



LIBELLETTER

September 1996

TELEVANGELIST AND CHURCH LOSE TWO IN THE CIRCUITS

August dealt televangelist Robert Tilton and his Word of Faith World Outreach Center Church a pair of defeats in the federal circuit courts as the dismissals of two suits against Capital Cities/ABC brought by the Church and its leader were affirmed.

Tenth Circuit Libel Suit

The Tenth Circuit affirmed the June 19, 1995 grant of summary judgment in the suit Tilton brought individually for libel and false light invasion of privacy over a 1991 *PrimeTime Live* broadcast that alleged the minister led an extravagant lifestyle and made false promises to his followers. *Tilton v. Capital Cities/ABC, Inc. et al.*, 1996 WL 490701 (10th Cir.(Okla.)).

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FEDERAL JUDGE REFUSES TO APPLY NEW YORK'S ABSOLUTE SHIELD LAW PRIVILEGE

United States District Judge Thomas C. Platt has ordered a reporter to reveal a confidential source, refusing to apply New York state's absolute immunity provision of the reporter's Shield Law, s. 79-h (b). *Pellegrino v. New York Racing Association*, 94 Civ. 5161.

The order, which arose out of a 42 U.S.C. § 1983 claim brought by Anthony Pellegrino against his former employer, the New York Racing Association (the NYRA), is said to be the first time since the 1970 enactment of the Shield Law that a New York federal judge has ordered a reporter to reveal a confidential source. (N.Y.L.J., September 3, 1996).

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9TH CIRCUIT FINDS PERSONAL JURISDICTION IN CALIFORNIA SUIT AGAINST N Y DAILY NEWS AND COLUMNIST

Finding that the defendants, *The New York Daily News* and its New York based columnist, had published the allegedly defamatory column about the plaintiff knowing that plaintiff lived in California and that 13 daily and 18 Sunday copies of the paper were regularly delivered in California, the United States Court of Appeals for the Ninth Circuit held that these contacts were sufficient to meet the due process requirements for specific personal jurisdiction in California. *Gordy v. The Daily News*, No. 95-55102 (9th Cir., Sept. 9, 1996). Regular circulation, however small, and knowledge that the resident plaintiff would suffer harm in the forum state appear to be sufficient under the Ninth Circuit's analysis.

Distinguishing away prior precedent — including *Demaris v. Greenspun*, 712 F.2d 433 (9th Cir. 1983) which stated that the court was "not disposed to carry the jurisdiction beyond the area of the paper's primary circulation" — and noting that the California long-arm statute conferred jurisdiction to the maximum

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PUBLISHER PREVAILS ON SUMMARY JUDGMENT IN HIT MAN CASE

By Seth D. Berlin

On August 30, 1996, the Honorable Alexander Williams, Jr., of the United States District Court for the District of Maryland, Southern Division, granted summary judgment for publisher Paladin Enterprises, Inc. ("Paladin") in two wrongful death actions. *Rice et al. v. Paladin Enterprises, Inc., et al.*, Case No. AW-95-3811 (D. Md.) *Saunders, et al. v. Paladin Enterprises, Inc., et al.*, Case No. AW-96-444 (D. Md.) Those lawsuits arise out of three 1993 contract murders in which, plaintiffs alleged, the murderer, James Perry, relied upon the Paladin publication, "Hit Man: A Technical Manual for Independent Contractors" ("Hit Man"), in committing the crimes. On September 6, 1996, the Court issued a slightly-modified amended opinion and denied the plaintiffs' motion for reconsideration.

Perry had been hired by Lawrence Horn to kill Horn's ex-wife, Mildred, and son, Trevor, so that Horn would inherit a \$1.7 settlement awarded to Trevor for medical malpractice that had left him a quadriplegic. Also murdered was Janice Saunders, Trevor's nurse.

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EIGHTH CIRCUIT RULING PROVIDES LIMITED COMFORT FOR MEDIA "RIDE-ALONGS"

By Mark Sableman

In a divided decision that gives limited comfort to news organizations facing "ride-along" claims, the Eighth Circuit has affirmed dismissal of civil rights claims brought against St. Louis police officers and television station KSDK. The claims grew out of a police search

during which a KSDK news crew accompanied the police and filmed portions of the raid.

The decision, *Parker v. Boyer*, Nos. 95-3988 and 95-4075, 1996 WL 465092 (8th Cir. August 16, 1996) represents a narrow win for both the media and the

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INTERESTED IN PLANNING THE 1997 NAA/NAB/LDRC CONFERENCE?

We want to know who among you is interested in helping to plan and organize the 1997 NAA/NAB/LDRC Conference, which is to be held September 10-12, in Reston, Virginia. The extraordinary success of past Conferences is the result of the extraordinary efforts of Terry Adamson and Dan Waggoner, co-chairs of the LDRC Conference and Education Committee, and all of the LDRC members who have worked with them to develop ideas, prepare materials and recruit speakers, panel members and facilitators.

If you are interested in serving on this working committee, please call, fax or otherwise send me a note to that effect.

The co-chairs have scheduled a first meeting of the committee for 12:30 p.m. (N.Y. time) on Thursday, November 7, 1996. That is the day after the LDRC Annual Dinner, and the day of the LDRC Defense Counsel Section Annual Breakfast Meeting. Laura Handman and her firm, Lankenau Kovner & Kurtz, have very graciously offered to provide conference room facilities for the meeting. Lankenau Kovner & Kurtz is located at 1740 Broadway, just up the street from the Crowne Plaza, location of the DCS Breakfast and the PLI Conference that day. -- Sandy Baron

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ONTARIO COURT STAYS DEFAMATION CLAIM BROUGHT BY AMERICAN

Finding that "[a]ll of the relevant factors . . . point overwhelmingly to the U.S.A. as the appropriate jurisdiction," the Ontario Court of Justice permanently stayed on *forum non conveniens* grounds a libel suit brought by a Detroit based discount brokerage and its founder against a New York based magazine. *Olde v. Capital Publishing Limited Partnership, et al.* (95-GD-34467) (July 22, 1996).

The suit arose out of an article, bearing the headline "The Family Name," published in the September 1995 edition of *Worth* magazine, a personal finance magazine published by New York based Capital Publishing. The piece included "unflattering personal comments" about the personal and private life of individual plaintiff Ernest Olde, as well as unflattering comments about the business practices of the brokerage firm he founded, Olde Discount Corporation. Olde Discount Corporation and its founder, Ernest J. Olde, filed suit in Windsor, Ontario. The defendants moved to stay the Canadian proceedings on various grounds, including *forum non conveniens*.

The defendants argued that a United States court would be the more appropriate forum to adjudicate the plaintiffs' claims. In support of their motion, the defendants noted that all of the parties were U.S. citizens, all of the material dealings between the parties relating to the article occurred in the United States, the article focused primarily on Olde Discount's business operations in the United States, and the bulk of the plaintiffs' alleged injury, if any, would have occurred in the United States. The Olde plaintiffs' decision to file suit in Canada, defendants argued, amounted to forum shopping in a calculated effort to avoid the protection afforded publishers under the First Amendment to the U.S. Constitution.

The plaintiffs claimed that Ontario was a proper forum to litigate the dis-

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FOOD LION I -- THIRD PARTY SUBPOENAS QUASHED TRIAL DATE SET

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592 (M.D.N.C. September 6, 1996) (*Food Lion I*), Magistrate Judge P. Trevor Sharp has granted ABC's request for a protective order prohibiting Food Lion from proceeding with a "large number" of third-party subpoenas directed to hotels, letter-carrier services, and telecommunications companies. The ruling was part of a larger order resolving 10 separate discovery motions. A December 9, 1996 trial date before U.S. District Judge N. Carlton Tilley was also announced.

ABC's Protective Order

ABC's motion for a protective order was filed in order to stop Food Lion from

proceeding with a "large number" of third-party subpoenas, a la Philip Morris, directed at hotels, letter-carrier services, and telecommunications companies. The subpoenas sought documentation "to and from ABC journalists during an eighteen-month period and communications by and to a large number of other persons and entities." *Slip op.* at 2.

Despite the fact that the subpoenas called for the communication information of over 100 people for an eighteen-month period, Food Lion described the subpoenas as "narrowly drawn . . . ordinary subpoenas of the kind that are routinely issued to third parties." *Slip op.* at 3. The court, however, "emphatically disagree[d]." *Slip op.* at 3.

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FOOD LION II--COPYRIGHT OWNERSHIP CASE DISMISSED

Rejecting an extraordinary attempted hijack on newsgathering, Federal District Judge N. Carlton Tilley, Jr. dismissed Food Lion's suit against ABC in which plaintiff sought a declaration of ownership over the copyrights of the undercover videotapes made by the defendant reporters while serving as employees of the supermarket chain. *Food Lion v. Capital Cities/ABC, Inc., et al.*, No. 4:95CV513 (M.D.N.C. August 16, 1996) (*Food Lion II*)

In advancing its position, Food Lion argued that it owned the copyrights to the videotapes under the "works made for hire" provision of the Copyright Act, or, alternatively, under the North Carolina state doctrine of constructive trusts. Food Lion contended that the videotapes were works made for hire "because they were 'prepared by an employee within the scope of his or her employment' within the meaning of [17 U.S.C. Sec. 101 (1)]." *Slip op.* at 2.

Looking to Section 228 of the Restatement (Second) of Agency, which provides "that acts which are not of the kind a person is employed to do or which are not motivated in part by a desire to serve the employer are outside the scope

of employment," Judge Tilley pointed out that the undercover videotaping in the instant case "meets neither of these conditions, nor any other reasonable, interpretation of the scope of employment." *Slip op.* at 2.

In fact, Judge Tilley noted that the plaintiff virtually conceded the point in their opposition papers which stated, "[w]hile it is not normally within the scope of a meat wrapper's deli clerk's job to film their surrounding work conditions, it is not per se inconsistent with their job functions." (emphasis in original) *Slip op.* at 2-3, n.2.

As to plaintiff's state law based constructive trust argument, Judge Tilley also sided with the defendants, holding that since "a declaration of ownership is a right exclusively provided for under federal law," any attempt to protect that federal right through the use of state law would be preempted. *Slip op.* at 3.

Food Lion's prior lawsuit, asserting tort claims related to the investigation, including trespass, common law fraud, negligent supervision, respondeat superior, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices, is still pending.

ONTARIO COURT STAYS DEFAMATION CLAIM BROUGHT BY AMERICAN

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pute because both the magazine and the individual plaintiff had ties to Ontario. Although Capital Publishing distributed only about 1360 copies of *Worth* monthly in Ontario, approximately 0.21% of its total circulation, the plaintiffs alleged that this was a sufficient predicate for exercise of the Court's jurisdiction. The individual plaintiff also claimed that he had ties to Ontario because his wife was Canadian, he had done business in Windsor, and he maintained a summer home on an Ontario lake. The court found that his principle business dealings were in the U.S., and that the corporate plaintiff carried on a brokerage business in the U.S., but not anywhere in Canada.

The Court declined to exercise jurisdiction and permanently stayed the ac-

tion. Under Canadian law, courts may exercise jurisdiction only if the forum has a "real and substantial" connection with the subject matter of the litigation. *Forum non conveniens* doctrine provides that a court may refuse jurisdiction where there is a more convenient or appropriate forum elsewhere. The Court found that neither the Olde plaintiffs nor the libel suit had a "substantial" connection with Ontario.

"In my view the principal focus of the business concerns of two plaintiffs, one an American corporation, is the U.S.A.. Most of the unflattering personal comments about Mr. Olde appear to have absolutely no connection with Ontario. All of the relevant factors

here point overwhelmingly to the U.S.A. as the appropriate jurisdiction. As Borins J. indicated in *SDI Simulation*, the court need only determine that clearly a more appropriate forum exists in order to reach the conclusion that Ontario should decline jurisdiction."

Olde et al. v. Capital Publishing et al. (95-GD-34467) (July 22, 1996), *slip op.* at 10. The plaintiffs have appealed the trial court's decision.

The Plaintiffs were represented by Myron Shulgan, of Wilson Walker Hochberg Slopen, in Windsor, Ontario. Defendants were represented by Sheila Block of, Tory Tory DesLauriers & Binnington in Toronto as well Jonathan D. Hart and Judith Mather of Dow Lohnes & Albertson in Washington D.C.

FOOD LION I — THIRD PARTY SUBPOENAS QUASHED TRIAL DATE SET

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Calling the subpoenas "fatally overbroad," Magistrate Judge Sharp granted ABC's request for a protective order for two reasons. First, the court wrote, "the burden and expense of the discovery greatly outweighs its likely benefit, taking into account the needs of the case and the importance of the evidence." In spite of Food Lion's contentions that it needed communication information "so it can have a full picture of ABC's news-gathering activities in connection with the Food Lion story," the court ruled that because Food Lion can and has obtained information from other sources, "the subpoenas are greatly burdensome on answering parties and their overbreadth seriously intrudes on the privacy of individuals identified in the subpoenas." *Slip op.* at 3-4.

