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MLRC Media Law Resource Center

MEDIALAWLETTER

Associate Member Edition 2007:1

MLRC

INTERNATIONAL

REPORTER'S PRIVILEGE

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MLRC Bulletin Analyzes U.S. Media Trials of 2006

9 Wins, 5 Losses at Trial; But Damage Awards Relatively High

In 2006 there were 14 trials against media defendants on libel, privacy and related claims based on gathering and publishing information. Defendants won nine out of the 14 trials, an impressive 64 percent win rate. But the average damage award for the five losses was relatively high – an average of $2.5 million.

These results are reported and analyzed in MLRC's annual REPORT ON TRIALS AND DAMAGES released this week. The REPORT is an ongoing study of libel, privacy and related claims against media defendants, showing the results and trends in this area of First Amendment litigation in trials from 1980 to the present.

Overall, MLRC's 2007 REPORT analyzes 557 trial verdicts from 1980 through 2006. The study shows a long-term trend of fewer trials against media defendants and more media victories at trial. In the 1980s there were an average of 27 trials a year; that dropped to 19 a year in the 1990s. And in this decade, the average number of trials a year has dropped to 14.

While the media victory rate at trial has steadily increased over the course of the study, from 36 percent in the 1980s, 40 percent in the 1990s, and 54 percent so far in the 2000s, defendants who lose are facing higher damage awards. In the 1980s, only 22 percent of damage awards topped the million dollar mark. That has risen to 39.5 percent so far this decade.

MLRC's Report also tracks the results of post trial motions and appeals from trials. These statistics should send a cautionary signal to plaintiffs, since there is a relatively low percentage of victories for plaintiffs at the end of the legal process.

The MLRC REPORT is mailed to all Media and DCS members, and is available to Media and Enhanced DCS members on MLRC's web site, www.medialaw.org. Additional print copies are available for $35 by calling (212) 337-0200.

Defense Wins in 2006

Florida

Lusczynski v. Tampa Bay Television, No. 03-11424 (Fla. Cir. Ct., Hillsborough County jury verdict for defendant Sept. 11, 2006). The jury returned a verdict in favor of a television station on a police officer's false light claim over a news report that discussed complaints by some police officers about the Tampa Police Department's promotions process, including allegations of favoritism and corruption.

Kentucky

Lassiter v. Lassiter, 456 F.Supp.2d 876 (E.D. Ky. bench verdict for defendant Sept. 26, 2006). The federal district court granted a bench verdict to the defendant who authored a book about how her religious faith helped her overcome an abusive marriage. The court applied a strict liability standard to the libel claim brought by the defendant's ex-husband, but found that the allegations were true or opinion.

Missouri

Continental Inn v. Lake Sun Leader, No. 26V050400241 (Mo. Cir. Ct., 26th Cir. directed verdict for defendant, Aug. 18, 2006). The trial court granted a directed verdict in favor of *The Lake Sun Leader*, in a libel suit over its report about the closure of a local motel for building code violations.

Ohio

Young v. Russ, No. 02 CV 974 (Ohio Ct. C.P., Lake County jury verdict for defendant Feb. 17, 2006). The jury returned a verdict in favor of WKCC-TV in a libel trial over the station's reports that plaintiff, an elementary school custodian/lunchroom monitor, used excessive force in disciplining students. In a negligence trial, the jury concluded that the reports were substantially true.

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Rhode Island

Trainor v. State of Rhode Island, No. WC/2003-295 (R.I. Super. Ct., Washington County directed verdict for defendant Feb. 13, 2006). The trial court granted a directed verdict to *The Standard Times*, a weekly community newspaper, over a crime blotter report. The court ruled that report was covered by the fair report privilege, was substantially true, and there was no evidence of malice.

South Carolina

Tuttle, et al. v. Marvin, No. 04-948 (D. S.C. jury verdict for defendant Jan. 30, 2006). The jury returned a verdict in favor of the author and publisher of "Expendable Elite: One Soldier's Journey Into Covert Warfare." The jury also rejected the defendants' counterclaim for libel filed against plaintiffs, six Vietnam War veterans who served with the author.

Johnson v. Lexington Pub. Co., Inc., No. 02-CP-40-6064 (S.C. C.P. directed verdict for defendant, July 2006). The trial court granted a directed in favor of the *Lexington County Chronicle and Dispatch News* in a libel suit over a series of articles and editorials describing instances of abuse, neglect and exploitation of the clients at a state funded care facility.

Texas

Lowry v. Hastings Entertainment, Inc., No. 2003-30333-211 (Tex. Dist. Ct., Denton County jury verdict for defendant, June 26, 2006). The jury returned a verdict in favor of the producer of the Girls Gone Wild video series on a fraud claim by two women who alleged that defendant promised that a taped scene of plaintiffs exposing themselves would not appear in the video series.

Root v. Ellis County Press, No. 03-3487-F (Tex. Dist. Ct., 116th Dist., Dallas County jury verdict Jan. 26, 2006). The jury returned a verdict in favor of the Ellis County Press and reporter Joey Dauben over an article reporting this incident, and against the alleged authors and distributor of a flyer that repeated information from the newspaper article. After a four-day trial, the jury found for the defendants.

Plaintiff Wins in 2006

Illinois

Thomas v. Page, No. 04-LK-013 (Ill. Cir. Ct., Kane County jury verdict for plaintiff Nov. 14, 2006) ($ 7,000,000 compensatory damage award). The jury returned a verdict in favor of Illinois Supreme Court Justice Robert Thomas in his libel suit over opinion columns in a local newspaper that discussed Thomas' handling of an attorney disciplinary hearing.

Kansas

Brandewyne et al. v. Author Solutions, Inc. d/b/a AuthorHouse, No. 04 CV 4363 (Kan. Dist. Ct., Sedgwick County jury verdict $230,000 May 8, 2006; bench punitive award $240,000 Aug. 4, 2006). The jury returned a verdict in favor of romance author Rebecca Brandewyne and several family members on libel and privacy claims against a "self publishing" company that released a book written by Brandewyne's ex-husband.

Valadez v. Emmis Communications, No. 05 CV 0142 (Kan. Dist. Ct., Sedgwick County jury verdict for plaintiff Oct. 20, 2006) ($1,100,000 compensatory damage award). The jury returned a verdict in favor of a Kansas man who alleged that reports on KSNW-TV falsely implied he was suspected of being the notorious BTK serial killer.

Pennsylvania

Joseph v. Scranton Times, Inc, No. 3816-C of 2002 (Pa. C.P., Luzerne County bench verdict for plaintiff Oct. 27, 2006) ($3,500,000 compensatory damage award) The trial court ruled in favor of a businessman and his company on libel claims against the *Citizens' Voice* newspaper for a report that the company was under federal criminal investigation.

Puerto Rico

Kran Bell v. Santarrosa, No. KDP 2002-0545 (P.R. Super. Ct. jury verdict March 7, 2006) ($260,000 compensatory damage award). The jury ruled in favor of plaintiff, the former husband of Puerto Rico's then-Governor, on libel and related claims over statements made on a popular news and gossip television show that plaintiff was having an extramarital affair.

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MLRC Bulletin Examines 2006 Media Law Developments

Bulletin articles available to enhanced DCS members and Media members at our website www.medialaw.org (click *here*). For more information, please contact us at medialaw@medialaw.org

MLRC's year-end BULLETIN 2006:3/4 contains a series of articles on the leading issues of the year in reporter's privilege law, copyright, Internet law, media libel & privacy and related claims, and criminal libel law and practice. In each of these areas, 2006 has been a year of significant developments.

The reporter's privilege issue continued to loom large this past year. In "Reporter's Privilege Issues: Continuing Attacks in 2006," MLRC attorney Maherin Gangat reviews the year's developments in reporters privilege law, from the settlement in the Wen Ho Lee case and the jailing of video blogger Josh Wolf, to the pending contempt appeal in the BALCO case.

MLRC publishes a strong counter to the resistance journalists are facing in these cases to the establishment of a common law privilege. In "The Four Myths Surrounding The Common Law Reporter's Privilege," Theodore J. Boutrous, Jr., Thomas H. Dupree, Jr., and Michael Dore of Gibson Dunn & Crutcher LLP argue the case for a common law reporter's privilege. The article dispels the legal "myths" that courts have used to block the development and momentum for common law privilege, especially in the criminal investigative context.

"The case for a federal common law reporter's privilege is compelling," they conclude. And despite recent set backs "the path remains clear to recognizing a common law privilege." Their article will be a "must read" for journalists and their advocates.

Among the most interesting issues of the year on the copyright front are the copyright infringement lawsuits over the Google Library project. In "The Google Library Project," Allan Adler of the Magazine Publishers Association discusses the cases and the challenges the project poses for authors and publishers' copyright interests.

In "The Google Library Project: Both Sides of the Story," technology lawyer *Jonathan Band* offers a responsive piece discussing and defending the Google Library project and how fair use arguments might be raised to defend Google's ambitious project to create a comprehensive book search index.

The article dispels the legal "myths" that courts have used to block the development and momentum for common law privilege.

Section 230 of the Communications Decency Act – the federal law that gives broad immunity to interactive computer service users and providers for disseminating material originating from others – continues to generate interesting case law. In "New Challenges And Familiar Themes In The Recent Case Law Considering Section 230," Samir Jain and Colin Rushing, of Wilmer Cutler Pickering Hale and Dorr LLP, look at the latest decisions applying § 230, including a discussion of the California Supreme Court's recent decision in *Barrett v. Rosenthal* reaffirming the broad scope of protection under the statute.

Part II of BULLETIN 2006:3/4 contains MLRC's annual review of the significant developments of the year in media libel, privacy and related law. And Part III contains an update on recent developments in criminal libel in the United States.

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THE OTHER SIDE OF THE POND

UK and European Law Update

By David Hooper

UK Privacy Law

I drew attention in December's *MediaLawLetter* to the striking decision of Mr Justice Eady in *CC v AB* [2006] EWHC 3083 (QB) (04 December 2006), where the Judge held that even an adulterous relationship may attract a legitimate expectation of privacy at the request of the adulterer.

A temporary injunction was granted restraining the cuckolded husband from publicizing details of an adulterous affair his wife had with a celebrity. It was perceived as an extension to the law of privacy and a departure from previous English authorities (in particular the case of *A v B* [2002] EWCA Civ 337).

The betrayed husband was initially refused leave to appeal by Lord Justice Buxton, and an oral application for leave to appeal was scheduled to be heard between February 16 and March 9. However, a settlement has now been reached on confidential terms and the injunction against the husband remains in place.

The case turned on the husband's admitted harassment of the celebrity, the husband's desire to exploit publication explicitly for financial gain and the possible damage to the celebrity's wife's mental state. As the injunction was only a temporary one pending trial, it remains to be seen if it will be followed. On balance it seems a further move in favour of Article 8 at the expense of Article 10.

Ash v. McKennitt

I also discussed the implications of the Court of Appeal's ruling in *Ash v McKennitt* (2006) EWCA 1715 (Dec. 14 2006), which was a ringing endorsement of Mr Justice Eady's first instance decision. Canadian folk-singer Loreena McKennitt claimed that Ms Ash's book about her, "Travels with Loreena McKennitt: My Life as a Friend," was a breach of confidence and infringed her privacy rights.

Ms Ash has now lodged a petition for leave to appeal to the House or Lords, arguing that the decision represents "a significant shift in favour or privacy at the inevitable expense of freedom of expression." The petition asserts that the Court of Appeal's decision sets a worrying precedent and could lead to more pre-publication injunctions, stifling the press's right to freedom of expression and limiting the amount of information available to the public.

The ruling means that publication of any private information about public figures may not be permitted unless it has some public interest value. The fact that the information may be available to the public will not necessarily be fatal to a claim for privacy. It is a case which has caused considerable concern to the publishers of unauthorised biographies. It remains to be seen if the House of Lords accept the case.

Copic Presse and Google

On February 13, there was a decision in Belgium which highlighted the differences in approach to the law of copyright between continental Europe and the United States. The decision of the Brussels First Instance Court in favour of a group of Brussels newspapers against Google News is being appealed.

The use of the headline link amounted in the Belgian view to a breach of copyright and of the database rules. The use of cached material was also held to be a breach of copyright. It appears to be an early stage in what may prove to be long-drawn litigation which is likely to produce an interesting examination of the European and American approaches to whether the use of headlines and a small extract of text can infringe copyright and, if so, whether it is fair use or fair dealing and whether search engine technology and the robot exclusion standard gives rise to an implied licence to use the headlines, if the newspaper does not request the removal of its material from the search engine by giving it a no-archive instruction.

Last year a federal district court in Nevada reached the opposite conclusion to the Belgian court. *See Field v Google Inc.,* 412 F.Supp.2d 1106 (D. Nev. 2006). In a copyright infringement suit against Google for caching plaintiff's website as part of its search engine, the court had no doubt that the robots.txt metatag which could result in a no-archive instruction being given to the Google search engine effectively resulted in an implied licence for Google to list the claimant's website, unless instructed to the contrary. Furthermore, the use of the small amount of material from the site by way of indexing amounted to fair use and the court granted summary judgment to Google.

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Criminal and Continental Libel

Sir David and Sir Frederick Barclay, the owners of the Telegraph Group, have withdrawn their criminal libel claim in France against the *Times*' after the newspaper published a clarification. The action was brought in relation to a *Times* article published in November 2004 stating that the Barclay twins "often take advantage of owners in distress to pick up assets on the cheap."

The Barclays brought their claim in France seemingly because they felt that British justice was too slow and inefficient, and possibly also because libel is a criminal offence in France. The fact that such a claim had been brought by a newspaper proprietor had attracted its share of controversy.

It followed a similar claim they had brought when they were owners of the *Scotsman* and *European* newspapers against BBC Radio Guernsey and the journalist John Sweeney when they were awarded 20,000 Francs (£2,200). A certain piquancy had been added to the claim by the fact that the editor of the business section where the offending article at the *Times* had appeared, had in the intervening period, become editor of the *Sunday Telegraph*, a Barclay owned newspaper.

After preliminary hearings, the French court accepted jurisdiction. In its clarification, the newspaper declared that "[i]t was not our intention to suggest, as some people may have understood it, that the Barclays frequently exploit vulnerable people in financial difficulty in an underhand and unfair way for commercial gain or to impugn their business ethics or integrity."

