — would already have accrued.

Defendants also focused the court's attention on the public policy justifications cited by courts and legislatures in states, such as Texas, that affirmatively encourage interlocutory review in speech and press cases. And, in an effort to underscore that a desire for interlocutory review in this instance reflected more than wishful thinking, defendants cited statistics from the *LDRC 2001 Report on Trial and Damages* demonstrating the high rate of appellate success by similar defendants on the very points of law at issue in this case.

These arguments apparently resonated with members of the court: On May 30, by a vote of 8-1, the Alabama Supreme Court granted the application for reconsideration, granted interlocutory review, and set the appeal for briefing and argument on the merits in the normal course.

Whether defendants ultimately will persuade a majority of the Alabama Supreme Court that they are entitled to judgment as a matter of law remains to be seen. The lesson we draw from the events to date, however, is that media organizations and their employees that have meritorious defenses susceptible of resolution as questions of law generally should at least consider availing themselves of available procedural vehicles for pretrial disposition and interlocutory appellate review of adverse rulings — and, in some hospitable jurisdictions, even when the applicable rules do not formally provide for such relief.

At the least, it doesn't hurt to ask.

*Lead appellate counsel for Finebaum and WERC are Lee Levine, Jay Ward Brown and Audrey Billingsley of Levine Sullivan & Koch, L.L.P. in Washington, D.C., and Warren B. Lightfoot of Lightfoot, Franklin & White L.L.C. in Birmingham. In the trial court, defendants were represented by L. Graves Stiff, III and Elise Frohsin of Starnes & Atchison in Birmingham. Plaintiff is represented by Jack E. Swinford and Robert J. Hayes of Hayes, Swinford, Dummier & Stanford, P.C. in Birmingham.*

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*While Alabama's procedural rules do not expressly provide a method for seeking reconsideration in this circumstance, the defendants concluded that they would hardly be worse for asking, and they filed an application for reconsideration.*

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## Libel Verdict Against Horse Tip Sheet Reversed

After reconsidering the case, the Kentucky Court of Appeals has reversed a \$75,000 libel verdict against the publisher of a horse racing tip sheet when the winning plaintiff failed to file a timely response to defendant's appeal. *Musselman v. Alvey*, No. 1999-CA-001481-MR (opinion and order June 15, 2001). The same Court of Appeals panel upheld the verdict in December. See *LDRC LibelLetter*, Dec. 2000, at 7.

The case arose from a jury ruling that Edward Musselman had defamed Donald Alvey in a series of articles in October and November 1997 in *Indian Charlie*, a free tip sheet which Musselman distributes at horse racing tracks in Kentucky and neighboring states, and posts on the Internet. The articles questioned Alvey's abilities as a bloodstock agent (a consultant on racehorse breeding), handicapper and gambler, and made fun of his personal appearance.

### *Seeking Sanctions*

While the publisher, Edward Musselman, filed a timely appeal and brief to the Court of Appeals, the victorious plaintiff at trial, Donald Alvey, submitted his brief after the deadline, and the court clerk rejected it. Musselman then made a motion for relief, asking that the lower court opinion be reversed and that sanctions be imposed on Alvey, pursuant to Kentucky court rules. See Ky. Civ. R. 76.12(8)(c). The appeals court granted Musselman's motion on Nov. 6, and further ruled that it would proceed to decide the case without oral argument. As the court later stated, "[n]oteworthy is the fact that the order did not specify the exact CR 76.12(8)(c) relief which would be granted, presumably because the nature of such relief would be addressed in the final decision."

A two-member majority of the three-judge appeals court panel then proceeded to review the merits of the

*(Continued on page 34)*

### *Tennyson Schad Died May 26<sup>th</sup> at Age 70*

Tennyson Schad, partner in Norwick & Schad, New York, and outside counsel for Forbes for three decades, died this past month here in New York. Tenn had been fighting cancer for a while now, although Tennyson's indomitable spirit and wit made it difficult to appreciate the hardships and stresses he undoubtedly was facing.

Tenn was involved with LDRC on behalf of Forbes for as long as any of us can remember. We spoke often and they were memorable conversations because of the invariably unique quality of the matters he raised and the incredible intellectual energy with which he pursued them. Tenn was very smart. But he was more than that. He was tenacious, and intellectually vigorous. He turned over analytical rocks that others might have simply missed, always seeking solutions for his clients.

At a memorial gathering at Forbes it was clear the degree to which the good men and women of the organization valued Tennyson and were going to miss him. He was one of them. He had long passed from being "the lawyer" to being a deeply appreciated member of the editorial team.

He also had a passion for photography and was the founder and underwriter of a gallery in New York in the 1970s and 1980s, Light Gallery, that made a substantial contribution to the growth of modern photography. When Tenn opened Light Gallery in 1971, apparently there was no other gallery in New York devoted to contemporary photography and only one other commercial gallery in New York devoted to photography of any era. It should surprise no one who knew Tennyson to learn that Light Gallery was among the first to show Robert Mapplethorpe's work. The obituary in *The New York Times* regarding Tenn attributed his passion for photography to the time he served as associate editorial counsel at Time Inc, where he went after serving as an associate at Cravath, Swaine & Moore.

The *Times* article quoted a New York photography expert as saying, "Tennyson never played it safe." Indeed. We will miss him.

## Verdict Against Horse Tip Sheet Reversed

(Continued from page 33)

appeal and upheld the jury verdict in a decision released Dec. 8. The court decision affirmed the trial court's determinations that Alvey was a private figure, and that the articles were not "pure opinion." The decision did not address the sanctions issue. Judges David A. Barber and Sara Walker Combs signed the appellate decision; Chief Judge Paul Gudgel dissented without opinion.

Musselman filed a petition for rehearing, citing the inconsistencies between the November order and the December decision; Alvey did not respond. In February, the same three judges granted the petition, and withdrew the Dec. 8 opinion.

### *Second Take*

On June 15, the panel issued a new opinion reversing the trial court judgment and remanding with instructions to dismiss. This time, Chief Judge Gudgel wrote the opinion for himself and Judge Barber. Judge Walker Combs dissented.

Chief Judge Gudgel did not address the merits of the case in his majority opinion. "Given the fact that appellee [Alvey] made no effort to ask for an enlargement of time in which to file a brief until after this appeal was submitted, and the fact that appellee filed no response to appellant's petition for rehearing ..., " he wrote, "we conclude that this appeal should be disposed of consistent with the dictates of CR 76.12(8)(c) and our November 6 order granting such relief." Slip op. at 3.

### *"Strenuous" Dissent*

Judge Sara Walker Combs "strenuously" dissented, arguing that there was no inconsistency between the November order and the December decision.

There is no inconsistency because there is no assurance — either implied or procedurally required — that appellant would prevail after we conscientiously review this case on the record and on its merits — regardless of Alvey's obvious dereliction in failing to articulate his own position on appeal," she wrote. Slip op. at 5.

"... I do not read CR 76.12(8)(c) as *compelling* an appellate court to enter what amounts to a default judgment in favor of the only party filing a brief on appeal . . . Certainly the rule permits — and perhaps even invites — such an extreme result. However, it does not require or dictate that we ignore the findings and conclusions of the trial court, disregard a jury verdict, and/or punish an appellee by denying him relief that may have been properly granted in the court below — solely because of his failure to tender an appropriate appellate brief." Slip op. at 6 (emphasis in original).