Additionally, the court stated that "the subpoenas clearly infringe ABC's First Amendment rights with regard to its confidential sources." Citing the Virginia Circuit Court's decision in *Philip Morris Companies, Inc. v. American Broadcasting Companies, Inc.*, 1995 WL 301428, 23 Media L. Rep. 1434 (Va. Cir. Ct. 1995, as modified by

Philip Morris Companies, Inc. v. American Broadcasting Companies, Inc., 23 Media L. Rep. 2438 (Va. Cir. Ct. 1995), the court wrote, "[a]lthough the discovery is not requested directly from ABC, the inquiries directed to third-parties nonetheless implicate ABC's privilege." The court continued to reject Food Lion's suggestion that ABC "screen out" the confidential sources, a proposal which the court found to be "completely impracticable in view of the breadth of the subpoenas." *Slip op.* at 4. Thus, because the court had already held that Food Lion had not exhausted all other sources of information, Judge Sharp ruled that Food Lion had not overcome the federal journalist's privilege.

Other Discovery Motions

In addition Judge Sharp also ruled on nine other discovery motions. Of note, the court directed ABC to provide the answers of deposition witnesses whom ABC counsel had instructed not to answer deposition questions solely on the ground of lack of relevance. Objections to deposition questions based on

lack of relevance are not permitted in the Fourth Circuit. *Slip op.* at 6.

Further, ABC's motion for reconsideration of an earlier ruling granting Food Lion limited discovery into two other ABC hidden camera investigations was rejected as the court saw no threat to ABC's journalist's privilege. *Slip op.* at 7. Judge Sharp also found that ABC's use of two financial expert witnesses from Price Waterhouse posed no "significant likelihood of future inadvertent disclosures," despite the fact that Food Lion has utilized the services of Price Waterhouse "on a number of legal matters, including current court cases." *Slip op.* at 8-10.

Trial Date Set

The order also included the announcement that a trial date had been set for December 9, 1996 before U.S. District Judge N. Carlton Tilley. The court also scheduled a hearing on any dispositive motions, in limine motions or other motions for December 2. The parties were instructed to complete the briefing on any such motions by November 19, while a final hearing on discovery motions was set for October 16.

BOOK REVIEWERS CAN BREATHE EASIER IN NEW JERSEY

By Peter G. Banta

In a case of first impression in New Jersey, Chief Judge Thompson of the U.S. District Court has ruled that defamation claims against book reviewers are to be judged against the liberal standard first announced in *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994). The ruling was issued on August 12, 1996 in a "NOT FOR PUBLICATION" opinion on a motion to dismiss in *T.F.H. Publications v. Fancy Publications, Inc. et al.* (Civil No. 96-865 (AET)). The plaintiff was a publisher of various books and magazines related to pets, including *Reptile Hobbyist Magazine* and *Green Iguanas Yearbook*. The defendant was also publisher of books and magazines in the same fields.

Defendants published in one of their magazines, *REPTILES*, a review of plaintiff's *Green Iguanas Yearbook*. The review was unfavorable, accusing the author of many inaccuracies, and referring to it as one of the worst of the Iguana books available today. For example, one of the statements said, "Produced by T.F.H. Publications, this Iguanas Yearbook appears to be a hastily thrown together package of misinformation. Actually not all of the information is incorrect but while reading this book it seems inaccuracies jump off the page at every turn."

The plaintiff further alleged that the book review "intentionally and maliciously contained inaccurate statements for the purpose of injuring plaintiff while at while at the same time benefitting the defendants who were in the process of publishing their book *Green Iguanas: An Owner's Guide*, that would compete directly with plaintiff's publication." The plaintiff added counts for other torts based on the review, including tortious interference, unfair competition, common law fraud, and conspiracy.

The defendants filed no answer, but immediately moved to dismiss. In addition to arguments that the article was non-actionable opinion, the defendants as-

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OREGON SUPREME COURT: PRIOR RESTRAINT AND TRADE SECRETS ACT PROVISIONS VIOLATE OREGON CONSTITUTION OTHER STATE ACTS VULNERABLE?

By Daniel J. Standish

On August 29, 1996, the Supreme Court of Oregon issued a peremptory writ of mandamus directing the Circuit Court for Washington County, Oregon to reverse an order prohibiting newsletter publisher Sports Management News, Inc. (SMNI) from publishing alleged trade secrets of Adidas America, Inc. (Adidas) without first submitting the publication to the court and securing its permission to disclose the information. *State of Oregon ex rel Sports Management News, Inc. v. Nachtigal*, (SC S43103) (Ore. 8/29/96) The court held that the Oregon Trade Secrets Act provision relied upon by the lower court violated the free expression clause of the Oregon Constitution.

Adidas brought the action after SMNI included a short article concerning Adidas in *Sporting Goods Intelligence*, a newsletter published by SMNI. In its complaint, Adidas alleged that the

article contained trade secrets about its future shoe designs that SMNI had acquired from an allegedly confidential "proprietary booklet." At Adidas' request, the trial judge issued a prior restraint.

SMNI petitioned the Oregon Supreme Court for a writ of mandamus, and the higher court issued and order directing the Circuit Court to vacate the prior restraint or, in the alternative, to show cause why it had not done so. (See *LDRC LibelLetter*, March 1996, p. 15 and April 1996, p. 6 for further background.) The lower court's failure to vacate the prior restraint in response to the Supreme Court's initial order led to further briefing by the parties and the Supreme Court's recent decision.

The Circuit Court's order prohibiting publication of the information without prior court approval was based on the non-disclosure provisions of the Ore-

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PRIOR RESTRAINT LIFTED IN GEORGIA PERMITTING PUBLICATION OF HIV-POSITIVE STATUS OF CRIMINAL DEFENDANT

By Tom Clyde

For almost a month, a Georgia state court prohibited Atlanta newspaper *Southern Voice* from reporting on information contained in a publicly-filed police report concerning the arrest of an HIV-positive physician charged with aggravated assault for repeatedly biting a woman in a public park. The state court ultimately lifted its own temporary restraining order, which prohibited publishing the identity of the physician, on August 18, 1996, but not until after *Southern Voice* had tried and failed to obtain federal court intervention. *Doe v. Ryan Publications Inc.*, File No. 96-7627-5 (DeKalb County Super. Ct. July 12, 1996); *Ryan Publications Inc. v. Peeler*, No. 96-cv-1986 (N. Dist. Ga., Aug 7, 1996).

The incident arose out of the May 31, 1996 arrest of Dr. Stosh Ostrow for

allegedly physically assaulting a woman with whom he collided while rollerblading in Atlanta's Piedmont Park. The police report stated that Dr. Ostrow inflicted bite wounds on both of the woman's arms and her right thigh and that Dr. Ostrow was HIV-positive. Dr. Ostrow's HIV-positive status, which was underlined twice in the police report, was apparently the officer's basis for charging him with aggravated assault, a crime that requires use of a deadly weapon under Georgia law.

After obtaining a copy of the publicly-filed police report, *Southern Voice*, a newspaper that covers the gay and lesbian community, prepared to publish a story on the arrest. According to *Southern Voice*, the story was particularly newsworthy because Dr. Ostrow was a prominent local advocate on

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OREGON SUPREME COURT

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gon Trade Secrets Act, which authorize a court to "preserve the secrecy of an alleged trade secret by reasonable means," including requiring prior court approval for disclosure of an alleged trade secret in any action brought under the Trade Secrets Act. See O.R.S. § 646.469. In its decision, the Oregon Supreme Court concluded that this portion of the statute violates the free-expression clause of the Oregon Constitution, which provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or

print freely on any subject whatever" See Or. Const., Art. I, § 8. The Court concluded:

The Oregon Constitution clearly and categorically recognizes the newsletter's right to print freely on any subject whatever and does not permit a statute to restrict that right, as the challenged statute does in this instance, by authorizing a judge to require a third-party publisher, one who did not commit a crime in obtaining its information, to submit its speech for court approval before publication.

Finding that state law provided complete relief to SMNI, the court found it unnecessary to address federal constitutional issues. The decision ultimately may have wide-ranging ramifications for the validity of non-disclosure provisions contained in trade secret acts in other states. Approximately 40 states have adopted some form of the Uniform Trade Secrets Act, upon which the Oregon statute is based.

Sports Management News, Inc., which published SGI, is represented by Lee Levine and Daniel J. Standish of Ross, Dixon & Masback, L.L.P.

PRIOR RESTRAINT LIFTED IN GEORGIA PERMITTING PUBLICATION OF HIV-POSITIVE STATUS OF CRIMINAL DEFENDANT

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AIDS-related issues. After *Southern Voice* called Dr. Ostrow for comment, he promptly brought a motion for a temporary restraining order in the Superior Court of DeKalb County, Georgia, claiming that disclosure of his name and HIV status would violate a Georgia statute that prohibits revealing confidential AIDS or HIV information, "disclosed or discovered within the patient-physician relationship."

Dr. Ostrow claimed that he disclosed his HIV-positive status to the Emergency Medical Technician that treated him at the scene of his arrest for purposes of treatment, and that the EMT's subsequent disclosure of this information to police violated the statute. According to Dr. Ostrow's motion, *Southern Voice's* intention to publish the information included in the police officer's report posed the threat of a further

violation of the statute. Dr. Ostrow claimed that an injunction was necessary because he had no remedy at law; he admitted he was precluded from recovering damages for the publication of information obtained from a public record. *Southern Voice* responded by alerting the court to the body of federal constitutional law and Georgia law that imposes an extremely high presumption against the issuance of prior restraints and affords strong constitutional protections to the publication of information lawfully obtained from public records.

After a July 15, 1996 hearing at which Senior Judge Clarence L. Peeler focused on potential harm to Dr. Ostrow's practice, not the legal propriety of a prior restraint, the Court entered a temporary restraining order precluding *Southern Voice* from publishing Dr. Ostrow's name until "further order of the Court." *Southern Voice* attempted to

have the order overturned by the federal District Court for the Northern District of Georgia, but Senior Judge Charles A. Moye, Jr. refused to intercede in the state court action, citing the abstention doctrine in *Younger v. Harris*.

Southern Voice moved for reconsideration in DeKalb County Superior Court. At the hearing, Presiding Judge Clarence F. Seeliger held that the Court's prior order was an unconstitutional prior restraint and denied plaintiff's motion for a restraining order. Following the ruling, a report of Dr. Ostrow's arrest and HIV status appeared not only in *Southern Voice*, but also in *The Atlanta Journal-Constitution*, and in American Lawyer's local legal newspaper, *The Daily Report*.

Tom Clyde is with DCS member firm Dow, Lohnes & Albertson in Atlanta, Georgia.

BOOK REVIEWERS CAN BREATHE EASIER

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serted that the *Moldea* standard should be adopted in New Jersey. Chief Judge Thompson noted that the reviewer tied his comments and opinions to specific examples in the text being reviewed. The court expressly adopted *Moldea's* holding that "when a reviewer offers a commentary that is tied to the work being reviewed and that is a supportable interpre-

tation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation." The court specifically held that the fact that the defendants were in the process of publishing their own competing book would not affect the result.

The court brushed away the other tort claims by ruling in accordance with existing precedent that the plaintiff

could not get around the constitutional protections for defamation by labeling its claims as something else.

Peter G. Banta is a partner with the DCS member firm Winne, Banta, Rizzi, Hetherington & Basralian, P.C. in Hackensack, New Jersey.

NEW YORK COURT BROADLY ACCORDS OPINION PROTECTION IN DISPUTE BETWEEN COMPETING TICKET SERVICES

By: Victor A. Kovner, Esq.
William S. Adams, Esq.

A recent decision by Justice Robert Lippmann of the New York Supreme Court held that statements contained in a letter to the New York City Public Advocate were protected opinion, and granted defendants' motion to dismiss libel and prima facie tort claims brought against a company and its outside counsel. *Ticketmaster-New York, Inc. v. MovieFone, Inc.*, Index No. 101789/96 (N.Y. Sup. Ct., N.Y. Co., Sept. 9, 1996). The decision reaffirms the importance of context in distinguishing opinion from fact under New York law, as most recently set forth by the Court of Appeals in *Brian v. Richardson*, 87 N.Y.2d 46 (1995).

In 1994 and early 1995, plaintiff Ticketmaster, the dominant provider of computerized ticketing services to stadiums, arenas and theaters in the United States, was the focus of intense scrutiny by the Antitrust Division of the Department of Justice, the New York State Attorney General and a Congressional subcommittee. At the same time, Ticketmaster was involved in various litigation against defendant MovieFone, a major provider of computerized ticketing services for movies across the country.

While all three investigations were still ongoing, and while the media were devoting extensive news coverage to them, MovieFone's in-house counsel sent a letter to Mark Green, the Public Advocate of New York City, enclosing a "dossier of news articles, analyses, and diagrams that will give you a comprehensive understanding of TicketMaster's business practices and actions from various perspectives." The letter went on to state that "I should for good order's sake point out that Sections A, B, and C1 are derived from interpretations of news articles; the articles themselves and/or the underlying facts need to be known to obtain a full and unbiased understanding."