The case had been fiercely contested by the *Times* and it remains to be seen whether this was in reality the climb-down many believed it to be and whether the Barclays, as newspaper proprietors, will desist from any such litigation against other newspapers particularly in the libel-friendly climate of France.

CFAs

The unsatisfactory nature of Conditional Fee Agreements was further illustrated by a case brought by a woman, Patricia Tierney, complaining about a story in the *Sun* newspaper linking her with a brothel and a well-known English footballer, Wayne Rooney.

Just before the trial it was discovered that she had some years previously admitted to the police that she had worked as a prostitute – precisely what she was complaining about against the *Sun*. This revelation brought the case to a dramatic stop and exposed the claimant to the risk of prosecution. However, the newspaper's costs, which they are unlikely to recover, were over £150,000.

If Ms Tierney had won her case, her lawyers would have claimed a success fee of 100% which was estimated to have been likely to work out at £500,000. As it happened, justice was done but at considerable expense bearing in mind the tawdry nature of the allegations. That such costs are incurred in relatively uncomplicated libel litigation does add to the chilling effect of such claims and to the likelihood of their being settled – quite possibly contrary to the justice of the case.

Ironically, claimants losing cases such as this can assist claimants' lawyers generally in that they can point to the risk of such litigation in support of their claim for 100% success fee – a point not lost on Carter-Ruck, the well-known claimants lawyers (who were not involved in the case) in their comment after the case.

Protection of Sources

On February 21, the Court of Appeal upheld an investigative journalist's right to keep secret his source for an article published seven years ago about a mental hospital's alleged mistreatment of Moors murder Ian Brady. *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101 (21 February 2007).

The Court held that journalist Robin Ackroyd's right to protect his source outweighed the hospital's legitimate aim to seek redress against the source. The article had already been the subject of an earlier legal battle between the hospital and the article's publisher, Mirror Group Newspapers ("MGN"), over Robin Ackroyd's identity. The Court held that it was a "false assumption" to think that because Mr Ackroyd's identity had been disclosed, it would automatically follow that the underlying source would also be disclosed.

The Court criticised the protracted litigation in the MGN case, where it had been assumed that if the anonymous freelance journalist's name (Robin Ackroyd) had been revealed this would necessarily lead to the disclosure of *his* underlying source.

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In the long-running litigation brought by the Mersey Care National Health Service Trust, the decision of Mr Justice Tugendhat in favour of the investigative journalist Robin Ackroyd (cross-refer to my article of February 2006) was upheld. *See MediaLawLetter* Feb. 2006 at 39.

Earlier litigation brought by the Health Trust against Mirror Group Newspapers had gone to the House of Lords in consequence of which the Mirror had had to disclose the identity of Robin Ackroyd as the journalist source of the original story. He had provided the information to the paper but he had himself got it from an undisclosed source at the hospital.

It was assumed that the Trust would then be able to compel Mr Ackroyd to disclose who was his source within the hospital who had disclosed confidential medical information in connection with an allegation of a mental hospital's mistreatment of a notorious child murderer.

Despite the importance of upholding patient confidentiality, Mr Justice Tugendhat had concluded that it was *not* in the public interest to compel Mr Ackroyd to disclose his source. The Court of Appeal could not fault the reasoning of Mr Justice Tugendhat and dismissed the appeal while expressing surprise that there had been so much litigation to so little avail and noting that it appears to have been assumed in the earlier House of Lords litigation that the upshot would be the revelation of Mr Ackroyd's source.

The upshot was an endorsement of both Article 10 and Section 10 Contempt of Court Act 1981 which provides for the protection of journalist sources. Those in the United States who criticise the UK libel laws may care to contrast the UK's protection of journalists' sources with the position in the United States. Journalists such as Richard Ackroyd do not get thrown in jail in such circumstances.

Misuse Of Personal Information

The Secretary for Constitutional Affairs, Lord Falconer, announced on February 8, 2007 that the government is to introduce legislation providing for prison sentences of up to two years for those who illegally trade in or misuse individual's personal information. At present the penalty under Section 55 Data Protection Act 1998 is £5,000. The abuse of private information had been highlighted by the Information Commissioner's Report What Price Privacy Now? (http://www.ico.gov.uk/upload/documents/library/corporate/research_and_reports/what_price_privacy.pdf and he had called for such an increase in penalties.

The penalties are aimed at "blaggers" who through corruption or deception persuade information holders to pass their information over. Taken with the recent case where the royal editor of the *News of the World* received a prison sentence for unlawfully intercepting voicemails on royal and other celebrity mobile phones (a straightforward criminal case rather than one raising issues of journalistic freedom) and another case where in a separate case a wealthy businessman and enquiry agents were likewise jailed for the purchase and sale of such intercepted information, it is clear that the laws protecting confidential data are going to be more strictly enforced.

David Hooper is a partner with Reynolds Porter Chamberlain in London.

German Constitutional Court Bolsters Protection of Journalists' Sources

By Christoph Arhold

In an important decision, the German Constitutional Court ruled that searching journalists' offices and seizing their materials to identify their sources interferes with the freedom of the press. *Judgment of the German Constitutional Court,* Feb. 27 2007, Case 1 BvR 538/06; 1 BvR 2045/06.

According to the court, the risk that confidential documents may be published, even if they contain State secrets, does not normally justify such interference.

Background

The plaintiff is editor in chief of the German political magazine CICERO and the person in charge under the terms of the German Press Law. In April 2005, CICERO published an article about the terrorist Abu Musab al-Zarqawi which quoted information from a classified Federal Office of Criminal Investigation (*Bundeskriminalamt*) document .

This led the public prosecutor's office to start an investigation of the editor and the journalist. The Potsdam local court issued a search warrant for the plaintiff's office and private apartment in Berlin and the editorial offices of CICERO in Potsdam.

To justify its decision, the court stated that the journalist had published a state secret within the meaning of Section 353b of the German Criminal Code, and could thus be accused of aiding and abetting the betrayal of State secrets.

According to the court, the journalist knew the official of the *Bundeskriminalamt* who passed him the relevant information acted with the criminal intention of making the State secret public. This also allegedly applied to the editor in chief of CICERO, who was informed of these circumstances and approved the publication of the article.

During the search, data devices of different kinds were seized and the hard disk of the journalist's computer was copied. A complaint by the plaintiff against the search warrant was rejected by the Potsdam District Court.

The plaintiff then filed a constitutional complaint against this decision with the German Constitutional Court (*Bundesverfassungsgericht*). In February 2006 the public prosecutor's office stayed proceedings, subject to payment of EUR 1,000.

Constitutional Court's Decision

The plaintiff claimed that neither the local court nor the District Court had given sufficient consideration to the constitutional protection of freedom of the press. The Constitutional Court decided in his favor. Its judgment is reasoned as follows.

The search of editorial offices interfered with press freedom, as it disturbed editorial work in the office. More importantly, the seizure of evidence gave the public prosecutor's office the possibility to access editorial data, thus violating the confidentiality of the editorial work which was part of the freedom of the press.

Most importantly of all, the proceedings violated the confidential relationship with the journalist's sources, and thus interfered with the protection of journalistic sources. This interference was not justified. The suspicion that the journalist had aided and abetted the betrayal of official secrets was not a sufficient reason for a search of the editorial offices and the seizure of evidence.

The suspicion that the journalist had aided and abetted the betrayal of official secrets was not a sufficient reason for a search of the editorial offices and the seizure of evidence.

A journalist and an official who betrays a secret must have agreed to publish the confidential information

§ 353 b Criminal Code penalises the unauthorised betrayal of official secrets. However, publishing a secret in the press does not necessarily and automatically add up to the offence of aiding and abetting the betrayal of official secrets. For instance, no statutory criminal offence in the meaning of § 353 b Criminal Code is committed if the information was accidentally leaked, or leaked by someone under no obligation to respect its confidentiality. Moreover, if an official who must respect confidentiality only intends to give a journalist background information, and they do not agree to publish this information, the offence is already committed when the information is revealed to the journalist, and its publication can no longer be considered as aiding and abetting the betrayal. In other words, the journalist can only have committed a crime if there is an agreement between him and the official to betray the confidential information by pub-

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lishing it. It is up to the prosecutor's office to prove such an agreement. The mere fact that a journalist has published confidential information can therefore not justify a search of his offices.

Not all forms of suspicion are sufficient for the issuance of a search warrant

In such situations the public prosecutor's office must investigate the facts thoroughly before deciding how to treat the journalist. All forms of suspicion are not sufficient to justify a search warrant against members of the press, or the public prosecutor's office would be able to violate press freedom at its discretion - there must be specific indications beyond mere publication that an agreement between the journalist and the official is probable.

Identifying the journalistic source must not be the main objective

Even when there is an indication of such an agreement between the journalist and the official, the search and seizure are still constitutionally prohibited if they are conducted solely or mainly to identify the informant. Even when there is enough reason to suspect the journalist (or editor) of an offence, the search and seizure of evidence may only be conducted to clarify the suspicion, and not to obtain grounds for suspecting the informant. The risk of infringing the protection of journalistic sources is especially high when the suspicion of aiding and abetting is based solely on the publication of the official secret.

Applying these standards, the Constitutional Court came to the conclusion that the search and seizure in CICERO's editorial offices infringed press freedoms. The search warrant was issued in a situation where there were no concrete indications of an intended betrayal of secrets other than publication in the press, and all attempts to find such indications were unsuccessful. Consequently, the search of the editorial offices was ordered with the main aim of identifying the alleged informant in the *Bundeskriminalamt* .

Comments

This is a milestone judgment by the Constitutional Court, which considerably strengthens the right of the press to protect journalistic sources.

For a long time, prosecutors' offices and local courts have circumvented this fundamental right by charging journalists with aiding and abetting the betrayal of official secrets. Their goal was to discourage whistleblowers in the public administration, and deter journalists from quoting confidential documents, as otherwise the journalist took the risk of being prosecuted and the whistleblower risked being identified by a search of the journalist's home and office.

This practice has now been ruled out. In particular, by requesting clear indications of an agreement between the whistleblowing official and the journalist, the Constitutional Court has set the hurdles so high that searches based on the suspicion of betrayal of State secrets should be out of the question. And rightly so.

Public administration must be controlled by public opinion, which depends on the availability of objective, uncensored and politically uninfluenced information, for instance in the press. But to fulfil this task, the press in turn needs more than just the official information made available by the authorities, and it therefore tries to obtain first-hand, uncensored and neutral information from the actors, i.e. from informants (sources) in the administration, who are willing and able to provide objective information.

Of course, the uncensored publication of that information may go against the interests of these responsible for the institutions, who are therefore potential targets of review and criticism.

This is why the protection of journalistic sources is a highly valued part of the freedom of the press indispensable in a free and democratic society. When a criticised institution seeks to detect its critics so that it can ignore or at least manipulate public opinion, this is an extremely serious interference with one of the most important pillars of democratic society. It then becomes the task of the courts to uphold and, when necessary, restore the freedom of the press. This is exactly what the Constitutional Court in Germany has done. The judgment should serve as a model for decisions by courts in other jurisdictions.

Christoph Arhold is a lawyer with White & Case in Brussels, Belgium.

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Northern Irish Libel Verdict Leaves a Bad Taste

By Karyn Harty

As one who originally hails from County Antrim in Northern Ireland, home of the Giant's Causeway and the overdone steak, I was intrigued by a recent jury award of £25,000 in libel damages by a Northern Irish jury to the proprietors of a Belfast restaurant in respect of a restaurant review published in the *Irish News*. *Convery v. Irish News.*

Some have heralded the verdict as the end of serious restaurant reviews, and many are concerned at the precedent of a restaurant securing significant damages over criticism in a review, given the extremely damning remarks published in such reviews on a weekly basis in the press.

The case certainly raises serious questions about the restrictions on the ability of the press to 'tell it like it is.' It might be useful to take a closer look at what was actually published, how the law in Northern Ireland operates and how those factors combined culminated in a jury award equivalent to about $50,000.

Background

In general one wonders about the wisdom of bringing libel proceedings over a bad review. I admired the Dublin proprietor who, having been subject to a scathing review in the *Irish Times*, took out a prominent advertisement in the same newspaper thanking its loyal patrons for their custom and looking forward to many more years of good food at the restaurant. Or the client who said rather than sue he planned to meet a false allegation that he used processed ham in his organic pies by placing a platter of ham on the counter with a sign saying "*You decide.*"

The defendant to the libel action which led to the recent award, the *Irish News*, is a Belfast based newspaper with a circulation of about 50,000 copies. To place that in context, the population of Northern Ireland is about 1.7 million, with around 600,000 people living in the greater Belfast area. The *Irish News* is broadly Irish nationalist in outlook and is well regarded for its coverage of current affairs and local issues.

In August 2000 the *Irish News* weekend section carried a restaurant review written by Caroline Workman, an experienced food writer and author of the *Bridgestone Food Lover's Guide to Northern Ireland*. Ms. Workman had dined at Goodfellas, a popular Italian themed restaurant in West Belfast. She was clearly unimpressed with her dining experience. Published under the headline "*Not good, fellas*," the review took the restaurant severely to task. The following is a flavour (if you'll excuse the pun) of Ms. Workman's criticisms.

> "*We were happy just to order a cola – until it arrived. Flat, warm and watery, you can be sure it was on tap.*"
>
> "*after one ring of squid, a mouthful of prawns and a taste of the paté, it became clear that these dishes were made with the cheapest ingredients on the market. You get what you pay for these days, although Goodfellas doesn't pass on any savings to its customers. At £3.55 for squid (overcharged at £4.25) I did not expect reconstituted fish meal. The translucent grey rings cannot have been real squid and the hard batter coating and bottled thousand island dressing did little to make them more appetising.*"
>
> "*My chicken marsala (£8.55) was inedible. The meal itself looked fine, but it was coated in a sickly saccharine sauce that clashed horribly with the savoury food.*"
>
> "*The sloppy sauce had generous quantities of dodgy looking seafood. Even the pizza (£7.95) was a let down, covered with nasty processed salami*."
>
> "*We didn't witness any theatrical tossing and stretching of dough, so it's possible that frozen pizza rounds are brought in.*"

Libel Trial

Ms. Workman gave the restaurant one out of a possible 5 stars, and rated it "Stay at home." Ciaran Convery, owner of Goodfellas, sued. The *Irish News* pleaded justification and fair comment and, when the matter finally came on for hearing before a jury in Belfast in February 2007, Ms. Workman gave evidence that review and the 'stay at home' rating she

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had given to Goodfellas were "completely honest." Mr. Convery described the review as a "hatchet job."