"The heart of this appeal has been forgotten," she wrote, "whether the trial court and the jury erred in determining that Alvey was a private figure for purposes of application of the appropriate standards of the law of defamation." Slip op. at 7. Combs added that she would uphold the trial court decision on liability, but remand for a new determination of damages.

Musselman was represented by Robert L. Heleringer of Louisville; John Kmetz of Louisville represented Alvey at trial. Jon L. Fleischaker and R. Kenyon Meyer of DCS member firm Dinsmore & Shohl, L.L.P. submitted an amicus brief on behalf of the Kentucky Press Association.

*Any developments you think other  
LDRC members should know about?*

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## Second Circuit Ends Vocal Performer's Federal Challenge to Advertising

### *But Sends State Misappropriation Claims To State Court*

By David S. Versfelt

On May 8, the United States Court of Appeals for the Second Circuit ended a vocal performer's federal claim against use of a musical composition in a 1996 commercial advertisement, but vacated dismissal of the performer's state claims to allow them to be brought in New York state court. *Oliveira v. Frito-Lay, Inc.*, 2001 WL 536811 (2d Cir. May 8, 2001). The decision ended the vocal performer's attempt to extend the "false implied endorsement" doctrine under the Lanham Act, 15 U.S.C. §1125(a), but left for another day any ruling on the scope of New York Civil Rights Law §51.

### *Background of the Commercial*

In 1996, Frito-Lay and its ad agency created a TV commercial featuring a poolside scene with several well-known models and the Muppet character "Miss Piggy." Accompanying the visual action was an excerpt from the 1964 sound recording of the bossa nova hit, "The Girl From Ipanema." Holders of copyrights in the music and lyrics of the recording had granted a license for the commercial use, as had the record company owner of the master recording. The recording itself was not copyrighted because federal copyright was not available for sound recordings in 1964.

The excerpt heard in the commercial contained the vocal performance of Astrud Gilberto singing the English lyrics to the bossa nova hit. Ms. Gilberto, now Ms. Oliveira, conceded that she held no registered copyright or trademark and had recorded the performance without any contract with the record company. Nevertheless, she sued Frito-Lay and its ad agency, seeking damages arising from the use of the recording because she had publicly performed the song so often in the last 35 years that she had obtained a trademark-like interest. She alleged that interest to be sufficient to support a claim for "false implied endorsement" under §25(a) of the Lanham Act. She also claimed that the facts fell within §51 of the New York Civil Rights Law.

### *The District Court's Rulings*

Before Judge Loretta Preska of the Southern District of New York, the parties engaged in more than two years of motion practice consisting of motions to dismiss more than a dozen federal and state claims asserted by Oliveira in several amended complaints. When the dust settled, Judge Preska had granted summary judgment against Oliveira on her Lanham Act claim of "false implied endorsement" because: (1) Oliveira had no competitive or commercial interest affected by the ad, and so lacked standing under the Lanham Act, and (2) no reasonable jury, viewing the ad, could find that Oliveira had endorsed the Frito-Lay product. As for Oliveira's state claims, including her claim under §51 of the Civil Rights Law, Judge Preska found that Oliveira had in 1964 disposed of any right she might have had in the recording, and thus had no basis for a claim.

### *The Court of Appeals Ends the Lanham Act Claim*

The Second Circuit, in a unanimous opinion written by Judge Leval and joined by Judges Kearse and Sotomayer, *(Continued on page 36)*

### **UPDATE: Clearing the Decks...**

CNN recently settled two noteworthy cases: the Berger litigation in Montana (see note at p. 36) and the lawsuit brought by Jack Smith, one of the two producers of the now-notorious Tailwind reports carried on CNN and, in different form, in *Time* magazine. Mr. Smith and his colleague, April Oliver, were fired by CNN as a result of the Tailwind reporting and its aftermath. Ms. Oliver sued CNN (see *LDRC LibelLetter*, May 1999 at 1), and the suit was settled by CNN in May 2000. Seven federal cases brought by various former military personnel who either were featured or claim to have been implicated in the Tailwind reports remain pending in federal court in San Jose, California, and one in Georgia state court on appeal.

## Second Circuit Ends Vocal Performer's Federal Challenge to Advertising

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affirmed summary judgment on the Lanham Act claim because a factfinder could not reasonably find an implied endorsement in the use of the recording. Oliveira's assertions that "The Girl From Ipanema" has long served as her "signature song" could not support her claim because mere repetition of performance cannot give rise to a protected mark in a recording. Significantly, the Court of Appeals did not address the district court's ruling that Oliveira had no standing to assert a Lanham Act claim because she had no evidence of commercial or competitive harm.

### *The Court Of Appeals Dismisses the State Law Claims*

Section 51 of the New York Civil Rights Law has since 1995 granted vocal performers a right to prevent use of their voice in commercial advertisements. There is an exception to the statute, however, where the performer has "sold or disposed" of the work containing the voice. Judge Preska had dismissed Oliveira's §51 claim (and her few common law state claims) because the district court found that Oliveira had in 1964 "disposed" of any interest she had in the recording.

The Second Circuit vacated that ruling by Judge Preska in order to obtain a more complete evidentiary record regarding potential facts as to possible contracts of Oliveira relating to the 1964 recording. The affirmance of summary judgment on Oliveira's Lanham Act claim ended the sole remaining basis for federal jurisdiction, so the court of appeals directed the district court to dismiss Oliveira's state claims without prejudice to refile them in state court.

*Mr. Versfelt practices in the New York office of Kirkpatrick & Lockhart LLP and represented the defendants in this litigation. Plaintiff is represented by Annemarie Franklin, New York.*

## After Numerous Ups and Downs, a Settlement Concludes *Berger v. Hanlon*

After an eight-year trip from the District of Montana to the Supreme Court and back again, the media ride-along case *Berger v. Hanlon* has come to a close. The remaining parties, including defendants CNN, CNN employee-reporters, and Turner Broadcasting System, reached a settlement last month. Terms were confidential, attorneys said.

The case involved 1993 coverage by CNN of the execution of a search warrant on Paul and Erma Berger's Montana ranch by U.S. Fish & Wildlife agents who were searching for poisoned wildlife. CNN personnel never entered the Bergers' private home, although an agent wearing a CNN microphone did. Footage from the search aired on two environmental news programs.

In May 1999, the Supreme Court ruled unanimously in a per curiam opinion that the facts recited in the Bergers' complaint were sufficient to allege a Fourth Amendment violation. *Hanlon v. Berger*, 119 S. Ct. 1706 (1999). The Court remanded the case to the Ninth Circuit for further proceedings consistent with its opinion in *Wilson v. Layne*, handed down the same day. 119 S. Ct. 1692 (1999). In *Wilson*, the Court found that law enforcement officers who permit reporters to accompany them into private homes when they execute warrants violate the homeowner's Fourth Amendment rights. See *LDRC LibelLetter*, June 1999 at 1.

