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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through December 22, 2011

MLRC

LIBEL & PRIVACY

COMMERCIAL SPEECH

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FIRST AMENDMENT

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Thank you Ken Richieri

Ken Richieri is stepping down as Chair of the MLRC Board of Directors after serving in that role for the last three years. Fortunately for MLRC, he will remain a director of the organization. In Ken, one has an extraordinary combination of commitment and corporate governance skills – skills that made him a remarkable Chair. He has a unique ability for managing the development and discussion of ideas and concepts, and for forging concensus.

Anyone who knows Ken at all is aware of his wide-ranging intelligence, knowledge of the industry, common sense and sense of humor. But Ken also brought to his Chairmanship an appreciation for far-reaching thinking and for asking needed questions, and pushed forward strategic planning sessions by the MLRC Board. [Let me note that a partner in this, the Strategic Planning Committee Co-Chair, was Elisa Rivlin, who will be taking over as Chair of the MLRC Board from Ken.]

Ken has brought boundless energy to his role as Chair, all the more impressive considering the demands of his day-job as Senior Vice President and General Counsel of The New York Times Company. He is committed to the success of MLRC and its mission. As of result of his leadership, MLRC is probably as well positioned as it has ever been to continue to serve its growing, and increasingly diverse, membership.

As executive director, I am profoundly grateful for the guidance and support and friendship I have received from Ken. As the ultimate beneficiaries of his leadership, I have no doubt that the membership is deeply grateful as well for his tenure as Chair. Thank you, Ken Richieri!

-Sandy Baron

Thank you Nathan Siegel

On behalf of the entire membership, I want to thank Nathan Siegel for his tenure as President of the MLRC Defense Counsel Section Executive Committee in 2011. Nathan has been a simply marvelous President. Nathan brings a relatively unique background to the DCS, having served as an in-house counsel during his career. As a result, he not only worked seamlessly with the Board of Directors of MLRC, but generated ideas for the DCS and its committees and MLRC and its ongoing programs that were infused with the broad range of his experiences.

Many of you have worked with Nathan over the years – through the MLRC or in his in-house or outside counsel roles. What we all know is that Nathan is a first-class lawyer, with a particularly creative mind. He leads us to see new issues and new ways of looking at the old ones. He is also simply a wonderful guy. His commitment to MLRC and its programs and projects, and his commitment to the principles that underpin so much of what we do here and in media defense law, makes him a natural leader of the DCS.

Now as you all know, the President of the DCS Executive Committee becomes President Emeritus, and thus serves another year on the Exec Committee. Well, thank goodness for that, I say. For I am not at all ready, and nor should any of you be ready, to see Nathan slip away from leadership any time soon.

With much gratitude, Nathan, on behalf of all of us. Thank you.

- Sandy Baron

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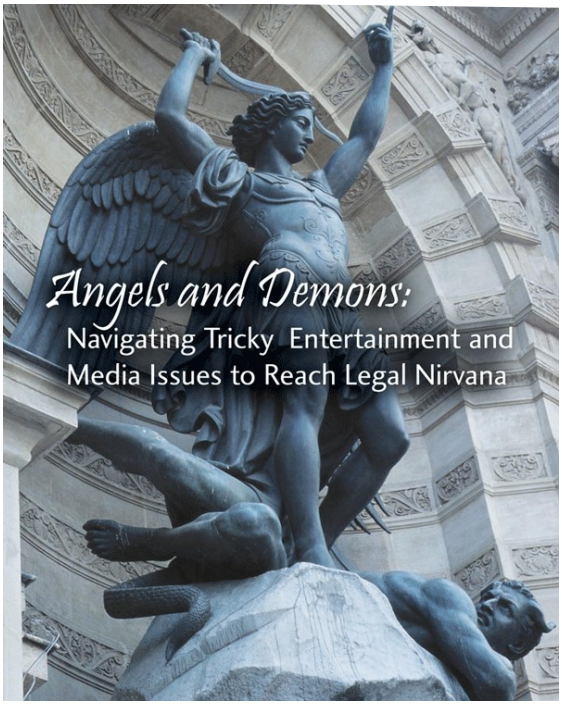

Join Us for the 2012 MLRC/Southwestern Media and Entertainment Law Conference

Angels and Demons: Navigating Tricky Entertainment and Media Issues to Reach Legal Nirvana

January 19, 2012
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Exorcising Rights: Releasing the Demons in Reality Programming

The premise of most reality and mockumentary programming is simple: ubiquitous cameras capture eager participants engaged in "real" life activities, competitions, and romantic adventures. The reality of producing such programming, however, is not simple at all. Releases are the lifeblood of reality television and film, but have they gone too far or can they ever go far enough to cover this expanding genre? This panel will discuss:

- Provisions in reality programming releases that could make the devil blush.
- Common challenges to the enforceability of reality programming releases.
- Controversial provisions that have withstood judicial scrutiny.
- A hypothetical scenario reflecting the complexity of the reality/mockumentary genre.

Moderator: JP Jassy (Bostwick & Jassy)
Panelists: John Farrell (Endemol USA), Glen Kulik (Kulik, Gottesman, Mouton & Siegel) and Lou Petrich (Leopold, Petrich & Smith)

Social Media - Savior or Satan?

Social media has enabled news and entertainment companies to engage and communicate with their audiences in a variety of ways. But, with that interaction comes risk. This panel will examine the impact of both official and unofficial use of social media on the entertainment and news industries and how they are grappling with the legal issues that arise. Topics will include:

- How to manage employees' use of social media to mitigate risk of defamation, spoilers, and FTC endorsement regulation violations.
- How to manage data-security and privacy issues and protect your company's brand.
- How do the different terms of service for each social media website dictate what use your company can make of that platform.

Moderator: Dan Cooper (Paramount Pictures)
Panelists: Karlene Goller (Los Angeles Times), Paul Koenig (Paramount Pictures) and Jennifer Mardosz (Fox Entertainment Group)

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Sympathy for the Devil in Music

Media lawyers are generally well-versed in the day-to-day "clearance" issues that can arise. However, the dirty little secret is that most will have only a cursory knowledge when it comes to issues of music law. This panel gathers day-to-day experts and practitioners in the music law arena and will discuss some of the common issues that arise in the creation of music-centric media content, including:

- Putting together a "special" music-intensive episode of a show that otherwise does not usually contain musical performances.
- Capitalizing on ancillary revenue streams and how the deals work for such products (such as downloads, soundtracks, etc.).
- Music in the context of routine media content where music issues arise unexpectedly, such as in news broadcasts, interviews and impromptu music performances.

Moderator: Jeffrey Schneider (NBCUniversal)
Panelists: Jonathan Haft (Hollywood Records), Jeffrey Light (Myman Greenspan Fineman Fox Rosenberg & Light), panelist TBD

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Renaissance Hollywood Hotel (Marriott)
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Scranton Times Wins on Retrial After First Trial Vacated Due to Judge's Appearance of Impropriety

By Kevin C. Abbott

After a judgment of $3.5 million in favor of the plaintiffs was vacated due to the appearance of impropriety in the assignment of the first trial five years ago, the Scranton Times, publisher of the *Citizens' Voice* newspaper in Wilkes-Barre, Pennsylvania, won a complete defense verdict in the retrial before a new judge. *Joseph, et al. v. The Scranton Times, LLP et al.*, No. 3816 (Pa. Comm. Pleas Dec. 8, 2011).

In a thorough 37-page Memorandum Opinion issued on December 8, 2011, the new trial judge, the Honorable Joseph Van Jura, found that the plaintiffs had failed to prove that they had been damaged as a result of any of the allegedly defamatory statements in the 10 articles concerning the investigation of the plaintiffs and their alleged ties to organized crime.

Judge Van Jura focused much of his opinion on the plaintiffs' failure to prove that they suffered any damages as a result of the allegedly defamatory articles.

Background

The case has been pending for nearly a decade. On May 31, 2001, dozens of federal and state law enforcement officers searched the homes of William D'Elia, the reputed head of organized crime in the area, his paramour, and two men alleged to be associates of D'Elia, including Thomas A. Joseph. The *Citizens' Voice*, relying largely on confidential sources, published 10 articles from June to October 2001 about the searches and the alleged scope of the investigation as it applied to Joseph and others. Although D'Elia and one of his associates were eventually charged and convicted, no charges were ever brought against Joseph.

In 2002, Joseph, his son, and three of Joseph's businesses brought libel and invasion of privacy claims against the Scranton Times as the publisher of the *Citizens' Voice* newspaper. In 2006, the case was tried without a jury before Judge Mark Ciavarella. Before trial, the Scranton Times had objected to the manner in which the case had been assigned and had requested the assignment of an out-of-county judge but that request was denied, with both Judge Ciavarella and President Judge Michael Conahan assuring the Scranton Times that the case had been randomly assigned. After a two-week bench trial, Judge Ciavarella entered a verdict of $3.5 million in favor of Joseph and one of his businesses. Relying largely on Ciavarella's findings of fact, the Pennsylvania Superior Court affirmed. The Scranton Times petitioned the Pennsylvania Supreme Court for allowance of an appeal.

While the newspaper's petition for appeal was pending, Judges Conahan and Ciavarella were charged with federal crimes arising out of a scheme in which the two judges were paid over $2 million by the owner and builder of a juvenile detention facility. Both judges were removed from office and eventually convicted of federal crimes. Ciavarella is now serving a 28-year sentence and Conahan is serving a 17 1/2 year sentence.

After the charges were filed against Conahan and Ciavarella, the newspaper petitioned the Supreme Court to exercise its rarely used King's Bench powers to take immediate jurisdiction of the case. Finding that there was a colorable claim of irregularity in the assignment of the case, the Supreme Court appointed the Honorable William A. Platt to hold an evidentiary hearing and make a report and recommendation on whether the newspaper was entitled to any relief.

After holding the evidentiary hearing, Judge Platt found an appearance of impropriety in the assignment of the *Joseph* action. As to the assignment of the trial, Judge Platt found that the assurances of Conahan and Ciavarella that the pretrial motions and the non-jury trial would be randomly assigned were misleading or plainly false. In fact, Conahan and the Court Administrator (Conahan's cousin who later plead guilty to unrelated federal embezzlement charges) hand-selected Ciavarella to preside over the trial.

The assignment was so unusual that the deputy court administrator made a notation in the court's records in order to protect herself. Based on Ciavarella's own testimony at the evidentiary hearing, President Judge Platt found that "Conahan and Ciavarella were confederates in what appears to have been (by Ciavarella's own admissions here) a long-term criminal conspiracy." Moreover, evidence was

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presented at the hearing that Conahan, who assigned the trial to Ciavarella, had a long-term relationship with reputed crime boss D'Elia which included Conahan accepting unmarked envelopes delivered to the courthouse by D'Elia and regular meetings with D'Elia, even after D'Elia was arrested by federal authorities.

The Supreme Court accepted Judge Platt's findings and vacated the judgment in favor of the plaintiffs in order "to remedy the pervasive appearance of impropriety in this case, and to give justice, and the appearance of justice, an opportunity to prevail." *Joseph v. Scranton Times, L.P.*, 987 A.2d 633 (Pa. 2009).

The Supreme Court rejected Joseph's argument that the judgment could be vacated only if the Court found actual prejudice resulting from the judges' misconduct. The Supreme Court emphasized that the appearance of impropriety was enough to warrant relief – "A jurist is either fair or unfair; there are no acceptable gradations." The Supreme Court found that "[t]he inherently troubling nature of Conahan's and Ciavarella's compromised positions of jurists is enhanced, in this case, given that the subject matter of this defamation lawsuit concerned newspaper articles reporting on the undisputed fact of a federal criminal investigation into D'Elia's and Joseph's alleged ties to organized crime activities, an investigation which included search warrants for Joseph's home and business." The case was remanded for a new trial.