The judge allowed both justification and fair comment to go before the jury. James Fitzpatrick & Co, the Belfast solicitors who defended the *Irish News*, say the jury answered some of the questions put to them in the issues paper in favor of the newspaper's justification defense but found against the *Irish News* on fair comment. They jury awarded Mr. Convery £25,000 in damages, a verdict which is now the subject of an appeal.

It is worth noting some peculiarities in relation to Northern Ireland's legal system. Northern Ireland sits as a separate and distinct legal jurisdiction within the United Kingdom. Although it shares a border with the republic of Ireland, its system is essentially UK based although it has some legislation of its own. Culturally, its courts system is probably closer to the English system than the Irish system although there are many similarities between the three jurisdictions.

In the area of libel, it is a hybrid of the two. Libel judgments in the English courts are binding on Northern Irish judges, whereas Irish decisions are not. Curiously, only 7 people sit on a Belfast jury, as compared with the practice of using juries of 12 in other jurisdictions.

Northern Irish juries are famous for their generosity and, although it is rare for cases to run to trial in Belfast, when they do the results can be surprising. Take for example, the libel action brought by a Queen's Counsel (a senior barrister) over a false allegation by a tabloid newspaper that he had been seen fighting over the last chocolate éclair in a Belfast bakery, for which he received £50,000 in damages. Or the action brought against boxer Barry McGuigan by his manager, Barney Eastwood, which led to a jury award of £600,000 in libel damages.

It may be that the practice of selecting just 7 jurors for libel juries in Belfast is tougher on defendants, because there is perhaps less scope for a balanced view emerging than might be the case with the jury of 12 used in other jurisdictions. Or it may be that Belfast people are just very generous when it comes to spending other people's money.

As regards the law though, there is always a risk in straying into the dangerous area of factual assertions and the law applies to restaurant reviews just as it does to news items and comment articles. In that context this case is particularly curious.

The defense of fair comment does not exonerate a defendant who makes pure statements of fact, as opposed to opinions or inferences drawn from facts either generally known or stated elsewhere. Comment, if it is truly comment, may be exaggerated, unreasonable and even unfair, but it must be honest. Malice defeats the defense, and if there has been a distortion of the facts for emphasis, or matters have been omitted that results in the facts being taken out of context, then the defense may not succeed.

With justification, the defendant's state of mind is immaterial. The facts stated are either substantially true or they are not. However with fair comment, the defendant's state of mind is key and much depends on the jury's perception of the author's evidence. The extent to which the opinion or inference expressed is based on the publisher's honest belief is thus usually the crux of the matter.

It is not uncommon for judges to withdraw fair comment from the jury, having ruled that the defendant has taken something out of context or has been unfair to the plaintiff by leaving out key pieces of information. In cases where the court does allow fair comment to go before the jury, because of the emphasis on the need for the facts on which the comment is based to be shown to be true, often fair comment flounders along with the defendant's justification defense.

Curiously in this case against the *Irish News* the jury held that the restaurant review was at least partially true, but the jury found against the newspaper on fair comment. It appears therefore that the jury felt there was an element of malice in the way in which the facts were portrayed.

Of course one might well ask whether a reviewer should not be entitled to speculate as outrageously as they like as to the origin of the squid if it really tasted that bad, or whether the cola was out of a bottle or a tap, without risking liability in defamation, particularly if they have got their facts right.

We await the appeal hearing with interest.

Karyn Harty is a partner with McCann FitzGerald solicitors in Dublin. She qualified in Belfast before joining McCann FitzGerald in 1998.

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UK Libel Action Collapses Prior to Six Week Trial

By Niri Shan & Lorna Caddy

February 2007 saw the dismissal by the English courts of Alberta Matadeen's libel case against newspaper owners, Associated Newspapers Limited. *Matadeen v. Associated Newspapers Ltd*. This case had been expected to be one of the largest UK libel actions to take place in recent years, with the trial involving some 52 witnesses scheduled for six weeks between April and May this year.

Background

Mrs. Matadeen is the owner of the former Alexandra Nursing Home in Erdington, Birmingham. Her claim arose from front page news articles published in the *Evening Standard* in October 2002, alleging mistreatment of elderly and vulnerable residents of the Alexandra Nursing Home, which Mrs. Matadeen owned. The articles were based upon a three-week undercover investigation carried out by one of the *Standard's* journalists. Mrs. Matadeen vigorously denied the allegations.

Associated Newspapers could concentrate on its defense rather than worrying about effectively being held to ransom over costs.

Associated Newspapers relied, primarily, on the defense of justification, i.e., the sting of the allegations made in the articles was true. In the UK, the burden of proof in this defense lies with the defendant.

As a consequence, the defense became tantamount to a public inquiry into the treatment of residents and conditions at the Alexandra. A six-lawyer team from Taylor Wessing subsequently conducted a thorough investigation over just short of a four-year period, serving a resultant expert report and 20 detailed witness statements that corroborated the journalist's published observations.

These included statements from the Government regulators, the Commission for Social Care Inspection, and relatives of the nursing home's residents, a staff member and a neighbour.
Two months before the trial was due to begin, Mrs. Matadeen agreed to withdraw her claim, and the court dismissed the action on 15 February 2007.

Conditional Fee Problem

In this case, Mrs. Matadeen had instructed solicitors on a conditional fee agreement (CFA) without "after the event" insurance. Publishers in the UK are all too familiar with facing libel claims from claimants represented by lawyers on CFAs. These are effectively "no win, no fee" agreements, with Courts allowing claimants' lawyers to seek a 100% uplift on their fees in case of a win (to compensate them for those cases that they lose), effectively doubling the cost for the defendant.

Given the claimant has no risk of paying his or her own costs, there is no commercial check on the claimant's lawyers' rates or the overall level of their fees. Consequently, claimants' costs in libel actions often spiral out of control. It is not uncommon in a UK libel action, with the uplift on the claimant's lawyer's fees, to see a successful claimant claiming in excess of £1 million by way of costs.

Defending libel actions against claimants represented on a CFA is a notoriously expensive business. The stakes are high. If the defendant is successful, the claimant may well not be able to meet the defendant's costs. Equally, if the claimant is successful, the defendant will have to pay a large proportion of the claimant's costs plus face a claim for an uplift on the costs of up to 100%.

Cost Capping

Early on in proceedings, Associated Newspapers made an application to the court that Mrs. Matadeen's costs be capped at a reasonable amount. It was argued that there was a real and substantial risk that, if Associated Newspapers was successful at trial, Mrs. Matadeen would be unable to meet all or a very substantial part of its costs.

Equally, if Mrs. Matadeen was successful at trial, Associated Newspapers would have to meet a large proportion of her costs plus face a claim under the CFA for an uplift on the costs of up to 100% by way of the success fee. Associated Newspapers argued that this scenario could have a chilling effect on freedom of expression.

In 2005, the Court agreed and made the first costs-capping order ever awarded in the context of libel proceedings, establishing this as a seminal case in the field. *See Matadeen v. Associated Newspapers* (Master Eyre, 17.3.05).

The order was made with the proviso that Associated Newspapers' costs were capped at the same level. The effect

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of the cap was that neither party would be able to recover costs exceeding the cap from the other. The case was referred to a costs judge to decide the level of the cap. In the meantime, the parties negotiated the level of the cap between themselves to £447,500.

This order represented an important first step in bringing proportionality to costs incurred by lawyers representing claimants on CFAs. It recognizes that publishers need to be able to report candidly on important issues of public interest without being overly fettered by cost concerns.

In this case, it meant that Associated Newspapers could concentrate on its defense rather than worrying about effectively being held to ransom over costs. In doing so, it was able to preserve the integrity of the articles written on a subject of important public interest.

Niri Shan and Lorna Caddy are media and entertainment lawyers at Taylor Wessing in London. They acted for Associated Newspapers in this case. The claimant was represented by solicitors firm Charles Russell.

Pennsylvania Appellate Court Affirms Absolute Protection of State Shield Law

By Robert C. Clothier

In a decision that has Pennsylvania media lawyers breathing a sigh of relief, the Pennsylvania Superior Court reversed a controversial trial court decision carving out a "crime-fraud" exception to the Pennsylvania Shield Act. *Castellani v. The Scranton Times, L.P.*, 2007 PA SUPER 2 (filed January 3, 2007) (Popovich, Lally-Green, Todd, JJ.).

In a unanimous ruling, the Superior Court held that The Times-Tribune (Scranton, Pa.) and its reporter, Jennifer Henn, cannot be compelled to disclose their confidential source in a defamation action filed by two county officials who, the paper had reported, had been "vague, effusive, and less than candid" when testifying before a state grand jury.

While "mindful and sympathetic to the trial court's concern about possible criminal violations of the Grand Jury process," the Court found that it was "forbidden from reading into the Shield Law an exception neither enacted by the General Assembly nor found by the Supreme Court as a result of the developing body of law."

Background

The Superior Court decision arose out of a defamation lawsuit based on an article published in *The Scranton Times* that reported that "an unnamed source close to the investigation" had revealed that the plaintiffs Randall A. Castellani and Joseph J. Corcoran, two Lackawanna County commissioners, had been "less than candid" and gave "vague, evasive answers" during testimony before a grand jury investigating allegations of wrongdoing at a county prison.

The two officials thereafter sued the paper for defamation, claiming that the article's characterization of their testimony was false and defamatory. The officials trumpeted a report submitted by a special prosecutor appointed to investigate a possible leak of grand jury information, who concluded not only that "there was no breach of secrecy" but also that the newspaper's account of the officials' testimony was "totally at variance with the transcript of their testimony before the Grand Jury."

During discovery, the county officials sought a court order compelling the paper to disclose the identity of its confidential source. They argued that because the leak of grand jury information was illegal, the Shield Law should not apply.

The newspaper opposed the request, asserting rights under the Pennsylvania Shield Law and First Amendment Reporter Privilege. The trial court granted the officials' motion to compel, concluding that when interest in the free flow of information "clashes with the need to enforce and protect the foundation of the grand jury purpose, the Shield Law should relinquish its priority."

The Newspaper's Appeal

The newspaper filed both a notice of appeal and a petition for permission to appeal the trial court's interlocutory order. The Superior Court ruled that the trial court's order was appealable under the collateral order doctrine.

In so ruling, the Superior Court held that the Pennsylvania Shield Law and First Amendment reporters' privilege are:

> "deeply rooted in the public policy of this commonwealth and the public policy of the United States. It cannot be gainsaid that these privileges exist to preserve the free flow and exchange of ideas and information to the news media and that such inter course is essential to the existence of a democratic republic."

This sweeping endorsement by a Pennsylvania court of the policy grounds for these privileges is heartening if not extraordinary, given that the Pennsylvania Supreme Court, in 2003, *assumed, but did not actually decide*, that Pennsylvania recognizes a First Amendment reporter's privilege. *See Commonwealth v Bowden*, 838 A. 2nd 740 (Pa. 2003) ("we need not reach the broader, thornier question of whether the Third Circuit [in, *e.g., Riley v. City* of Chester, 612 F.2d 708 (3d Cir. 1979)] properly interpreted *Branzburg* in recognizing a privilege.").

The Pennsylvania Shield Law

The Pennsylvania Shield Law states, in relevant part, that "[n]o person engaged on, connected with, or employed by any newspaper of general circulation … shall be required to dis-

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close the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit." 42 Pa.C.S.A. § 5942.

The Superior Court found that the Pennsylvania Shield Law has "few exceptions," one written into the statue itself (applicable to television and radio stations) and one recognized by the Pennsylvania Supreme Court in *Hatchard Westinghouse Broadcasting Company*, 532 A.2d 346 (Pa. 1987). *Hatchard* was a defamation action where the court held that a libel plaintiff may obtain a media defendant's unpublished documentary information "to the extent that the documentary information does not reveal the identity of a personal [i.e., confidential] source of information or that the documentary information may be redacted to eliminate the revelation of a personal source of information."

The Superior Court noted that "it is obvious that if the Court (in *Hatchard*) extended its exception to include the identity of a confidential source, it would have re-written to Shield Law entirely, and no Court in this Commonwealth may undertake such an action."

"The fact that a crime may have occurred by virtue of the alleged disclosure of certain grand jury testimony does not necessitate or empower this Court to craft a new exception to the Shield Law."

Thus, the Superior Court concluded, "the trial court's crafting of 'crime-fraud' exception to the Shield Law, which requires the revelation of the identity of the confidential source of the news agencies' information, runs afoul of *Hatchard*."

The Superior Court explained that "the fact that a crime may have occurred by virtue of the alleged disclosure of certain grand jury testimony does not necessitate or empower this Court to craft a new exception to the Shield Law." In relying on the Shield Law, the Court never addressed the First Amendment reporter's privilege.

The Court's holding was not that surprising. Indeed, the real surprise was the trial court's decision, not the Superior Court's reversal. But the Court's analysis appeared inconsistent with the Supreme Court's holding in *Commonwealth v Bowden*, 838 A. 2nd 740 (Pa. 2003). In that case, two reporters argued that *Hatchard* limited the Shield Law's absolute protections to confidential source information *only* to defamation cases; in all other cases, they argued, the Shield Law protected all unpublished information regardless of its confidentiality.

The Pennsylvania Supreme Court in *Bowden* categorically rejected that position, holding that the Shield Law protects only confidential source information in *all* cases. In the *Scranton Times* decision, the Superior Court called the *Hatchard* ruling an "exception" to the general rule. According to *Bowden*, however, the rule in *Hatchard* is the general rule in all cases, not an exception applicable only to defamation cases.

Concurring Opinion

A troubling concurring opinion, while agreeing with the panel's analysis, emphasized that the efforts to uncover a confidential source took place in the context of a defamation lawsuit, not a criminal prosecution. The opinion stated that it would "not foreclose the possibility, as does the majority, that in a future case – for example where, in a criminal prosecution of a grand jury leak, a reporter's evidence about the source of that leak is sought – the Shield Law may have to yield."

In that case, and "only in such case, where the interest of the state and the public in disclosure is at its zenith, can we consider creating an exception to what is, on its face, an unambiguous Shield Law." Although the concurring opinion implies that this would be consistent with the panel's decision, that is far from clear, as the panel decision expressly stated that the possible commission of a crime does not permit a court to create an exception to the Shield Law.