Accompanying the letter were 68 pages of newspaper articles, diagrams and analyses, including, as Section A, a summary. The summary contained the lan-

guage in suit: "The Justice Dept. investigation is expected to lead to a consent decree or criminal indictment within two or three months" and "[a]ll of this leads to a possibility of an indictment of major corporation, its executives, and possibly its multi-billionaire owner." Plaintiff contended that the challenged statements falsely implied that Ticketmaster was the target of an explicitly criminal investigation by DOJ and that it had committed crimes for which it was going to be indicted.

Noting first New York's preference for pre-trial disposition of libel cases, the court proceeded to undertake the three-part fact/opinion analysis set forth in *Richardson*: whether the statements have a precise meaning which is readily understood; whether the statements are capable of being proven true or false, and -- most importantly in this case -- whether the full context of the communication signals the reader that the statement is opinion rather than fact.

First, the court observed that the recipient of the letter was the Public Advocate, a City-wide elected official charged with the responsibility of investigating allegations of wrongdoing, who had previously acted as New York City's Commissioner of Consumer Affairs. As such, the court found, he was a discerning reader who, by training and experience, could distinguish between allegations of opinion and expressions of fact.

Second, the court held that the letter signaled that it was opinion both through its language, which informed the Public Advocate that "the articles themselves

and/or the underlying facts need to be known to obtain a full and unbiased understanding", and through the fact that it was written by a competitor or aspiring competitor of the plaintiff.

Third, the court rejected plaintiff's attempt to recharacterize the statements -- which spoke of the "expectation" and "possibility" of an indictment -- as factual assertions that that DOJ investigation was an ongoing criminal investigation. It noted also that nothing in the nature of the investigations then occurring precluded the possibility that they might lead to an indictment of plaintiff.

Finally, the court held that, because the summary was accompanied by the newspaper articles and other documents upon which it was based, it would be readily understood by its reader as non-actionable conjecture, citing *Gross v. The New York Times Co.*, 82 N.Y.2d 146 (1993).

Plaintiff's prima facie tort claim was also dismissed, because "logic demands" that MovieFone was motivated to send the letter at least in part by its desire to derive a business advantage, and because the matter was of public concern. Because each of these motives obviously led to MovieFone's letter, plaintiffs could not prove the essential element that the statements be made "without any excuse or justification."

Victor A. Kovner and William S. Adams of DCS member firm Lankenau Kovner & Kurtz represented MovieFone and certain other defendants in this matter.

UPDATE: N.Y. COURT OF APPEALS REFUSES TO REVIEW *PROZERALIK V. CAP CITIES* \$11 MILLION LIBEL VERDICT

The New York State Court of Appeals, New York's highest court, on September 12, denied a motion by Capital Cities/ABC for leave to appeal the \$11 million defamation award in *Prozeralik v. Capital Cities Communications Inc. Prozeralik v. Capital Cities Communications, Inc.*, 1995 WL 761418

(N.Y.A.D. 4th Dept., Dec. 22, 1995) (*Prozeralik II*).

The libel suit was brought against a Buffalo television station, formerly owned by Capital Cities, by Niagara Falls restaurateur John Prozeralik, mistakenly identified by the broadcaster as

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SUDANESE NEWSPAPER SUIT DISMISSED: NO DEFAMATORY MEANING

Finding the statements at issue were not defamatory, the New York Appellate Division granted defendants' motion to dismiss reversing the trial court, in *Alfajr Printing and Publishing Co. v. Mortimer Zuckerman*. *Alfajr Printing and Publishing Co. v. Mortimer Zuckerman*, N.Y.L.J., Aug. 30, 1996 at 23 (N.Y.A.D., 2d Dept., Aug. 29, 1996)

El Fajr, a newspaper servicing the Sudanese community, brought a libel action against the *Daily News* over a newspaper report stating that "[v]ideo tapes and newspapers, like the Sudanese monthly, *El Fajr* publicize Abdel-Rahman's [a militant Islamic fundamentalist] appeals for action against the U.S., which he refers to as a 'den of evil fornication.'" *El Fajr* argued that the *Daily News* article implied that the plaintiffs allowed an "alleged militant activist with close ties to alleged radical terrorists accused of heinous acts, to use the newspaper to promote their agenda."

Defendants argued that to "publicize" meant to "publish," not to

"support." The appellate court agreed finding plaintiffs' views were a strained interpretation of the language in context.

Judges Copertino and Friedmann dissented and voted to affirm the trial court's denial of the defendants' motion to dismiss.

Judge Copertino argued that the word "publicize" has several meanings in the dictionary. Citing Webster's Third New International Dictionary, the judge pointed out that the word can be defined not only as objective dissemination of information but also as paid advertising or promotion. In the article in question, the defendant also referred to videotapes which were presumably one-sided vehicles for the terrorists' propaganda and promotion. According to the dissent, in this context the word "publicize" can be reasonably interpreted to imply that the plaintiffs supported Abdel-Raman's terrorist report. On this ground, the dissent concluded that the *Daily News* article is reasonably susceptible of a defamatory meaning.

UPDATE:

N.Y. COURT OF APPEALS REFUSES TO REVIEW \$11 MILLION VERDICT

(Continued from page 7)

the victim of an organized crime beating. (See *LDRC LibelLetter*, November 1994, at p. 4). The jury returning a verdict on November 10, 1994, found CapCities liable for defaming the plaintiff and awarded him \$11 million in compensatory damages and, after deliberations, \$500,000 in punitive damages. The \$11 million award included \$6 million for loss of reputation, \$3.5 million for emotional and physical injury, and \$1.5 million for out-of-pocket losses.

On appeal, the New York Appellate Division affirmed an \$11 million compensatory damages award, stating that the award did not "deviate materially from what would be reasonable compensation." *Prozeralik II*, 1995 WL at *1. The court, however, vacated the \$500,000 punitive damages award, finding that the evidence was "insufficient to establish that the false statements concerning plaintiff were made 'out of hatred, ill will, spite, criminal mental state or that traditionally required variety of common law malice.'" *Prozeralik II*, 1995 WL at *1, citing *Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 486 (N.Y.Ct.App. 1993) (*Prozeralik I*).

This was the second trial in this case. The first trial resulted in an \$18.5 million jury verdict which was remitted by the trial judge to \$15.4 million, affirmed by the Appellate Division, but subsequently reversed and remanded by the New York Court of Appeals based upon an error in instructing the jury on the issue of falsity. (See *LDRC LibelLetter*, January 1996, at p. 8).

NEW YORK COURT AFFIRMS "SINGLE PUBLICATION" RULE

In *Niess v. Business Week*, (N.Y. Sup. Ct. Queens. Co. 7/10/96), No. 015721/95, Justice O'Donoghue of the New York Supreme Court, Queen's County, granted defendants' motion for summary judgment based on New York's one year statute of limitations for libel actions.

At issue in this libel action was a quote that had appeared in the August 1, 1994 issue of *Business Week* in an article containing plaintiff's allegations of improper securities trading by her former employer, Ray Dirks Research. The alleged libel was a statement by Raymond L. Dirks that plaintiff was "a sick person mentally." The *Business Week* issue containing this statement was available for sale on newsstands and newsracks on July 25, 1994 and mailed to subscribers on July 21, 1994. Plaintiff commenced her defamation action on July 28, 1995, just seven days short of the expiration of the New York's one-year statute of limita-

tions for libel actions. (*New York C.P.L.R.* Section 215 (3).)

On motion for summary judgment, defendants, invoking the "single publication" rule argued that the one year statute of limitations for libel actions accrued on the date the publication was first released for sale and was not, as plaintiff argued, extended by subsequent distribution of the magazine. See e.g., *Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 126, 81 N.E. 2d 45, 49 (1948); *Love v. William Morrow & Co., Inc.*, 193 A.D. 2d 586, 589, 597 N.Y.S. 424, 427 (2d. Dept. 1993). Plaintiff, in a two-page affidavit which cited no law, invoked the "republication" rule, arguing that the one year statute of limitations ran anew each and every time the magazine was published.

In a two page order, Justice O'Donoghue summarily granted summary judgment in favor of *Business Week* based on the statute of limitations.

UPDATES

1. *The National Basketball Association v. Motorola, Inc., d/b/a Sports Trax, 96-7975 (S.D.N.Y.)*

In last month's *LDRC LibelLetter*, we reported on the decision by Judge Preska of the United States District Court for the Southern District of New York finding that the defendants, who distribute periodic game scores, time remaining and other such information from NBA games via hand-held pagers on a during-the-game basis, had violated New York law on misappropriation. The defendants have obtained an expedited appeal from the Second Circuit. Argument is currently scheduled for the week of October 21. The NBA has filed a cross-appeal from Judge Preska's dismissal of its unfair competition and Lanham Act claims. Apparently, the NBA did not seek to appeal Judge Preska's rejection of its copyright and Communications Act claims.

Judge Preska entered a Judgment for Permanent Injunction against defendants-Motorola and STATS Inc. on August 7, amended on September 3. The injunction bars the defendants from reporting through Motorola's SPORTSTRAX pager any scores, statistics, information or data about NBA basketball games while they are in progress without the express written authorization of the NBA or such other entity as may be licensed by the NBA to license that information for commercial purposes. The statistics that the defendants distributed to their subscribers had been derived from public broadcasts of the games watched and reported on by defendants.

America On Line, which has a STATS site on its system, filed a declaratory judgment action against the NBA in August in the Eastern District of Virginia. Judge Preska subsequently extended her judgment to bar distribution of scores and statistics by defendants and those in concert with them, seemingly trying to sweep AOL in to the judgment and the permanent injunction.

On motion by the defendants, Judge Preska stayed the permanent injunction pending the outcome of the appeal.

CALIFORNIA ANTI-SLAPP STATUTE NARROWLY CONSTRUED

In *Xi Zhao v. Wong*, No. A068903; (8/20/96) 96 Daily Journal D.A.R. 10149, the California Court of Appeal, First Appellate District, Division One, in San Francisco, reversed the lower court's dismissal of a slander action under California's Anti-SLAPP statute based upon a disturbingly narrow construction of the statute's applicability.

What—or Who—Killed Tai Kin Wong?

At the age of 44, Tai Kin Wong, a molecular biologist, suddenly died. The Alameda County Coroner's office described the cause of death as "undetermined" with "possible suspicious circumstances." Further official investigation ceased, however, because the Coroner's Office found that continued testing for exotic poisons, apparently a

probable cause of the death, was proving to be a "needle in a haystack"

However, the defendant, Tai Kin Wong's brother Daniel, had his own suspicions, which he verbally shared with family members and allegedly during off-the-record conversations with a reporter.

Before his mysterious death, Tai Kin Wong had been romantically linked and business partners with the plaintiff, Xi Zhao, also a molecular biologist. Having conveniently found what appeared to be a holographic will in her favor, the plaintiff filed a petition in probate, which, in turn, was successfully contested by the deceased's father. Defendant was not a party to the will contest.

(Continued on page 10)

2. CALIFORNIA CRIMINAL LIBEL LAW "DEAD"

*May Rise Again

As reported in the May and July 1996 *LDRC LibelLetter*, California State Senator Charles Calderon had introduced and, with the help of testimony by celebrities Steven Seagal and Paul Reiser, revived in the Senate a proposed criminal libel bill.

The bill, S.B. 1583, would have made it a misdemeanor, to make "a maliciously false defamatory statement of fact to another person with knowledge that the other person may, for financial profit, publish, broadcast or otherwise disseminate the malicious false defamatory statement of fact to the general public." Violation of the act would have resulted in up to one year in jail and \$10,000 in fines. Also subject to the act would have been publications which have a practice of publishing "malicious false defamatory statements of fact."

Although the bill survived a vote of the Assembly Judiciary Committee, the bill did not pass the full legislature. Having failed California's requirement that a bill be signed within two years of introduction, the bill has been pronounced "dead."

According to Senator Calderon's office, the Senator plans to re-introduce the bill at the legislature's next session.

3. REARGUMENT GRANTED IN K-MART EMPLOYEE \$1.49 MILLION LIBEL CASE

As published in the previous issue of *LDRC LibelLetter*, the Superior Court of Pennsylvania had affirmed an award against Kmart for \$1.4 million in punitive damages and \$90,000 in compensatory damages in a defamation suit brought by a former employee in *Rue v. Kmart Corp.*, No 025351, 1996 Pa. Super. LEXIS 1954 (Pa. Super. Ct. June 12, 1996). On August 22, 1996, however, K-mart's petition for reargument/reconsideration was granted, and the decision of the Court to award damages was withdrawn.

The case arose after K-mart had held a meeting with Rue's former co-workers who were told that Rue was fired for eating and concealing a bag of potato chips. After an unemployment compensation referee found this to be untrue, Rue sued for defamation.

CAL. ANTI-SLAPP STATUTE

(Continued from page 9)

The San Jose Mercury News some time thereafter ran a front page article entitled "What--or Who--Killed Tai-Kin Wong?" The defendant was not identified as a source, although he was interviewed for the article. The article raised the suspicions that plaintiff had the capability, opportunity, and motive for the murder.

The complaint alleged that the defendant had slandered the plaintiff by falsely accusing her of murdering Tai Kin Wong and forging the holographic will.