New Bench Trial

A two-week bench trial was conducted in May 2011. After extensive post-trial briefing, Judge Van Jura issued his verdict on December 8, 2011. Judge Van Jura focused much of his opinion on the plaintiffs' failure to prove that they suffered any damages as a result of the allegedly defamatory articles. As to the claim that Joseph's businesses suffered lost profits due to the articles, Judge Van Jura found that the plaintiffs' belief that they lost business was not enough to prove damages; "rather they must be proved by the testimony of third parties that the specific statements complained of caused them to withdraw their business." Opinion at 24**.**

The Court found no such proof. To the contrary, the Court cited evidence – much of it in the plaintiffs' own documents filed with state agencies or submitted to banks – that the various businesses owned by Joseph were harmed by events other than the articles.

For example, before trial, Joseph repeatedly blamed the events of September 11 for causing his airport limousine businesses to go out of business, but at trial blamed only the *Citizens' Voice* articles. As the Court wrote, "[t]he one and only time that Joseph Sr. has ever blamed the articles for harming his businesses was within the context of this litigation, and at least for the purpose of this litigation, he blames all his problems on the *Citizens' Voice* articles." Opinion at 30.

The Court also found that the plaintiffs failed to prove that their businesses were not harmed by the admittedly true statements in the articles about the investigation and the searches. The Court rejected the testimony of the plaintiffs' damages expert because he offered no opinion as to causation – instead, he simply opined that Joseph's businesses had the "potential" to have done better than they did in the decade after the publication of the articles. The Court noted that "[s]peculation by the fact-finder is not a legally sufficient substitute for the plaintiffs' failure to provide evidence on causation." Opinion at 33.

The court likewise found no credible evidence that Joseph's personal reputation was harmed by the allegedly defamatory statements. His personal claim was based largely on his own testimony and the Court did not find him to be a credible witness. Joseph testified that the articles caused him to stop socializing but the Court noted that in 2001 – at the very time the articles were published – Joseph had given sworn testimony in a car accident case that the accident had caused him to stop socializing. In his accident case testimony, he never mentioned the articles as the cause of his harm.

The Court also did not find credible Joseph's testimony that the true statements in the articles did not affect his reputation. Joseph had testified that his community did not care about organized crime and, as a result, the true statements that he was being investigated for ties to organized crime were not the cause of any harm to reputation.

The Court also found that Joseph's son had failed to present credible evidence that the one statement that was about him caused him any damage. Like his father, he "did not introduce the testimony of any member of his community who had a lesser or diminished view of his reputation because of the *Citizens' Voice* article." Opinion at 28.

Any post-trial motions are to be filed by January 9, 2012.

The Scranton Times is represented by J. Timothy Hinton, Jr. of Haggerty, McDonnell & Hinton and Kevin C. Abbott and Justin H. Werner of Reed Smith LLP. Plaintiff is represented by George W. Croner, Kohn, Swift & Graf, P.C., Philadelphia, PA and Timothy Polishan, Kelley & Polishan, P.C., Old Forge, PA.

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Police Officer Wins $100,000 Judgment in Libel Trial Against Ohio Newspaper

At press time, an Ohio jury awarded a police officer $100,000 in damages, finding that a local newspaper acted with actual malice in reporting that plaintiff had "sex with a woman while on the job." *Young v. Gannett Satellite Information Network, Inc.*, No. 1:10cv483 (S.D. Ohio, Jury Verdict Dec. 21, 2011) (Barrett, J.).

On November 30, Federal District Court Judge Michael R. Barrett denied the newspaper's motion for summary judgment, clearing the way for trial. In that decision, the judge held that a jury could find actual malice where prior to publication the reporter reviewed an arbitration decision finding the allegation against plaintiff not supported by the evidence. Interestingly, a police department internal affairs investigation found that the charge against plaintiff was substantiated. Despite conflicting evidence of falsity, the judge held that a jury could find the reporter "purposefully avoided or deliberately ignored facts establishing the falsity of the statement that [plaintiff] had sex with a woman while on the job."

MLRC will ask defense counsel to submit a more detailed report on the trial. This article is based on the decision denying summary judgment.

Background

On May 26, 2010, a Gannett paper, the *Milford-Miami Advertiser*, published a story about a City of Milford police officer who admitted having sex with the town mayor while on duty. The article explained that the officer only received a 15-day suspension, even though the police chief recommended termination. The article included a quote from the police chief explaining that suspension was better than going to arbitration.

The story went on to illustrate the perils of arbitration by describing an incident involving plaintiff dating back to 1997. A police dispatcher accused plaintiff of sexual harassment, including forcing her to have oral sex. The police department fired plaintiff for "sexual harassment, immoral behavior, neglect of duty and gross misconduct." Plaintiff took that decision to arbitration and was ordered reinstated. The arbitrator found insufficient evidence to support the rape charge (DNA evidence appeared to exonerate plaintiff) and any physical touching may have been "flirtatious activity between consenting adults." The arbitrator's decision was confirmed by an Ohio Court of Common Pleas decision.

Plaintiff sued the newspaper for libel, alleging that the claim that he had "sex with a woman while on the job" was false and defamatory.

Summary Judgment Denied

The newspaper moved for summary judgment based upon the fair report privilege, the substantial truth doctrine, the innocent construction rule, the incremental harm doctrine and lack of evidence of actual malice.

The district court rejected each of these defenses. The fair report and substantial truth arguments failed, according to the court, because the article was not a substantially accurate account of the arbitration decision and confirmation. The innocent construction defense failed because the article compared the present case (where an officer admitted having sex on the job) to plaintiff's disputed 1997 incident. This comparison negated any innocent construction.

As to incremental harm, the court found that the "laundry list" of grounds for plaintiff's termination (sexual harassment, immoral behavior, neglect of duty and gross misconduct) were merely general categories that paled in comparison to the specific charge that he "had sex with a woman while on the job."

Finally as to actual malice, the court faulted the reporter for omitting the arbitration decision, concluding that a jury could find the reporter "purposefully avoided or deliberately ignored facts" showing falsity.

After a 3-day jury trial, the jury found in favor of the Plaintiff, and awarded $100,000 in compensatory damages, but found that there was not a sufficient basis to award punitive damages.

The newspaper was represented by John C. Greiner and Steven P. Goodin, Graydon Head & Ritchey LLP, Cincinnati, OH. Plaintiff was represented by Stephen E. Imm, Katz, Greenberger & Norton LLP, Cincinnati, OH.

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First Circuit Rules that Dominican Sugar Executives Are Limited Purpose Public Figures

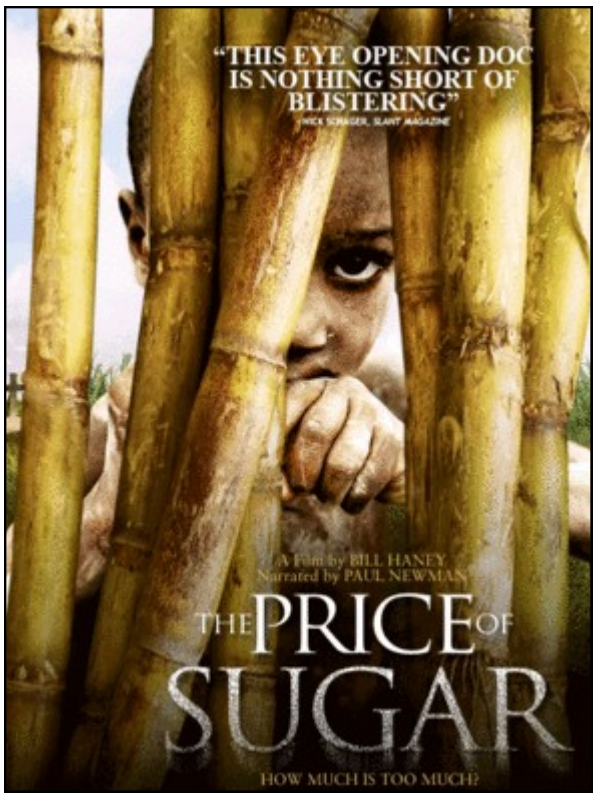
By Elizabeth C. Koch and Thomas Curley

Juan and Felipe Vicini, the owners of sugar-cane plantations in the Dominican Republic, are public figures for purposes of a documentary film criticizing the treatment of Haitian laborers in the Caribbean nation and the condition of the company towns (or *bateyes*) where the laborers live, according to a recent ruling by the United States Court of Appeals for the First Circuit. *Lluberes v. Uncommon Productions, LLC*, No. 10-2082, 2011 WL 6015606 (1st Cir. Nov. 23, 2011).

The finding came in a defamation action brought by the Vicini brothers against the producers of the 2007 film *The Price of Sugar*, which focuses on the missionary work of Father Christopher Hartley, a disciple of Mother Teresa, as the priest attempts to aid the Haitian migrants who toil in the cane fields of his parish, many of which are owned by the Vicini family.

In the litigation filed in the United States District Court for the District of Massachusetts, the brothers contend that they were personally defamed by a number of implications they ascribe to the film, including that they had allowed child labor, malnourishment, and horrific workplace injuries to occur on their plantations. In an August 2010 ruling, Judge Douglas P. Woodlock granted the filmmakers' motion for summary judgment, finding that the Vicinis were public figures who could not meet their burden of proving actual malice. *Lluberes v. Uncommon Productions, LLC*, 740 F. Supp. 2d 207 (D. Mass. 2010).

On appeal, the First Circuit unanimously affirmed the public figure determination. (However, because of an outstanding discovery issue, which the First Circuit remanded to the district court, it did not address the lower court's ruling for the filmmakers on actual malice.)



The finding came in a defamation action brought by the Vicini brothers against the producers of the 2007 film The Price of Sugar, which focuses on the missionary work of Father Christopher Hartley, a disciple of Mother Teresa

Throughout both the district court and appellate proceedings, the Vicinis vehemently disputed the public figure label. While originally contesting even the existence of a public controversy, before the appeals court, their argument had three constitute parts: first, they contended that they took no actions prior to 2003 that should subject them to public figure status; second, they claimed that their conduct after 2003 was shielded by the "anti-bootstrapping" principle; and finally, they alleged that whatever their status in the Dominican Republic, they were not public figures in the United States.

The *Batey* Controversy

As the First Circuit observed, prior to the release of the film, both Felipe and Juan Vicini had "c[o]me to occupy leadership positions within the family businesses," participated directly in efforts to address the problems in the *bateyes*, and had begun "courting" U.S. officials at the embassy in Santo Domingo. *Id.* at *5. While the Vicinis argued that they intended for these efforts to remain private, the Court recognized that the relevant questions was "whether they 'volunteered for an activity out of which publicity would foreseeably arise,'" *Id.* at *5 n.8, quoting 1 Rodney A. Smolla, *Law of Defamation* § 2:32 (2d ed. 2011), a question the Court easily answered in the affirmative.\

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The Vicinis also hired the public relations firm Newlink Communications to undertake a "massive," $1.2 million media campaign designed to "deal with the 'negative perceptions against the company,'" "'[b]lock messages' critical of the Vicinis, and '[i]mprove the image and reputation of the company in the eyes of the public.'" *Id.* at *5. This included country-specific strategies for the Dominican Republic and the United States, as well as media training for the brothers "in Spanish and English, such as mock interviews about the *bateyes* and model answers emphasizing Vicini initiatives." *Id.*

"All together," the Court held, "this conduct shows beyond hope of legitimate contradiction that Felipe and Juan are limited purpose public figures. Both leveraged their positions and contacts to influence a favorable outcome in the *batey* controversy. Both enjoyed access to the press and exploited it by orchestrating a PR blitz to garner public support and mute their critics. In doing so, both assumed roles of prominence for this limited purpose and the risk of closer public scrutiny that came with it." *Id.* at *7.