Robert C. Clothier is a partner in the Philadelphia office of Fox Rothschild LLP.

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Pennsylvania Supreme Court Nixes Surrender of Newspapers' Computer Hard Drives

By Robert C. Clothier

The Pennsylvania Supreme Court last year reversed a judge's order requiring several Pennsylvania newspapers to surrender two of their reporters' computer hard drives to the state attorney general and also vacated the judge's $1,000 per day contempt sanction against the papers. *In re 24th Statewide Investigating Grand Jury*, 907 A.2d 505, 35 Media L. Rep. 1054 (Pa. 2006) (Cappy, C.J., Castille, Newman, Saylor, Baer & Baldwin, JJ.)

The Court found that the outright surrender of the hard drives was overbroad and presented a "chilling effect" on the reporters' ability to gather information and utilize confidential sources. The Court, however, did not foreclose the use of a "neutral, court-appointed expert" to review the hard drives for information relevant to the grand jury's investigation.

While the result was a modest victory for the media, the legal grounds for the Court's ruling were far from clear. The newspapers argued that the surrender of the hard drives violated the First Amendment to the U.S. Constitution, the First Amendment Privacy Act, 40 U.S.C. §§ 2000aa-2000aa-12, and the Pennsylvania Shield Law, § 5942.

The Court did not address these arguments in its decision, instead referencing general First Amendment concerns that are "heightened" when materials are sought from the "news media."

The Grand Jury Subpoenas

The grand jury subpoenas arose out of a probe by the attorney general into a county coroner's dealings with the press. A statewide grand jury subsequently investigated whether the coroner gave reporters for the *Intelligencer Journal* his password to a part of the county's website restricted to law enforcement and other authorized persons. (No charges have been filed, and the coroner has denied turning over the password.)

In early 2006, Lancaster Newspapers, Inc., which owns the Lancaster *Intelligencer Journal*, the Lancaster *New Era* and the Lancaster *Sunday News*, was served with a subpoena demanding the production of four computer workstations. Though the newspapers' motion to quash was denied, the supervising judge permitted review of the hard drives only for historical information concerning internet access. The papers appealed to the Pennsylvania Supreme Court, which, in a prior decision, ruled that it lacked jurisdiction because the papers were never held in contempt.

Later in 2006, the attorney general procured additional subpoenas for two more computers. The newspapers offered to give the investigators printed versions of the items they requested, including emails, but prosecutors turned down the offer because they wanted to scan the computers for additional information.

Petition to Quash

The newspapers and reporters responded by filing a petition to quash the grand jury investigation, arguing that the subject matter was not appropriate for a statewide investigating grand jury. That petition was denied. The newspapers and reporters also filed a motion to quash the subpoenas, and that motion was also denied, though the judge again limited the Attorney General's search of the hard drives to Internet history and cached content of the hard drives. This time, the newspaper refused to comply with the order and was held in contempt. The judge imposed a sanction of $1,000 per day.

The newspapers and reporter filed with the Pennsylvania Supreme Court an emergency application for review. In addition to arguing that the grand jury lacked authority, they claimed, on the merits, that the grand jury subpoena was "overbroad" in that, by ordering the surrender of entire hard drives, it required the production of information irrelevant to the grand jury investigation.

The newspapers asserted that such a production would have a "chilling effect" on their ability to gather information and utilize confidential sources because, even though the information relevant to the grand jury investigation (Internet history, cached content) did not implicate confidential course, the other information on the hard drives had to have such information. The papers argued that less intrusive means were available to obtain the information sought by the subpoenas.

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The newspapers asserted four legal grounds. First, they claimed that the subpoena violated the First Amendment Privacy Protection Act, 40 U.S.C. §§ 2000aa-2000aa-12, which they said makes it unlawful for a governmental entity to "search for or seize" a newspaper's "work product materials" in connection with the investigation of an alleged crime if the crime consists of the newspaper's possession or access to the materials or information contained therein.

Second, they argued that the subpoena sought confidential source information on the hard drives that is absolutely protected from disclosure under the Pennsylvania Shield Law, § 5942, citing *In re Taylor*, 193 A.2d 181 (Pa. 1963).

Third, they argued that the subpoena violated the First Amendment reporter's privilege because the hard drives contained confidential source information and the attorney general made no showing of a sufficient need for that information to overcome the privilege.

Lastly, they argued that the subpoena would intrude on the newspaper's First Amendment right to newsgathering set forth in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

In response, the state attorney general contended that the newspapers had failed to offer "one shred of evidence" that the computer hard drives contained protected information, that the newspapers had conceded that the information specifically sought was not protected, and that the judge's safeguards were adequate.

Pennsylvania Supreme Court Decision

In a decision authored by Justice Thomas Saylor, the Supreme Court first rejected the newspapers' contention that the statewide supervising grand jury lacked jurisdiction. Turning to the merits, the Court agreed with the newspapers' contentions.

Analogizing the surrender of hard drives to the turning over of "entire media file cabinets," the Court ruled that the judge's ruling was overbroad and that "measures were available to obtain the information subject to the investigation short of outright surrender of the hard drives to the Commonwealth," citing *In re Grand Jury Subpoena Duces Tecum*, 846 F. Supp. 11 (S.D.N.Y. 1993) (quashing as overbroad a grand jury subpoena requiring production of computer hard drives to investigate potential securities trading violations).

The Court held that "a careful balancing of the respective interests involved leads us to the conclusion that this particular method of disclosure is unduly intrusive in the circumstances presented." But the Court said that "[w]e do not foreclose ... the utilization by the supervising judge of a neutral, court-appointed expert to accomplish the forensic analysis and report specific, relevant results," as was suggested *In re Grand Jury Subpoena Duces Tecum*, 846 F. Supp. 11 (S.D.N.Y. 1993).

The dissent by Justice Castille observed that "the Majority does not specifically identify whether it bases its decision on a particular ground raised by Lancaster Newspapers, all of their constitutional and statutory arguments or some combination thereof." But, the dissent noted, the fact that the majority "adverts to a potential chilling effect and overbreadth ... suggests that the decision is powered by First Amendment concerns."

The dissent, however, believed that none of the subpoenaed information "is protected by any of the privileges claimed by the newspapers, a point the newspapers conceded below," and believed that the safeguards adopted by the supervising judge "were perfectly reasonable."

Justice Castille concluded: "In my mind, the fact that the subpoena could be narrower and more to the liking of the newspapers does not render it unconstitutional."

Robert C. Clothier is a partner in the Philadelphia office of Fox Rothschild LLP. Media counsel in the case were George Werner of Barley Snyder in Lancaster, William DeStefano of Buchanan Ingersoll & Rooney in Philadelphia, and Ted Chylack of Sprague & Sprague in Philadelphia.

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Book Not "News" For Purposes of Shield Law

In a decision delivered from the bench during oral argument, a New Jersey Superior Court judge last December held that a book author could not claim protection under New York's shield law since his book, *TrumpNation: The Art of Being The Donald*, did not qualify as news under the statute. *Trump v. O'Brien*, Superior Court of New Jersey, Law Division – a Civil Part, Camden County, Docket No. L-545-06 (December 20, 2006) (Snyder, J.).

The ruling on a motion to compel discovery was part of an underlying defamation claim brought by Donald Trump against author and *New York Times* reporter Timothy L. O'Brien and Warner Books. The court also gave an alternative holding, stating that the sources of the alleged defamatory statements were not "confidential," since O'Brien had not specifically described them as such when he cited to them in the book.

The court also ruled that New York law applied on the ground that the tort and injury occurred in New York. Thus the court applied New York's shield law which is slightly less protective than New Jersey's statue.

Background

TrumpNation was published in 2005 by Warner Books. A *Publisher's Weekly* review described it as an:

> "instructive tongue-in-cheek primer for would-be Trumps. Sometimes hilarious quizzes summarizing the main points of each chapter demonstrate Trump's audacity, itinerant poor judgment and the kind of hubris one can only stand back and watch with astonishment and a sort of clandestine admiration."

The book notably estimates Trump's actual worth at $150 to $250 million rather than $5.4 billion as Trump has claimed. (*Forbes* magazine has reported Trump's worth at $2.7 billion and in an interview Trump said the figure should be doubled.)

Donald Trump sued Timothy O'Brien primarily on the basis of Chapter 6 entitled "Trump Broke" which discusses Trump's wealth. Trump argues that book is defamatory because it "rejects the fact that Trump is a billionaire" and instead asserts "that Trump is an unskilled and dissembling businessman whose actual wealth is a tiny fraction of what Trump says it is." (Trump's Memorandum of Law in Support of Motion to Compel Discovery, page 7).

Moreover, by suggesting that Trump exaggerated his financial holdings, O'Brien "sought to deter the business community from transacting business with Trump and to influence the consuming public to avoid Trump's goods and services." *Id.*

O'Brien was a staff reporter – and is now an editor – for the *New York Times*, who wrote a series of articles for the newspaper on the restructuring of Donald Trump's casinos. Both the book and the *Times* articles relied upon confidential sources. In his brief before the Superior Court, O'Brien asserted that although he wrote *TrumpNation* as a freelance author, he "saw the Book as a logical extension of his newspaper reporting."

O'Brien used "the same journalistic methods as he used in his newspaper reporting, albeit with a lighter tone, and obtained approval from *The Times'* editorial management to write the Book." (O'Brien Memorandum of Law in Opposition to Plaintiff's Motion to Compel Discovery, page 7). Indeed, O'Brien used the same confidential sources and research files in writing *TrumpNation* as he had for the *Times* pieces.

TrumpNation, however, differed in tone from the prior *New York Times* articles. For example, the book contains a humorous "Trump Quiz" at the end of each chapter. For example, Quiz 2 asks:

> To emerge victorious on The Apprentice, you should:
>
> 1. Let a leech slither up your urethra.
> 2. Find out before the end of the season whether Donald actually owns any of the projects to which he'll assign you if you win.

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3. Grovel.
4. Be extremely innovative and industrious.
5. Pander.
6. When in doubt, don't stick out.
7. Call Donald "Mr. Trump," and mean it.
8. Be smart and be on time.
9. Handle your boardroom grillings like Donald Rumsfeld handles press conferences.
10. Crawl around on all fours whenever necessary.
11. Have a big-time genetic pool.

On the motion to compel, Trump pointed to these quizzes and the general tone of the book, to argue that the book is a "sensationalist, gossipy biography" – not newsworthy information. And that O'Brien "sought only to titillate, providing lurid details of whether Trump uses Viagra (he does not), about Trump's affair with Marla Maples, about Trump 'prowling' at Studio 54 in the 1970s." (Trump's Memorandum of Law, page 3).

Trump also argued that the marketing of the book was evidence of its "sensationalist" basis: O'Brien appeared on a television show to discuss Trump's alleged exaggeration of his wealth. The author appeared at bookstores as well, speaking about the book, Trump's relationship with his family, and his finances and making, what Trump described in pleadings as "a lengthy, malicious and defamatory oral attack." (Trump Memorandum of Law, page 8).

The Lawsuit

Donald Trump filed a libel complaint against O'Brien and Warner Books in January 2006 in Camden County, New Jersey. In the first count of the complaint, Trump alleged that O'Brien and Warner Books defamed him by falsely and deliberately misstating his worth. And in a second count, Trump alleged that O'Brien slandered him in making statements about his worth on CNBC and in a book store appearance.

In August 2006, the trial court denied defendants' motion to dismiss, holding that the complained of statements in *TrumpNation* were susceptible to a defamatory meaning.

Following the denial of the motion to dismiss, Trump made a discovery request, seeking among other things the identity of three people described in the book as having "worked closely with" Trump, who told O'Brien that Trump is not "remotely close to being a billionaire."

Defendants invoked the "newsperson's privilege" and the motion to compel discovery ensued.

Motion to Compel Discovery

Trump argued for the application of New York law on the motion, despite the fact that he had brought the case in New Jersey. The court first found that a conflict existed between the New Jersey and New York shield statutes. New Jersey's shield law, Judge Snyder pointed out, creates "an absolute privilege and it's rather extensive." Though New York's statute has a similar public policy to protect journalists, it is "more liberal" in allowing disclosure of reporters' source material, especially where non-confidential sources are concerned.

Importantly, the two statutes also define "news" differently. Under New Jersey law, "'News' means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect." N.J. Stat. Ann. § 2A:84A-21a(b).

Under New York law, "'News' shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." N.Y. Civ. Rights Law § 79-h(a)(8).

While noting that O'Brien is a resident of New Jersey, that Trump has holdings in New Jersey, and that the book was sold nationwide, the court nonetheless concluded that the majority of contacts in the litigation were with the State of New York: Trump is a resident of New York, the publication of the work occurred in New York, and O'Brien "is a New York journalist [who] relies upon that reputation ... to not only market himself, but to continue to do what he does." In addition, the court found that the "book is marketed as a metropolitan New York type of publication."

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Analyzing the choice of law test, Judge Snyder acknowledged that "there's no doubt that New Jersey public policy is a strict policy to protect journalists." But that policy would not be frustrated by applying the New York shield law because "the states have a very similar interest in protecting journalistic integrity and sources."

Defining News

The argument then turned to the issue of whether *TrumpNation* could qualify as "news" under the New York shield law. Trump argued that the book did not qualify, and the judge strongly agreed, seizing on the "tone" of the book, and the "Trump Quizzes."

Although the defendants argued that an author's "tone" could not remove a book from First Amendment and shield law protection, the judge concluded "the tone sets what the book is."

He acknowledged that book was clearly of public interest, since it sold copies, and that some of the material could be defined as news. Still, the court looked to *TrumpNation* as a whole and decided that "the main function of this book is not to disseminate news to the public." The shield law did not apply, and the court ruled that O'Brien would be required to answer discovery queries about his confidential sources.

Confidential Sources

Judge Snyder offered an alternative basis for his holding as well. Even if *TrumpNation* qualifies as "news" under New York's shield law, plaintiff could still compel information about O'Brien's sources for the statements about Trump's wealth because the sources were not confidential.

The sources at issue were mentioned on page 154 of the book in a passage relating to a discussion of Trump's wealth: "Three people with direct knowledge of Donald's finances, people who had worked closely with him for years, told me that they thought his net worth was somewhere between $150 million to $250 million. [N]one of these people thought he was remotely close to being a billionaire."

O'Brien did not specifically characterize these people as "confidential" sources in a footnote. But elsewhere throughout book, the court pointed out at length, other information was specifically attributed to confidential sources.