On remand, the Ninth Circuit dismissed the claims against the governmental agents and reversed the district court's grant of summary judgment for the media defendants on the *Bivens* claims, as well as on state law claims of trespass and intentional infliction of emotional distress. The court stated that the Supreme Court had agreed with their finding of a Fourth Amendment violation. After CNN requested a rehearing en banc based on its contention that the panel had "substantially misapprehended" the decision of the Supreme Court, the Ninth Circuit amended their language to read, "The Court agreed with our holding that the plaintiffs stated a claim when they alleged that the federal officers violated the Fourth Amendment...." *Berger v. Hanlon*, 1999 U.S. App. LEXIS 28882 (9<sup>th</sup> Cir. November 4, 1999) (emphasis added). See *LDRC LibelLetter*, November 1999 at 40. The Ninth Circuit then remanded to the district court for further proceedings, and the parties settled in May 2001.

## Efforts to Permit Cameras in Federal Court Renewed in Senate

By Kathleen Kirby

On June 5, Senators Charles Grassley (R-Iowa) and Charles Schumer (D-N.Y.) unveiled a bill that would permit federal judges to open their courtrooms to cameras. S. 986, 107th Cong. (2001). The bill, labeled the Sunshine in the Courtroom Act and identical to S. 721 introduced last session, would grant appellate and district court judges the discretion to permit televised coverage of proceedings in their courtrooms. The district court provision would be under a three-year experiment, while the section allowing cameras in appellate courts would be permanent. The bill would also allow witnesses in district court (except for parties to the case to be televised) to have their identities concealed through technological obscuring of their faces and voices.

Citing to the successful audiocast of oral arguments at the U.S. Supreme Court in *Bush v. Gore* last winter, as well as the televised coverage of the Florida state court proceedings related to the election, the lawmakers indicated that allowing federal trials to be televised would dramatically improve public understanding of the judicial system without interfering with the administration of justice.

Federal courts generally are closed to cameras. In 1996, following a period of experiment, the Federal Judicial Conference, the principal policymaking entity for the federal courts, voted by a slim margin to permit each of the federal courts of appeals to “decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments.” Only the Second and Ninth Circuits elected to do so. While a few federal district court judges have determined that they have discretion to allow camera coverage of civil proceedings, such access remains the exception rather than the rule. Federal Rule of Criminal Procedure 53 prohibits photographs or radio broadcasts of federal criminal cases.

The Grassley/Schumer bill authorizes the Judicial Conference to draft nonbinding guidelines that judges can refer to in making a decision pertaining to coverage in a particular case. Testifying before the Senate Subcommittee on Administrative Oversight and the Courts last fall, however, Judge Edward Becker, a federal appellate judge from Philadelphia, made clear that the Judicial Conference vigorously opposes the bill. Judge Becker stated that the threat to a fair trial eclipses any right of the public to see courtroom proceedings,

that cameras would intimidate parties, witnesses and jurors, and that litigants might feel duress to settle litigation rather than face the cameras. Judge Becker also cited concerns with security of judges and the privacy of witnesses.

The language proposing camera coverage of federal proceedings included in the Grassley/Schumer bill had its origins in the Sunshine in the Courtroom Act first introduced in 1987 by Rep. Steve Chabot (R-Ohio) and then-New York Congressman Schumer. Legislation that would permit cameras in federal courts twice passed the House and was referred to the Senate. Last fall, Senators Arlen Specter (R-Pa.) and Joseph Biden (D-Del.) introduced their own cameras in the courtroom bill, this one aimed solely at the Supreme Court. S. 3086 would have required televised coverage of all public sessions of the Supreme Court, unless a majority of the Justices found that such coverage would violate due process rights of one of the parties.

None of these bills ever made it out of the Senate Judiciary Committee, which was until recently headed by Senator Orrin Hatch (R-Utah), a vocal opponent of televised court proceedings. With the shift in power in the Senate, however, Senator Patrick Leahy (D-Vt.), has assumed the helm of Judiciary Committee. Senator Leahy is another co-sponsor of the Sunshine in the Courtroom Act.

The Senate bill enjoys bipartisan support, and it is expected that Congressman Chabot will introduce similar legislation in the House within the next few weeks. Senators Grassley and Schumer have stated their intent to hold hearings on the Senate bill in the near future. Currently, at least 37 states directly televise trials, and 49 states permit some form of audio-visual coverage in their courtrooms. Two states that have long resisted allowing cameras in the courtroom, South Dakota and Mississippi, recently took affirmative steps toward eliminating their restrictions on audio-visual coverage. The Mississippi Supreme Court began broadcasting its hearings on April 2, and is finalizing plans to allow cameras in state appellate courts. In South Dakota, the only state which currently allows no coverage, the Supreme Court is actively working with broadcasters to develop guidelines and provisions for camera coverage.

*Kathleen Kirby is an attorney with Wiley, Rein & Fielding in Washington, DC and serves as counsel to the Radio-Television News Directors Association.*

## California Court Opens Juvenile Murder Proceedings — Reluctantly

By Roger Myers and Rachel Boehm

The recent experience of two newspapers, who narrowly persuaded a California court not to close juvenile delinquency proceedings involving two minors charged with murder, illustrates the lingering resistance to opening such proceedings to the press and public even in those states that have passed legislation providing for greater access.

Christopher Coleman and Jameson Jackson, both 15 and residents of a small Northern California town, stand accused of shooting to death a convenience store owner while robbing her store. The minors were charged with murder, torture, robbery and burglary in juvenile court, and a fitness hearing to determine whether they should be tried as adults was set for May 2001.

### *Statute Offers Limited Access*

As a general rule, the public is not entitled to attend juvenile proceedings in California. However, under 1980 amendments to § 676 of California's Welfare & Institutions Code — amendments made in response to concerns that minors were committing more serious crimes — the public and press are entitled to attend juvenile proceedings “on the same basis as they may be admitted to trials in a court of criminal jurisdiction” where the minor is charged with one of several serious crimes enumerated in that section, such as murder or robbery.

California's juvenile crime access law is consistent with a national trend giving the public and press greater access to juvenile delinquency proceedings. In recent years many other states have passed legislation allowing public access to juvenile proceedings where the minor is charged with a serious or violent crime, or where the minor is a repeat offender.

Aware of the § 676 right of access, Coleman and Jackson moved to exclude the public and press from their fitness hearings and other proceedings involving the charges against them, arguing that publicity about the case would make it difficult for them to select an impartial jury from the modest Mendocino County jury pool should they even-

tually be tried as adults. In moving to exclude the public and the press, the minors argued that the public could be excluded upon a showing of a “reasonable likelihood of substantial prejudice,” a test applied in some juvenile cases, rather than the more stringent “substantial probability” of prejudice test that must be met to exclude the public from courts of criminal jurisdiction.

### *Press Opposed Closure Motion*

The *Santa Rosa Press Democrat* and the *Ukiah Daily Journal* jointly opposed the minors' closure motion. They argued that since § 676 required that the public be given access to juvenile murder proceedings “on the same basis” as courts of criminal jurisdiction, the proceedings could not be closed unless the minors demonstrated a “substantial likelihood” of prejudice to the minor's fair trial rights.

The press also argued that no matter which test applied — the “reasonable likelihood” test urged by the minors or the “substantial likelihood” test required by § 676 and the First Amendment — the minors had not satisfied it. While the case had attracted some publicity, and Mendocino County is not large, the press noted that the circulation of the local newspapers that were covering the case was substantially smaller than the jury pool and there was no evidence of television or radio coverage of the case. In addition, the case had not engendered much publicity outside the county and change of venue was an obvious alternative, if necessary.