In granting the defendant's motion to strike the complaint pursuant to the California Anti-SLAPP provision, California Code of Civil Procedure 425.16(b), the lower court reasoned that "if you make a comment about a judicial proceeding, that's an act in furtherance of a person's right of petition [or] free speech."

The Statute

Section (b) of California's Anti-SLAPP statute authorizes a special motion to strike the complaint of an action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue..."

Section (e) of the statute, the portion of the statute containing definitions, defines "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue."

Section (e) defined the phrase to "include": (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceedings authorized by law; or (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

A Narrow View

In an analysis that defies summary, the court reduces the application of the statute to a "narrow sphere of activity" essentially involving exercise of the right of petition with regard to matters of public concern. The court effectively reads protection of "free speech" rights out of the statute except to the narrowest extent that they relate to petition rights. Moreover, it then reads in an additional requirement that the defendant's speech concern a "public issue" distinctly related to self-governing issues. The term to be defined becomes the defining term.

The court finds that (e)(1) requires that the statement at issue be submitted to or presented in the proceedings identified in (e)(1). Subsection (e)(3) is to be defined as limited to "public forums" as that term has been defined in the First Amendment context, a definition that would not include statements to the press. The court correctly notes that (e)(2) has been the most litigated of the definitional phrases and the one that is most likely to apply to the case at hand.

The court rejects outright the conclusion reached by other courts in California -- and most specifically, *Averill v. Superior Court*, 42 Cal.App.4th 1170 (1996) (See, *LDRC LibelLetter*, June 1996 at p. 9) -- which read the statute to have a broad application. To the contrary, this court does its best to limit application of the statute to what it perceives as the traditional SLAPP paradigm: the developer suing the community association in order to prevent or dissuade citizens from participating in local zoning hearings against the developer's interests.

In offering support for its narrow view of the statute, the court states that, particularly in cases where actual malice is required and discovery is ordinarily necessary in order to prove defendant's state of mind, the Anti-SLAPP expedited motion to strike, which suspends discovery rights, might violate a plaintiff's due process rights. Surely, the court reasons, the legislature would have not intended the statute to apply to a broad category of cases and thus exacerbate this constitutional dilemma (although the court acknowledges that

the statute specifically permits the trial court to allow limited discovery, for good cause shown, prior to ruling on an anti-SLAPP motion).

The appellate court rules that the defendant's statements in the case at hand were not made at a proceeding identified in Section (e)(1) of the statute, and, as they were made in private to a reporter, not in a public forum within (e)(3).

Not Public Issues

While defendant sought to bring the statements within (e)(2) -- the interview, he argued, was made in connection with the will contest and the coroner's investigation -- the court refused to allow that the matters were "public issues." Not every lawsuit, the court argued, relates to a public issue. That the death of Tai-Kin Wong was newsworthy, involving an unsolved murder and indeterminate coroner's inquiry, and that the lawsuit was a challenge to a discovered, holographic will leaving all to one who might well be a murder suspect, did not bring it within the statute. It was all "intriguing" and "newsworthy," but did not involve a "public issue" in the sense that we interpret the term," the court holds.

The court rejects as well any possible connection that the interview might have with influencing the will contest, which was on appeal at the time of the interview. Defendant was not a party and, the court concludes, an interview would not be regarded as a tactic to be protected. And while it might have a link with the coroner's investigation and defendant's efforts to influence that proceeding, the defendant's declaration in support of the motion was rejected by the panel as too vague on this point.

In sum, the court found that the Anti-SLAPP statute was intended to provide "an extraordinary remedy for a narrowly defined category of litigation" -- this case not among them.

This decision clearly represents a split within the California circuits. While it is a non-media case, the media is and should be following the matter with distinct interest.

PREPONDERANCE ON FALSITY IN DC

By Stuart F. Pierson

The District of Columbia Court of Appeals has adopted the preponderance of evidence standard as the minimum required in public concern cases where a private figure plaintiff has proved constitutional malice with convincing clarity. *Ayala v. Washington*, ___ A.2d 1488, 124 D.W.L.R. 1629 (D.C., July 25, 1996). Although this was a non-media case, the court asserted in a footnote, citing one of its earlier non-media cases and Justice Brennan's dissent in *Dun & Bradstreet*, that, at least in D.C., whether the defendant is media or non-media's constitutionally irrelevant.

Plaintiff-Ayala was a pilot for U.S. Air. After a brief romantic affair with him, defendant-Washington wrote letters to U.S. Air and the F.A.A. accusing him of poor conduct including the use of marijuana off duty. When the F.A.A. informed her it had investigated and concluded the allegations were unfounded, Washington wrote the agency again contending it was favoring Ayala because he was a man occupying a more important position.

Ayala sued for defamation, seeking compensatory and punitive damages. The case went to trial. At opening, the trial court precluded Ayala from arguing for punitive damages or introducing net worth and attorneys' fees evidence unless the jury found liability with adequate certainty. Because of disagreement about the proper burden of proof, a special verdict form was submitted, on which the jury found that Ayala had proved constitutional malice by clear and convincing evidence, but had proved falsity and publication only by a preponderance of the evidence. Concluding that the jury was required to find falsity by clear and convincing evidence, the trial court granted Washington's post-verdict motion for judgment and denied Ayala's motion to present evidence supporting punitive damages.

The Court of Appeals reversed and remanded for trial on damages. Observing that there are four elements to consider — "the kind of speech, the facts that

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EIGHTH CIRCUIT RULES STATUTORY DAMAGES DISCRETIONARY UNDER U.S. WIRETAP LAW

Newell Spears' package liquor store was robbed in April 1990. Suspecting an inside job, Newell installed a recording device on the phone line that the store and his adjacent residence shared. Calls were taped, if the machine was on and a blank tape was in the machine, from June 27 through August 13, 1990.

Newell never did catch the burglar, but the tapes did reveal one employee's adulterous affair. When Newell's wife Juanita made this information public, the employee and subsequently the authorities were tipped off as to Newell's surreptitious investigation, ultimately resulting in the seizure of the tapes by a United States deputy on September 3, 1990.

In January 1992, the discovered lovers, who by that time had divorced their respective spouses to marry each other, won a \$40,000 judgment against Newell and Juanita for violation of the 1986 Electronic Communications Privacy Act, 18 U.S.C. § 2510-2522. *Deal v. Spears*, 780 F.Supp. 618 (W.D.Ark, 1991), *aff'd*, 980 F.2d 1153 (8th Cir. 1992). Soon thereafter, seemingly everyone who may have called the store during the period Newell was recording filed similar claims and the Spears' faced the possibility of paying damages to nearly

thirty plaintiffs.

After eliminating the claims of several plaintiffs which were either time-barred or unproven, the district court granted summary judgment against Juanita Spears, as executrix of Newell's estate (Newell died in January 1995). The district court concluded, however, that it had discretion to decline to award statutory damages and denied such relief. *Reynolds v. Spears*, 857 F.Supp. 1341 (W.D.Ark. 1994), *aff'd*, 1996 WL 471414 (8th Cir.(Ark.)).

The plaintiffs appealed the decision arguing, among things, that the statutory damages provided for under 18 U.S.C. s. 2520(c)(2) are mandatory. The Eighth Circuit became the third federal circuit to address the issue.

Thus far, the Fourth and Seventh Circuits have split on the issue of whether the once mandatory damages were made discretionary by the 1986 Congressional amendments. Prior to 1986, § 2520 provided that "[a]ny person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall . . . be entitled to recover . . . actual damages but not less than liquidated damages computed at the rate of \$100 a day

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KENTUCKY COURT DISMISSES "INSIDE EDITION'S" DEFAMATION CLAIM

In *Kevin D. Stith v. Cosmos Broadcasting, Inc. No. 96 CI 00309* (Jefferson Circuit Court Div. Division Thirteen, Louisville, Kentucky 9/3/96), a Kentucky trial court dismissed in full a complaint brought by the plaintiff, an amateur horse trainer, against corporate defendants Cosmos Broadcasting, King World and NBC, as well as two individuals involved in the production of an *Inside Edition's* expose, aired on November 23, 1993, on abuses in horse training. The plaintiff, who was taped by hidden camera at a horse show site, alleged invasion of privacy, as well as defamation, false light and a myriad of other claims.

Defendants moved to dismiss for lack of personal jurisdiction over the individual defendants, as well as failure to state a

claim upon which relief can be granted.

Personal Jurisdiction

The two individual defendants, both non-residents, claimed they had no contact with Kentucky and therefore were not subject to its jurisdiction.

Denying the motion to dismiss for lack of personal jurisdiction, court held that because the individual defendants, "participated in the making of the television show and the television show aired in Kentucky" (Slip op. at 5), if it was determined that plaintiff's substantive claims could withstand a motion to dismiss, Kentucky has sufficient contacts with the individual defendants to support jurisdiction.

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PREPONDERANCE OF FALSITY

(Continued from page 11)

must be proven, the certainty of proof required, and the type of damages" — the court concluded that, while Ayala was a private figure, Washington's letters to the F.A.A. were of public concern, as they fell within the category of speech relating to "the conduct of government or the structure of society or any social issue."

The court's reasoning on the "certainty of proof" issue is somewhat confused. Despite the Supreme Court's explicit statement that it was not deciding the quantity of proof required, the court felt compelled by *Hepps* to reverse, interpreting it as holding that a private figure

plaintiff in a public concern case may recover compensatory damages on proving falsity merely by a preponderance of the evidence.

On punitive damages, however, feeling it was deciding an issue of first impression, the court held that such a plaintiff must prove constitutional malice by clear and convincing evidence but need prove falsity only by a preponderance of the evidence. It reasoned that there is adequate constitutional protection against punitive damages for such public concern speech where only actual malice must be proved by clear and convincing evidence.

"The reprehensible conduct that is sought to be punished and deterred

is speaking with constitutional malice. . . . Once a defendant has done that, it is mere fortuity if what was said should happen to turn out to be true. What is punished is the creation of an unwarranted risk, not the actual harm that results from the risk. [citing *TXO*]"

The Court of Appeals closed with a reiteration of the D.C. rule that, if there appears any "basis" for compensatory damages, punitive damages may be awarded even with nominal compensatories.

Stuart F. Pierson is with DCS member firm Davis Wright Tremaine in Washington, D.C.

WIRETAPPING CASE

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for each day of violation or \$1,000, whichever is higher." 18 U.S.C. § 2520 (2)(a) (1982) (emphasis added). After the amendment of the statute in 1986, § 2520 read, "the court may assess as damages whichever is the greater of — (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000." 18 U.S.C. s. 2520 (c)(2) (emphasis added).

In *Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1990), the Seventh Circuit held that statutory damages were not within the discretion of the district court, reasoning that because the legislative history was silent regarding the language change, it would not "infer" that Congress intended to make the award discretionary. Alternately,

in *Nalley v. Nalley*, 53 F.3d 649 (4th Cir. 1995), the Fourth Circuit held that the language change "from the mandatory to the permissive verb form indicates that Congress intended to confer upon district courts the discretion to decline to award damages in applying § 2520 (c)(2)." See *LDRC LibelLetter*, June 1995 at p. 7.

The Eighth Circuit sided with the court in *Nalley* holding that the district court did not err in holding that it had discretion to decline to award statutory damages. The court found the "crucial fact" to be Congress' clear change of the verb "shall" to "may" in the 1986 amendments. Unlike the Seventh Circuit, the Eighth Circuit did not view the silence of the legislative history regarding the change as a barrier to its application. As the court points out, using the increase in damages from \$1,000 to \$10,000 as an example, "no one suggests that, because there is no legislative

history about the change, the \$10,000 is, for example, a typographical error." *Reynolds v. Spears*, 1996 WL at *6.

The court went on to conclude that there are rational explanations for the change, thinking "it logical that Congress chose to make the award of such damages discretionary, given the potential of the law to bring financial ruin to persons of modest means, even in cases of trivial transgressions." 1996 WL at *7. [The court continued by noting that Newell had a legitimate business interest in recording the conversations both because of the burglary and because of concern over the personal use of the business telephone by employees, the fact that Newell was advised by a law enforcement officer that tapping one's own telephone was not a problem, and the lack of sophistication in Newell's equipment; facts which according to the court, "merit consideration in the discretionary award of statutory damages." 1996 WL at *8.]

Kentucky

(Continued from page 11)

Defamation and False Light Claims

Plaintiff was shown explaining the legal use of chains on horses, a practice that, though potentially shocking to some, was, as stated by the on-air reporter, perfectly legal in Kentucky. Practices that constituted abuse, illegal activities by others in the industry, were reported as well. The plaintiff claimed that the overall context of the segment de-

famed him and placed him in a false light.

The shocking visual images of other trainers notwithstanding, the court, relying primarily on the legality of the practice, dismissed the defamation and false light claims because the overall content of the segment did not demonstrate or imply that plaintiff had engaged in an illegal practice.