The Vicinis sought to avoid the public figure label by asserting that their conduct was "shielded by the bootstrapping taboo," required, they argued, to respond to defamatory statements

Bootstrapping and the Privilege of Reply

The Vicinis sought to avoid the public figure label by asserting that their conduct was "shielded by the bootstrapping taboo," *id.*, required, they argued, to respond to defamatory statements first made by Father Hartley in a January 2003 article published in the Spanish newspaper *El Mundo*, and then repeated in the film. In other words, because the priest had been criticizing *batey* conditions in equally harsh terms in the international media in the years preceding the 2007 release of the film, the Vicinis contended that their myriad activities during this time period were irrelevant to the public figure analysis. While praising the Vicinis' argument as "creative," the First Circuit recognized that the case "does not fit the bootstrapping mold." *Id.* As the Court observed, "[b]ootstrapping in this context occurs when the defendant relies on his own defamatory publication to manufacture a public controversy involving the plaintiff, and thus 'by [his] own conduct, create[s his] own defense by making the claimant a public figure.'" *Id.*, quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). Here, by contrast, the controversy over *batey* conditions began long before the *El Mundo* article in 2003; "[l]ike the Vicinis themselves, Fr. Hartley was a voice in that controversy; he was not its creator." *Id.*

The Court similarly rejected the Vicinis' attempt to rely on the so-called privilege of reply, a pre-*New York Times* common law theory that "allowed a defamed person to respond to the extent reasonably necessary to defend himself." *Id.* Here, the Court recognized, "[a]lthough not in so many words, the Vicinis ask us to graft the common-law privilege of reply onto the constitutional public-figure analysis." *Id.* Thus, the brothers argued that they should be able to "publicly defend themselves against defamatory statements in the *El Mundo* article without sacrificing their private-figure status." *Id.*

In so doing, the Vicinis relied upon the Fourth Circuit's decision in *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994), in which the court held that grandparents accused by their daughter-in-law of molesting their infant granddaughter did not become public figures simply by making "limited 'public comments and appearances' to rebut her accusations." *Lluberes*, 2011 WL 6015606, at *8. But as the First Circuit observed, *Foretich* is the only court of appeals decision to "take such a step," and scholarly reaction to its rationale has been divided. *Id.* at *8 & n.2. While the Court agreed with *Foretich* to the extent that "an individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations," *id.* at *8, such facts were not present here: "[a]lthough the Vicinis claim that the *El Mundo* article was a call to arms … they took little if any action directly in response to it… And even if the *El Mundo* article had some indirect influence on their conduct over the next four years, that conduct went well beyond any reasonable measure of self-defense." *Id.*

Public Figures and Geography

The Vicinis' final argument before the appellate court was that they are not limited purpose public figures in the United

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States, where the film was published. Their theory rested on an analogy to general purpose public figures, who must achieve the requisite degree of notoriety in the locale where they were defamed. This geographic restriction, the Vicinis reasoned, must also apply to limited purpose public figures because they are the more "'protected' of the two." *Id.* But that analogy, the First Circuit held, is flawed; the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974), was clear in defining a limited purpose public figure "not in terms of geography but in terms of the controversy that he has stepped into." *Lluberes*, 2011 WL 6015606, at *8-9.

Although cases directly on point are rare, the First Circuit looked to *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987). In *Trotter*, the Fifth Circuit held that a libel plaintiff was a limited purpose public figure for purposes of a U.S. publication where the controversy, which involved labor unrest at a bottling plant in Guatemala, was of domestic concern. *Id.* at 434. In *Trotter*, the controversy had "'captured the attention of a diverse and broadly-based audience [in the United States], including the media, political leaders, human-rights organizations, labor unions, and Coca-Cola shareholders.'" *Lluberes*, 2011 WL 6015606, at *9 quoting *Trotter*, 818 F.2d at 434. Similarly here, the First Circuit recognized, the *batey* controversy "resounded in the United States for obvious humanitarian reasons." *Id.* But moreover, there was a very particular interest in Dominican sugar producers, including the Vicinis, as the result of a U.S. quota system that subsidizes the importation of sugar from the D.R. into the U.S. Thus, "[c]oncerns that negative publicity about the *bateyes* might jeopardize the quota system prompted [the Vicinis] to launch the PR blitz that reached U.S. media outlets and policymakers." *Id.*

The case has now returned to the district court for a ruling on an outstanding discovery issue, involving the degree of protection afforded to the producers' communications with a third-party script annotator who assisted an attorney retained by the filmmakers to provide a risk assessment in connection with the purchase of insurance coverage for the film.

On appeal, appellees Uncommon Productions, LLC and William Haney III were represented by Elizabeth C. Koch, Thomas Curley of Levine Sullivan Koch & Schulz, LLP and Jonathan Albano of Bingham McCutchen LLP. Appellants Felipe Vicini Lluberes and Juan Vicini Lluberes were represented by Joan A. Lukey and Maria G. Arlotto of Ropes & Gray.

MLRC UPCOMING EVENTS

MLRC/Southwestern Media and Entertainment Law Conference
January 19, 2012 | Hollywood, California

MLRC/Stanford Digital Media Conference
May 21-22, 2012 | Stanford, California

MLRC/NAA/NAB 2012 Media Law Conference
Sept. 12-14, 2012 | Reston, Virginia

MLRC Annual Dinner
November 14, 2012 | New York, NY

Defense Counsel Section Annual Meeting and Lunch
November 15, 2012 | New York, NY

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Eighth Circuit Affirms Summary Judgment in Favor of CBS in Limited-Purpose Public Figure Defamation Case

By Chad R. Bowman

The Eighth Circuit recently affirmed summary judgment in favor of CBS Broadcasting Inc. and WCCO-TV reporter Esmé Murphy in a defamation action arising from a news report about a Minneapolis developer's controversial $1.8 million home giveaway contest.

In a welcome precedent for media defendants in the Eighth Circuit given the court's relatively sparse case law on limited-purpose public figures, an appellate panel affirmed that the plaintiff's publicity efforts after being arrested for running the home giveaway contest made him a public figure. Because the plaintiff failed to establish evidence of actual malice, summary judgment was therefore proper. The appellate court also affirmed the trial court's denial of the plaintiff's motion for spoliation sanctions against CBS arising from the pre-litigation recycling of one of the raw interview videotapes used for the ultimate news report. *Stepnes v. Ritschel*, --- F.3d ----, 2011 WL 6113873 (8th Cir. Dec. 9, 2011). The district court's decision was published at 771 F.Supp.2d 1019, 39 Media L. Rep. 1429 (D. Minn. 2011).

In a welcome precedent for media defendants in the Eighth Circuit given the court's relatively sparse case law on limited-purpose public figures, an appellate panel affirmed that the plaintiff's publicity efforts after being arrested for running the home giveaway contest made him a public figure.

Background

Plaintiff Paul Stepnes built a "high priced home" as a showcase property, unfortunately for him just prior to a downturn in the housing market. After he failed to sell the $1.8 million property, it went into foreclosure in February 2008 – with a statutory "redemption" period extending to late September 2008 during which Stepnes could recover the house if he paid off its debt and the interest thereon.

Seeking to raise money to redeem the property, Stepnes in May 2008 launched and began promoting the "Big Dream House Giveaway" contest. The aim of the contest was, according to its website, to "'take a negative situation and make something positive come out of it by raising enough money to pay off the mortgage of a housing shelter for women and children'" through the "Chester House Foundation."

The contest ran as follows: Entrants paid $20, either at the house or online. Each $20 fee entitled a contestant to guess the number of variously sized and shaped nails, screws and other fasteners in a large container. There was no disclosed ratio of the various sizes and shapes of these fasteners, nor was it disclosed that other materials (such as "a plastic protection sheet and a cardboard box for stability") were in at least one of the contest containers. Under the contest rules, the contestant with the closest estimate without going over the correct number when the contest ended in November 2008 would "win" either the house or $1 million cash, at the winner's option – assuming that at least $5 million in tickets had been sold. If fewer tickets were sold, the winner was entitled to 50 percent of "net" proceeds. The website did not disclose that the prize home was in foreclosure and encumbered by nearly $2 million in debt, or that that there was a September 2008 redemption deadline. The contest website also initially promoted weekly drawings for smaller prizes, such as a microwave oven.

Shortly after the launch of the contest, Minneapolis police arrested Stepnes for allegedly running an illegal lottery. He argued, however, that the Big Dream House Giveaway was not a guessing game predominantly determined by chance but merely a contest of mathematical skill. Stepnes then hired a public relations firm, purchased advertising, gave press interviews, and re-launched the contest.

In July 2008, WCCO-TV reporter Esmé Murphy prepared

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a news report about the controversy. She reported that Stepnes had been arrested and could be heading to jail; that police believed the contest was an illegal lottery; that the prize home was in foreclosure with a redemption date prior to the end of the contest; that the Chester House Foundation was not a registered charity in Minnesota; and that an advertised "weekly prize" had never been awarded.

Stepnes canceled the Big Dream House Giveaway soon afterward, claiming it had been destroyed by his arrest and the CBS report. Stepnes filed a lawsuit asserting civil rights claims against the City of Minneapolis and individual police officers arising from an alleged false arrest, as well as defamation claims against WCCO owner CBS Broadcasting Inc. and Murphy arising from the allegedly defamatory broadcast.

The District Court's Decision

Following the close of discovery, the district court granted motions for summary judgment by all defendants. With regard to CBS and Murphy, the court found Stepnes to be a limited purpose public figure who failed to establish actual malice. The court also dismissed claims against the city defendants after concluding that police had probable cause to believe that Stepnes was conducting an illegal lottery and that the governmental defendants were entitled to qualified immunity and official immunity.

The Appellate Decision

In affirming dismissal of the defamation claim against CBS and Murphy, the Eighth Circuit readily agreed that there was a pre-existing public controversy because "Stepnes's contest and arrest had already been debated in the local press, and both of those issues had ramifications beyond the contest participants."

The court concluded that Stepnes had access to effective channels of communication and voluntarily assumed a prominent role in this debate – indeed, he sought publicity, hired public relations personnel, and spoke to the press to promote his view that the Big Dream House Giveaway was a *bona fide*, and legal, skill contest.

While Stepnes argued on appeal that these activities were merely defensive and therefore he retained a private persona pursuant to *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 168 (1979), the Eight Circuit was unconvinced. After reviewing the record, the court noted that Stepnes's conduct "went beyond defending himself," as he "sought media coverage by using a public relations firm to 'shape the message' and 'turn a negative spin into a positive spin.'"

Turning to the actual malice question, the court found no reckless disregard for truth or malice in an anchor lead-in that "'the only place that man [Stepnes] could be moving is jail,'" given Murphy's confirmation of Stepnes's arrest, statements by police that Stepnes was conducting an illegal lottery, and confirmation from the city attorney's office that Stepnes was under investigation. The court similarly found "minor inaccuracies" – such as the report's misidentification of which state agency registers charities and its statement that Stepnes was arrested for violating charitable gambling laws – to be substantially true where the Chester House Foundation was not registered with any state agency as a charity (and Murphy had checked) and where Stepnes was arrested for running an illegal lottery.

The court also rejected a claimed defamatory implication that Stepnes was hiding the fact that the prize home was in foreclosure, because none of the plaintiff's proffered evidence indicated that Murphy "recklessly disregarded the truth in conveying the impression that Stepnes was not open with potential contestants regarding the foreclosure."