From the outset of the hearing on the minors' motion to close the proceedings, the newspapers faced an uphill battle. To begin with, the retired judge hearing the motion appeared to be working under the now outdated assumption that juvenile proceedings are automatically closed to the public, and was clearly uncomfortable with the concept of public juvenile proceedings, despite the legislative mandate of § 676. Accordingly, the judge approached the hearing as though it were the press's (rather hefty) burden to persuade the court that access should be allowed, rather than the juvenile's burden to show that the public could be

*[The judge] was clearly uncomfortable with the concept of public juvenile proceedings, despite the legislative mandate.*

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## California Court Opens Juvenile Murder Proceedings — Reluctantly

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excluded, and seemed clearly inclined to grant the minors' closure motion.

### *Closure Reluctantly Denied*

At the end of a lengthy hearing, during which the press made nearly every argument in favor of access that had ever been recognized by a court, the judge agreed to take the matter under submission. His ruling, issued two days later, reluctantly denied the closure motion. Although it found the minors' arguments in favor of closure were "very persuasive," the court ultimately recognized it was "bound by the law," and "based on the charges of murder and related crimes ... it appears that Welfare & Institutions Code § 676(a) mandates that the public shall be admitted to juvenile proceedings on the same basis as they may be admitted to trials in a court of criminal jurisdiction."

Nevertheless, the court concluded that it had "discretion" to apply the "reasonable likelihood" test, but then it mooted the issue by finding that the juveniles had not shown that allowing press and public access to the proceedings would create even a "reasonable likelihood" of prejudice.

### *The Lessons From This One*

Despite the press's victory in the case, it was clear that it had only narrowly escaped a closure ruling that would have been contrary to California's statutory right of access to juvenile murder proceedings and the collective case law interpreting the public's First Amendment right of access to criminal proceedings. There are thus two lessons stemming from this case.

First, despite a growing trend on the part of state legislatures to grant the public and the press increased access to juvenile proceedings, judges who have spent their careers working under the assumption that juvenile courtrooms must be closed may be reluctant to embrace this new right of access. Accordingly, counsel should be prepared to fully educate the courts about these new laws, both in their written submissions to courts and during oral argument.

Second, California media attorneys should be on the alert for opportunities to get a published opinion on the books rejecting the notion that, where a § 676 right of access applies, juvenile proceedings may be closed on a mere showing of a "reasonable likelihood" of prejudice. This outdated test — which stems from the Court of Appeal's decision in *Tribune Newspapers West, Inc. v. Superior Court*, 172 Cal. App. 3d 443 (1985), and has since been followed without discussion or analysis in two more recent opinions, *Cheyenne K. v. Superior Court*, 208 Cal. App. 3d 33 (1989) and *KGTV Channel 10 v. Superior Court*, 26 Cal. App. 4th 1673 (1994) — does not satisfy the legislative mandate in § 676 that the public and press be granted access "on the same basis as they may be admitted to trials in a court of criminal jurisdiction." Until an appellate court agrees, the California media will continue to be haunted by these cases.

*Mr. Myers and Ms. Boehm, who argued the case, are with Steinhart & Falconer LLP in San Francisco, CA, which represented the Santa Rosa Press Democrat and the Ukiah Daily Journal in this matter.*

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## ***United States v. Brown: The Striking of an Unconstitutional Prior Restraint, But a Step Backward on Juror Access***

By Mary Ellen Roy and Sheryl A. Odems

In *United States v. Brown*, 250 F.3d 907 (5th Cir. 2001), the U.S. Court of Appeals for the Fifth Circuit struck down as a prior restraint an order by the district court prohibiting members of the news media from “interfering with” or “circumventing” the district court’s orders empaneling an anonymous jury. The Fifth Circuit upheld, however, the district court’s decision denying the news media’s motion for post-verdict access to the names and addresses of the jurors. The decision is noteworthy not only for the substance of its holdings, but because of the disdain it reveals towards the news media, stating, for example: “Eager media have entertained the citizens of Louisiana and beyond with nonstop coverage of the current prosecutions of Louisiana’s colorful ex-Governor.”

### ***Facts***

*Brown* involved the prosecution of former Louisiana governor Edwin Edwards, current Louisiana Commissioner of Insurance James Brown, and others on charges that they conspired to concoct a sweetheart liquidation deal for an insolvent Louisiana insurance company. Brown and Edwards were acquitted on various charges ranging from insurance fraud to witness tampering. Brown alone was convicted of making false statements to an FBI agent. Judge Edith Brown Clement, who recently was nominated to the United States Court of Appeals for the Fifth Circuit, presided over the district court proceedings.

### ***The Prior Restraint and Anonymous Jury Orders***

Before trial, the district court granted the government’s motion for an anonymous jury, on the grounds that (i) the defendants were charged with attempting to interfere with the judicial process and witnesses, (ii) if convicted, the defendants faced lengthy incarcerations and substantial fines, and (iii) the case had attracted extensive publicity. In doing so, the court admonished that “any attempts by the media or others to interfere with this

order will not be tolerated.”

Several news media organizations — Hearst-Argyle Television, Inc. (NBC affiliate WDSU-TV), The Times-Picayune Publishing Corporation, Capital City Press, the Associated Press, and the Louisiana Press Association — intervened in the case and moved for access to identifying juror information upon entry of the verdict. The district court initially deferred ruling on the news media’s motion. In so doing, the district court issued the following order: “In the meantime, the media is ordered not to attempt to circumvent this Court’s ruling preserving the jury’s anonymity.”

The news media petitioned the Fifth Circuit for a writ of mandamus and, in the alternative, appealed from the district court’s orders to the extent the orders prohibited the news media from attempting to “interfere with” or “circumvent” the anonymous jury orders on the ground that such a prohibition would constitute an unconstitutional prior restraint and an improper restriction on ordinary newsgathering. The news media also challenged the district court’s decision to defer the news media’s motion for post-verdict access to juror information.

### ***Closure of Voir Dire***

While the news media’s challenges were pending in the Fifth Circuit, the trial in the underlying prosecution began. Without advance notice or hearing, and without issuing contemporaneous findings, the district court closed all but approximately one hour of the two-day jury *voir dire* to the public. The district court denied the news media’s motions to open the proceedings on the ground that the closed proceedings related to “follow-up” questions dealing with potential juror bias. The news media filed a petition for writ of mandamus to the Fifth Circuit. The district court finally released a copy of the transcript of the closed *voir dire* proceedings after the jury’s verdict.

### ***Denial of Access to Juror Information***

A few days after the Fifth Circuit heard oral argument on the news media’s appeals, the trial concluded. Just

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## *United States v. Brown*

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prior to the announcement of the verdict, the district court orally informed the jurors that the court would not release their identities unless they did not wish the court to maintain their anonymity.

The court later issued written reasons denying the news media's motion for post-verdict access to juror identities and the juror questionnaires. The district court noted that each questionnaire stated: "All information contained in this questionnaire will be kept confidential." The court held that it would not "breach this confidentiality agreement," but would make publicly available the questionnaires of only those jurors who consented to their release.