Intrusion, Invasion of Privacy and Trespass Claims

Plaintiff also claimed intrusion, invasion of privacy and trespass based, among

other things, on the use of a hidden camera. In dismissing these claims, the court found that plaintiff had no reasonable expectation of privacy at the show grounds; he had *not* indicated that his statements were intended to be private; he was well-known within the industry; filming by the hidden camera had occurred at the site where the horse were shown; and, moreover, plaintiff, a mere "invitee" to the grounds, lacked standing to support a claim of trespass.

IMPACT OF AMENDED FEDERAL DISCOVERY RULES IN LIBEL & PRIVACY LITIGATION

By Nicole A. Wong

In 1993, the federal discovery rules were amended to "slay the twin dragons of cost and delay," by replacing the adversarial discovery process with one of mutual disclosure. *In re Lotus Dev. Corp. Securities Litigation*, 875 F. Supp. 48, 50 (D. Mass. 1995). But in the unique context of libel and privacy suits — and their attendant First Amendment concerns — media defendants may be the unintended victims of the new rules.

Beyond the debate of whether the amended rules will actually save either time or money, the media's principal concern is that coerced "voluntary" discovery undermines the existing constitutional limits on litigation against it. Early indications that the amendments unfairly advantage libel or privacy plaintiffs raise important strategic questions about if and when a media defendant should remove a case to federal court, and what tactics to follow if already there.

The 1993 amendments to Federal Rule of Civil Procedure 26 require an initial stay of formal discovery, early mandatory disclosure of "information relevant to disputed facts alleged with particularity in the pleadings," and limits on formal discovery. The salutary purpose of the amendments is to "accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." Notes of the Advisory Committee on Rules, 1993 Amendment to Fed. R. Civ. Proc. 26.

While it is still early to see the full impact of the amendments, a 1996 survey of media defense practitioners suggests the new rules do not help defense counsel, but may favor the plaintiffs in libel and privacy suits. See *LDRC Defense Counsel Section Survey* above. As one survey respondent wrote: "I have always felt that the changes impose an enormous burden upon the defendant, especially at

RULE 26 SURVEY RESULTS

LDRC member firms Steinhart & Falconer (San Francisco) and Willcox & Savage (Norfolk, VA) have recently surveyed DCS members around the country regarding the impact of amended federal discovery rules in libel and privacy cases. Of the 45 respondents to the survey, 24 (53%) had at least some experience with the changes, and roughly half (14) of those had dealt with the new rules specifically within the libel and/or privacy context.

In a somewhat surprising result, the survey reveals that of the latter group, most attorneys (nearly 80%) believe that the new Rule 26 favors neither plaintiff nor defendant. However, none of those surveyed believe that the defendant is favored, and two believe that the plaintiff is favored. Moreover, more than half had changed their litigation strategy in response to the changes — most commonly, seeking dismissal, summary judgment or settlement more often. Other less common strategic changes in-

cluded seeking more protective orders and seeking removal less often.

Of the early disclosures produced in response to the new 26(a)(1), the most common were nonconfidential sources with seven, followed by third-party documents supporting statements at issue with six, reporter's notes with five, and plaintiff documents in reporter's possession with four. Of the early disclosures received, the most common related to falsity with six, followed by evidence of economic damages and evidence of defendant's negligence or actual malice with five respectively, and evidence of reputational damages and medical/emotional/psychiatric treatment with three each.

Four of the attorneys surveyed have sought protective orders to avoid the disclosure of witnesses or documents. Two of those were successful each time they sought an order, while the others were "frequently" successful.

the hands of a knowledgeable plaintiffs' attorney who knows how to plead his case to the advantage of them."

Indeed, there is little sense that either the time or expense of discovery has been brought under control, but rather that "a further layer of discovery" has been added. See Statement Adopting Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507, 510 (1993) (Scalia, J., dissenting); Belleau, A., "A Critique of the 'New' Discovery Rules," 42 Fed. Law. 6, 36 (July 1995). Despite the advisory committee's empty admonition to "not indulge in gamesmanship," the amendments provide new fodder for litigation over what information is "relevant," what facts are "disputed" and pleaded with "particularity," and what must therefore be disclosed. And so, the specter of "in terrorem discovery" remains.

Compounding the uncertainty in the amendments themselves, the new rules are not uniformly applied throughout the federal districts. Indeed, less than half of the 94 districts have adopted the early disclosure requirements, and only two-

thirds have adopted the pre-trial disclosures or early meet and confer requirements. Steinstra, D., "Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26," Federal Judicial Center (Mar. 1995).

The uncertainty and potential ancillary litigation caused by the amendments threatens the well-established First Amendment principle that "suits against the media should be controlled so as to minimize their adverse impact upon press freedom." *McBride v. Merrell Dow & Pharm. Inc.*, 717 F.2d 1460, 1466 (D.C. Cir. 1983) (limiting initial discovery in a libel suit to questions that may support summary judgment); *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("even fear of the expense involved in [a suit's] defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone'").

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IMPACT OF AMENDED FEDERAL DISCOVERY RULES IN LIBEL & PRIVACY LITIGATION

(Continued from page 13)

The Libel/Privacy Plaintiff's Advantage

Any benefit from the amendments will most likely advantage the less prepared party -- usually, the plaintiff. Notice pleading in conjunction with early mandatory disclosures permit the plaintiff to drag a defendant into unmeritorious, but nonetheless expensive, litigation. Moreover, the effect of the "mutual" disclosure requirements actually relieves the plaintiff of requesting discovery by shifting the burden to the defendant to disclose "relevant" information. At the same time, the initial stay on formal discovery stymies defendant's efforts to take control of the case and get the necessary material to make an early motion. The plaintiff thus reaps the benefit of defendant's work, and may gain enough information (which plaintiff may not have obtained on his or her own) to either avoid summary judgment or at least leverage an inflated settlement.

The Media Defendant's Position

In contrast, the new front-loaded discovery scheme offers little advantage for the media defendant, for several reasons.

First, the new rules do not substantially advance the media defendant's discovery because the basic information disclosed by the plaintiff is rarely helpful. The survey of the LDRC Defense Counsel Section reported that the most common information produced under Rule 26(a)(1) is plaintiff's claimed evidence of falsity or fault which is generally either self-serving or already known to the defendant. Little if any information on reputational damages is provided at this stage.

Second, the initial stay on formal discovery delays defendant's ability to get third party discovery or to promptly take plaintiff's deposition, valuable tools to narrow plaintiff's complaint and/or seek an early summary judgment motion. In addition, defendant loses the

strategic opportunity of using the plaintiff's early deposition to educate plaintiff -- and his or her counsel -- of the weaknesses in the case and the potentially unfavorable discovery into plaintiff's life that lies ahead.

Third, although the speedy resolution of the suit is the primary objective, a media defendant must be cautious not to compromise its confidential sources in the process. The new rules force the defendant to make critical decisions at a very early stage of litigation about whether to seek a protective order limiting discovery into this aspect of its editorial processes. If the defendant fails to disclose these sources within the timeframe required by Rule 26(a)(1), it may be barred from introducing their testimony at trial if the original nondisclosure was without "substantial justification" -- even though the sources may later be willing to come forward and testify. Fed. R. Civ. Proc. 37(c).

Finally, because libel and privacy plaintiffs occasionally lose interest in a suit after having "vindicated" themselves by filing a complaint, some defendants prefer not to initiate discovery but instead wait for the case to die of its own accord. Obviously, the new rules preclude this "wait and see" strategy by forcing the defendant to spend time and money in early discovery. The 1993 amendments potentially thwart all of these defense strategies.

Not surprisingly, the survey of the Defense Counsel Section indicates that media defendants under the amended rules are seeking motions to dismiss and summary judgment more often. Some defendants also find cases are settling earlier. Moreover, the survey reports these defendants are more frequently seeking protective orders to prevent discovery into sources or the deposition of editors and reporters.

While the impact of the 1993 amendments is still uncertain, the following provides some guidelines for media defendants considering removal to or from federal court.

Check Local Rules

First and foremost, check your local rules to find out if the amended discovery rules have been adopted. Many local districts have adopted some of the amendments but not others, or have adopted similar "rocket docket" rules under the Civil Justice Reform Act, the legislative precursor to the 1993 amendments.

Evaluate Your Case

Given the significant changes to the discovery obligations that will be imposed in federal court, carefully weigh the pros and cons under these amendments of removing a particular case to federal court. What information, if any, can you likely obtain in early discovery that will help dispose of the case on an early motion? Additionally, what opportunities will you have to forcefully educate both the plaintiff and his or her counsel about the weaknesses in their case? On the other hand, what information do you have that is unfavorable or must be protected from discovery?

Confidential Sources and Information

Confidential sources present one of the most difficult early disclosure problems under Rule 26(a)(1). Confidential background sources are even more problematic because their existence -- not disclosed in the article or broadcast -- may be a fact the defendant is hoping plaintiff will not learn.

Make the earliest possible determination of whether sources promised confidentiality will come forward or whether the client nevertheless will choose to disclose them. If the decision is made to withhold the identity or existence of a source, assert an objection in the required disclosure statement based on the First Amendment qualified privilege or state counterparts (including shield laws, if applicable). Make the objection as generic as possible, e.g., "the following are individuals likely to have

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IMPACT OF AMENDED FEDERAL DISCOVERY RULES IN LIBEL & PRIVACY LITIGATION

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fidential sources, if any " As mentioned above, to guard against the risk of proof preclusion at trial, consider a stipulation or motion for protective order for discovery into the editorial process.

Motions to Dismiss or for Summary Judgment

The early use of motions to dismiss or for summary judgment is extremely important in cases where there is potentially damaging evidence or confidential sources that may have to be "voluntarily" disclosed if the case is not promptly disposed of on legal grounds. In federal court, it may be necessary to seek a stipulation or order postponing the Rule 26-mandated disclosures while the defendant pursues an early dispositive motion. But see *In re Lotus*, 875 F. Supp. at 53 (denying stay of Rule 26 automatic disclosures pending decision on defendant's motion to dismiss).

The 1993 amendments plainly put pressure on both sides of a libel or privacy suit to make their case early. Unfortunately, experience suggests it is the defendants more often than the plaintiffs who comply with the rules.

Ms. Wong practices media law at the San Francisco firm of Steinhart & Falconer LLP. We want to thank Jim Brelsford for his input.

"GAG ORDER OF THE CENTURY" EASED IN O.J. CASE

Finding two provisions of the trial court's wide-reaching "gag order" in the O.J. Simpson civil suit trial, vague and overbroad, the California Court of Appeal has stayed their operation until further notice. The appellate court also eased restrictions on press access, permitting access to a courtroom artist and providing for a closed circuit live audio feed, which is not to be recorded or broadcast, to the pressroom, so that members of the press could report on the proceedings. *Cable News Network, Inc., et al., v. The Superior Court of Los Angeles County*, No. B104967 (Cal. Ct. App., 2d App. Dist., Sept. 16, 1996)

The appellate review of the order came at the request of 14 news organizations as well as Fred Goldman, a real party in interest, who were dissatisfied with the trial court's second attempt at keeping the lid on press access and coverage of the wrongful death action. Upon reviewing its first order, which prohibited "all parties, attorneys and witnesses under control of counsel," from "discuss[ing] anything connected with this trial with the media or in public

places," *slip op.* at 2, the trial court eased the restrictions somewhat by stating:

No counsel, party, or witness under control of counsel may discuss or state any opinions concerning evaluation of evidence, including any witness, whether called to testify or not, whether offered, received, excluded, purported to exist but not tendered or not available; the jury or any juror; the court, including the trial proceedings; or whether the defendant did or did not commit the homicides, outside of the trial proceedings with the media or in public places within hearing of the public." *Slip op.* at 5.

The second gag order was also extended to apply to the "employees and agents or representatives" of the attorneys. *Slip op.* at 5.

Judge Fujisaki justified the order by stating that "electronic coverage of the criminal trial had 'diverted and dis-

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CALIFORNIA COURT OF APPEAL LIFTS CLOSURE ORDER IN EASTWOOD CASE

Finding a First Amendment right of public and press access to civil trials, a California Court of Appeal has lifted a closure order by the Los Angeles County Superior Court in *Locke v. Eastwood* finding it overbroad. *NBC Subsidiary (KNBC-TV), Inc., et al., v. The Superior Court of Los Angeles County*, No. B105327 (Cal. Ct. App., 2d App. Dist., Sept. 17, 1996). The trial court's order had excluded both the press and the public from the courtroom at all times when the jury was not present and delayed disclosure of transcripts of every closed hearing until after the trial.

In the underlying case, actress Sondra Locke is suing actor Clint Eastwood for deceit, intentional interference with prospective economic advantage, and breach of fiduciary duty arising out of

Eastwood's alleged promises to assist Locke in the development of certain motion pictures. Given the high likelihood of public and media interest in the case the trial judge made various case management orders concerning media coverage of the trial including limiting access of print and other journalists to the parties and to the courtroom.