This was a "glaring omission," according to Judge Snyder, "when this author has gone to great lengths to articulate in his footnotes or in the body of the text, who is and who is not one that would be a confidential source."

Residual Findings

The court made a number of clarifications for the record on appeal. Should New Jersey law have applied to the case, Judge Snyder noted, O'Brien would have been granted the protection of the New Jersey shield law: "New Jersey's law is written so strictly, ... I can't make a finding that's consistent with the finding under New York law. There's no doubt about it."

In a brief statement, the judge also held that O'Brien could not seek to prevent disclosure of his materials under a constitutional, qualified privilege either.

Finally, the judge ruled even if the New York shield law did apply, "editorial processes" would not be protected, and O'Brien would be required to turn over any interview notes from sessions with non-confidential sources. These, the court held, would go directly to the issue of actual malice, and were essential to Trump's case.

Interlocutory Appeal Sought

The defendants have filed a motion for interlocutory appeal with the New Jersey Appellate Division. A media coalition has moved for leave to intervene in support of defendants' motion for interlocutory appeal.

Among other things the media brief would argue that:

> The trial court's holding ignores additional case law applying the New York Shield Law to other works that are even more "entertainment-oriented" than the Book – e.g., an unauthorized biography of Martha Stewart that was excerpted in The National Enquirer or an MTV reality television show entitled True Life: I'm a Staten Island Girl.
>
> Even if the trial court's interpretation of what constitutes "news" under the New York Shield Law

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Trial Court Grants Motion to Compel Discovery of Sources in Donald Trump Libel Lawsuit

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were correct as a matter of statutory interpretation, such a reading would be so contrary to the First Amendment principles underlying New Jersey's strong public policy of providing absolute protection for journalists from compelled disclosure in libel cases, that the trial court should have applied New Jersey law to the privilege question, which the trial court conceded would have shielded the material at issue from disclosure.

Defendants Timothy O'Brien, Time Warner Book Group and Warner Books are represented by Mary Jo White, Andrew J. Ceresney, and Andrew M. Levine of Debevoise & Plimpton in New York and Mark S. Melodia, Steven J. Picco, and James F. Dial of Reed Smith in Princeton, NJ.

Donald Trump is represented by Marc E. Kasowitz, Daniel R. Benson, Mark P. Ressler, and Maria Gorecki of Kasowitz, Benson, Torres & Friedman, in New York, and William M. Tambussi and William F. Cook of Brown & Connery, Westmont, NJ. The media motion in support of the interlocutory appeal was filed by Floyd Abrams, Joel Kurtzberg and Brian Barrett of Cahill Gordon Reindel.

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Reporters Privilege Case Update

Contempt Of Court Order Against Chronicle Reporters Vacated

California

On March 1, U.S. District Judge Jeffrey White vacated the contempt of court findings and sanctions against Lance Williams and Mark Fainaru-Wada, two *San Francisco Chronicle* reporters ordered to reveal who had given them confidential grand jury testimony related to the BALCO steroids investigation.

A criminal defense attorney for one of the BALCO defendants admitted in February that he gave Fainaru-Wada access to the grand jury transcripts and allowed him to take verbatim notes of the transcripts. The reporters, who faced up to 18 months in prison, did not confirm or deny that the defense attorney was their confidential source.

Kansas

On March 2, a Kansas judge ordered *The Wichita Eagle* to turn over all notes and KWCH-TV to turn over all unaired footage relating to interviews with a criminal defendant charged with the murder of a 14-year old girl. Finding that it appeared that the man confessed in the interviews to raping the girl, the court held that the government's need for the information as evidence in the criminal case outweighed the journalists' First Amendment rights. *The Wichita Eagle* subsequently published its reporter's notes on the paper's website.

Minnesota

On February 2, a Minnesota judge ordered three journalists with *The Free Press* to comply with a subpoena for notes and other information relating to a phone interview with a man while he was in a standoff with the police. (The suspect took his own life a few hours later during the standoff).

The state shield law requires journalists to disclose confidential information if there is probable cause to believe the information is clearly relevant to a criminal investigation. Finding the shield law inapplicable, the judge wrote: "Freedom of the press is not quite as sacrosanct or absolute as *The Free Press* would like it to be. The right claimed by *The Free Press* to seek the 'truth' must never be allowed to take precedent over the compelling and overriding interest of law enforcement authority to maintain human life."

The Free Press and its corporate parent say they intend to appeal the ruling.

At the hearing, the judge also ruled on an unrelated matter involving one of the journalists who had been subpoenaed for notes and testimony regarding a conversation he had with a suspect in a robbery case. In that case, the journalist had gotten the suspect's cell phone number from court documents, called the suspect, and described the conversation in an article. The judge rejected the government's petition, noting that the suspect was in police custody and that the information being sought by authorities could be obtained in other ways.

South Dakota

In February 2007, a South Dakota criminal court judge rejected a defense attempt to subpoena the notes of an editor covering a high-profile juvenile offender trial. The defendant was a high school wrestling champion accused of sexually molesting younger teammates. His lawyer subpoenaed Sarah Ebeling, the editor the *New Era*, a local weekly newspaper, demanding she turn over all of her notes and recordings from interviews she conducted while covering the trial. Circuit Judge Steven Jensen quashed the subpoena on relevance grounds.

Tennessee

The Supreme Court of Tennessee declined to review a ruling on the application of the state shield law in the context of a libel action. In the 2000 presidential campaign WorldNetDaily and two freelance writers published an 18-part series accusing Al Gore and some of his Tennessee supporters of corruption. WND and the reporters were sued by Clark Jones, a Tennessee businessman and Gore supporter. In a pretrial ruling, the court of appeals ruled that defendants would have to identify their sources if they introduced evidence that their publications were true.

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Reporters Privilege Case Update

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District of Columbia: United States v. Libby

On March 6, 2007, former White House official I. Lewis "Scooter" Libby was found guilty on two counts of perjury, one count of obstruction of justice, and one count of making false statements for his statement to a federal grand jury and to federal investigators in the Plame investigation.

The trial was notably marked by the testimony of news reporters, including Judy Miller who spent 85 days in jail resisting a grand jury subpoena. On March 1, District Judge Reggie B. Walton decided a number of motions relating to Libby's request to call NBC reporter Andrea Mitchell to testify and to introduce additional statements and evidence from NBC reporter Tim Russert. *United States v. Libby*, (No. 05-394, 2007 WL 623646 (D.D.C. March 01, 2007).

With respect to Mitchell, Libby wanted her to testify about a 2003 comment she made on CNBC, indicating that before Plame's identity became public, there was a rumor among Washington reporters that Plame worked for the CIA. The defense argued that this would bolster Libby's claim that he first learned of Plame's identity from Mitchell's colleague, Russert. The government filed a motion to preclude her testimony, which the judge granted. According to the court, "Mitchell recanted this exchange" that she had "misunderstood [the] question and screwed it up." In the circumstances, Mitchell's statement was hearsay and it could not be introduced for the sole purpose of impeaching her.

Libby also wanted to introduce statements that Russert had made on the air in 1997 and 1998 which suggested that Russert had greater knowledge of grand jury procedure than he said he had when appearing before the grand jury. The court concluded that these statements involved collateral matters and could not be used to impeach Russert.

Finally, Libby sought to introduce a letter the government had written to Russert concerning his testimony to the grand jury. The government letter stated that if Russert challenged his grand jury subpoena, the government would not argue that he had waived any privilege by speaking to an FBI agent in 2003 about his conversation with Libby, but rather the government would compel testimony under *Branzburg v. Hayes* (1972).

Judge Walton agreed with the government that the letter was an understanding between attorneys, and not a concession to secure Russert's testimony. Because it was of little importance, and Russert likely did not know about it, the court concluded that the letter could not be admitted to impeach Russert or demonstrate bias, and should not be admitted.

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State Shield Law Efforts Making Gains Across the Country

Efforts to enact a statutorily-based reporter's privilege are currently underway in seven states: Kansas, Massachusetts, Missouri, Texas, Utah, Washington and West Virginia. With the exception of Kansas and West Virginia, shield law bills were introduced in all of these states last year (or, in the case of Texas, the prior legislative session).

Only the proposal under consideration in Washington provides absolute protection for confidential sources. All of the bills, except the one introduced in West Virginia, contain definitions for who or what kind of media may claim the privilege. Three of the bills—Texas, Washington and West Virginia—make reference to the internet as a means of disseminating information to the public.

Highlights from each proposal follow below.

Kansas

Bill No. 313 was introduced in the Senate in early February 2007. It remains pending before the Judiciary Committee.

- The bill covers sources and information.
- "Journalist" defined as: "a publisher, editor, reporter or other person employed by a newspaper, magazine, news wire service, television station or radio station who gathers, receives or processes information for communication to the public."
- Balancing test: the party seeking to compel must show that the information is "material and relevant," unavailable by other means and "of a compelling and overriding interest for the party seeking the disclosure and is necessary to secure the interests of justice."
- Upon satisfaction of the balancing test, the subpoenaed information becomes subject to in camera inspection; the court will compel disclosure only if it then determines that "disclosure is likely to be admissible as evidence" and that "its probative value is likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists."

To access the bill, go to: www.kslegislature.org/bills/2008/313.pdf

Massachusetts

Identical bills were introduced in the Senate (No. 808) and in the House of Representatives (No. 1672) in early January 2007. The Senate bill has been referred to the Judiciary Committee, and the House bill to the Joint Committee on Public Service.

- The bills cover sources (and information that would "tend to identify" the source) regardless of any promise of confidentiality, and unpublished "news or information."
- "Covered person" defined as: "a person who engages in the gathering of news information and has the intent, at the beginning of the process of gathering news or information, to disseminate such news or information to the public."
- "News media" defined as including: "a newspaper, a magazine; a journal or other periodical; radio; television; any means of disseminating news or information gathered by press associations, news agencies or wire services, including dissemination to the news media such as identified herein; or any printed, photographic, mechanical or electronic means of disseminating news or information to the public."
- Disclosure of sources may be compelled if "(i) disclosure of the identity of a source is necessary to prevent imminent and actual harm to public security from acts of terrorism; (ii) compelled disclosure of the identity of a source would prevent such harm; and (iii) the harm sought to be redressed by requiring disclosure clearly outweighs the public interest in protecting the free flow of information."
- Balancing test for compelling disclosure of unpublished news or information: the party seeking to compel must show that the news or information is "critical or necessary" and unavailable by alternative means, and that "there is an overriding public interest in the disclosure."

To access the Senate bill, go to: www.mass.gov/legis/bills/senate/185/st00/st00808.htm

To access the House bill, go to: www.mass.gov/legis/bills/house/185/ht01pdf/ht01672.pdf

Missouri

A shield law bill, HB 774, passed the House of Representatives on March 15, and a public hearing before the Senate is scheduled for March 28. Two bills had also been introduced in the Senate: SB 58 and SB 307.

- HB 774 covers sources and "unpublished or nonbroadcast information."

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State Shield Law Efforts Making Gains Across the Country

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- "Covered person" defined as: "any person or entity whose revenue comes principally from the business of gathering, creation, or distribution of news or from charitable contributions that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means, and that meets one of the following three criteria: (a) Publishes, in either print or electronic form, a newspaper, book, magazine, pamphlet, or any other periodical; or (b) Operates a radio or television broadcast station, a network of such stations, a cable system, a satellite carrier, or a channel or programming service for any such station, network, system, or carrier; or (c) Operates a news agency or wire service, or a news or feature syndicate." (The revenue requirement was added when the bill passed out of the House General Laws Committee.)
- Factors for the court to consider in deciding to pierce the privilege: "the nature of the proceedings, the merits of the claim or defense, the adequacy of any remedy otherwise available, the possibility of establishing by other means that which it is alleged the source or information will tend to prove, the public interest in protecting the confidentiality of any source as balanced against the public interest in requiring disclosure, and the relevancy of the source or information."
- Balancing test: before compelling disclosure, the court must find that the subpoenaed information does not relate to matters or details "necessary" to be kept secret, that all other sources have been exhausted and that disclosure is "essential to the protection of the public interest involved in the proceedings."

To access the House bill, go to: www.house.mo.gov/bills071/biltxt/perf/HB0774P.HTM

Texas

Three shield law bills have been introduced in Texas, one in the Senate (SB 966) and two in the House (HB 382 and HB 2249). The sponsor of HB 382 (the first of the three to be introduced) subsequently co-sponsored HB 2249, which is identical to the Senate bill. A public hearing on the bills is scheduled for March 28. It is expected that HB 2249 and SB 966 will be the main focus of the hearing.

- HB 2249 and SB 966 cover confidential and nonconfidential information, and the sources of such information.
- "Journalist" defined as: "a person who for financial gain, for a substantial portion of the person's livelihood, or for subscription purposes gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider and includes: (A) a person who supervises or assists in gathering, preparing, and disseminating the news or information; (B) a person who is or has been a journalist, scholar, or researcher employed by an institution of higher education; or (C) a person who is on a professional track to earn a significant portion of the person's livelihood by obtaining or preparing information for dissemination by a news medium or an agent, assistant, employee, or supervisor of that person."
- "News medium" defined as: "a newspaper, magazine or periodical, book publisher, news agency, wire service, radio or television station or network, cable, satellite, or other transmission system or carrier or channel, or a channel or programming service for a station, network, system, or carrier, or an audio or audiovisual production company or Internet company or provider, or the parent, subsidiary, division, or affiliate of that entity, that disseminates news or information to the public by any means, including: (A) print; (B) television; (C) radio; (D) photographic; (E) mechanical; (F) electronic; and (G) other means, known or unknown, that are accessible to the public."
- Balancing test: the party seeking to compel must show that "(1) all reasonable efforts have been exhausted to obtain the information from an alternative source; (2) to the extent possible, the subpoena or compulsory process does not require the production of a large volume of unpublished material and is limited to the verification of published information and the surrounding circumstances relating to the accuracy of the published information; (3) reasonable and timely notice was given of the demand for the information, document, or item; (4) nondisclosure would be contrary to public interest; (5) the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and (6) the information, document, or item: (A) is relevant and material to the proper administration of the official proceeding for which the testimony or production is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony or production; or (B) is central to the investigation or prosecution of a criminal case regarding the establishment of guilt or innocence and, based on an independent source, reasonable grounds exist to believe that a crime has

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State Shield Law Efforts Making Gains Across the Country

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occurred." (This test resembles that found in the federal shield law bill introduced by Senator Lugar in May 2006 (S. 2831).)