The district court reported at the case close that "[A]ll the jurors indicated that they wished to remain anonymous."

The news media filed a post-verdict petition for writ of mandamus from this order and, in the alternative, appealed from the order

### *The Fifth Circuit Decision*

In analyzing whether the district court's non-circumvention orders constituted a prior restraint, the Fifth Circuit reasoned that the orders were ambiguous and susceptible to differing interpretations. The court found that, on one hand, the orders could be construed to proscribe independent newsgathering activity regarding the jurors. Alternatively, the court explained that the orders could merely "connote 'not going around' either the substance of the [anonymous jury] order . . . or the integrity of court procedures . . . by obtaining confidential court data." Although the Fifth Circuit appeared to resist a definitive interpretation of the orders, the panel ultimately concluded that the orders "plausibly constituted a prior restraint because [they] gagged the press from reporting some kinds of independently gathered stories pertinent to the trial."

### *Right Answer But Worrisome Analysis*

Notwithstanding the fact that the Fifth Circuit ultimately reached the correct result on the prior restraint is-

sue, the court's decision nevertheless is troubling in several respects. First, although the court ultimately concluded that the district court's prior restraint order was unconstitutional under the criteria articulated in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) – *i.e.*, whether the news coverage restrained posed a clear and present danger; whether less restrictive means were available; and the efficacy of the prior restraint – it did so only with what it described as "considerable doubt."

The panel reasoned, with regard to the first two factors, that the "district court could well conclude that the integrity and independence of the jury process were at risk," and that the "only obvious alternative to enforcing juror anonymity," sequestering the jury, would have been "an imperfect alternative."

Indeed, it was only the inefficacy of the district court's non-circumvention orders which ultimately led to the Fifth Circuit's decision to strike the orders. Describing the efficacy factor as the "Achilles heel" of the district court's order, the court reasoned that the orders not only were overbroad, because of the ambiguity of the terms "circumvent" and "interfere," but also might ultimately fail to achieve their purpose, *i.e.*, maintaining juror anonymity, because "restraining the press from independent investigation and reporting about the jurors would not necessarily deter defendants who have already manifested a willingness to tamper."

### *May Raise Bartnicki Issue*

The decision is also troubling because it suggests that had the news media lawfully obtained juror information from court personnel, who provided it to the news media in violation of the court's anonymous jury order, the district court might have been justified in restraining the news media's publication of such information, under its broad discretion to manage the trial and regulate the parties within its control.

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*What is clear is that while other circuits seem to be moving toward greater openness and access to judicial proceedings, the Fifth Circuit has not signaled such a change in course.*

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## ***United States v. Brown***

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Given the United States Supreme Court's recent reaffirmation in *Bartnicki v. Vopper*, 121 S.Ct. 1753 (2001), that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order," it is unclear whether the Fifth Circuit, if squarely faced with the issue, would -- or could -- uphold a prior restraint on the publication of such information. *Bartnicki* did not involve a prior restraint, and declined to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.

### ***Upheld Denial of Post-Verdict Access***

The Fifth Circuit upheld the district court's denial of the news media's motion for post-verdict access to juror identities, concluding that the interest in ensuring the privacy of jurors and in protecting them against harassment constitutes a strong governmental interest. Acknowledging that the measures employed by the district court were "at the outer limit of permissible restrictions," the appellate court nonetheless held that the order was sufficiently narrow, as the district court had affirmatively asked the jurors whether they wished to relinquish their privacy and the order did not prohibit the jurors from voluntarily doing so in the future.

In upholding the order, the Fifth Circuit acknowledged that while there "may be cases where a district court would abuse its discretion by refusing to revoke an order of juror anonymity post-trial," continued anonymity in *Brown* was appropriate as several post-verdict motions had been filed assailing jurors' conduct and thus, "jurors would remain vulnerable to abuse by those acting for the defendants."

The Fifth Circuit's decision on the post-verdict access issues is noteworthy because it represents a departure from the decisions of other federal courts that have addressed the issue of post-verdict access to juror information in that it fails to acknowledge that the need for juror anonymity generally diminishes significantly at the conclusion of even the most highly publicized tri-

als — absent evidence of a continuing threat to the physical safety of jurors. See *In re Globe Newspaper Co.*, 920 F.2d 88, 91-92 (1st Cir. 1990); *United States v. Antar*, 38 F.3d 1348, 1362 & n.21 (3rd Cir. 1994); *United States v. Espy*, 31 F. Supp.2d 1, 2-3 (D.D.C. 1998); *In re Indianapolis Newspapers, Inc.*, 837 F. Supp. 956, 957 (S.D. Ind. 1992); *United States v. Doherty*, 675 F.Supp. 719, 723 (D. Mass. 1987). Arguably, the decision can be distinguished by its unique facts — that the case involved allegations of juror misconduct which continued to be investigated post-verdict, thus justifying the need for continued secrecy.

Whether the courts within the Fifth Circuit will interpret *Brown* narrowly and limit it to its facts, or embrace it as a vehicle to enshroud the jury process in a veil of secrecy in other high-profile cases remains to be seen. What is clear is that while other circuits seem to be moving toward greater openness and access to judicial proceedings, the Fifth Circuit has not signaled such a change in course.

Finally, the Fifth Circuit denied, without prejudice, the news media's petition for mandamus regarding the district court's closure of jury *voir dire*, holding that the district court's release of the transcript of the closed *voir dire* proceedings (several weeks later) had rendered the petition moot.

*Mary Ellen Roy is a partner and Sheryl A. Odems is an associate at Phelps Dunbar LLP in New Orleans, Louisiana. Phelps Dunbar represented WDSU-TV in the news media's intervention challenges before the district court and the Fifth Circuit. The other news media intervenors, the Times-Picayune Publishing Corporation and the Associated Press, Capital City Press, and the Louisiana Press Association were represented, respectively, by Corroero, Fishman, Haygood Phelps Walmsley & Casteix, L.L.P., Taylor Porter, Brooks & Phillips, L.L.P., and Roedel, Parsons, Koch, Frost, Balhoff & McCollister. The United States Attorney's Office for the Eastern District of Louisiana defended the district court's orders in the proceedings before the Fifth Circuit.*

## American Law Institute Debates Third Restatement of Torts

### *Redrafting of "Basic Principles" May Impact Speech and Media-Related Cases*

By Henry R. Kaufman

At its 2001 annual meeting in May, the American Law Institute debated a draft Restatement of the Law of "Liability for Physical Harm (Basic Principles)." This is one part of a multi-phase undertaking by the ALI, with potentially significant implications for future development of media law, to write a Third Restatement of Torts.

On May 15 the ALI tentatively approved several sections of the Basic Principles. Two sections, however, including one treating the pivotal concept of "duty" in negligence cases, were sent back for further revision. As part of that rewrite the Torts Third Reporters have agreed, at the request of a group of ALI members who practice media law, to consider incorporating language that addresses First Amendment considerations applicable to the duty principle in speech and media-related cases.

#### *ALI's Restatements of Torts*

Historically, the ALI has had great influence over development of tort law, dating back to the first Restatement of Torts, begun in 1923 and completed in 1939. That was decades before Supreme Court recognition of First Amendment limitations on speech and media-related torts.