Facing challenge by media organizations, the trial court held a hearing on the closure order on September 12. The court then justified its order by noting that the jury would not be sequestered (although the court stated it would consider sequestration of the jury if the journalists would pay the costs) and stating the closure was necessary "to prevent the jury from hearing information

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"GAG ORDER OF THE CENTURY" EASED IN O.J. CASE

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tracted the participants,' presenting a 'circus atmosphere' that 'detracted from the integrity of the trial process and the dignity of the courtroom.'" *Slip op.* at 3. He continued to note that as sequestration of the jury was "unreasonable" in a long civil trial, "[t]he trial process requires that the evidence be presented to the jury, undistorted by these extraneous influences. The intensity of media activity in this civil trial thus far strongly supports this court's belief that history will repeat itself unless it acts to prevent it." *Slip op.* at 3.

While siding with Judge Fujisaki on the proposition that given the probability of prejudicial publicity, "the trial courts must take strong measures to ensure that the balance is never weighed against the accused," the appellate court tempered the judge's strong words with the understanding that "[a] responsible press has always been regarded as the handmaiden of effective judicial administration." *Slip op.* at 7, citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Given the history of the case, the fact that the civil jury will not be sequestered, and that various other means of damage control were unavailable, the appellate court agreed, however, that "a review of the pretrial record demon-

strates that the court was justified in concluding there would be intense and pervasive publicity concerning the case." *Slip op.* at 11. Quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), the court wrote, "the judge 'could . . . reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pretrial could impinge upon the defendant's right to a fair trial." His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.'" *Slip op.* at 11, quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 562-63 (1976).

Thus, the appellate court agreed that Judge Fujisaki had "adequate justification" for the order, but limited that approval "to the extent the order is clear and confined." *Slip op.* at 11. The court then went on to find that two provisions "present[ed] grave constitutional doubt as to their validity." *Slip op.* at 14.

First, the court found the phrase "witnesses under control of counsel," vague as to whom it applied. As the court noted there was no distinction in

the provision between those witnesses called by subpoena and those retained and compensated as experts. *Slip op.* at 14.

Next, the court found the clause prohibiting the expression of opinion about "the court, including the trial proceedings," to be "obviously overbroad." *Slip op.* at 15. The court wrote that it "doubt[s] that the court intends to proscribe every expression that includes a statement of opinion that bears on the court or its processes. But, literally read, that appears to be the reach of the provision." *Slip op.* at 15. As an example of the problem the appellate court pointed out that the prohibition, literally read, "would reach even an estimate whether examination of a particular witness would go forward, or conclude, by a particular time or day." *Slip op.* at 15.

In addition, the appellate court also eased restrictions on media access to the trial. The court ordered that a courtroom artist be granted access to the proceedings, and also provided for a live audio feed to the pressroom, to give the media the ability to follow the proceedings. The feed, however, cannot be recorded and is not to be used for broadcast. The court denied, however, media attempts to obtain permission for electronic broadcast or still photography of the proceedings.

CALIFORNIA COURT OF APPEAL LIFTS CLOSURE ORDER IN EASTWOOD CASE

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regarding evidence that may not be presented to the jury or is not relevant to these proceedings." *Slip op.* at 5. The media organizations responded with an appeal to the California Court of Appeal.

Addressing the question of whether the public and the press have a First Amendment right to attend civil trials, the appellate court drew on historical tradition and First Amendment policy, to find that such a right does indeed exist. The court then went on to find that the facts in the *Locke* case did not permit the trial court to exclude the public and the press from all proceedings occurring

outside the presence of the jury.

Relying heavily on the U.S. Supreme Court decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), finding a public and press First Amendment right to attend criminal trials, the California Court of Appeal first drew upon the historical tradition of open trials to expand the right of access to civil trials. Tracing the history of open civil trials as far back as the Statute of Marlborough of 1267 up to U.S. Supreme Court dicta in *Richmond Newspapers*, the court concluded that historical tradition supports the notion that open civil trials were "engrafted onto the First Amendment." *Slip op.* at 6.

Next, the court called upon First Amendment policy to support its holding. Citing the policy considerations supporting open criminal trials listed in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Richmond Newspapers*, the court found that openness civil trials would serve the same ends. Namely, open civil trials would 1) ensure the free discussion of governmental affairs by an informed public; 2) "contribute[] to the fact-finding process by discouraging perjury;" and 3) eliminate the possibility of conducting civil matters in secrecy so that 4) "the public can determine

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TELEVANGELIST AND CHURCH LOSE TWO IN THE CIRCUITS

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The court based its decision on the reasons provided by the district court's opinion. In that decision, the district court relied at various points on issues of falsity, opinion, substantial truth and actual malice. But actual malice provided the touchstone as Judge Michael Burrage returned time and time again to the conclusion that Tilton simply did not show with convincing clarity that ABC knew or had serious doubts as to the truth of the report. *Tilton v. Capital Cities/ABC, Inc., et al.*, 23 Media L. Rep. 2057 (N.D. Okla. 1995), See *LDRS LibelLetter*, August 1995 at p. 11.

Fifth Circuit RICO Suit

In the Fifth Circuit, Tilton's church, the Word of Faith World Outreach Center Church, filed claims alleging that ABC had violated the RICO statute and also had conspired to deprive Tilton and his followers of their religious rights. The Court of Appeals affirmed the February 1995 dismissal of the suit which arose out of the same broadcasts that gave rise to Tilton's Tenth Circuit causes of action. *Word of Faith World Outreach Center Church v. Sawyer, et al.*, 90 F.3d 118 (5th Cir. 1996), See *LDRS LibelLetter*, April 1995 at p. 1.

In this instance, the Church alleged "that through a pattern of racketeering acts ABC and the other defendants sought to drive the Church out of business." *Id.* at 121. According to the plaintiff, "the alleged racketeering acts included interstate transportation of stolen computer disks; theft of donations, Church mail, and other Church property by certain defendants or by bank, mail-handling, or Church employees who had been persuaded to help the defendants; wire fraud in the form of false statements made during broadcasts; a scheme to deprive the Church, its bank, its mail-handling contractor, and its law firm of the honest services of its loyal employees; and obstruction of justice." *Id.* at 121.

In order to prove its claim, the Church must have sufficiently pled "a pattern of racketeering activity." According to the court, racketeering activity consists of "two or more predicate offenses, defined by the statute to include acts violating federal wire or mail fraud statutes." *Id.* at 122. Following the Supreme Court's decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), the court of appeals stated that the plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *Id.* at 122 (emphasis in original).

Citing three of the Circuit's own precedents the court then held that plaintiffs did not show a pattern of racketeering activity. Rather, the court held that the decisions in *In re Burzynski*, 989 F.2d 788 (5th Cir. 1993), (no threat of continuity where alleged predicate acts were part of the lawful defense of a lawsuit), *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453 (5th Cir. 1991), (no threat of repetition where alleged predicate acts were directed at only a single property interest), and *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241 (5th Cir. 1988), cert. denied 489 U.S. 1079 (1989), (no threat of continuity where alleged predicate acts were part of lawful corporate takeover), "make clear that where alleged RICO predicate acts are part and parcel of a single, otherwise lawful transaction, a 'pattern of racketeering activity' has not been shown." *Id.* at 123.

In this case, the court continued, "the alleged predicate acts occurred during the production and airing of Prime-Time broadcasts concerning Tilton and his Church. The alleged acts were all part of a single, lawful endeavor -- namely the production of television news reports concerning a particular subject." *Id.* at 123. The court pointed out, however, in a footnote, that the law of this circuit was different from that of some other circuits -- citing decisions from the Ninth, Seventh, and Sixth Circuits -- in which this case might have

withstood dismissal.

In the alternative, the Church also cited to newspaper reports and to several lawsuits against ABC, contending that "it is ABC's regular pattern of conducting business to use illegal means to further its TV production." *Id.* at 123. In answer, the court noted that in *Food Lion v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811, 819-20 (M.D.N.C. 1995), the district court also found a lack of continuity in dismissing the plaintiff's RICO claims. As the court pointed out, "pleading the mere existence of lawsuits is not the same as pleading the facts that demonstrate predicate illegal acts as the defendant's regular way of doing business." *Id.* at 123-24.

Although ABC argued that the district court decision could also be affirmed on the grounds that the Church did not plead either "predicate acts" or injury, the court chose not to reach these issues. The court continued to note, however, that by predicating its holding on RICO's pattern requirement, it should be evident that they did not accept ABC's "blanket contention" that a RICO claim can never arise from a television broadcast. *Id.* at 122, n.3.

As for the Church's attempt to expand the reach of 42 U.S.C. s. 1985 (3), which was written to address conspiracies motivated by racial animus, to cover conspiracies against religions, the court was equally unavailing and affirmed the district court's dismissal. *Id.* at 124.

FEDERAL JUDGE REFUSES TO APPLY NEW YORK'S ABSOLUTE SHIELD LAW PRIVILEGE

*(Continued from page 1)***The Claim**

Pellegrino filed his claim, seeking a "name-clearing hearing" before the NYRA after *Daily Racing Forum* reporter Francis LaBelle, Jr., wrote in a September 1994 article that according to "sources within the NYRA" Pellegrino had been fired from his job as clerk of scales due to charges of sexual harassment lodged against him. La Belle did not name the source in the article.

To prevail on his claim, however, Pellegrino must show that "stigmatizing information was made public by a state actor." *Slip op.* at 3. With the NYRA conceding both that the information was, in fact, stigmatizing, and, additionally, its status as a state actor, the sole issue remaining is whether the NYRA was "responsible" for the publication. When Pellegrino turned up nothing but denials in discovery, LaBelle was left holding the key to his case.

Collateral Estoppel?

An earlier district court order by Judge Meshler had denied Pellegrino's motion for an immediate name-clearing hearing — one of plaintiff's claims under § 1983 — based in part on the finding that "it was likely that Assistant Clerk of scales gave LaBelle the information, which, in turn, had been revealed by Pellegrino himself when he went to the jockey's room to retrieve his belongings." The Second Circuit affirmed. Plaintiff filed a second amended complaint.

Judge Platt refused to apply the doctrines of collateral estoppel or *res judicata* because no final judgment had yet been entered on Pellegrino's claim. Noting that final judgments on fewer than all the claims in a given case are "entered only upon the 'express direction' of the court," Judge Platt found the issue and claim preclusion arguments raised by LaBelle to be inapplicable. *Slip op.* at 8.

Absolute Privilege

As for the absolute privilege of the

state shield law, Pellegrino argued that it was inapplicable because the evidence he sought went to the heart of his federal § 1983 claim. The privilege, as a consequence, would be governed by federal common law. Additionally, citing *von Bulow v. von Bulow*, 811 F.2d 136, 141 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987), Pellegrino argued that in cases involving both federal and state law claims, any privileges would be governed by principles of federal law.

LaBelle, in turn, relied heavily on the recent Second Circuit decision in *Krause v. Graco Children's Products, Inc. (In re Application to Quash Subpoena to Nat'l Broadcasting Co., Inc.)*, 79 F.3d 346 (2d Cir. 1996), where the Second Circuit applied the qualified privilege provision of the New York Shield Law to quash the defendant's subpoena for the production of outtakes. See *LDRC LibelLetter*, April, 1996 at page 1.

Judge Platt, siding with Pellegrino, found that LaBelle's reliance on *Krause* to be "misplaced." Distinguishing *Krause's* application of the qualified privilege to LaBelle's attempt to convince the court to apply the absolute privilege, Judge Platt noted that in *Krause* there was no argument over the applicability of the Shield Law since "the qualified privilege under § 79-h (c) is identical to the federal reporter's privilege." *Slip op.* at 10. In the case of the absolute immunity provision, Judge Platt wrote, "there is no federal equivalent to § 79-h (b)." Therefore, Judge Platt reasoned, "if the absolute privilege of the Shield Law were applied to this case, it would constitute a significant expansion upon the traditional privilege afforded to journalists under federal law." *Slip op.* at 10-11.

Noting the Supreme Court's lack of enthusiasm for creating new constitutional privileges which would limit the public's right to "every man's evidence," Judge Platt went on to hold that expanding the journalist's privilege in the instant case "would place an unjustifiable limit on Pellegrino's access to evidence." *Slip op.* at 14, citing, *Herbert v. Lando*, 568 F.2d 974, 998 (2d Cir. 1977) (Meskill, J. dissenting), *rev'd*, 441 U.S. 150 (1979),

and, *United States v. Bryan*, 339 U.S. 683, 710 (1984).

Qualified Privilege

In order to compel disclosure, however, Pellegrino still needed to satisfy the three requirements of the federal common law journalist's privilege laid out in *In re Petroleum Prods., Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982). Under the test the party seeking compelled disclosure must be able to show that "the information sought is 1) highly material and relevant; 2) necessary or critical to the maintenance of the party's claim; and 3) not obtainable from other sources." *Slip op.* at 12.

Applying the test, Judge Platt found that Pellegrino had, in fact, satisfied all three requirements. First, Judge Platt noted that the identity of the source was clearly material and relevant. Next, because Pellegrino's claim depended upon a showing that a NYRA employee was the source, Judge Platt found "that the identity of the source is critical to the maintenance of Pellegrino's § 1983 claim." Finally, Judge Platt ruled that the court was satisfied that Pellegrino had "exhausted all other reasonable methods of determining the identity of LaBelle's source." *Slip op.* at 13.