Finally, the court affirmed the district court's denial of spoliation sanctions based on the pre-litigation loss of a single raw interview tape, which included an interview with plaintiff and his lawyer. The court did so even under a "gross negligence" standard proffered by the plaintiff that the Eighth Circuit noted it had never adopted, because the evidence showed that WCCO generally recycled tapes, that Murphy collected all materials relevant to the story, that other preservation efforts were taken by the station, and that when it was discovered that one tape was missing "WCCO TV employees conducted an extensive search for the tape."

The Eighth Circuit also affirmed the dismissal of claims against the governmental defendants.

CBS Broadcasting Inc. and Esmé Murphy were represented by Anthony M. Bongiorno and Carl R. Benedetti of CBS and Michael D. Sullivan, Jeanette Melendez Bead and Chad R. Bowman of Levine Sullivan Koch & Schulz, LLP, as well as John P. Borger and Leita Walker of Faegre & Benson's Minneapolis office.

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D.C. Court Grants First Anti-SLAPP Motion

Applies Law Retroactively

By Charles D. Tobin and Drew E. Shenkman

A District of Columbia judge has ordered the first dismissal under the jurisdiction's new anti-SLAPP law, finding that a firefighter failed to show he was "likelihood of success" in his defamation claim concerning reporting that he earned extreme amounts of overtime. *Lehan v. Fox Television Stations, Inc. and Roby Chavez*, Case No. 2011 CA 004592 B (D.C. Super. Ct. November 30, 2011).

Judge Rufus G. King III, of the D.C. Superior Court applied the new statute retroactively and granted the dismissal motion brought by WTTG, which is owned by Fox Television Stations, and its former reporter Roby Chavez. King held that fire department Lt. Richard Lehan failed to meet his burden to show the station was at fault or that he suffered any damages. The judge dismissed the lawsuit with prejudice and ordered the defendants to brief attorney's fees, which are discretionary under D.C.'s statute.

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Background

The lawsuit arose out of WTTG's January 2011 report on a local government review of $5 million annual budget overruns in the D.C. Fire and Emergency Medical Service. A committee of the D.C. Council, examining the District's overtime budget, received a report that listed Lt. Lehan as the service's largest overtime earner in fiscal 2008 and in the top 10 largest in fiscal 2009 and 2010.

On top of his $90,000 annual salary, Lehan had earned between $66,000 and $119,000 in overtime each of those years, the Council committee's records showed. WTTG's report on the committee's probe highlighted Lehan's earnings, and reported his comments that he worked the overtime to support a large family and took simply took the assignments given to him. The station also reported that, according to unnamed sources, Lehan and his brother, also a firefighter, were in charge of the computer system that assigned overtime.

Lehan in June 2011 sued for defamation and defamation per se. He alleged that the station's figures were inaccurate and that the report's use of phrases like "racked up" and "month-after-month" were defamatory. He also alleged that the report that he and his brother controlled the assignment of overtime was false. He charged the station with accusing him of a criminal act.

Anti-SLAPP Motion

The station filed a special motion to dismiss under the District's anti-SLAPP statute, D.C. Code §16-5501, *et seq.*, enacted in March 2011. D.C. is the 29th jurisdiction with a law permitting early challenges SLAPP lawsuits -- which stands for "Strategic Lawsuits Against Public Participation." Under the D.C. statute, if a defendant establishes the lawsuit arose out of "acts in furtherance of the right of advocacy on issues of public interest," the burden shifts to the plaintiff to demonstrate a "likelihood of success" on the merits. If the plaintiff fails, the statute requires the court to dismiss the lawsuit, and provides the judge with discretion to award reasonable attorney's fees.

The station argued that the statute applied because the journalism met the statutory definitions for "issues of public interest," as it: touched on "an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"; involved the communication of "views to members of the public in

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connection with an issue of public interest"; and also involved "an issue related to health or safety; environmental, economic, or community well-being." On the merits, the station argued:

- The figures the station reported were substantially accurate;
- The station's report was based on government records and therefore protected by fair report privilege;
- The descriptions "racked up" and "month-after-month" were nonactionable expressions because they were truthful or were protected opinions;
- The station's report did not accuse Lehan of a crime, let alone one involving moral turpitude, and therefore was not libel per se;
- Lehan could not show damages;
- Finally, that Lehan is a public official and could not establish actual malice by clear and convincing evidence.

To bolster the actual malice argument, WTTG filed an affidavit from the reporter. He attested that his confidential sources were high ranking fire-department officials who had provided information on several previous stories, including internal investigations, and that their information had always been reliable.

"Certainly, a publication that describes how the District Government is spending its money would be a matter of public interest and subject to comment."

Lehan vigorously challenged the statute's application on retroactivity grounds. He argued the law provided new "substantive" rights because, in his view, it increased a defamation plaintiff's burden. Therefore, he argued, since the story was broadcast in January and the statute enacted in March, it could not be applied retroactively.

He also filed an affidavit containing his calendar year income figures, which were at variance with the fiscal year figures contained in the public records and WTTG's report. Lehan also argued he was not elevated enough in D.C. government to warrant treatment as a public official under defamation law, and that simple negligence therefore applied. Finally, his affidavit and an affidavit from his firefighter-brother both attested that the Lehans did not control the computer assignment of overtime.

WTTG responded to the retroactivity issue by arguing that the procedural/substantive dichotomy used to analyze *Erie* questions in federal court was unhelpful, and that under controlling D.C. law, retroactivity simply turns on whether the statute made it harder for Lehan to win the lawsuit. WTTG argued that as Lehan had the same defamation burdens before the statute and after -- falsity, defamatory content, lack of privilege, actual malice and damages -- the statute did not alter his chances of prevailing. Instead, the statute merely accelerated the timeframe for the court's consideration of the merits.

Judge King ruled in the defendants' favor at the November 21 hearing, and his November 30 order dismissing the lawsuit incorporated the hearing transcript. He firmly agreed with WTTG that the statute applied retroactively. He noted that while a part of the legislative history had used the word "substantive":

> [M]y finding is that the burden of proof on the Plaintiff does not change. It simply is accelerated a little bit, in part. So, that instead of having to actually provide preponderance of the evidence proof, he has to show early on that he is likely to be able to do so. That is not a substantive change in his burden of proof. It does not add anything that he will have to do. It simply changes the timing of when he has to do it. He has to do a little bit of it now. He has to show likelihood, that he is likely to get there and then he actually has to get there. In the Court's view, it does not change the substance of the law. The statute then applies.

As to applicability, the judge said the anti-SLAPP statute clearly covered WTTG's reporting: "Certainly, a publication that describes how the District Government is spending its money would be a matter of public interest and subject to comment."

The judge then held that the distinction between a public and a private figure would not "make[] the critical difference in this case" because the reporter's affidavit demonstrated that Lehan could not even show "ordinary negligence." In

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addition to relying on public records, the judge found, the reporter established that he:

> did an investigation that frankly sounded very like the showing that police officers have to make when they want to show probable cause based on a confidential informant. They have to show that they had experience; that it was substantial and that there has never been an incident when the informant has been proven false. I think [the reporter] did that here. So, I don't think that there was negligence then in using that information.

Judge King alternatively held, however, that Lehan is a public figure whose claim is governed by actual malice, and that fault "cannot be shown by a clear and convincing standard or even a negligence standard."

Finally, the judge agreed that Lehan had failed to demonstrate a likelihood that he could establish damages, not even emotional harm:

> [T]he allegation is not that he was falsely reporting his hours. It was that he simply worked a lot of hours when in the view of some, he should not have been working those hours. That is almost not even embarrassing in the normal daily run of news on the operations of the city government. The idea that some people are working a lot of hours almost is not even embarrassing. I say almost. I don't need to get into whether it is or whether it is not. But, there is no showing of damage.

Lt. Richard Lehan was represented by Michael E. Thorsen, John D. McGavin and Dawn E. Boyce, of Bancroft, McGavin, Horvath & Judkins, P.C., Fairfax, VA.

Fox Television Stations and its former reporter Roby Chavez were represented by Charles D. Tobin and Drew E. Shenkman, Holland & Knight LLP, Washington D.C., in close collaboration with Susan Seager, Senior Counsel, Fox Entertainment Group, and Lisa Rafferty, Vice President, Legal Affairs, Fox Television Stations, Los Angeles.

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Failure to Retract Online Material After Indication of Falsity Not a Republication

The Ninth Circuit held that the failure to retract information online after the publisher has an indication of falsity is not a republication to restart the statute of limitations. *Roberts v. McAfee, Inc.*, No. 10-15561 (9th Cir. Nov. 7, 2011) (Tashima, Fletcher, Reinhardt, JJ.).

Plaintiff, the former general counsel of software maker McAfee, was fired in 2006 in a stock option accounting scandal. The company issued a press release that year stating the plaintiff had acted "improperly." Plaintiff was later indicted and charged with criminal fraud, but was acquitted after trial in 2008.

In 2009, plaintiff sued, alleging the press release was defamatory. Plaintiff conceded that his claim was time-barred if measured by the date of first publication, but argued that McAfee's failure to take down the press release "once it received substantial indications of falsity" restarted the statute of limitations. "The fundamental problem with [plaintiff's] theory – that a mass communication is republished when the defendant fails to retract it after receiving notice of its falsity – is that it undermines the single-publication rule," the Court held.

The court went on to explain that under plaintiff's theory "repose would never be certain." In a telling example, the court observed that a 40 year old newspaper article whose veracity is called into question today would be actionable. "Such a result would be entirely at odds with the goal of the single-publication rule."

Plaintiff was represented by Hal K. Gillespie, Gillespie, Rozen & Watsky, PC, Dallas, TX. Defendant was represented by Lynne C. Hermle, Orrick, Herrington & Sutcliffe LLP, Menlo Park, CA.

Court Rejects Police Complaint to Stop Chicago Sun-Times' Publication of Line-Up Photos

Request for TRO Rejected; Action Dropped

By Damon E. Dunn

Starting in February 2011, the *Chicago Sun-Times* published a series of investigative reports by Tim Novak and Chris Fusco questioning why Richard Vanecko, a nephew and namesake of then Chicago Mayor Richard Daley, was not criminally charged after he struck and killed 21-year-old David Koschman during a drunken argument on Chicago's Rush Street. Vanecko fled the scene and the Chicago Police Department ("CPD") had said that eyewitnesses failed to pick him out of a line-up conducted several weeks later. After the *Sun-Times* filed FOIA requests, however, CPD reopened the investigation and determined that Vanecko threw the fatal punch. Still, no charges were brought, and CPD refused to release the line-up photographs.

The newspaper then sought and obtained a preauthorization determination from the Illinois Attorney General that the lineup photographs were not exempt from disclosure under section 7(1)(c) of the Illinois Freedom of Information Act. Chicago's new mayoral administration released unredacted photographs and the *Sun-Times* promptly published them. The *Sun-Times* reported that, although Vanecko was a big man, the police officers chosen to participate in the line-up were even larger. To illustrate the point, the *Sun-Times* published a graphic of the lineup, which included the officers' names and compared their birth dates, height, weight, eye color and hair color with Vanecko's.

Police Seek TRO

On November 21, 2011, The Fraternal Order of Police Chicago Lodge No. 7 ("FOP") sued the *Sun-Times* and the City of Chicago in the Circuit Court for Cook County, Illinois over the release and publication of the lineup photographs

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and descriptions of the participating officers. The FOP sought a temporary restraining order to remove the Internet story and restrain further publication of information related to the officers' identities.

The FOP contended that the officers had a right to anonymity and the disclosures not only jeopardized their safety but also were prohibited by FOIA, privacy laws, the municipal code and a bargaining agreement with the City. The *Sun-Times* objected to the TRO, arguing that Illinois does not (yet) have "secret police" and the TRO represented an unconstitutional prior restraint, particularly where the officers were public servants who were not working undercover.