The Second Restatement of Torts, drafted by ALI Reporters Prosser and, later, Wade, was begun in 1955 and completed in 1979. The Second Restatement did not take a final position on all post-*Sullivan* issues, reasoning that the constitutional rules were still developing.

The period since the Second Restatement has, of course, seen dramatic activity in media law, including many novel theories of liability crafted by tort claimants in an effort to circumvent *Sullivan* and its progeny. Any undertaking to comprehensively "restate" this body of developing precedent will inevitably have far-reaching ramifications.

#### *The Third Restatement*

In 1991, the ALI began to draft a Third Restatement of Torts. Tort law is now vast in scope, Balkanized into many subtopics and specialties. The ALI has therefore

elected to pursue a series of projects, two of which have been completed. In 1998 a Restatement of "Products Liability" was approved. And last year "Apportionment of Liability" was completed, covering developments in contributory negligence and comparative responsibility.

These first two volumes do not have wide-ranging implications for media law. Products Liability, however, does address media claims involving allegedly injurious experiments, recipes, regimens, instructions and like editorial matter in textbooks, cookbooks, health and diet books, how to books, travel guides and other factual publications. The ALI has rejected products liability in such cases. Excluded from the definition of a "product" is the category of "intangible personal property," including information in media such as "books, maps and navigational charts." According to the new Restatement, "[m]ost courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech, have, appropriately, refused to impose strict products liability in these cases."

#### *The Pending Draft on "Basic Principles"*

The purpose of the Basic Principles is to restate standards applicable to torts causing "*physical*," as opposed to "emotional" or "dignitary," injury. The Principles thus have only limited application to media law and the current draft does not address First Amendment limitations on negligence liability in speech or media-related cases. But the Reporters' Notes do approvingly cite two media cases involving allegedly "negligent" publications with no discussion in the current draft of their potential constitutional implications: *Hyde v. City of Columbia*, 637 S.W. 2d 251 (Mo. Ct. App. 1982) and *Weirum v. RKO Gen. Inc.*, 539 P.2d 36 (Cal. 1975).

*Hyde*, decided seven years before *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), questionably sustained on a negligence theory a newspaper's potential civil liability for the truthful but allegedly injurious publication of the name and address of the victim of a sexual assault, lawfully ob-

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## American Law Institute Debates Third Restatement of Torts

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tained from a police official, when the perpetrator was still at large.

*Weirum* upheld a radio broadcaster's liability for wrongful death caused by a youthful driver responding to a live, on-air promotional contest urging listeners to speed to distant locations. *Weirum*, far from establishing media liability of broad application, may define only a rare if not singular exception to the profound constitutional issues presented by claims for physical injury alleged to arise out of the influence of editorial or artistic content on the actions of a third party. *Weirum* has been consistently distinguished or rejected in a range of other media cases.

### *Media Comments on the Basic Principles Draft*

Because approval of *Hyde* and *Weirum* might suggest the ALI generally endorses media liability for physical injury caused by third parties under a mere negligence standard, without consideration of First Amendment constraints, a group of ALI members active in media law — including this author, Sandy Bohrer, Jim George, David Klaber, Luther Munford, Carl Solano, and Jack Weiss — submitted written comments critiquing citation of the two cases and proposing certain other revisions to accommodate constitutional doctrine.

The media comments noted that in both *Hyde* and *Weirum* constitutional defenses were asserted by the media defendants and addressed by the courts. In each case a significant First Amendment analysis was required in order to determine whether the negligence claim could be squared with constitutional limitations on imposition of liability for the publication of truthful, newsworthy information lawfully obtained, as well as with the cognate rule that only speech inciting others to imminent lawless action can constitutionally be proscribed.

The media comments also suggested the need to address the concepts of duty and burden of compliance as they must be specially applied in order to protect individual and societal interests under the First Amendment.

Finally, the comments recommended supplementing a discussion of the doctrine of negligent hiring with citation of *Van Horne v. Muller*, 185 Ill.2d 299, 705 N.E.2d 898

(1998). In that case the Illinois Supreme Court held that a radio station owner cannot, consistent with the First Amendment, be held liable for defamatory statements about a public figure by an on-air employee based on an allegation of mere negligence in hiring an "outrageous" and "controversial" disk jockey.

### *Future of the Third Restatement of Torts*

Once revised, the Basic Principles will be further considered, first by advisory and consultative committees and then at a future ALI annual meeting, perhaps in May 2002. Beyond resolution of immediate concerns presented in the Basic Principles, the task of drafting the balance of the Torts Restatement will doubtless remain a monumental undertaking, requiring perhaps an additional generation if not more to complete.

No work has yet been scheduled on additional segments of the Torts Third project. Nonetheless, the ultimate goal is no less than to rewrite the entire Second Restatement, including its many other substantive topics of potential application to speech or media-related activities such as infliction of emotional distress, fraud and misrepresentation, defamation, privacy, trespass, interference with contract, etc. A separate Restatement on "Employment Law" is also planned for the near future.

This author and other interested ALI members will continue to express their views as the drafting process progresses, believing it is essential that First Amendment precedents and values to be adequately reflected, not only in the pending Basic Principles draft but also in all future aspects of the Restatement.

*Henry R. Kaufman was General Counsel of LDRC from 1980 to 1996 and is now in private practice. He is a member of the American Law Institute and of the LDRC Defense Counsel Section. A full copy of the media comments discussed in this article can be obtained by contacting hrkaufman@aol.com.*

## English Libel Trial Challenges Qualified Privilege Defense: *Loutchansky -v- Times Newspapers Limited and others*

By Meryl Evans

### *Introduction*

In about 1849 the Duke of Brunswick sent his servant out to the office of a newspaper to buy a copy of an issue which had been published 17 years before and which contained a libelous article about him. The courts decided that this was a fresh publication that enabled the Duke to sue long after the initial limitation period had expired.

One hundred fifty years later, in the summer of 1999, a young journalist on *The Times* was reporting on the Bank of New York money-laundering scandal. David Lister, a business reporter assigned the Bank of New York story because of his ability to assimilate complex facts and report on them in a cogent manner, got a sniff of a new angle. It had been widely reported that the central suspect in the Bank of New York affair was Semyon Mogilevich, an alleged Russian mobster. But David heard that law enforcement officials thought that Mogilevich might not have been acting alone and that another (so far unnamed) individual was also being investigated to see if he too was linked to the affair.

After some detective work, David spoke to a confidential source at Interpol headquarters in Lille, France. The source confirmed David's suspicions as to who this other figure might be. A story was published on September 8, 1999. A further story was published on October 14, 1999, this time reporting on alleged links between Grigori Loutchansky and Lev Chernoi, a Russian then under investigation in Switzerland for alleged money-laundering. Like many newspapers *The Times* has a website. The articles were placed on it. Thus it was that the worlds of David Lister and the Duke of Brunswick started to collide.

### *Who is Grigori Loutchansky?*

If you want to find out who Grigori Loutchansky is, what might you do? If you log on to the Internet and tap in his name or that of Nordex, the business empire he controls,

you will find that articles have been written about him since about 1996, reporting on suspicions that he is involved with the Russian Mafia, that he is a money-launderer and that he is involved in smuggling weapons. These are precisely the allegations over which he sued *The Times*.