Judge Platt further justified the compelled disclosure by noting LaBelle had confirmed that the source had already been deposed and had falsely denied that he supplied the information. Given this fact, Judge Platt reasoned that "the person LaBelle seeks to protect apparently is a substantial wrongdoer in this very proceeding and should not be permitted to benefit from this to plaintiff's detriment." *Slip op.* at 14.

NYRA's Request for Additional Information

In addition to Pellegrino's motion to compel disclosure, LaBelle also faced a request for additional information filed by NYRA. In its statement, NYRA claimed "that if LaBelle's claims of privilege have been improperly asserted, he should be re-

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FEDERAL JUDGE REFUSES TO APPLY NEW YORK'S ABSOLUTE SHIELD LAW PRIVILEGE

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quired to disclose the whole of his inquiries . . . that gave rise to his article." *Slip op.* at 14.

The court agreed "to the extent that LaBelle must disclose his primary and secondary sources, along with the substance of the information gained from each source, as well as the dates, times, and places of the receipt of his information." *Slip op.* at 15.

Following Judge Platt's order, NYRA made a motion to modify raising additional issues not related to LaBelle's disclosure. In response, LaBelle's attorney, Dori Hanswirth of Squadron, Ellenoff, Plesent & Sheinfeld, has argued that any additional issues should be decided before LaBelle is formally ordered to disclose. The papers were filed September 12, 1996.

In the meantime, LaBelle has not yet made a formal refusal which would subsequently lead to contempt charges. Ms. Hanswirth has said that if, and when, the formal request comes LaBelle will not comply, with an appeal to the Second Circuit apparently in the offing.

ADDITIONAL SHIELD LAW DECISIONS . . .

Reporter Must Testify in Securities Litigation

In a shareholder class action suit brought against two pharmaceutical companies alleging securities law violations through the dissemination of false and misleading statements about the efficacy and safety of the drug ribavirin, District Court Judge Kimba Wood, of the Southern District of New York, denied journalist Michael Waldholz's motion to quash a subpoena seeking to compel his testimony at trial. *In re ICN/Viratek Securities Litigation*, 87 Civ. 4296 (S.D.N.Y., July 9, 1996).

Plaintiffs want Waldholz to testify about an interview with Robert Smith, a board member of one of the companies, he conducted for a 1987 Wall Street Jour-

nal article. The article quotes Smith as having stated that the drug could "stop" the progression of lymphadenopathy, an AIDS-related illness. Smith, however, has testified in his deposition that he used the word "slow," and not the word "stop," and therefore that Waldholz misquoted him. *Slip op.* at 3.

Despite the fact that Waldholz has already admitted that he does not specifically recall the interview and that he keeps no notes, Judge Wood found that plaintiffs had overcome the federal common law journalist's privilege and consequently, Waldholz must testify, even if to only give testimony as to his "general reporting practices." *Slip op.* at 4.

Shield Law Victory in California

The California Court of Appeal has annulled the judgment of contempt issued against two San Jose television journalists for refusing to reveal a confidential source used in reporting on the Polly Klaas murder trial. *In re Willon* (need cite)

The trial court had grounded the contempt citations on its inherent authority to punish those who violate court orders. Under this reasoning the court said that the journalists must reveal their sources in order to determine if the court's gag order had been violated by the source. In doing so, the court relied on *Farr v. Superior Court*, 22 Cal. App. 3d 60 (1971), which held that judges' power to control their courtrooms trumped the statutory reporter's shield. *Farr*, however, was decided before the elevation of the California reporter's shield law into article 1, section 2(b) of the state constitution.

After the incorporation of the shield law into the constitution, the Court of Appeal held, the rationale of *Farr* is "inapplicable." The court then went on to announce that before a court can hold a journalist in contempt in this situation there must be "specific findings demonstrating that disclosure of the information sought is necessary to avert an actual threat to the defendant's right to a fair trial." *Slip op.* at 22.

In making this determination, the ap-

pellate court continued, "where a violation of a protective or 'gag' order has already occurred, a court should determine the necessity of disclosure of the newsperson's source by addressing two principal considerations in light of all the relevant circumstances: 1) If the newsperson does not disclose the identity of the source, is there a substantial probability of future violations, or "leaks," that will impair the defendant's ability to obtain a fair trial? and 2) Are there reasonable alternatives to disclosure that will protect the interests asserted by both the newsperson and the defendant?" *Slip op.* at 26.

CALIFORNIA COURT OF APPEAL LIFTS CLOSURE ORDER IN EASTWOOD CASE

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whether the judiciary is observing the standards of fairness and following established procedures." *Slip op.* at 19.

Turning to the trial court's findings in the Locke case, the appellate court then applied the test laid down by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), and further clarified in *Waller v. Georgia*, 467 U.S. 39 (1984). In *Waller*, which involved press access to a criminal suppression hearing, the Supreme Court wrote, "Under *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48.

Applying this test, the appellate court found that the trial court's order was overbroad, in addition to not being supported by sufficient findings. Further, the court noted that the trial court's allowance for delayed public disclosure "does not comply with the First Amendment." *Slip op.* at 25. Accordingly, the appellate court found the closure order "inconsistent with the First Amendment," and ordered it to be set aside. *Slip op.* at 26.

EIGHTH CIRCUIT RULING PROVIDES LIMITED COMFORT FOR MEDIA "RIDE-ALONGS"

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police, for several reasons:

- The television station won on the ground that its crew was not acting under color of state law simply because it accompanied the police into the plaintiffs' home. But Chief Judge Richard Arnold, an influential judge who is sometimes mentioned as a possible Clinton Supreme Court nominee, dissented from this holding.

- The police officers won on the ground that they had immunity because their conduct did not violate any clearly established federal rights of which a reasonable person would have known. But the court did not reach the issue of whether there was a "clearly established" constitutional right to be free from a media-accompanied search. The court pointed to the fact that the *Parker* raid occurred before the rulings in *Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D. N.Y. 1994), *aff'd Ayeni v. Mottola*, 36 F.3d 680 (2d Cir. 1994), on which plaintiffs relied.

- Judge James M. Rosenbaum, a district judge sitting by designation, in his concurrence specifically concluded "that police officers executing a search warrant violate a resident's Fourth Amendment rights, when they admit representatives of the public media into a private citizen's home, without first securing the resident's express consent."

Both the narrowness of the media victory in *Parker*, and the facts of the case and its litigation, suggest that "ride-along" cases may be increasingly difficult for the media to win.

Indeed, the background of the *Parker* case shows that even some traditional supporters of First Amendment rights oppose any right of the media to accompany police on a raid. In this action, the plaintiffs were represented by the American Civil Liberties Union for Eastern Missouri, which took on the case after considerable internal debate and division. That led to further paradoxes, including, at one point in the ap-

pellate process, ACLU opposition to the filing of an amicus brief by the Reporters Committee for Freedom of the Press.

The plaintiffs originally filed civil rights claims against both the police officers and the television station, and pendant state invasion of privacy claims (alleging a grab bag of claims from intrusion to intimacy to false light) against the station. District Judge Donald J. Stohr initially dismissed the pendant privacy claims without prejudice on the ground that innovative privacy theories should be resolved in the first instance by state courts. Judge Stohr dismissed the civil rights claims against KSDK on the ground that the station was not a state actor, but he entered summary judgment *against* the police on the theory that they violated plaintiffs' rights by letting the television crew go along on the raid.

On appeal, based on the facts found by Judge Stohr, the Eighth Circuit majority first reversed the district court's finding against the police officers. The appeals court held that the issue was "whether police officers would have known that permitting a television crew to enter a house during the execution of a search warrant would violate a clearly established fourth-amendment right."

The majority found that "most courts" had rejected the argument that media-accompanied searches were a civil rights violation. But the court also noted two recent cases — *Ayeni* and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (involving a telephone company employee rather than a journalist) — that indicated this conduct was improper. Because these two rulings came down *after* the raid on the Parkers' house, and because they represented "at most only the beginnings of a trend in the law," the majority concluded that the police officers did not violate a "clearly established" right, and hence were protected by qualified immunity.

Notably, only Judges Morris Arnold (author of the court's opinion) and Richard Arnold found the issue unsettled. In his concurring opinion,

Judge Rosenbaum stated that the court was bound to determine in the first instance whether the claimed constitutional right existed, and he stated that he would have found, "consistent with *Ayeni v. Mottola*," that police are bound *not* to admit media representatives on a raid.

The court's decision then turned to whether KSDK acted "under color of state law" such that it could be sued in a civil rights claim. On this point, the majority, Judges Morris Arnold and Rosenbaum, held that the station "acted independently of the police" and, at most, committed acts parallel to and contemporaneous with the police officers' execution of the search. They concluded that "KSDK was not exercising a right or privilege created by the state when it decided to enter the Parkers' home to record the events taking place there," and, therefore, it was not susceptible to a civil rights suit.

Judge Richard Arnold dissented on this point, stating that "In my view, the news crew acted in concert with the police in entering the Parkers' home" and were "willful participants" in "joint activity" with the state, and thus should be considered state actors for purposes of the civil rights statute.

The Eighth Circuit has denied the plaintiffs' petition for rehearing. Plaintiffs' counsel has stated that he plans to petition for certiorari.

Mark Sableman is with DCS member firm Thompson Coburn in St. Louis, Missouri.

9TH CIRCUIT FINDS PERSONAL JURISDICTION IN CALIFORNIA

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extent permitted by the Due Process Clause, the court held that the defendants' contacts were sufficient consistent with the Supreme Court's decisions in *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), and *Calder v. Jones*, 465 U.S. 783 (1984).

[In *Keeton*, where neither the plaintiff nor the defendant were resident in the forum state, the Supreme Court upheld specific jurisdiction in the forum state based upon *Hustler's* regular circulation in that state of 10,000 to 20,000 copies a month, a relatively small percentage of the magazine's overall circulation. Such circulation, the Court held was not "random, isolated or fortuitous." In *Calder*, the Supreme Court upheld the exercise of jurisdiction in an action by a forum resident against a non-resident reporter and editor of *The National Enquirer*. *The Enquirer*, had its largest circulation in the forum state. While the reporter and editor were to be judged by their own contacts with the state and not those of their employer, the Supreme Court held that the individual defendants acted in a manner that was intentionally directed at the forum state and one of its residents, and knowing that the brunt of the injury would be borne by the plaintiff in the state in which she lived and worked.]

The Ninth Circuit's Decision

In ruling on defendants' motion to dismiss for lack of jurisdiction, the Court limited its inquiry to facts relating to jurisdiction.

(a) Plaintiff

Plaintiff Berry Gordy, founder and former President of Motown Records, was, for twenty-four years, a resident of California; in the Court's words "most of his friends, family, and business associates reside in California."

(b) The Daily News

The Daily News, a New York based

paper, focuses primarily on events that occur in New York, though some features deal with subjects, such as entertainment, which the Court characterized as having "nationwide interest". The newspaper's circulation is primarily in the New York area: 99% within 300 miles of New York. Moreover, the *News* does not contract with or employ distributors, or solicit subscriptions in California, and the state of California accounts for only .0017% of the paper's total circulation.

(c) Columnist George Rush

Author of the allegedly defamatory piece, Rush is a citizen, resident and domiciliary of New York, where he researched and wrote the allegedly defamatory piece. Prior to publication of the article, Rush authorized his associate to telephone Gordy in California for the purpose of obtaining his response; Rush's assistant also contacted two confidential sources in California and— for purposes other than the article in question—had "many California sources" in addition to the two contacted for the Gordy piece.

While the court refused to repeat the alleged libel in the opinion, it did note that the events reported in the article did not take place in California, nor did the article mention the state of California.

The Ninth Circuit's Jurisdictional Analysis

California's long-arm statute, Cal. Civ. Proc. Code section 410.10, extends jurisdiction "to the limits imposed by the Due Process Clause, namely "minimum contacts with [the forum]."

Though plaintiff did not contend that defendants had sufficient contacts for purpose of general jurisdiction, he did contend that the contacts were sufficient for limited jurisdiction: i.e. for purposes of his litigation. Citing *Ballard v. Savage*, 65 F.3d 1495 (9th Cir.1995) and *Data Disc. Inc. v. Systems Technology Assoc. Inc.*, 557 F. 2d 1280 (9th

Cir. 1977), the Court relied on the Ninth Circuit's "long iterated three requirements" relating to jurisdiction.

First, the nonresident defendant "must do some act or consummate some transaction with the forum. . . ." Second, the claim must be one "which arises out of or results from the defendant's forum-related activities." Third, exercise of jurisdiction must be "reasonable."

(a) Contact with the Forum

Despite the paucity of contacts between defendants and the State of California, the Court noted that the *News* and its columnist knew that the plaintiff lived in California, and that at least "13 to 18 copies of the defamatory article" would be distributed in that state. Relying primarily on *Calder*, the court concluded that defendants intentionally directed an allegedly defamatory column at a California resident, making jurisdiction appropriate. The court distinguished previous Ninth Circuit decisions in which suits were not permitted against small circulation non-resident defendants -- e.g. plaintiffs were corporations, there was no distribution in California, the defendants resided at an unreasonably far distance, etc. -- ultimately concluding that *de minimis* circulation was not an inflexible factor.