- Additionally, disclosure may be compelled if (1) the party seeking the information shows that the information was obtained as a result of a journalist's eyewitness observations of criminal conduct or any criminal conduct on the part of the journalist and the court is satisfied that reasonable efforts to obtain the information from alternative sources has been exhausted; and (2) it is "reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm." The bill explicitly provides that this section of the bill does not apply where the act of "communicating, receiving, or possessing" information is the alleged criminal conduct.

To access the Senate bill, go to: www.legis.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=SB966

To access the HB 2249, go to: www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB2249

Utah

The Advisory Committee on the Rules of Evidence to the Utah Supreme Court has put forward two proposals for an evidentiary rule that would create a reporter's privilege in the state (Rule 509). The proposals are identified as the "majority draft" and the "alternative draft." The alternative draft has the backing of the state Attorney General, as well as the media.

- The majority draft covers confidential sources (and information that would "directly lead" to the disclosure of such sources) and "confidential unpublished news information."
- The alternative draft would also cover all unpublished news information.
- Under the majority draft, "news reporter" means: "a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected."
- The alternative draft uses the same definition for "news reporter" and expands it to also include authors.
- Under the majority draft, disclosure of "confidential unpublished news information" may be compelled if the party seeking the information "demonstrates a substantial need for that information which outweighs the interest of a continued free flow of information to news reporters." (Note that the test weighs the flow of information to reporters, not to the public.)
- The majority draft further outlines six broad situations where no privilege may be claimed: (1) "If the news reporter's failure to disclose the information enables or aids anyone to commit or plan to commit a crime or tort;" (2) "If there is a clear and imminent threat of harm to any person or place if the information is withheld;" (3) "As to relevant information in a defamation action against the news reporter or the organization or entity on whose behalf the news reporter was acting; however, the privilege exists until the person maintaining the action has demonstrated a good faith evidentiary basis for the claim of defamation;" (4) "As to any information that falls within a statutory duty to report sexual or physical abuse, neglect, or exploitation of a child or vulnerable adult to law enforcement or another governmental agency;" (5) "As to any personal direct observations the news reporter makes that involve the commission of a crime or tort;" or (6) "As to any physical or tangible evidence of a crime or tort in the possession of the news reporter or organization or entity on whose behalf the news reporter was acting, except for notes, documents, photographs, audio and video recordings and other records that the news reporter created."
- The alternative draft contains no such exceptions to the privilege and instead proposes this balancing test: the party seeking to compel must show that (1) reasonable efforts to obtain the information from elsewhere have been unsuccessful, (2) the information is "of certain relevance to an issue of substantial importance and goes to the heart of the matter" and (3) "interests in compelling disclosure of the information outweigh the interests in protecting the free flow of information to the public."

To access the majority draft, go to: www.utcourts.gov/resources/rules/comments/2007/03/URE0509.pdf

To access the alternative draft, go to: www.medialaw.org

Washington

A shield law bill passed the House (HB 1366) on February 16 and in the Senate (SB 5358) on March 8. A hearing before the Senate Judiciary Committee on the House bill is scheduled

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for March 30. A hearing before the House Judiciary Committee on the Senate bill is scheduled for March 28.

- Both bills cover sources (and information that would "tend to identify" the source) where there is a "reasonable expectation of confidentiality," and "news or information." (The bills exclude from the scope of "news or information" any physical evidence of a crime.)
- Both bills provide absolute protection for confidential sources.
- Under the House bill, "news media" defined as: (a)(i) "Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any person or entity that is in the regular business of disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution; (ii) Any person who is or has been a journalist, a scholar or researcher employed by any institution of higher education, or other individual who either: (A) At the time he or she obtained or prepared the information that is sought was earning or about to earn a substantial portion of his or her livelihood by obtaining or preparing information for dissemination by any person or entity listed in (a)(i) of this subsection, or (B) obtained or prepared the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of any person or entity listed in (a)(i) or (ii)(A) of this subsection; or (iii) Any parent, subsidiary, or affiliate of the entities listed in (a)(i) of this subsection."
- The Senate bill contains the same definition of "news media" except as follows:
  - Subsection (i): "... audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means ..."
  - Subsection (ii) : "... Any person who is or has been an employee, agent, or independent contractor of any entity listed in [i] of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity."
- Balancing test for "news or information" under both bills: the party seeking to compel must show that "(a)(i) In a criminal investigation or prosecution, based on information other than that information being sought, that there are reasonable grounds to believe that a crime has occurred; or (ii) In a civil action or proceeding, based on information other than that information being sought, that there is a prima facie cause of action; and (b) In all matters, whether criminal or civil, that: (i) The news or information is highly material and relevant; (ii) The news or information is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto; (iii) The party seeking such news or information has exhausted all reasonable and available means to obtain it from alternative sources; and (iv) There is a compelling public interest in the disclosure. A court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure."
- Both bills also provide protection against subpoenas to third-party service providers.

To access the House bill, go to: www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/House%20Bills/1366.pdf

To access the Senate bill, go to: www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Senate%20Bills/5358-S.pdf

West Virginia

Bill No. 2735 was introduced in the House in late January 2007. It remains pending before the Judiciary Committee.
- The bill covers "information, documents and items" obtained in newsgathering.
- The privilege may only be claimed by a party who is not a party to the underlying proceeding.
- The privilege applies to: "A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, Internet, magazine, radio, television, news or wire service, or other medium." (The bill does not define who may claim the privilege.)
- Balancing test: the party seeking to compel must show that the subpoenaed information is "material and relevant," not reasonably available by other means and is "necessary."

To access the bill, go to: *www.legis.state.wv.us/Bill_Text_HTML/2007_SESSIONS/RS/BILLS/hb2735%20intr.htm*

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MySpace Wins Dismissal in "Sexual Predator" Suit

By Michael D. Marin and Christopher V. Popov

On February 13, 2007, the federal district court for the Western District of Texas dismissed a highly publicized case arising from the statutory rape of a 14 year-old girl by a man she met on MySpace.com, the world's largest social networking website. *Doe v. MySpace, Inc.*, No. A-06-CA-983-SS, 2007 WL 471156 (W.D. Tex. Feb. 13, 2007) (Sparks, J.).

The 14 year-old and her mother sued MySpace, Inc. and its parent company, News Corporation, alleging that the companies were negligent and grossly negligent for failing to implement safety measures to prevent "sexual predators" from communicating with minors on MySpace.com. The plaintiffs further alleged that MySpace and News Corporation fraudulently and negligently misrepresented the nature and effectiveness of the site's existing safety features, which the plaintiffs argued were useless without effective age verification.

The court's sweeping application of CDA immunity and common law "no duty" principles constitutes a landmark development in Internet law.

District Court Decision

In a thorough and expansive opinion, Judge Sam Sparks dismissed the plaintiffs' negligence and gross negligence claims based on the Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA"), which provides immunity for interactive computer services from claims flowing from the online publication of third-party content.

The court also held that the plaintiffs' negligence and gross negligence claims were barred under Texas common law, which provides that a person generally has no duty to protect another from the criminal acts of a third party. Finally, the court dismissed the plaintiffs' fraud and negligent misrepresentation claims for failure to satisfy the heightened pleading standards of Rule 9(b).

The court's sweeping application of CDA immunity and common law "no duty" principles constitutes a landmark development in Internet law. While previous cases have held that the CDA bars claims based upon a website's publication of defamatory or otherwise harmful content, *Doe* is the first case to hold that the CDA bars claims based on seemingly innocuous online communications that lead to injuries in the offline world. Furthermore, *Doe* is the first case to hold that a free website, like MySpace.com, has no duty to implement age verification or other safety measures.

Section 230

The district court began its analysis by considering whether the immunity afforded to "interactive computer services" under the CDA barred the plaintiffs' claims. Section 230(c)(1) of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

It was undisputed that, under the CDA, MySpace was an "interactive computer service" and that the 14 year-old plaintiff and the man who allegedly assaulted her were "information content providers."

After establishing that the plaintiffs and defendants were the type of parties to which Congress intended the CDA to apply, the court discussed the purpose of the CDA's immunity provision as set forth in its preamble. The court concluded that Congress intended for the CDA to promote "the continued de-

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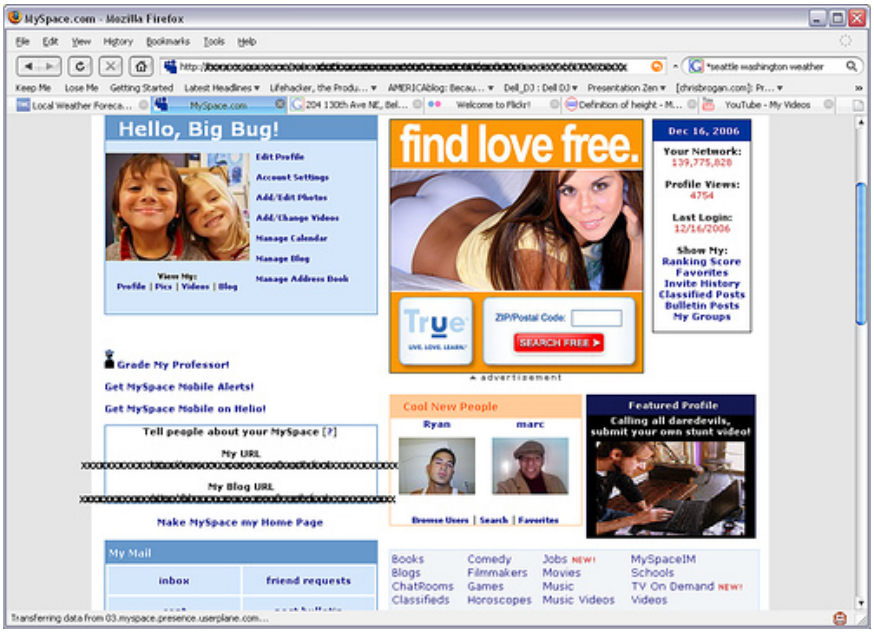

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velopment of the Internet" by ensuring "that web site operators and other interactive computer services would not be crippled by lawsuits arising out of third-party communications."

Quoting from the Fourth Circuit's opinion in *Zeran v. America Online*, 129 F.3d 327, 330-31 (4th Cir. 1997), the court recognized that by "enacting the CDA, 'Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" In furtherance of this policy, the court recognized that federal courts have uniformly rejected attempts to hold interactive computer services liable for claims arising from the publication of third-party content.

The plaintiffs attempted to distinguish their claims from *Zeran*, 129 F.3d 327, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), and other seminal CDA cases by arguing that their case was based not on the particular content posted on MySpace.com, but instead, on MySpace's general failure to implement safety features to prevent sexual predators from contacting minors. The court rejected this distinction as "disingenuous," noting that the underlying basis for the plaintiffs' claims was that MySpace was negligent for publishing communications between the plaintiff and the alleged sexual predator, and that had MySpace somehow blocked those communications, the alleged sexual assault would have never occurred.

The court also rejected the plaintiffs' attempt to hold MySpace liable for the inadequacy of its existing safety measures. The court held that the CDA's Good Samaritan provision, 47 U.S.C. § 230(c)(2)(A), which bars claims based on an interactive computer service's voluntary efforts to restrict harmful content on its website, precluded the plaintiffs from holding MySpace liable for maintaining ineffective security measures relating to age verification. Accordingly, the court held, "No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities. Therefore, . . . Defendants are entitled to immunity under the CDA."

Texas Common Law

In addition to holding that the plaintiffs' claims were barred under the CDA, the court held that traditional common law principles prevented the plaintiffs from holding MySpace liable for the criminal acts of its users. The court noted that, "[a]s a general rule, a person has no legal duty to protect another from the criminal acts of a third person."

While the court acknowledged that there are exceptions to this general "no duty" principle – *e.g.*, where there is a parent-child, employer-employee, host-invitee, or other special relationship between the actor and third person – it held that MySpace's relationship with its users did not give rise to such an exception. Furthermore, the court rejected the plaintiffs' novel "cyber premises" liability theory, in which they argued that MySpace, like the owner of a physical premises, should have a duty to prevent foreseeable injuries from occurring on its website.

The court's refusal to create a new exception to the common law "no duty" rule in this context was motivated by practical considerations for the social networking industry and for MySpace in particular, which now maintains over 150 million user profiles. The court reasoned that "[t]o impose a duty under these circumstances for MySpace to confirm or determine the age of each applicant, with liability resulting from negligence in performing or not performing that duty, would of course stop MySpace's business in its tracks and close this avenue of communication, which Congress in its wisdom has decided to protect." In concluding its common law analysis, the court recognized that the only special relationship giving rise to a duty in this case was the relationship between the victim and her parents: "If anyone had a duty to protect Julie Doe, it was her parents, not MySpace."

Other Lawsuits

Judge Sparks's analysis will soon be tested. Four families represented by the same plaintiffs' counsel involved in the *Doe* case recently filed similar complaints against MySpace, Inc. and News Corporation in the Superior Court of California in Los Angeles County. The California court has yet to consider the viability of the plaintiffs' claims in this new round of cases.

Michael D. Marin and Christopher V. Popov of the Austin office of Vinson & Elkins, LLP and Cliff Thau of the Vinson & Elkins New York office represented MySpace, Inc. and News Corporation in the litigation.