Loutchansky is excluded from the United Kingdom (and has been since December 1994) at the personal direction of the Home Secretary, on the grounds that his presence here would not be conducive to the public good. He has challenged the exclusion order but it remains in place, the latest review of it having been completed last November. The next challenge to it will probably be heard in the autumn. Loutchansky was

given special leave to enter the country to attend the trial he initiated against *The Times*.

Loutchansky was also been refused an immigration visa by Canada in 1993. The Israeli government refused to renew his Israeli passport in 1997. And the US State Department refused to issue him a visitor's visa in 1995.

Documents from the State Department show that the reason was "because of his position as director general of Nordex which we have previously determined is supported by criminal organizations." John Deutch, then head of the CIA, when giving testimony to a Congressional Committee in 1996, said of Nordex that it was "an example of an organization associated with Russian criminal activity moving out of Russia and establishing itself, in this case, I think, principally in Vienna" but declined to say anything more about it in open session.

Loutchansky has never been charged with, let alone convicted of, any offences related to organized crime, money-laundering or weapons smuggling. His only convictions date back to 1983 when, in Latvia during the days of Soviet rule, he was found guilty of offences described by a Home Office official as "fraud and embezzlement".

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*[A]rticles have been written about [Loutchansky] since about 1996, reporting on suspicions that he is involved with the Russian Mafia, that he is a money-launderer and that he is involved in smuggling weapons.*

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## English Libel Trial Challenges Qualified Privilege Defense

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### *Loutchansky's Libel Actions*

Loutchansky first sued only over the September and October 1999 newspaper articles, issuing proceedings in December 1999. The defendants were Times Newspapers Limited (which publishes *The Times*), Peter Stothard, the paper's editor, and two of its journalists, David Lister and James Bone. A defense was filed pleading qualified privilege. Although there is a wealth of material recording the suspicions about Loutchansky, *The Times* did not possess or have access to any evidence which would prove the ultimate truth of the suspicions and allegations on which it had reported.

In October 2000, a hearing took place on the defendants' application to strike out the action or alternatively to stay it. The basis for this application was, in a nutshell, that someone who had been excluded from the country for such a length of time and on the most serious of grounds cannot have a reputation worthy of devoting the Court's and the defendants' time and resources for its protection. Alternatively, if such an exercise was a proportionate use of resources at all, it could only be justified if and when Loutchansky was allowed to enter the country, it being grossly unfair to the defendants and contrary to the interests of justice if such a claimant could choose to instigate proceedings which then continued in his absence, and without the defendants having the opportunity to cross-examine him before a jury at trial.

The defense's application to strike failed. Mr. Justice Gray decided that Loutchansky was entitled to enter the UK to attend the trial under Article 6 of the European Convention on Human Rights (brought into direct effect in English law in October 2000 through the Human Rights Act 1998). Article 6 guarantees the right to a fair trial, and the Judge found that this overrode all other considerations. The trial was set for March 19, 2001.

Loutchansky then brought a second action. This time he sued over the same two articles which were archived on *The Times'* website. Fifteen months had by then

passed since first publication of the articles, three months beyond the one year limitation period for libel.

### *The Key Issues in the Libel Claim Against the Newspaper*

The main questions for the Court in relation to the first action over the hard copy publications were: Was the subject matter of the articles a matter of public interest? Were the circumstances surrounding each publication, including the quality of the journalism, such that the defendants were entitled to publish without liability for defamation? What reputation did Loutchansky have in this country prior to the publications complained of? To what extent could the defendants rely on Loutchansky's exclusion from this country, the investigations carried out by law enforcement and intelligence forces in several countries and previous press reports reporting substantially the same allegations as had been published by *The Times*?

This final question arose in two contexts – whether the defendants could rely on material in existence at the time of publication but of which they were then unaware (“after-acquired information”) to support their defense of qualified privilege, and whether this material could be relied upon in mitigation of damages (an area where the rule in *Scott -v- Sampson* (1882) 8 QBD491 restricts what can be relied upon).

### *Key Issues in the Claim over the Newspaper's Internet Archives*

The second action over the availability of those same articles on the newspaper's website gave rise to the same questions but also some additional ones peculiar to the method of communication. Was there any ‘publication’ by *The Times* after the date when the articles were first posted on the website? (If not, the proceedings would have been brought after the expiry of the limitation period.) This argument was

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*Mr. Justice Gray decided that Loutchansky was entitled to enter the UK to attend the trial under Article 6 of the European Convention on Human Rights*

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## English Libel Trial Challenges Qualified Privilege Defense

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mounted through an attempt to amend the defense to plead a 'single publication rule.' If so, to how many people was it published, and who bore the burden of proving this? Was any defense to the publication of the 'hard copies' of the articles automatically a defense to the Internet publications in the second action? If the single publication rule is rejected, were the circumstances of subsequent publications such that the defendants were entitled to immunity from defamation? Was *The Times* entitled to maintain on its website an archive of back issues of what had appeared previously?

### *Pre-Trial Decision Limits Qualified Privilege*

Several pretrial rulings limited the qualified privilege defense and hampered the defendants' case. *The Times* applied to amend its qualified privilege defense in the first action to include "after-acquired information." This information consisted of additional government reports about Loutchansky from Austria, Israel and Interpol that would bolster the public interest in *The Times*' articles. Mr. Justice Gray ruled that the qualified privilege defense had to be assessed solely by reference to information in the possession of the defendants at the time of publication. The amendments were accordingly disallowed. This ruling was appealed to the Court of Appeal. *The Times* argued that after-acquired information, such as these additional government reports, were relevant to two qualified privilege factors mentioned by the House of Lords in *Reynolds -v- Times Newspapers* [1999] 3 WLR 1010, namely, 1) the nature of the information and the extent to which the subject matter is a matter of public concern and 2) the status of the information.

The Court of Appeal upheld the trial court ruling and its focus on a libel defendant's knowledge at the time of publication because "if there is no duty to publish, it is facile to talk about a public 'right to know.'" *Loutchansky v. Times Newspaper Limited*, Case No. A2/2001/0305 (Ct. Appeal April 3, 2001) available through [www.courtserve.gov.uk](http://www.courtserve.gov.uk). Permission to appeal to the House of Lords was declined.

The House of Lords is currently considering *The Times*' petition for leave to appeal.

During the strike out hearing in October 2000, Mr. Justice Gray also made an observation that he could not see how the fact of the Home Office's exclusion order against Loutchansky could be relied upon to mitigate damages. The defendants argued that the exclusion order was comparable to a criminal conviction, in terms of the deleterious effect it would have on the individual's reputation. The judge rejected this argument, primarily because the exclusion order is an act of the executive, as opposed to the product of a judicial process, and is not a matter of public record. He made it clear that this observation did not bind the trial

judge, but as it was likely that he would be the trial judge (and indeed was) the observation in effect enjoyed the status of a ruling. Permission to appeal this ruling was sought from the Court of Appeal, so that there would be certainty before the

trial commenced concerning what could and could not be relied upon in mitigation of damages. Permission to appeal was declined as there had not yet been a final ruling from the trial judge.