(b) Relation Between the Claim and Defendants' Activities

"There is little doubt," said the Court, "that Gordy's claim arises out of the forum-related activities" of the defendants. In reaching this conclusion, the Court repeated its own earlier reasoning that the "tortious effect" occurred in California and that 13-18 copies of the paper had been distributed there, although rejecting plaintiff's contention that such matters as general newsgathering, advertising revenue, or contribution to California administered pension plan were relevant to the analysis. This,

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PUBLISHER PREVAILS ON SUMMARY JUDGMENT IN HIT MAN CASE

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Both Perry and Horn were convicted, the former sentenced to death and the latter to life without parole. As part of their proof of premeditation, prosecutors argued that Perry, who had ordered a copy of *Hit Man* a year before the crime, followed its instructions in committing the murders.

Plaintiffs' wrongful death actions alleged that Paladin and its president, Peder Lund, aided and abetted Perry in committing the murders. Plaintiffs also alleged causes of action for strict products liability, civil conspiracy, and negligence. The publisher responded to the complaints by asserting that the book is protected by the First Amendment.

To test its First Amendment defense, the publisher filed a motion for summary judgment based upon a Joint Statement of Facts. In that Joint Statement, agreed to by the parties only for purposes of the motion, it was stipulated that defendants "intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in their publications." By the same token, plaintiffs stipulated in the Joint Statement that defendants also intended their books to be used by authors seeking information for the purpose of writing books about crime and criminals, law enforcement officers, persons who enjoy reading accounts of crime for entertainment, persons who fantasize about committing crimes but do not thereafter commit them, and criminologists and others who study criminal methods. In addition, plaintiffs stipulated that Paladin had no knowledge that Perry or Horn planned to make use of the book to commit a crime.

Brandenburg v. Ohio Applied

In granting summary judgment, the Court applied *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its progeny to hold that the First Amendment bars the imposition of liability in this case because *Hit Man* was not directed to, nor was it

likely to, incite imminent lawless action. Specifically, the Court held that "[n]othing in the book says 'go out and commit murder now!' Instead, the book seems to say, in so many words, 'if you want to be a hit man this is what you need to do.' This is advocacy, not incitement." Slip op. at 23. The Court also held that the book does not "have a tendency to incite violence," noting that out of the 13,000 copies of *Hit Man* sold, "one person actually used the information over the ten years that the book has been in circulation." *Id.* at 24.

The conclusion that *Hit Man* was unlikely to incite imminent lawless action was also supported, the Court held, by the context in which it was disseminated, particularly the fact that it was published in the form of a book "that presumably take[s] time to read" and

that is "available to an unlimited number of people at different times." *Id.* at 25. The Court concluded its analysis of the *Brandenburg* issue by stating that "[i]t is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals." *Id.* at 25-26.

The Court also disposed of a number of other theories put forth by plaintiffs. First, the Court rejected plaintiffs contention that the "incitement of imminent lawless action" requirement of *Brandenburg* only applies to virulent advocacy and political protest, and thus should not provide protection to *Hit Man*. *Id.* at 19-20 (citing *DeFilippo v. National Broadcasting Co.*, 446 A.2d

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while not conferring *general* jurisdiction over the defendants in California, was sufficient for purposes of the litigation at hand.

(c) Reasonableness of Exercise of Jurisdiction

Plaintiff having met the first two requirements, the Court said, defendants now were required to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Applying, but

not setting forth, "seven factors", none "dispositive in itself", the Court found exercise of jurisdiction "reasonable" under the circumstances.

"Rush and the Daily News," said the Court, "knew that Gordy lived in California when they allegedly defamed him; they have good reason to expect that a substantial impact of their actions would be felt in California; they are in a business in which they deal with California matters regularly. . . ." Moreover, "*The Daily News* sends reporters to California; and . . . serves subscribers in California, though they are few."

LDRC ANNUAL MEETING: IMPORTANT NOTICE

The LDRC Annual Meeting will take place at 4:30 p.m. the same day (November 6th) and building (The Sky Club, 200 Park Avenue) as the Annual Dinner. Rogers & Wells has been kind enough to volunteer the use of their conference room which is located on the 50th floor.

We look forward to seeing you there.

Please call us at (212) 889-2306 if you plan to attend or have any questions. Thank you.

HIT MAN CASE

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1036, 1040 (R.I. 1982) (*Brandenburg* standard applied where minor hanged himself imitating a stunt he observed on the Johnny Carson show); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (*Brandenburg* standard applied to murder committed by person who had just viewed scenes of gang violence in the film "The Warriors" even where perpetrator uttered a line from the film while committing the crime) (additional citations omitted).

Plaintiff's Call for Exceptions Rejected

The Court further declined plaintiffs' invitation to reject traditional First Amendment jurisprudence, which affords protection unless the speech in question falls into one of a few well-recognized categories of regulable expression, and instead to apply, by analogy, a combination of the law of commercial speech, libel and obscenity. For example, the Court rejected plaintiffs' argument that, if a publisher may, consistent with First Amendment principles applicable to libel cases, be held liable for injury to a person's reputation, then a publisher should also be held liable for a person's death, when it publishes with "reckless disregard for human life." *Id.* at 14-16. Similarly, the Court rejected plaintiffs' request that the Court apply the so-called *Soldier of Fortune* cases, which imposed liability on "Soldier of Fortune" magazine "for deaths resulting from the magazine's 'gun for hire' advertisements," because, unlike the case at bar, they "involve commercial speech which is afforded limited first amendment protection." *Id.* at 26-27. Finally, the Court declined to create a new category of unprotected speech for expression that aids and abets murder; rather, the Court held, *Brandenburg* applies even in the "aiding and abetting" context. *Id.* at 14.

Aiding and Abetting

The Court's opinion also commented briefly on the viability of the causes of action alleged by plaintiffs in the circumstances raised by this case. For example,

the Court noted that, "[a]lthough Maryland appears to recognize aider and abetter tort liability," the Court was unaware of "any reported decision suggesting that Maryland extends the tort of aiding and abetting to the circumstances of this case." *Id.* at 11 and n.2. In addition, the Court expressed "grave reservations as to whether a theory of products liability . . . would result in strict liability in this case because courts have held that a book is not a product for purposes of products liability law." *Id.* at 27 n.5.

Calling this a "novel case with unprecedented future implications," Judge Williams noted that *Hit Man's* content is "enough to engender nausea in many readers" and that he "personally finds the book to be reprehensible and devoid of any significant redeeming social value." *Id.* at 27. Nonetheless, the Court reiterated the "often quoted" statement that:

[T]he constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.

Id. (quoting *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988)).

Plaintiffs have filed a notice of appeal in the United States Court of Appeals for the Fourth Circuit.

Thomas D. Kelley and Steven D. Zansberg of Faegre & Benson LLP in Denver, Colorado and Lee Levine and Seth D. Berlin of Ross, Dixon & Masback, L.L.P., in Washington, D.C. are counsel for the defendants in this case.

NEW LDRC STUDY

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when appealing cases involving public plaintiffs than in appeals involving private plaintiffs. In the most recent period, defendants reversed 64.7% of public plaintiffs' verdicts versus only 14.3% of private plaintiffs' verdicts. This compares to a 73.3% public plaintiff versus a 34.8% private plaintiff reversal rate during the post-*Connaughton* period and a 58.4% public plaintiff versus 23.5% private plaintiff reversal rate from *Bose* to *Connaughton*. Over the entire 1984-96 period, liability was reversed in 58.4% of appeals involving public plaintiffs and only 23.5% of appeals involving private plaintiffs.

*Finally, media defendants were marginally more successful than nonmedia defendants in appealing unfavorable verdicts, although during the most recent period each group obtained outright reversals in 50% of appeals. Over the *Bose*-to-*Connaughton* period, media and nonmedia defendants obtained reversals in 37.5% and 31.6% of their appeals, respectively. Over the post-*Connaughton* period, media defendants obtained reversals in 51.9% of their appeals, versus a reversal rate of 45.5% of appeals brought by nonmedia defendants. Over the entire 1984-96 period, the respective reversal rates were 42.7% for media defendants and 40.5% for non-media defendants.

Single issues of the new study are available at the rate of \$35.00. To order, contact Melinda Tesser, at 212-889-2306.

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404 Park Avenue South, 16th Floor
New York, New York 10016

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

Executive Director: Sandra S. Baron;
Associate Directors: Michael K. Cantwell
and

Pamela R. Winnick;
LDRC Fellow: John Maltbie
Staff Assistant: Melinda E. Tesser

NEW LDRC STUDY: PLAINTIFFS' TRIAL VERDICTS REVERSED IN ALMOST HALF OF LIBEL/PRIVACY APPEALS IN JULY 1994-JUNE 1996

The newly released LDRC BULLETIN (volume 96, number 3) reports on the results of appeals from 33 libel, privacy, and related trials decided between July 1994 and June 1996. In 25 of the cases the initial verdict was for the plaintiff, with the defendant initially prevailing in the other 8 cases.

The new report updates data from a previous LDRC study on independent appellate review that covered appeals decided between April 1984 and June 1994. The prior study was divided into two periods, the first beginning with the April 1984 decision in *Bose Corporation v. Consumers Union* and the second period beginning with the June 1989 decision in *Harte Hanks Communications v. Connaughton*.

The independent appellate review study found that on appeal defendants have continued to be successful in reversing or ameliorating plaintiffs' awards as well as in preserving their own victories at the trial court level. Interestingly, defendants have met with the greatest success — reversals, remands and remittiturs of plaintiff's verdicts as well as affirmance of defendant's verdicts — in the period post-*Connaughton*, June 1989-June 1994. Among the key findings were the following:

◦During the new study period, nearly half of the appeals from plaintiffs' verdicts (12 of 25, or 48.0%) were reversed outright. This was down slightly from the 51.3% incidence (20 of 39) found in the post-*Connaughton* period, but up from the 37.6% reversal rate (32 of 85) found in the *Bose-to-Connaughton* period. Over the entire period studied (1984-96), liability was reversed in 43% (64 of 149) of appeals from plaintiffs' verdicts.

◦Because no cases were remanded to the trial court on the issue of liability, plaintiffs were more successful in having their liability verdicts affirmed during the new study than in the prior periods. That is, the 52.0% affirmance rate (13

of 25) reported in the new study was slightly higher than the 49.4% rate reported in the *Bose to Connaughton* period and significantly higher than the 38.5% rate reported in the post-*Connaughton* period. Over the entire 1984-96 period, liability was affirmed in 47% (70 of 149) of appeals from plaintiffs' verdicts.

◦Compensatory damages were also affirmed more frequently during the recent study than during any prior period. During the new study, compensatory damages were affirmed in 54.2% of appeals, versus an affirmance rate of 40% during the *Bose-to-Connaughton* period and a 31.6% rate in the post-*Connaughton* period. Again this resulted from the fact that no compensatory damage awards were either remitted or remanded for reconsideration during the recent study. By contrast, during the *Bose-to-Connaughton* period 5.9% of the compensatory awards were remitted and 16.5% remanded, and during the post-*Connaughton* period 2.6% of compensatory awards were remitted and 13.2% remanded.

◦The affirmance rate for punitive damages in the recent study was also the highest reported to date. During the new study punitive damage awards were upheld in one third of appeals (6 of 18, or 33%). By contrast, they were affirmed in 22.8% of appeals during the *Bose-to-Connaughton* period and only 14.8% of appeals during the post-*Connaughton* period.

◦In part this higher affirmance rate resulted from fewer remittiturs of punitive damages in the recent period than in prior studies. In fact, the reversal rate for punitive damages during the recent two-year period (55.6%) was only slightly below the 58.8% reported for the entire 1984-96 period and was higher than the 52.6% reversal rate during the *Bose-to-Connaughton* period. Again, the post-*Connaughton* period

was most favorable to defendants, with 74.1% of all punitive awards reversed outright.

◦On balance, defendants in the new study were less successful in modifying unfavorable verdicts than they had been in prior periods. Counting reversals, remands, and remittiturs, 60% of all findings of liability against defamation defendants were adjusted in some fashion during the new study period, versus 79.5% in the post-*Connaughton* period and 69.4% during the period from *Bose to Connaughton*.

◦The new study revealed that plaintiffs continue to meet with little success in their attempts to overturn unfavorable verdicts. During the new period, judgments favoring defamation defendants were affirmed in 87.5% of the appeals. The comparable rates in the *Bose-to-Connaughton* and post-*Connaughton* periods were 82.6% and 100%, respectively.

◦The new study also showed that defendants benefit when the trial court decision is reviewed under the more searching standard of "independent appellate review." Thus, over the full 1984-96 period, liability was reversed outright in just under half (47.3%) of appeals in which independent appellate review was applied, versus only 18.2% of the appeals in which independent appellate review was not applied.

◦The effect of independent appellate review showed up even more dramatically with respect to punitive damages. Over the entire study period, punitive awards were reversed outright in 62.0% of appeals applying independent appellate review, in contrast to a reversal rate of only 29.4% when independent appellate review was not applied.

◦The new study confirms that libel defendants were far more successful

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