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First Circuit Applies Section 230 To Dismiss Claims Against Lycos

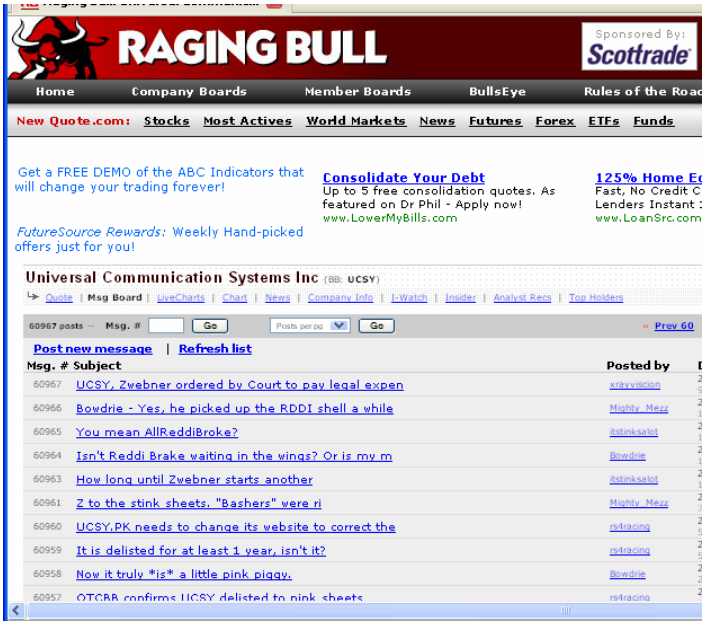
Adopts Prevailing Standard to Grant Immunity in Suit Over Third Party Postings

In February, the First Circuit interpreted Section 230 of the Communications Decency Act for the first time, affirming a Massachusetts District Court decision to dismiss claims against Lycos for third party postings on an investors message board. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, No. 06-1826, 2007 WL 549111 (1st Cir. Feb. 23, 2007) (Boudin, Selya, Lynch, JJ.).

In a lengthy and thoughtful analysis, the Court concluded that "it is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech.... We confirm that view and join the other courts that have held that Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content." *Id.* at *6.

Background

The plaintiffs Universal Communications Systems, Inc. ("Universal"), a Florida-based telecommunications service, and its CEO Michael Zwebner, sued Lycos, Terra Networks (Lycos' corporate parent at the time), Roberto Villasenor, Jr (an alleged poster), as well as several John Doe defendants. At issue were postings on Lycos' Raging.Bull.com website which provides forums for investors to post comments about publicly traded companies.



Plaintiffs sued in Florida federal district court, asserting claims for (1) fraudulent securities transactions under Fla. Stat. § 517.301; (2) cyberstalking under 47 U.S.C. § 223; (3) dilution of trade name under Fla. Stat. § 495.151; and (4) cyberstalking under Fla. Stat. § 784.048. The Florida securities claim was made against all of the defendants, and the remaining claims were made against Lycos and Terra Networks only.

The case was transferred to the District of Massachusetts, based on a user agreement forum selection clause. The district court dismissed the claims against Lycos and Terra Networks holding that Section 230 immunized them from all four counts in plaintiffs' complaint.

> ***Lycos's conduct in operating the Raging Bull web site fits comfortably within the immunity intended by Congress."***

Section 230

On appeal, the First Circuit noted that this was the first time the Court was called upon to interpret Section 230, but that it was not deciding the issue on "a blank slate." "Other courts that have addressed these issues," Judge Lynch wrote, "have generally interpreted Sec. 230 broadly, so as to effectuate Congress's policy choice." *Id.* at *4 quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)).

The Court adopted this broad reading and had "no trouble finding that Lycos's conduct in operating the Raging Bull web site fits comfortably within the immunity intended by Congress."

Lycos qualified as an "Interactive Computer Service" provider under the statute. While Lycos does not offer internet access to its users, it does provide websites, such as RagingBull.com, which "'enable computer access by multiple users to a computer server,' namely the server that hosts the web site." *Universal Commc'n Sys.*, at *5 (quoting 47 U.S.C. §230(f)(2)).

The Court also found that the message board postings were "information provided by another information content provider" and the Court held that it would "join the other courts that have held that Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content."

It further found that the Lycos Network was set up in a way that was "standard for message boards and other web sites,"

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First Circuit Applies Section 230 To Dismiss Claims Against Lycos

(Continued from page 31)

and there was nothing about the web site format to make the Court believe that the alleged "misinformation" at issue was Lycos's misinformation.

The Court rejected plaintiffs' argument that Lycos had "provided 'culpable assistance' to subscribers wishing to disseminate misinformation" – citing *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) for this argument. The Court found it doubtful that a culpable assistance exception existed to Section 230 immunity. Moreover, even assuming arguendo that active inducement could negate Section 230 immunity, plaintiffs did not "come close" to pleading any facts in support of the theory.

Plaintiff's cyberstalking and securities claims were thus barred under Section 230. The cyberstalking claims arose from the postings on RagingBull.com and the securities claims were "based on the theory that individuals were taking a short position in [Universal] stock and then spreading misinformation to depress the stock price, so as to profit from their short position."

To address either of these claims, the Court noted, would require it to look at Lycos as the "publisher" of the alleged misinformation or defamatory information, which had been provided by a third party.

Trademark Dilution

The First Circuit also addressed plaintiffs' trademark dilution claim, which the district court had dismissed as "a defamation claim in the guise of an antidilution claim."

The Court affirmed dismissal, but found that the claim could be dismissed as a matter of trademark law. Plaintiffs alleged that since Lycos suggested that its users identify publicly traded companies by their stock symbol, Lycos used plaintiff's mark "UCSY," and "caused injury to [Universal's] business reputation and dilution of its UCSY trade name."

The Court rejected the argument. The alleged injury would ultimately be derived from the criticism on RagingBull.com, and "to premise liability on such criticism would raise serious First Amendment concerns." Consequently "whether Lycos's use of the 'UCSY' trade name is viewed as a noncommercial use, as a nominative fair use, or in some other way, we hold that using a company's trade name to label a message board on which the company is discussed is not a use covered by the Florida anti-dilution statute."

Lycos, Inc. was represented by Daniel J. Cloherty, David A. Bunis, and Rachel Zoob-Hill, of Dwyer & Collora, LLP, of Massachusetts. Plaintiffs were represented by John H. Faro, of Faro & Associates, of Florida.

Michigan Federal Court Dismisses Libel Claims Against Microsoft

Section 230 Bars Claims Over Message Board Postings

A Michigan federal district court this month dismissed libel claims against Microsoft over alleged defamatory third party postings on MSN message boards. *Eckert v. Microsoft Corp.*, No. O6-11888, 2007 WL 496692 (E.D. Mich. Feb. 13, 2007) (Edmunds, J.) (adopting magistrate judge's report and recommendation).

Acting pro se, plaintiff sued Microsoft for postings on a message board called "Joe's Christian Debate," including one that accused him of being a pedophile. He also alleged that Microsoft was liable for not closing out the link between his MSN screen name and his work e-mail. The court dismissed the claims, holding that Microsoft was protected by Section 230.

Although the Sixth Circuit has not yet considered the scope of Section 230, the district court relied on "near-unanimous case law" to hold that Section 230 immunized Microsoft against defamation claims over third-party content. *Id.* at *3 *citing Chicago Lawyers' Committee For Civil Rights Under The Law, Inc. v. Craigslist, Inc.*, 461 F.Supp.2d 681 (N.D. Ill. 2006).

Moreover, Microsoft could not be held liable for failing to remove the link between plaintiff's screen name and his work e-mail because Section 230 forecloses this type of notice-based liability under these circumstances. *Citing Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir.1997).

Microsoft was represented by Charles G. Calio, Joanne G. Swanson, of Kerr, Russell, in Detroit.

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Arizona Applies *Doe v. Cahill* Standard to Anonymous Internet Speakers

Subpoena Quashed Where Plaintiff Could Not Meet Summary Judgment Standard

The Superior Court of Arizona, Maricopa County, dismissed a complaint for defamation, invasion of privacy and copyright infringement against an anonymous website publisher, holding that plaintiff failed to meet a summary judgment standard. *McMann v. Doe*, No. CV 2006-092226 (Ariz. Super. Ct. Jan. 18, 2007) (Whitten, J.).

In a brief decision, the court endorsed the summary judgment standard as set forth by the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) – a decision which recognized that heightened protection is necessary to protect anonymous speakers who are sued for libel and related claims.

Background

Plaintiff Paul McMann, a Massachusetts real estate developer, brought the underlying complaint against a John Doe web critic, who created the website www.paulmcmann.com.

The website features McMann's name over a large picture of a jack o' lantern, a statement that McMann has 'turned lives upside down," and a warning to the reader to 'Be afraid. Be very afraid.'" The site also has a number of links, including one to a blog or message board, where readers are invited to "sound off about your own experiences."

In motion papers, the unidentified defendant stated that he created the website because he was "extremely dissatisfied" after a business transaction with McMann.

To attempt to determine the identity of the publisher, McMann issued subpoenas to GoDaddy and Domains by Proxy, the hosts of the website. Defendant filed a motion to quash the subpoenas. After briefing and a hearing, the court granted the motion and dismissed the case without prejudice, applying the *Doe v. Cahill* standard.

"Under that standard," the Arizona court noted, "the Plaintiff must show that its claim would survive a Motion for Summary Judgment before being entitled to discover the identity of an anonymous speaker through any compulsory discovery process." *See Doe v. Cahill,* 884 A.2d at 457 ("we hold that a defamation plaintiff must satisfy a summary judgment standard before obtaining the identity of an anonymous defendant.").

The Arizona court simply stated that "[b]ased upon the extensive pleadings by the parties…Plaintiff cannot meet [the *Cahill*] standard for all the reasons argued in Defendant's briefs."

Massachusetts Action

Plaintiff had previously brought suit in Massachusetts federal court. *See McMann v. Doe*, No. 06-11825-JLT, 2006 WL 3102986 (D. Mass. Oct. 31, 2006). The court held that the complaint failed to plead sufficient facts to warrant diversity jurisdiction. But it then went on to examine in detail the issue of protecting anonymous speech in the context of Internet libel suits. The district court agreed that anonymous speech is entitled to First Amendment protection but it questioned whether the standard employed in *Cahill* struck the right balance.

Under *Cahill,* a public figure could unmask an anonymous critic without a showing of actual malice. *Cahill* only required plaintiff to produce evidence in its control to "substantiate the actual malice element." On the other hand, "requiring a preliminary showing of fault would mean no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the internet."

Regardless, the Massachusetts court concluded that "it is reasonable to apply some sort of a screen to the plaintiff's claim" finding that the statements on the website were opinion, and "plaintiff's affidavit merely contains an assertion that the statement is not true."

Plaintiff was represented by Joseph E. Holland of Holland Law Firm, in Mesa, Arizona.

Defendant was represented by Louis J. Hoffman of Hoffman & Zur, in Scottsdale, Arizona and by Gregory A. Beck of the Public Citizen Litigation Group in Washington, D.C.

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MLRC London Conference
September 17-18, 2007
International Developments in Libel, Privacy, Newsgathering and New Media Law

MLRC's London Conference 2007 on September 17-18, 2007 is a two-day event for media lawyers and press experts to discuss the latest developments in media law and practice.

Delegates from around the world will gather to participate in a series of facilitated discussions on developments in media libel law, privacy law, newsgathering laws and the challenges posed by the new digital media environment.

Among the highlights of the London Conference are a roundtable discussion with UK libel judges on the challenges of press litigation in the 21st century. Justice Henric Nicholas of the Supreme Court of New South Wales will comment on the Asian media law landscape from a Commonwealth law perspective. And Alan Rusbridger, editor of The Guardian, and Richard Sambrook, Director BBC Global News, will discuss the impact of the new digital media environment on journalism and the business of journalism.

The closing session of the conference is an Oxford-style debate on privacy law, with English and American lawyers facing off on the difficult question of the boundary between freedom of expression and privacy: What should be private? Who should decide what is private?

The conference also includes a delegates dinner on Sunday night September 16th and a breakfast meeting on September 19th for in-house media counsel.

The London Conference is a unique opportunity to meet colleagues from around the world. Space is limited, so we urge you to register early to ensure a place. We hope you will join us!

Contact londonconference@medialaw.org for more information.

The MLRC London Conference is presented with the support of:

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Government Drops Subpoena to ACLU Seeking Return of Classified Document

By Charles Sims, Emily Stern & Elizabeth Figueira

On December 21, 2006, U.S. District Court Judge Jed S. Rakoff issued a final order closing a whirlwind case where federal prosecutors had attempted unsuccessfully to pressure the ACLU to turn over a classified document, and then sought to accomplish that same goal with an overbroad grand jury subpoena. *In re Grand Jury Subpoena Served on the ACLU*, Order, No. M11-188 (Dec. 21, 2006).

The victory for the ACLU came less than two weeks after it filed a motion a quash a subpoena from the U.S. Attorney in the Southern District of New York demanding "any and all" copies of a document that the ACLU had received from a confidential source. The ACLU withdrew its motion after the government's suddenly declassified the document and recalled its subpoena in the midst of critical public opinion about the heavy-handed, unprecedented, and obviously unlawful subpoena.

The subpoena alleged violations of 18 U.S.C. § 793(e) of the Espionage Act, which punishes possession, distribution, or control of information relating to the national defense.

Background

In October 2006, the ACLU received the unsolicited document, and was studying it in connection with its ongoing advocacy work in civil liberties and the Administration's conduct of its war on terror. The ACLU's advocacy and educative activities makes it comparable to more traditional news agencies and entitles it to the same First Amendment protections.

Nearly a month later, the U.S. Attorney's Office for the Southern District of New York contacted the in-house counsel at the ACLU, demanding the return of the classified document. After ensuing conversations with the Assistant U.S. attorney, it became apparent that the government already had a copy of the document in its possession and also knew the source who had originally provided the document to the ACLU.

When the ACLU refused to return the document to the government without legal intervention, the U.S. Attorney's Office served the organization with a subpoena demanding "any and all copies" of the specific document. The subpoena alleged violations of 18 U.S.C. § 793(e) of the Espionage Act, which punishes possession, distribution, or control of information relating to the national defense.

As the two sides conversed, it became clear that the all-inclusive language of the subpoena sought to eliminate all copies from the ACLU's files, precluding the ACLU and its counsel even from retaining a copy of what might, for example, be provided in compliance with the subpoena – a request unheard in the case law or treatises on grand jury practice, which routinely advise that counsel's retention of an exact copy of any materials submitted in response to subpoenas is essential.

Motion to Quash

Believing the subpoena to be an illegitimate use of the broad grand jury powers, the ACLU filed a motion to quash the subpoena on December 11, 2006. The ACLU argued that the subpoena exceeded the traditional investigatory powers extended to grand juries by requiring the organization to surrender "any and all" copies of the classified document.

The filing papers described how enforcement of a subpoena would act as a prior restraint on speech and would allow the government to avoid the rule of the *Pentagon Papers* case, which prevents the government from obtaining an injunction barring publication of classified documents unless publication would cause "direct, immediate, and irreparable damage to our Nation or its people."

The ACLU also maintained that the request for even one copy of the document the rules established by *Branzburg v. Hayes*, which (in Justice White's majority opinion, echoed by Justice Powell's concurrence) prohibits government entities from using the grand jury investigatory powers to harass or impede First Amendment activity.