*The Times* also sought, but was refused, information from the Home Office regarding Loutchansky's exclusion. A witness summons was served on a Home Office employee in an attempt to gain access to the material which underpinned the Home Secretary's decision to exclude Loutchansky from this country and later decisions to maintain that exclusion. We argued that, in order properly to assess the public interest, this material ought to be before the Court during the trial. The Treasury Solicitor successfully applied to set aside the witness summons on the grounds that the material in the possession of the Home Office and the Secret Intelligence Services was not relevant to our defense.

With the trial due to commence on March 19, 2001, the Judge ordered on March 16 that the trial be split so that liability would be heard first then (if the defense of qualified

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*[T]he qualified privilege defense had to be assessed solely by reference to information in the possession of the defendants at the time of publication.*

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privilege failed) a trial on damages would take place immediately after it, before the same jury. A three week period had been set aside for the trial. The jury was not empaneled until the second Monday, March 26<sup>th</sup>. The whole of the first week of the trial was taken up with legal argument. The trial was due to finish shortly before Easter but the Judge was not due to sit on any other matters before Easter so that there were a few extra days available for the trial, if needed, before the Court term ended.

### *The Trial*

In the event, it was possible only to fit the liability trial into the time allowed for both trials (liability and damages).

We were left with little choice but to consent to the discharge of the jury once they had completed their function in the liability trial. This function was to decide the primary facts upon which the trial judge would then decide whether the defense of qualified privilege

succeeded. The jury's decisions on the primary facts very substantially supported the defendants' accounts of the circumstances which led up to publication of the articles in the first action.

In the course of the trial, the Judge had made a number of rulings. Their combined effect was to destroy the defense of the second action. The Judge declined to adopt the single publication rule and decided that, once the defendants knew that they could not prove the truth of what was published, they could have no continuing duty to publish and they could not therefore have a defense of qualified privilege for any publication on the Internet after the date of service of the defense in the first action (the significance of this date being that, as the defense did not plead justification, i.e., truth, the defendants knew from that date, at the latest, that they could not prove that what had been published was true).

The Judge also decided that, although Loutchansky had to prove publication in the sense that someone had actually accessed the Internet copies of these two articles (and he had not adduced any evidence of such publication), this

could be inferred from the sheer volume of hits on the site (not on the articles themselves). Against that background, we admitted publication to a small but unascertainable number of readers. Needless to say, it was not possible to say when those presumed readers accessed the articles, nor who they were. Judgment was entered in the second action, with damages to be assessed.

The Judge then retired to ponder his decision and, two weeks later, delivered his judgment. The defense of qualified privilege failed. Although the subject matter of the first article was in the public interest, the failure of David Lister's attempts to contact Loutchansky for comment prior to publication and the fact that the article was not, in the Judge's view, sufficiently urgent to warrant publication that day

without further efforts to contact Loutchansky, meant that *The Times* had failed to demonstrate a duty to publish. Judgment was entered for Loutchansky, with damages to be assessed. He was granted an injunction to prevent future publication by *The Times*

of words bearing the meanings (or any of them) of which he had complained.

### *Appeals*

At the time of writing, several appeals are under way, covering all the major points touched upon above. The House of Lords are considering whether to give us leave to appeal on the "after-acquired information" point; the Court of Appeal will hear our appeal against the Judge's rejection of the qualified privilege defense in the first action; and we await to hear whether the Court of Appeal will give us permission to appeal against the single publication and qualified privilege decisions in the second action.

A separate appeal arises over a decision made by the Judge a couple of weeks after judgment in the first action. Loutchansky applied for "summary disposal" of the damages trial. Summary disposal is a relatively new mechanism, available under Section 8 of the Defamation Act 1996, where damages are assessed by a Judge alone, sitting without a

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*Although the subject matter of the first article was in the public interest. . . The Times had failed to demonstrate a duty to publish.*

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## English Libel Trial Challenges Qualified Privilege Defense

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jury. The damages in each action are limited to £10,000.

We opposed this application as *The Times* wanted to exercise its constitutional right to trial by jury and, according to our interpretation of Section 8, it is intended for use in cases where there is no triable defense. We argued that the procedure is inappropriate for actions in which judgment has already been entered, after a full trial on the liability issues. The Judge disagreed with our interpretation of Section 8 but gave us permission to appeal. It remains to be seen whether the appeal will be heard before the damages trial takes place.

### *What this Means for U.S. Publishers*

Those U.S. publishers who have been keeping an eye on developments in our law over the last few years may have been encouraged by the lower trend in general damages, by the developments in *Reynolds* and by learning of the right to freedom of expression enshrined in the European Convention on Human Rights brought into direct effect in the UK through the Human Rights Act 1998. U.S. publishers may have started to think that it might now be safer to publish in the UK material which would never attract a libel action in the U.S. But doors which had started to creak ajar are now beginning to slam shut. The qualified privilege defense has succeeded at trial in just one action so far (*GKR Karate v Yorkshire Post Publications* [2000] 1 WLR 2571) and *Loutchansky -v- Times Newspapers Limited and others* is the fifth case I know of where it has not been upheld. The Courts in the UK are shying away from opportunities to give primacy to freedom of expression, and old law is being applied to novel situations in a restrictive and conservative way.

The net effect of the rulings on the Internet aspects of this action is to burden defendants with liability, unlimited in time and in the number of publications, for material which may well be utterly defensible on the date of first publication but which, as circumstances change with the passage of time and as the public interest in a particular topic waxes and wanes, may not be defensible in the future. Take, for example, a defendant convicted of a serious crime — a murder, perhaps. Reports of his conviction will be defensible. But what if he overturns that conviction on appeal? Any publisher which still makes available, via the Internet, an old

copy of the original report is vulnerable to suit. And this might happen years or even decades after the original publication. Publishers face a stark choice — reassess the entirety of what you publish and do so on a daily basis to ensure that it is all as defensible today as it was yesterday, or take it off the Internet.

US newspapers with websites accessible in the UK, take heed. Bear in mind also that the same considerations probably apply to publishers who provide material via electronic databases. Little did the Duke of Brunswick realise, in 1849, the contribution he was making to publication via the Internet.

### *What the Future Holds*

Believe it or not, this is not the full story of *Loutchansky -v- Times Newspapers Limited and others*. There will be appeals; there may, at some stage, be a damages trial. There are all manner of arguments ripe to be fought in the damages trial, concerning what is admissible in mitigation of damages. If the damages trial takes place before a Judge alone, it looks as though some of those battles might not be fought. If they are fought, there will at least be some company for the Duke of Brunswick — the main battleground will be over a case dating back to 1882 — *Scott -v- Sampson* 8 QBD 491.

English law has so far done a decent job of applying pre-existing law to novel technologies and means of communication. My enduring sentiment, at this point in the *Loutchansky* action, is that certain cases are showing their age and have lost their value and certain attitudes need to change fundamentally if English law is not to gain a reputation for suppressing freedom of expression, for stymieing the amount of information accessible on the Internet, and for altering the records of the first draft of history.

*The defendants are represented by solicitor Meryl Evans of Reynolds Porter Chamberlain, and barristers Richard Spearman QC (4-5 Gray's Inn Square) and Richard Parkes (5 Raymond Buildings). Loutchansky is represented by solicitor Debbie Ashenhurst of Olswang, and barristers Desmond Browne QC (5 Raymond Buildings), Hugh Tomlinson (Matrix Chambers) and Jonathon Barnes (5 Raymond Buildings).*

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