Judge Michael B. Hyman denied the TRO, agreeing with the defendants that the FOP could not assert the privacy rights of its members and the alleged infringement on their privacy was, in any case, expected for police officers. *The Fraternal Order of Police Chicago Lodge No. 7, et al, v. Sun-Times Media, LLC, et al*, No. 11 CH 40181 (Ill. Cir. Nov. 22, 2011).

Recognizing that the newspaper had a duty to report on the conduct of government, the court ruled as a matter of law that the Koschman homicide investigation concerned the public interest and could not be constitutionally enjoined on the facts presented.

The *Sun-Times* objected to the TRO, arguing that Illinois does not (yet) have "secret police" and the TRO represented an unconstitutional prior restraint, particularly where the officers were public servants who were not working undercover.

Police Bring DPPA Claim

Undeterred, the FOP amended its complaint to add the individual officers as the plaintiffs and sought another TRO against the *Sun-Times* under the federal Driver's Privacy Protection Act, 18 U.S.C. 2701, *et seq*. ("DPPA"). Essentially a penal statute, the DPPA also allows for private causes of action against defendants who improperly use certain "personal information" obtained through motor vehicle records. The plaintiffs alleged that the *Sun-Times* obtained their full names, birth dates, height, weight, hair and eye color from the Illinois Secretary of State's office.

The *Sun-Times* filed an opposition, arguing that the plaintiffs' new theory of recovery still did not satisfy the First Amendment test for enjoining publication of true and newsworthy information. Although that the definition of "personal information" in Section 2725(3) of DPPA includes photographs and names, the line-up photographs and names were obtained from a FOIA request to the City, not the Secretary of State. With respect to the information that was obtained from the Secretary of States' office, the *Sun-Times'* argued that the DPPA does not include the other categories of data accompanying the *Sun-Times'* lineup graphic, namely, birth dates, height, weight, hair and eye color. Moreover, unlike the types of "personal information" expressly included in Section 2725(3), the officers' birth dates and physical characteristics were not unique to them and could describe other individuals as well.

The plaintiffs responded that the DPPA protected any motor vehicle records that could be used to identify them and court decisions did not differentiate. The plaintiffs also argued that the DPPA expressly afforded equitable relief even though it references only federal district court suits.

Again the court denied the TRO. Judge Hyman noted that while the DPPA was inartfully drafted, it did not expressly include the general information alleged here. Moreover, the officers' approximate age and physical characteristics could not be "personal information" under the DPPA, because such information would be openly visible to the public while the officers were performing their duties. Assuming the plaintiffs could state a DPPA claim based on a newspaper report, they had not demonstrated a "gravity of evil," such as a "clear and present danger," sufficient to justify enjoining the newspaper reporting.

On December 13, 2011, plaintiffs dismissed their case, preserving the option of filing DPPA claims in federal court. On December 15, 2011, the *Sun-Times* reported that Koschman's mother applied for a special prosecutor to reexamine the entire homicide investigation.

Damon E. Dunn of Funkhouser Vegosen Liebman & Dunn Ltd, Chicago, represented Sun-Times Media, LLC. The City of Chicago was represented by Karen M. Coppa, Esq. and Andrew Mine. Fraternal Order of Police Lodge 7 was represented by Sean C. Starr and Ronald C. Dahms.

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D.C. Preliminarily Enjoins New Graphic Tobacco "Warnings," Applies Strict Scrutiny to Compelled Display of Government Advocacy

By Joel Kurtzberg
and Kayvan Sadeghi

On November 7, 2011, U.S. District Judge Richard Leon granted a preliminary injunction against the U.S. Food and Drug Administration ("FDA") in a case filed by R.J. Reynolds Tobacco Co., Lorillard Tobacco Company, Commonwealth Brands, Inc., Liggett Group LLC, and Santa Fe Natural Tobacco Company, in the U.S. District Court for the District of Columbia. *R.J. Reynolds Tobacco Co. v. FDA*, Civil Case No. 11-1482 (D.D.C.). The tobacco companies' First Amendment challenge to the constitutionality of FDA's new graphic cigarette warning labels has potentially far-reaching implications for future Government regulation of commercial speech and of products the Government disfavors.

The FDA issued a Final Rule on June 22, 2011 that would have required tobacco companies to display new graphic labels on cigarette packs and advertising by September 22, 2012. The preliminary injunction stays the effective date of the Rule until 15 months after the district court's final resolution of the litigation. Cross motions for summary judgment are pending before the district court and the preliminary injunction is on appeal before the United States Court of Appeals for the D.C. Circuit.

The district court granted a preliminary injunction because "the plaintiffs have demonstrated a substantial likelihood that they will prevail on the merits of their position that these mandatory graphic images unconstitutionally compel speech, and that they will suffer irreparable harm absent injunctive relief pending a judicial review of the constitutionality of the FDA's Rule." The new graphic images were found likely to be unconstitutional compelled speech because they appear to cross the line from purely factual and noncontroversial health warnings (which would be permissible under the First Amendment provided that they were not unjustified or unduly burdensome) to a compelled display of government advocacy in support of its non-smoking agenda. As compelled advocacy, the graphic images are subject to strict scrutiny, under which plaintiffs are highly likely to succeed.

The Court was not persuaded by the Government's reference to similar graphic tobacco warnings in countries that lack the robust protections of the First Amendment, and it paid particular attention to the precedent that the new warnings regime would create for non-tobacco products: "One can only wonder what the Congress and the FDA might

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The new graphic images were found likely to be unconstitutional compelled speech because they appear to cross the line from purely factual and noncontroversial health warnings (which would be permissible under the First Amendment provided that they were not unjustified or unduly burdensome) to a compelled display of government advocacy in support of its non-smoking agenda.

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conjure for fast food packages and alcohol containers if, like the Canadian government, they were not compelled to comply with the intricacies of our First Amendment jurisprudence." Opinion at 20n26.

Congress' and FDA's New Graphic Tobacco "Warnings"

The new graphic tobacco warnings stem from the Family Smoking Prevention and Tobacco Control Act (the "Act"), passed by Congress and signed into law by President Obama in 2009. Among other things, the Act requires nine new specified textual warnings accompanied by graphic images of FDA's choosing, to occupy the top 50% of the front and back panels of all cigarette packages. Congress gave FDA "24 months after the date of enactment" of the Act to issue regulations implementing the new warnings. The new textual warnings and graphic-image labels were scheduled to take effect 15 months after issuance of the Rule. *See* Opinion at 5.

On November 12, 2010, FDA submitted for public comment a Proposed Rule unveiling 36 graphic color images that could be displayed with the 9 new textual warnings created by Congress. *Id.* at 5. Following public comment and its own impact study, FDA implemented its Final Rule on June 22, 2011, adopting nine of the 36 proposed images.

The new graphics are posted online at http://www.fda.gov/TobaccoProducts/Labeling/CigaretteWarningLabels/default.htm. As described by the Court, they include:

> [C]olor images of a man exhaling cigarette smoke through a tracheotomy hole in his throat; a plume of cigarette smoke enveloping an infant receiving a kiss from his or her mother; a pair of diseased lungs next to a pair of healthy lungs; a diseased mouth afflicted with what appears to be cancerous lesions; a man breathing into an oxygen mask; a bare-chested male cadaver lying on a table, and featuring what appears to be post-autopsy chest staples down the middle of his torso; a woman weeping uncontrollably; and a man wearing a t-shirt that features a "no smoking" symbol and the words "I Quit." An additional graphic image appears to be a stylized cartoon (as opposed to a staged photograph) of a premature baby in an incubator.

Opinion at 7.

Each warning also brandishes the "1-800-QUIT-NOW" smoking-cessation hotline. *Id.* at 8. The Court noted that "FDA does not dispute that 'some of the photographs were technologically modified to depict the negative health consequences of smoking,' although it insists that 'the effects shown in the photographs are, in fact, accurate depictions of the effects of sickness and disease caused by smoking.'" *Id.* at 7n12. The Court's view of the "warnings" was made clear in the first footnote on page one:

> The FDA conveniently refers to these graphic images as "graphic warnings." While characterizing the mandatory textual statements as "warnings" seems to be a fair and accurate description, characterizing these graphic images as "warnings" strikes me as inaccurate and unfair. At first blush, they appear to be more about shocking and repelling than warning. Accordingly, I will refer to them simply as graphic images, and set this self-serving "warning" label aside for closer analysis on another day.

Related Litigation

Before FDA issued its Final Rule, some of the same plaintiffs challenged the Act itself on First Amendment grounds, including the Act's requirement that FDA promulgate graphic warnings. The Western District of Kentucky granted summary judgment against the tobacco companies with respect to the Act's graphic warning requirements (and for them on other aspects of the Act), and that case remains pending on cross-appeals in the Sixth Circuit.

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As a preliminary issue here, the Government construed the case against FDA as an attempt to re-litigate the earlier case and asserted that the Court should defer to the Western District of Kentucky's grant of summary judgment against some of the same tobacco companies with respect to graphic warnings. The Court decisively rejected the notion that it was bound by the decision out of the Western District of Kentucky. "I would remind the Government that even decisions from other district courts in *our* Circuit have no binding effect on this Court. This case is, indeed, one of first impression in our Circuit – and one wholly separate, both factually and legally, from the *Commonwealth Brands* case." *Id.* at 12. Among other things, the Court noted that the challenge to the Act was "a facial challenge to the constitutionality of graphic warnings in general" as opposed to this challenge to the nine particular graphic images selected by FDA. *Id.* at 12n17. (These specific graphics had not been selected at the time of the *Commonwealth Brands* decision.) With that, the Court turned its attention to the FDA Rule.

First Amendment Protection Against Compelled Speech

The Court began its analysis of the merits by briefly summarizing the core First Amendmen t protection against compelled speech. *See* Opinion at 13:

> A fundamental tenant of constitutional jurisprudence is that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley* [v. *Maynard*], 430 U.S. [705] at 714 [(1977)]. A speaker typically "has the autonomy to choose the content of his own message." *Hurley* [v. *Irish American Gay, Lesbian, and Bisexual Group of Boston*], 515 U.S. [557] at 573 [(1995)]. And, in fact, "[for corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co.* v. *Pub. Uti/so Comm 'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion). Thus, where a statute "'mandates speech that a speaker would not otherwise make,' that statute 'necessarily alters the content of the speech.'" *Entertainment Software Ass 'n* v. *Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006) (quoting *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc*., 487 U.S. 781, 795 (1988)). As the Supreme Court itself has noted, this type of compelled speech is "presumptively unconstitutional." *Rosenberger* v. *Rector & Visitors of Univ. o/Va.*, 515 U.S. 819, 830 (1995).

The opinion is noteworthy for its refusal to accept the Government's asserted compelling interest at face value. It is not enough for the Government to claim that it is seeking to inform consumers. Nor is it enough that the Government's actions are broadly intended to further public health.

There is, however, a limited exception to the compelled speech doctrine, which allows the Government to require disclosure of "purely factual and uncontroversial information" in order to prevent "confusion or deception," as long as the required disclosures are not "unjustified and unduly burdensome." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Perhaps the quintessential example of such disclosures is the long-standing Surgeon General's warnings on tobacco products.

Plaintiffs acknowledged that their products had been accompanied by warnings for more than 45 years and noted that they had "never brought a legal challenge to any of them." Opinion at 3n4. Nor did Plaintiffs challenge the text of the new warnings required by Congress. However, the graphic images and the size and placement requirements, confiscating the top 50% of the front and back of cigarette packs, rendered the new warnings unduly burdensome and no longer "purely factual and uncontroversial."

The Court agreed, at least preliminarily, and its analysis of whether the images were purely factual is particularly instructive. First, the Court looked to the creation of the

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images, noting that "the fact *alone* that some of the graphic images here appear to be cartoons, and others appear to be digitally enhanced or manipulated, would seem to contravene the very definition of 'purely factual.'" Opinion at 13 (emphasis in original). Second, the Court looked to the criteria by which FDA selected the graphics – which were chosen by means of a study that measured "salience," defined as the ability to elicit emotional reactions such as shock and disgust – which further indicated that the images were not intended to be purely factual and noncontroversial. *See id.* Finally, the Court employed a know-it-when-you-see-it approach:

> Moreover, it is abundantly clear from viewing these images that the emotional response they were crafted to induce is calculated to provoke the viewer to quit, or never to start, smoking: an objective wholly apart from disseminating purely factual and uncontroversial information. Thus, while the line between the constitutionally permissible dissemination of factual information and the impermissible expropriation of a company's advertising space for Government advocacy can be frustratingly blurry, here – where these emotion-provoking images are coupled with text extolling consumers to call the phone number "1-800-QUIT" – the line seems quite clear. *Id.*

Because the graphic "warnings" did not fit within the *Zauderer* exception, "neatly or otherwise," they were subject to strict scrutiny. *Id.* at 16.

To withstand strict scrutiny, FDA bore the burden of demonstrating that the Rule is narrowly tailored to achieve a compelling government interest. Here, FDA "neither carried its burden of demonstrating a compelling interest, nor demonstrated how the Rule is narrowly tailored to achieve a constitutionally permissible form of compelled commercial speech." *Id.* at 21.

One might expect the compelling interest to be self-evident in the context of tobacco warnings. However, the Court conducted a more thorough analysis of the interest at stake and noted that while this step may ordinarily be perfunctory, here it was "seriously clouded by the Government's own explanation of its goals, which are, to say the least, unclear. . . [because] the Government's stated purpose does not seem to comport with the thrust of its arguments, or with the evidence it offers to support the Rule." *Id.* at 17.

The Court did not accept at face value FDA's assertion of an interest to inform tobacco consumers (or potential consumers) of health risks. Rather, the Court again looked to the means by which FDA had evaluated the warnings, pointing out that "the study [FDA conducted to evaluate the proposed images] was not designed to assess whether the proposed graphic images would have a statistically significant impact on consumer awareness of smoking risks." *Id.* at 18. Accordingly, the Court found FDA's asserted purpose to be an argument of convenience in light of the permissible disclosure standard set forth in *Zauderer*. "As best as I can discern, however, the Government's primary purpose is not, as it claims, merely to inform." *Id.* at 17.

The Court also found the warnings not narrowly tailored to achieve "the Government's purpose (whatever it might be)." Rather, the Court looked at the dimensions of the warnings as an indication that the true purpose was, as the Secretary of Health and Human Services had stated, to "'rebrand[] our cigarette packs,' treating (as the FDA Commissioner announced last year) 'every single pack of cigarettes in our country' as a 'mini-billboard.'" *Id.* at 20.

The final straw was the "QUIT NOW" message included with each graphic warning. "That each warning brandishes the '1-800-QUIT-NOW' smoking-cessation hotline only enhances plaintiffs' argument that the FDA has 'conscript[ed] [tobacco manufacturers] into an anti-smoking brigade.'" *Id.* at 21n28.

Last, the Court held that the tobacco companies faced irreparable harm for two reasons. First, the monetary loss suffered by plaintiffs in preparing to comply with the new graphic warnings pending a determination from the Court would constitute irreparable harm, even though it was purely economic, because plaintiffs would be precluded from seeking money damages from FDA, thus rendering any financial loss irreparable. *Id.* at 23-24. Second, the Court noted that courts have found the loss of First Amendment rights to be irreparable harm *per se*. *Id.* at 24 (citing *Elrod* v.

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Burns, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

Significance of the Decision

Judge Leon's decision is a strong defense of First Amendment rights and a rebuke of the Government's efforts to use regulatory power to push a particular agenda. Preventing such over-reaching in the context of tobacco – where the Government's ambitions may be at their most sympathetic – is crucial to avoid an erosion of First Amendment freedoms. As the Court recognized, "when one considers the logical extension of the Government's defense of its compelled graphic images to possible graphic labels that the Congress and the FDA might wish to someday impose on various food packages (i.e., fast food and snack food items) and alcoholic beverage containers (from beer cans to champagne bottles), it becomes clearer still that the public's interest in preserving its constitutional protections" favors injunctive relief. *Id.* at 28.

The Court's opinion is directly in keeping with recent Supreme Court precedent, which has similarly rejected Government efforts to use speech regulation to advance its agenda. *See Sorrell* v. *IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (June 23, 2011) ("[t]he State can express [its] view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.")

The opinion is also noteworthy for its refusal to accept the Government's asserted compelling interest at face value. It is not enough for the Government to claim that it is seeking to inform consumers. Nor is it enough that the Government's actions are broadly intended to further public health. Rather, the Court looked to the record to determine the more direct purpose of the particular FDA Rule before it. Here that more immediate purpose – to advance an anti-smoking agenda by compelling tobacco manufacturers to carry the Government's advocacy – is precisely what the First Amendment assures that the Government may not do.

Joel Kurtzberg and Kayvan Sadeghi are a Partner and Associate at Cahill Gordon & Reindel LLP, counsel for Lorillard Tobacco Company in this case.

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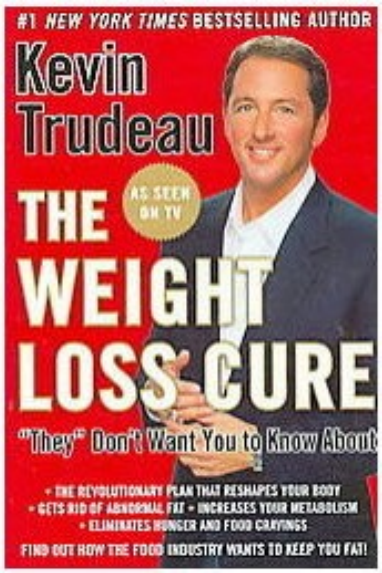
Seventh Circuit Affirms $37.6 Million Fine Against Infomercialist Kevin Trudeau

The Seventh Circuit affirmed a $37.6 million contempt fine imposed on infomercialist Kevin Trudeau, as well as a $2 million bond to deter further misleading and deceptive infomercials. *Federal Trade Commission v. Kevin Trudeau*, No. 10-2418 (7th Cir. Nov. 29, 2011) (Ripple, Manion, Tinder, JJ.).

The fine and bond, which had been imposed on Trudeau by the district court for violations of a settlement order not to misrepresent his book *The Weight Loss Cure*, were found to be both within the court's discretion and not in violation of the First Amendment.



For misrepresenting his book, Trudeau has been sanctioned with $37.6 million in compensatory damages and a "performance bond."

Background

In 2007, the district court found that Trudeau had misrepresented his book *The Weight Loss Cure* in infomercials by claiming both that it was "easy" to follow, and that upon program completion, a participant could eat "anything they want." *See FTC v. Trudeau*, 567 F. Supp. 2d 1016 (N.D. Ill. 2007). In light of the program's inclusion of colonics, human growth hormone injections, and cleanses, among other laborious recommendations and requirements, Trudeau's pitching it as "easy" was found to be a misrepresentation. Moreover, the program's required lifelong dietary restrictions led the court to conclude that Trudeau's infomercial pitch that after completion participants could eat "anything they want" was a misrepresentation.

The district court ordered Trudeau to pay $37.6 million and imposed a three year ban on making infomercials. The Seventh Circuit vacated the fine and ban and remanded to the district court to make a more detailed finding on damages. *See FTC v. Trudeau,* 579 F.3d 754 (7th Cir. 009) ("Trudeau I"). On remand, the district court again imposed a $37.6 million fine, but converted the blanket ban on performing infomercials to a "performance bond" requirement to deter against future misleading advertising.

Seventh Circuit Decision

In its November decision, the appeals court affirmed the $37.6 million contempt fine, which was imposed under section 13(b) of the FTC Act. The appeals court explained that the district court had provided the necessary explanation for how it had arrived at this number. The award, which was based on the total losses to consumers, in the form of costs plus shipping of books ordered under the infomercials toll-free number, was found to be within the district court's discretion, and a correct method of awarding damages. In fact, the appeals court emphasized that the fine was quite conservative, insofar as it had excluded books purchased in stores which bore an "As Seen on TV" sticker.

Moreover, the appeals court rejected an argument of Trudeau's against using consumer loss as the measure of damages, namely that the holding in another case, *FTC v. Verity Int'l, Ltd.,* 443 F.3d 48 (2d Cir. 2006) should control. In *Verity,* the Second Circuit excluded middlemen profits in calculating damages in an FTC action against a phone-sex scheme. The Seventh Circuit ruled that the *Verity* exception did not apply to Trudeau. Among other things, Trudeau had assigned rights to payment for his books to another company, ITV Global, in exchange for monthly million dollar payments. The appeals court held that no middleman exception applied here when calculating 13(b) damages.

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Finally, the court found that the requirement that Trudeau post a $2 million dollar performance bond before airing any other infomercials, regardless of their content, was constitutional. This "performance bond" did not violate the First Amendment because it offered Trudeau an opportunity to "purge." That is, Trudeau can still perform non-deceptive infomercials if he chooses. As the court explained:

> [A] bond is required only if Trudeau decides to resume making infomercials. It does not limit Trudeau as an author; it does not curtail Trudeau's attempt to pitch products in any print medium; it does not even apply if Trudeau makes a TV or radio ad under two minutes. Its application targets only the commercial conduct that has caused such tremendous consumer harm in the past —infomercials.

The bond requirement passed the intermediate scrutiny test because protecting consumers is a substantial interest and the performance bond advanced that interest and was narrowly drawn. The $2 million bond was also proportional to the harm Trudeau had caused, and even somewhat low in light of the 32,000 times that Trudeau aired his deceptive infomercial after he had been order not to.

Kevin Trudeau was represented by Kimball Anderson, Winston & Strawn, Chicago, IL.

MLRC UPCOMING EVENTS

MLRC/Southwestern Media and Entertainment Law Conference
January 19, 2012 | Hollywood, California

MLRC/Stanford Digital Media Conference
May 21-22, 2012 | Stanford, California

MLRC/NAA/NAB 2012 Media Law Conference
Sept. 12-14, 2012 | Reston, Virginia

MLRC Annual Dinner
November 14, 2012 | New York, NY

Defense Counsel Section Annual Meeting and Lunch
November 15, 2012 | New York, NY

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Third Circuit Reaffirms Rejection of FCC's "Fleeting Images" Policy

Reverses Super Bowl Fine

By Robert Corn-Revere and Ronald G. London

On Nov. 2, 2011, the United States Court of Appeals for the 3rd Circuit reaffirmed and largely readopted its 2008 decision rejecting the $550,000 forfeiture and finding of indecency violation levied against CBS for the 2004 Super Bowl halftime show featuring Janet Jackson and Justin Timberlake. *CBS Corporation et al. v. FCC*, No. 06-3575.

The appeal involved the live broadcast of the show, which culminated in an unscripted nine-sixteenth-second exposure of Janet Jackson's breast.

The 3rd Circuit previously had held the FCC arbitrarily and capriciously departed from a prior policy of excepting fleeting broadcast material from the scope of actionable indecency, and that the agency could not impose strict liability on CBS, or hold it liable for conduct of Jackson and Timberlake, who were independent contractors not CBS employees. The 3rd Circuit reexamined that decision after the FCC appealed to the Supreme Court, which vacated the 3rd Circuit's original decision and ordered it to decide whether the Supreme Court's 2009 decision in *FCC v. Fox Television Stations* required it to reconsider its decision. In *Fox*, the Court held the FCC had not acted arbitrarily and capriciously in changing its indecency policy to enforce the law against broadcasts of "fleeting expletives."

The appeal involved the live broadcast of an unscripted nine-sixteenth-second exposure of Janet Jackson's breast.

In the remand proceeding, the 3rd Circuit reaffirmed its earlier decision to invalidate the fine imposed on CBS. It held that, while the FCC had recognized it was changing its policy that made fleeting expletives non-actionable, the Commission failed in the Super Bowl case to acknowledge the prior policy even existed, or to explain its departure from that position. The court granted the CBS petition for review in full, and vacated the FCC's decision.

3rd Circuit's Original Holding

In the court's original opinion, the 3rd Circuit found that at the time of the 2004 Super Bowl halftime show, the FCC's policy was to exempt fleeting or isolated material—both images and words—from the scope of actionable indecency. "During a span of three decades," the court observed, "the Commission frequently declined to find broadcast programming indecent, its restraint punctuated by only a few occasions where programming contained indecent material so pervasive as to amount to 'shock treatment' for the audience." Contrary to the FCC's argument that it always treated fleeting images differently from fleeting expletives, the 3rd Circuit found that the agency's indecency enforcement history proved otherwise.

Moreover, regardless of whether the Super Bowl fine was unprecedented because the FCC had previously treated fleeting images and fleeting words the same (or never had articulated a specific policy on how it would treat fleeting images), the court held the FCC's inclusion of fleeting

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images within the scope of actionable indecency was an unexplained departure from prior policy.

Reaffirmation and Reissuance

On remand from the Supreme Court, the 3rd Circuit held, in an opinion by Judge Rendell, joined by Judge Fuentes, that "[w]hile we can understand the Supreme Court's desire that we re-examine our holdings in light of its opinion in *Fox* — since both involve the FCC's policy regarding – fleeting material – … if anything, *Fox* confirms our previous ruling." Therefore, the court determined it "should readopt our earlier analysis and holding that the Commission acted arbitrarily in this case." In doing so, the majority held, there was no reason to depart from the prior ruling's extensive examination of FCC precedent, which found that it had never treated images and words differently in its historically restrained indecency enforcement policy under which fleeting live material was deemed non-actionable.

The court rejected the FCC's argument that "one small portion of the background section" in the Supreme Court's *Fox* opinion supported the position that the fleeting-material policy never applied to images, but always was restricted to words. The FCC claimed that the Court's brief reference confirmed the fleeting expletives policy was an exception to the general rule that other types of content – words or images – were actionable even if fleeting. But the 3rd Circuit held it could "discern no such meaning" in that language.

The court determined it "should readopt our earlier analysis and holding that the Commission acted arbitrarily in this case."

The 3rd Circuit explained that "summary recitation of the Commission's opinions … appears in the Court's background discussion of the FCC's historical approach to indecent language, and is neither reasoning nor holding" but "mere characterization." In this vein, the court continued, "*Fox* says nothing at all about images" nor did it "suggest that the FCC's previous fleeting-material policy applied only to 'words,' or distinguished between words and images." In short "the *Fox* Court had no occasion" to consider the FCC's prior fleeting-material policy in the context of images.

The 3rd Circuit thus held it was "unwilling to read the Court's silence as overruling our conclusion, based on a careful review of three decades of FCC precedent" in the prior CBS decision. "If we were to read the Supreme Court's background discussion in *Fox* as indicating that the history of FCC enforcement in the area of fleeting material recognized an exception only for non-literal expletives, to the exclusion of images," the 3rd Circuit continued, "we would be accusing the Supreme Court of rewriting history."

The 3rd Circuit found that the Commission had attempted to convert "a passing reference in *Fox's* background section into a holding that undermines what the opinion otherwise makes clear: an agency may not apply a policy to penalize conduct that occurred before the policy was announced." The court thus readopted its prior decision, with some alterations to address other conclusions reached by the original majority opinion.

Specifically, the original decision had held that even if the departure from precedent did not invalidate the Super Bowl forfeiture, the FCC could not impose liability on CBS for the actions of Jackson and Timberlake because they were independent contractors and not CBS employees. It also rejected the FCC's argument that CBS had a "nondelegable duty" to comply with the indecency policy, because the First Amendment bars punishing a speaker for the content of expression absent a showing of scienter, i.e., knowing or reckless violation of indecency law. On all these liability and intent issues, the majority decision on remand held the prior discussion had been unnecessary, and thus excised that portion of the prior opinion from the reissued decision.

Judge Scirica, who had authored the 3rd Circuit's original opinion, dissented from its reaffirmance and readoption. In his view, the relevant passage of the Supreme Court's *Fox* decision, and the context in which it arose, supported the FCC's argument. Even so, Judge Scirica would not have upheld the FCC's fine against CBS. Instead, he opined, the FCC applied the wrong statutory provision, and misapprehended the level of "willfulness" that would have been required, in seeking to punish CBS. In that view, a remand to determine whether CBS had acted recklessly in airing the Super Bowl halftime broadcast would be required.

Bob Corn-Revere and Ronnie London of Davis Wright Tremaine represented CBS before the 3rd Circuit and the FCC.

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Supreme Court Preview: FCC v. Fox Television Stations

Merits and Amicus Briefs

On January 10, 2012, the Supreme Court will hear argument in *FCC v. Fox Television Stations* to consider whether the FCC's current indecency enforcement regime violates the First Amendment.

At the beginning of 2010, the Second Circuit held that the *Pacifica* indecency rules were no longer tenable in the current media landscape. *See* 613 F.3d 317 (2d Cir. 2010). The court noted:

> The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast — almost 87 percent of households subscribe to a cable or satellite service — and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control. The internet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs. As the FCC itself acknowledges, "[c]hildren today live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago." *Id.* at 326.

The FCC petitioned the Supreme Court to review this decision and asked the court to review the following questions.

1. Whether the court of appeals erred in invalidating a finding by the Federal Communications Commission (FCC) that a broadcast including expletives was indecent within the meaning of statutory and regulatory prohibitions on indecent broadcasts, on the ground that the FCC's context-based approach to determining indecency is unconstitutionally vague in its entirety.

2. Whether the court of appeals erred in invalidating a finding by the FCC that a broadcast including nudity was indecent within the meaning of statutory and regulatory prohibitions on indecent broadcasts, on the ground that the FCC's context-based approach to determining indecency is unconstitutionally vague in its entirety.

A wide-range of groups have weighed in with amicus briefs on both sides of the issue. The briefs are available at the links below.

Briefs Filed With the Supreme Court

Brief for the Petitioner Federal Communications Commission, et al.
Brief for Respondents ABC, Inc., KTRK Television, Inc., and WLS Television
Brief for Respondents ABC Television Affiliates Association
Brief for Respondents CBS Television Network Affiliates Association and NBC Television Affiliates
Brief for Respondents Center for Creative Voices and Future of Music Coalition
Brief for Respondent's Fox Television Station, Inc., NBCUniversal Media, LLC, CBS Broadcasting, Inc., and FBC Television Affiliates Association
Reply Brief for Petitioner Federal Communications Commission, et al.

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Amicus Briefs

Brief for the Decency Enforcement Center for Television in Support of Petitioner
Brief for National Religious Broadcasters in Support of Petitioner
Brief for Parents Television Council in Support of Petitioners
Brief for Morality in Media, Inc., in Support of Petitioner
Brief for Focus on the Family and Family Research Council in Support of Petitioner
Brief for Former FCC Officials in Support of Respondent
Brief for the National Association of Broadcasters and Radio-Television Digital News Association in Support of Respondent
Brief for the Reporter's Committee for Freedom of the Press and the E.W. Scripps Company in Support of Respondent
Brief for American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, Benton Foundation, Children Now, and, United Church of Christ Office of Communication, Inc in Support of Affirmance
Brief for Yale Law School Information Society Project Scholars, New America Foundation, and Professor Monroe Price in Support of Neither Party

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United States Supreme Court Denies Petition for Writ of Certiorari Challenging Newspaper Preservation Act

By Niles S. Benn and Terence J. Barna

The U.S. Supreme Court recently denied a Petition for Writ of Certiorari drawing into question the constitutionality of the Newspaper Preservation Act, 15 U.S.C.A. §1801-1804. *Keisling v. Renn*, 425 Fed. Appx. 106, 2011 WL 1632955 (3d Cir. May 2, 2011) (per curiam), *cert. denied*, 132 S. Ct. 383 (U.S. October 3, 2011), *reh'g denied*, 2011 WL 6141426 (U.S. December 12, 2011).

Congress enacted the Newspaper Preservation Act in July of 1970 as "an economic regulation which has the intent of promoting and aiding the press." *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 483 (9th Cir. 1983), *cert. denied*, 464 U.S. 892 (1983). The Act grants a limited antitrust exemption by permitting competing newspapers, at least one of which must be a "failing newspaper," to enter into joint operating arrangements ("JOAs") so as to preserve separate editorial voices and maintain a "newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C.A. §1801.

The term "failing newspaper" is defined in the Act as a "newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C.A. §1802(5). Under the Act, the United States Attorney General, prior to granting approval for a joint operating agreement, "shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper . . ." 15 U.S.C.A. §1803(b).

Plaintiff argued, *inter alia*, that members of the media "suppressed reports of corruption" in order to "protect [their] government-issued" JOA and that the Act violated the First Amendment's "prohibition against Congressional involvement in press activities," thereby creating an unlawful competitive advantage to the detriment of smaller publishers. At least three courts have rejected constitutional challenges to the Act, including First Amendment claims similar to those made by the plaintiff.

Background

In late 2009 the plaintiff, William Keisling, filed a §1983 civil rights action in Pennsylvania federal court against MediaNews Group, Inc., one of its newspapers, the *York Daily Record*, reporter Rick Lee (collectively, the "Media Defendants"), and more than twenty other defendants. Plaintiff alleged that all of the named defendants conspired to violate his right to 1) petition for a redress of grievances under the First Amendment; 2) free and protected speech under the First Amendment; 3) substantive due process under the Fourteenth Amendment; 4) procedural due process under the Fourteenth Amendment"; and 5) equal protection before the courts.

More specifically, plaintiff averred that the Media Defendants, acting "as an arm of the government," failed to print and "suppressed" information about various individuals, including one of the named defendants, and, several years later, "actively conspiring with. . . public officials to gag [plaintiff's] protected speech," refused to publish plaintiff's comments about public court proceedings he had been party to.

In essence, plaintiff sought to impermissibly control the content of a newspaper publication. *See, e.g.*, *The Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper . . . and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment").

The Media Defendants filed a 12(b)(6) Motion to Dismiss, arguing, *inter alia*, that plaintiff failed to state a cause of action under §1983 because newspaper entities and employees are not state actors as a matter of law and because plaintiff failed to allege the deprivation, by Media Defendants, of any federally protected right giving rise to a valid §1983 claim. Media Defendants cited various Pennsylvania District Court decisions holding that newspapers were not state actors. *See Wright v. York Daily Record, Lee, et al.,* No. 1:09-CV-0022 (M.D. Pa. August 27, 2009, C.J. Kane); *Banks v. Pittsburgh Tribune Review*, 2007

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WL 1314617 (W.D. Pa 2007) ("The private newspaper….., its publisher and its editor-in-chief do not, as a matter of law, act under color of state law so as to be liable under Section 1983"); *Mimms v. Philadelphia Newspapers, Inc.,* 352 F. Supp. 862 (E.D. Pa. 1972) (newspaper people operate "far from the governmental sphere and, by virtue of the first amendment, essentially insulated from it"); *Keen v. Philadelphia Daily News*, 325 F. Supp. 929 (E.D. Pa. 1971).

In response, plaintiff argued that the Media Defendants acted under color of state law because the *York Daily Record* and another York newspaper, *The York Dispatch*, are published "under a 'Joint Operating Agreement' with the U.S. Justice Department, as a waiver from the Clayton and Sherman Antitrust Acts. As such, these newspapers no longer publish independently of the government and its political subdivisions in York County, PA."

The Court, per District Judge John E. Jones, III, concluded that the individual reporter acted as a private person for purposes of §1983 and held that the Newspaper Preservation Act did not transform the newspaper and its owner into state actors.

> The purpose of this act is to 'preserve editorial voices in a given market and assist financially distressed newspapers,' thus, 'Congress encouraged the formation of [joint operating agreements] by giving them a limited exception to the antitrust laws.' *Salt Lake Tribune Pub. Co., LLC v. AT&T Corp.*, 320 F.3d 1081, 1086 n. 3 (10th Cir. 2003).
>
> Despite Plaintiff's argument to the contrary, there is absolutely no authority for the position that the joint operating agreement under which the Media Defendants operate makes them state actors. In fact, there is authority to the contrary. *See America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328, 335 (N.D. In. 1972) (concluding the actions of newspapers did not constitute state action within the meaning of 42 U.S.C. §1983 even though newspapers were operating under a joint operating agreement under the Newspaper Preservation Act).
>
> In sum, Plaintiff cannot state a section 1983 claim because the Media Defendants are not state actors.

Keisling v. Renn, 2010 WL 3984813, p. 4 (M.D. Pa. October 12, 2010).

The District Court, therefore, dismissed each of the Media Defendants from the case.

Third Circuit Opinion

On Appeal to the Third Circuit Court of Appeals, Media Defendants filed a Motion for Summary Action pursuant to Third Circuit L.A.R 27.4 and I.O.P. 10.6. The Third Circuit's Opinion cited favorably the Newspaper Preservation Act's pronouncement that "it is '[i]n the public interest of maintaining a newspaper press editorially and reportorially independent.'" *Keisling v. Renn*, 425 Fed. Appx. 106 at p. 2, *quoting* 15 U.S.C.A. §1801.

Moreover, the court held that "the Act merely waives the antitrust laws as to participating newspapers; it does not render the newspapers an arm of the federal government." *Id*. Because the Media Defendants were determined not to be governmental actors, the Third Circuit concluded that there was no substantial question presented by the appeal and affirmed the District Court decision.

United States Supreme Court

In his Petition for Writ of Certiorari filed with the Supreme Court, plaintiff raised the issue of the constitutionality of the Newspaper Preservation Act. However, because the constitutional challenge was not set forth in plaintiff's complaint, as amended, neither the District Court nor the Third Circuit Court of Appeals addressed the question. (Plaintiff first raised the constitutionality of the Act in his Brief in Opposition to the Media Defendants' 12(b)(6) Motion to Dismiss.)

Media Defendants argued that where an issue is not pleaded in the complaint and, hence, not considered by the District Court or Court of Appeals, the issue is waived before the Supreme Court. *See Tennessee v. Dunlap*, 426 U.S. 312, 316 n. 3 (1976). The United States Supreme Court denied the plaintiff's Petition, without opinion, on October 3, 2011 and denied rehearing on December 12, 2011.

Niles S. Benn and Terence J. Barna, Benn Law Firm, York, Pennsylvania, represented MediaNews Group, Inc., the York Daily Record and Rick Lee in this case. Plaintiff represented himself pro se.

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Criminal Sealing Statute and "Personal Privacy" FOIL Exemption Do Not Apply to Administratively Dismissed Parking Tickets

Newspaper Awarded Fees on Appeal

By Eve Burton and Eva Saketkoo

Petitioners The Hearst Corporation (publisher of the Albany *Times Union*) and *Times Union* reporter Brendan Lyons (collectively, the "Times Union") filed this access litigation under New York's Freedom of Information Law ("FOIL") seeking to compel the City of Albany ("City") to produce copies of parking tickets that were administratively dismissed or voided without any court action. *Hearst Corp. and Brendan Lyons v. City of Albany*, 88 A.D.3d 1130 (3d Dep't 2011).

Background

The FOIL request was part of the Times Union's continuing investigation and coverage of the City's selective enforcement of its parking laws to favor the friends and family of certain City employees and political insiders (a story that Lyons broke in 2008).

The City denied the Times Union's request claiming that (1) the administratively voided tickets were sealed under New York's criminal sealing statute (Criminal Procedure Law § 160.50, entitled "Order Upon Termination of Criminal Action in Favor of the Accused") and (2) also not subject to disclosure under the "personal privacy" FOIL exemption, arguing that "a person having a favorable termination [of dismissal of his/her parking ticket] would be offended that such personal information would be released." (The City claimed the documents were "sealed" even though it had produced the same documents to the State Comptroller's Office without obtaining any unsealing order from a court. Based on a review of the boxes of voided tickets produced by the City, the Comptroller concluded that 30,857 parking tickets were administratively "cancelled" over a several year period, most without any written explanation for the cancellation.)

At the hearing on the Petition, after eight months of litigation and full briefing of the matter, the City stated that even though its claimed exemptions were meritorious, it would produce all responsive documents to the FOIL request to the Times Union. The City argued that the Petition was therefore moot and that the Times Union should not be awarded any fees under FOIL since the City had a reasonable basis for asserting the claimed sealing and privacy exemptions.

The Court noted that the City's "strategy in releasing the documents – despite the fact that release would be illegal if its position that the records sought are sealed were correct – amply justifies the inference that respondent will strive to ensure that those issues evade review in the future."

Trial Court Ruling

The trial court (Albany County Supreme Court) agreed with the City and held that, in light of the City's production, the Petition was moot and the issues presented in the litigation did not fall within the exception to the mootness doctrine. Further the court found that although the Times Union substantially prevailed in the action, an award of fees under FOIL was not warranted because the City had a reasonable basis for claiming the voided parking tickets were exempt from disclosure under the criminal sealing statute. Lastly, the court *sua sponte* raised the issue and held that even if dismissal of the Petition was not warranted on mootness grounds, dismissal without prejudice was required under CPLR § 1003 for failure to join the 30,857 recipients of the nullified tickets as necessary parties to the FOIL action.

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Appellate Court Ruling

The Times Union appealed, and in a unanimous decision critical of the City's actions the Third Department Appellate Division reversed the lower court's decision in all respects. *Hearst Corp.*, 88 A.D.3d at 1133. Although the City had produced all the requested records, the Court held that the legitimacy of the City's claimed exemptions – which the City continued to argue had merit, both at the trial court and on appeal – was an issue that fell within the exception to the mootness doctrine; it presented a "substantial or novel issue, likely to recur and capable of evading review." *Id*. at 1131. Specifically, the Court noted that the City's "strategy in releasing the documents – despite the fact that release would be illegal if its position that the records sought are sealed were correct – amply justifies the inference that respondent will strive to ensure that those issues evade review in the future." *Id*.

The Court also rejected the City's claim that New York's criminal sealing statute applied to administratively dismissed parking tickets:

> The fatal flaw in respondent's contention [] is that CPL 160.50 applies only to records arising from a "criminal action or proceeding," both of which occur in criminal *courts*. The FOIL requests here, by contrast, sought documents related to tickets that respondent had *administratively* dismissed, and disclaimed any interest in those that had been dismissed "by a judge, in City or Traffic Court."

Id. at 1132 (emphasis in original; citations omitted).

With regard to the City's claimed privacy exemption, the Court was equally dismissive and held that "[f]ar outweighing the personal umbrage [that may be caused by disclosure of recipients of the dismissed tickets], however, is the public's interest in the circumstances surrounding [the City's] administrative dismissal of tens of thousands of parking tickets." *Id*. The Court further held that the trial court erred in dismissing the Petition on the alternative ground that the 30,857 recipients of the dismissed tickets were necessary parties to the action: "Ticket recipients may well be embarrassed if their identities are publicized, but that embarrassment, without more, does not render them necessary parties." *Id*.

Lastly, the Court held that the Times Union was entitled to an award of attorneys' fees and costs under FOIL since it substantially prevailed in the action and the City lacked a reasonable basis for denying access to the public documents: "Indeed, [the City's] prolonged delay in releasing the documents and – in ultimately doing so – transparent attempt to avoid judicial review of its unsupported assertion that the documents were exempt from disclosure, 'evinced a clear disregard of the public's right to open government.'" *Id*. at 1133. The Court remanded the action to the trial court solely for the determination of the amount of fees and costs to be awarded to the Times Union. *Id*.

Petitioners are represented by Hearst in-house counsel Eve Burton, Jonathan Donnellan, and Eva Saketkoo. Respondent the City of Albany is represented by Jeffrey Jamison of Albany's Corporation Counsel.

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Press Wins Access to School Chancellor Emails

Privacy and Inter-Agency Exemptions Rejected

A New York trial court ordered the City Mayor's office to comply with a FOIL request, seeking e-mails between the Mayor's office and short-lived, controversial Chancellor of New York City public schools, Cathie Black. *In the Matter of the Application of Hernandez against Mayor of NY*, 2011 N.Y. Misc. LEXIS 5620 (N.Y. Sup. Nov. 23, 2011).

In ordering the City to comply, the court noted the investigation of New York City Public Advocate Bill de Blasio into why it is said that the City "fails so miserably to release even the most routine data requested under the state's Freedom of Information law." The Court noted that FOIL law was construed under New York law to make all documents that did not meet exemption "presumptively available for review," and that the burden was on the City to show otherwise.

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Journalist Sergio Hernandez, then writing for the Village Voice, brought an Article 78 proceeding to obtain access after his request was denied by the Mayor's office. The City had rejected Hernandez's request, claiming two exemptions under the relevant New York Public Officers Law: 1) that releasing the e-mails would be an 'unwarranted invasion of personal privacy' and 2) that the e-mails were exempt as 'inter-agency and intra-agency' materials.

However, the court held that neither of these exemptions could warrant the denial of Hernandez's FOIL request. In addressing the City's privacy claim, the court applied two principles. First, a privacy claim does not serve as a blanket exemption from a FOIL request, but instead only protects certain private information, such as employment history. This information can be redacted in complying with FOIL requests. Secondly, even in the case of private information, the right to disclosure depends on balancing the privacy interest against the public interest in disclosure.

The court held that the City's refusal to disclose any information did not meet this standard. The City could not withhold information on a wholesale basis without showing that it was exempted, which the court presumed it was not. Secondly, even in the case of ordinarily private information, such as Black's employment history, the public interest would favor disclosure.

The court held there was a public interest in knowing this information. After all, Black's appointment as chancellor of New York City Public Schools had been controversial. Black is best known for being the Chairman of the Hearst Corporation. She had no experience in public education prior to her appointment and required an exemption to take the position.

In addition, much of Black's employment history as chairman of the Hearst Corporation was already public knowledge. In rejecting the City's privacy claim, the court did not deny that personal information such as cell phone numbers and personal e-mail addresses could be redacted.

Secondly, the court rejected that Black's e-mails to the mayor's office could be considered inter-agency or intra-agency communication. Black was undisputedly a private citizen at the time of the e-mail exchange in question. The court refused to extend the definition of this exemption, such as by considering a theory that Black could have been an agent of the city at the time of the communication.

More importantly, the court held that granting such an exemption would not serve the policy purpose of allowing agency's to engage in a deliberative process free of a chilling effect. Presumably, no such deliberative process was involved in the e-mails. Instead, they would have involved obtaining information from Black about her qualifications, necessary to obtain a waiver for Black and address community concerns, urt's view, within the public's right to know.

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