While the motion did not need to rely on the broader privilege that many courts discerned in *Branzburg*, which have lately been under attack, the motion noted that Second Circuit precedent, reviewed in *New York Times v. Gonzales*, 459 F.3d 160 (2d Cir. 2006), also supported quashing the subpoena.

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Government Drops Subpoena to ACLU Seeking Return of Classified Document

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The ACLU asserted that the demand for "any and all copies" was inescapably suppressive and confiscatory, not investigatory, noting that in that the Assistant U.S. Attorney already knew the contents of the document and the source who provided the document to the ACLU.

The government argued from the outset that the motion to quash and all proceedings should be secret; but after a hearing held on the day of filing the district court ordered that the ACLU's motion could be publicly filed, and advised the government that it would want to see the document (which the ACLU had contended was grossly misclassified) in connection with its decision on the merits of the motion to quash.

At the moment when the government's brief on the motion to quash was due, the government submitted, in lieu of a brief opposing the motion, a letter to the court advising that it had decided over the weekend to declassify the document and withdraw the subpoena, and urging the dismissal of the motion as moot.

The ACLU declined to agree that the matter was moot as a matter of law, but withdrew its motion in view of having received all the relief it had sought. The document that days before was too dangerous to leave in the ACLU's files was published over the Internet that same afternoon.

Charles Sims of Proskauer Rose represented the ACLU in this matter.

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Newspaper Wins Access to Sentencing Letters

Letters Submitted to Sentencing Judge for Consideration are "Public Judicial Documents"

The Superior Court of Pennsylvania held that a sentencing court abused its discretion when it denied the *Pittsburgh Post-Gazette* access to letters that had been submitted to the court prior to the sentencing of a Pittsburgh city official for a number of narcotics offenses. *Commonwealth of Pennsylvania v. Martinez*, No. 724 WDA 2004, 2007 PA Super 33 (Pa. Sup. Ct. Feb. 6, 2007) (Bowes, Panella, Popovich, J.J.).

Background

The underlying criminal case involved Gilbert Martinez, who had pled guilty in 2003 to "multiple counts of delivery of a controlled substance and possession with intent to deliver a controlled substance." Martinez worked in the Controller's Office in Pittsburgh's City-County Building.

Before Martinez was sentenced, people wrote letters on his behalf, asking that the sentencing court show leniency when determining the sentence. Some of these letters were from government officials. The defense attorney submitted them to the court and gave copies to the prosecution. At the sentencing hearing, the judge stated:

> I have been in receipt of a number of letters that were filed in your behalf, from everybody from family to government officials. I have reviewed those letters. This is the time set for sentencing.

About a month later, the *Pittsburgh Post-Gazette* sought to obtain copies of the letters. It filed a petition to intervene and argued that the public had an interest "in knowing whether any elected or appointed officials wrote to the [c]ourt in an attempt to excuse or minimize Mr. Martinez's breach of the public trust ...." Neither the prosecution nor Martinez objected. The trial court denied the motion, finding that the letters were not public judicial documents for they "were not introduced into evidence at the time of the hearing[]" and had not been filed.

The sentencing letters were "judicial documents" and were "public."

Appeals Court Decision

The appellate court framed the issue as follows: "Does the news media enjoy a common law right of access, after sentencing, to letters submitted on a defendant's behalf by defense counsel, which were presented to and reviewed by the sentencing court in preparation for sentencing?" It applied an abuse of discretion standard.

First, the court found that the sentencing letters were "judicial documents" and were "public":

> [g]iven the open nature of criminal trials, and sentencing proceedings in particular, we find that letters submitted to a sentencing court by defense counsel at the time of sentencing, which the sentencing court explicitly reviews in preparation for sentencing, are public judicial documents regardless of whether the sentencing court formally dockets the letters.

Consequently, there existed a presumption of access to these letters. Since the letters were submitted to the sentencing judge for consideration prior to sentencing, "our citizenry would have no basis to assess the discretion exercised by elected judicial officers[]" if they were not made available to the public.

Though the trial court has discretion regarding the common law right of access to public judicial documents, the sentencing court in Martinez's case "failed to identify *any* countervailing factors." The sentencing court had merely stated that it could deny "access to a judicial record 'when court files might ... become a vehicle for improper purposes.'" This, the court held, constituted an abuse of discretion. The lower court was directed to allow the *Pittsburgh Post-Gazette* to make copies of the sentencing letters.

Save the Date

November 9, 2007, New York City

Defense Counsel Section Breakfast

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UPDATE: Mayor of Toledo Permanently Enjoined from Denying Broadcaster Access to Press Conferences

Court rules in favor of "more sunshine" and "a better informed public"

The Northern District of Ohio issued a preliminary injunction against the mayor of Toledo, Ohio and his public information officer to prevent them from excluding a radio broadcast reporter from public news conferences. On January 31, 2007, the court issued a permanent injunction in that case. *Citicasters Co., v. Finkbeiner*, No. 07-CV-00117 (N.D. Ohio Jan. 31, 2007) (Carr, J.).

Background

Radio talk show host and reporter Kevin Milliken and WSPD Radio 1370, filed a complaint and motion for a temporary restraining order in early January, alleging that Milliken had been purposely excluded from public press conferences because of critical statements he had made about the mayor. Milliken also argued that the public information director was purposely neglecting to inform the station's news director that press conferences were being held.

Judge Carr granted a TRO, ruling that WSPD showed a strong likelihood of success on the merits, and ordering that Mayor Finkbeiner, his spokesman "and their officers, agents, and employees and all other persons associated with or acting in active concert or participation with them, be and are, enjoined and restrained from (1) excluding or refusing to admit Plaintiff Kevin Milliken to the Defendants' public press conferences and (2) failing to give advance notice, equivalent to that given to other similar organizations, to the News Director of Plaintiff WSPD 1370 of Defendants' public press conferences."

Following a hearing, the court granted a permanent injunction. The court concluded that the mayor and his public information officer had indeed violated the First Amendment. During that hearing, defendants had attempted to argue that Milliken was "not a reporter ... [but rather] an entertainer ... for talk show radio." They also argued that the mayor was allowed to hold "press briefings" to which he could invite a select group of reporters. Neither of these arguments was persuasive to the court.

Indeed, in its permanent injunction order, the court stated that it found the "City's excessive or exclusive focus on the idea of a briefing [ ] 'troublesome'" and was "concerned that some how every future media opportunity of Defendant would be labeled a 'briefing' necessitating future court hearings."

The court concluded its order with the following excerpt from the hearing:

> The Court observed, when counsel for the Defendants expressed concern that an Order would be 'a sword of Damocles hanging over [their clients' head]' that 'the purpose of a restraining order is to make clear to a public official that you disregard the First Amendment at your risk and peril. That's the whole point. And maybe it's not such a bad thing ... to the extent that there might be some restraint on the part of any public official developing that kind of relationship with members of the press to the exclusion of others, I happen to think that's not all bad. More sunshine, more disinfectant, more light, more knowledge, a better informed public. That's a risk that I think is well worth imposing.

Defendants were ordered to "admit Plaintiff Kevin Milliken to the Defendant's public press conferences" and to "give advance notice to the News Director of Plaintiff WSPD 1370 Radio equivalent to that given to other news organizations of Defendants' public press conferences."

Plaintiffs were represented by Thomas G. Pletz of Shumaker, Loop & Kendrick, LLP. Defendants were represented by William H. Bracy of the City of Toledo Law Department.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

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Media Coalition Challenges Proposed Access Restrictions in AIPAC Trial

By Michael Berry

Since a federal grand jury charged two lobbyists with violating the Espionage Act by receiving and disclosing classified information, the press has monitored the case closely, as First Amendment advocates have warned that the prosecution raises troubling implications for journalists covering the national security beat. *US v. Rosen*, No. 1:05-cv-00225-TSE, hearing (E.D.Va. March 15, 2007) (Ellis, J.).

Now, as the case moves towards its June 4, 2007 trial date, a coalition of news organizations has committed itself to monitoring the proceedings to preserve the public's right to access the filings, hearings, and evidence in the case.

Recently, the coalition sought to intervene in the case when the public docket suggested that the government had requested in a sealed pleading to "close the trial." Judge T.S. Ellis, III, the federal judge in the Eastern District of Virginia who is presiding over the case, denied the coalition's motion as moot and without prejudice.

The court and parties have begun to address whether the court should adopt special procedures to prevent classified information from being revealed at trial unnecessarily.

At the same hearing, though, Judge Ellis ordered that all briefing regarding any potential closure of the proceedings be filed publicly and that previously filed briefs be redacted and placed on the public record, thereby allowing the press and public an opportunity to review the government's request.

Background

In August 2005, two former lobbyists for the American Israel Public Affairs Committee ("AIPAC"), Steven Rosen and Keith Weissman, were charged with conspiring to violate the Espionage Act by receiving classified information relating to the national defense and transmitting that information to individuals who were not authorized to receive it.

In accordance with the Classified Information Procedures Act ("CIPA"), the court and parties have begun to address whether the court should adopt special procedures to prevent classified information from being revealed at trial unnecessarily. As part of that process, in December 2006 the court entered an order scheduling a CIPA hearing for March 15, 2007.

In February, the government filed a sealed motion relating to the upcoming CIPA hearing. The defendants responded on March 9 by filing an "Under Seal and In Camera Motion to Strike the Government's CIPA 6(c) Requests and to Strike the Government's Request to Close the Trial." The defendants' response was not docketed publicly until March 12. That same day, the court entered an order granting "defendants' motion to suspend the CIPA schedule pending resolution of defendants' motion opposing the government's proposed trial procedures" and specifying that the previously scheduled March 15 hearing would "first address defendants' challenge to the government's proposed trial proceedings."

Although neither party's filings were publicly available, the March 12 docket entries provided the first public notice that the government might have moved to restrict public access to the trial. The media coalition moved to intervene the following day, seeking to be heard in connection with the government's request.

Media Motion to Intervene

The Reporters Committee for Freedom of the Press spearheaded an effort to organize a media coalition to vindicate the public's First Amendment right to access the proceedings, and by March 13, the day the coalition filed its motion to intervene, the coalition included the Reporters Committee and eleven other members: ABC, Inc.; the American Society of Newspaper Editors; the Associated Press; Dow Jones & Company, Inc.; the Newspaper Association of America; the Newspaper Guild, Communications Workers of America; the Radio-Television News Directors Association; Reuters America LLC; the Society of Professional Journalists; Time Inc.; and The Washington Post. And, additional members, including The Hearst Corporation, continue to join the coalition's efforts.

In its motion, the coalition explained that "the First Amendment guarantees the public and the media the right to attend criminal trials," stressing that intervention is the appropriate procedural vehicle for the press to ensure that access is preserved.

The coalition's brief recited well-established First Amendment principles of access: A court must provide the public with adequate notice that a party has requested that filings or proceedings be sealed and then must give the public "an opportunity to object to the request *before* the court ma[kes] its decision."

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Media Coalition Challenges Proposed Access Restrictions in AIPAC Trial

(Continued from page 39)

As the motion explained, a court can seal a part of the proceedings from public view only if it finds "a compelling government interest" in secrecy and concludes that the remedy afforded is "narrowly tailored to serve that interest." Relying on Fourth Circuit precedent, the media coalition emphasized that these requirements apply in all cases, even when the government argues that closure is justified by national security interests.

Based on these principles, the coalition asked Judge Ellis to consider its motion to intervene on an expedited basis and to provide it with an opportunity to review the parties' briefing on the government's "request to close the trial" and any other pending or future requests to restrict public access.

March 15 Hearing

On March 15, the court held a hearing at which Judge Ellis said he would dispel misconceptions about briefing on the government's request and the upcoming CIPA process. During the hearing, which was open to the public and press, Judge Ellis stated that the case against the former lobbyists "isn't a closed trial" and "[i]t won't be a closed trial."

He also described the defendants' depiction of the government's motion as a "request to close the trial" as "hyperbolic." Nevertheless, the Judge's brief outline of the government's proposal scarcely suggests that the government advocates a truly open proceeding. The court explained in general terms that the government had proposed a procedure through which the court, the parties' attorneys, the defendants, and the jurors could see and hear evidence that contained classified information, "but the public would not have the information."

Judge Ellis expressed some skepticism about this proposal, noting that "CIPA does not answer whether or not this novel procedure is warranted or sanctioned." He said that the government's proposal "raised important issues and that any arguments about it "can be open to the public, and should be open to the public." To that end, Judge Ellis instructed the parties and the Court Security Officer to arrange for the previously filed papers to be made publicly available with references to specific classified information redacted.

The court then ordered additional briefing on the government's proposal and ordered that those papers be filed publicly (although classified material may be filed under seal if necessary). The court also set a schedule for considering the government's proposal: The defendants will file a supplemental brief on March 21. The government will respond on March 28, and the defendants may reply on or before April 3. The court will hold a hearing on the government's request on April 16.

During the hearing, Judge Ellis took another important step in support of the public's right of access. Recognizing that "we have some [other] pleadings in this case that don't need to be under seal," the Judge directed the Court Security Officer to review the docket to determine whether any sealed filings can be unsealed and to ensure that such information is placed on the public record.

Despite these steps toward greater openness, the court noted that the proceedings mandated by CIPA would continue to be closed. In those proceedings, the court will review parties' requests to use classified information at trial, determine whether the classified information is admissible as evidence, and decide the precise form in which that evidence may be presented.

In light of his rulings concerning the government's requested procedure, Judge Ellis denied the media coalition's motion to intervene "as moot and without prejudice." The Judge told the coalition's attorneys that they could renew their motion as the case proceeds if the coalition objects to any motion or order as an effort to restrict access.

Conclusion

The media coalition will continue to monitor pretrial proceedings for developments relating to public and press access. If appropriate, the coalition will move to intervene to oppose any measures that would unduly restrict access to the proceedings or evidence. If your organization is interested in joining the coalition or learning about its efforts, please contact Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, at (703) 807-2100 or ldalglish@rcfp.org.

Michael Berry is an associate in the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P. The Media Coalition is represented by Jay Ward Brown, Ashley I. Kissinger, and John B. O'Keefe of Levine Sullivan Koch & Schulz, L.L.P.

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Congress Passes Telephone Records and Privacy Protection Act of 2006

Law Prohibits "Pretexting" and Fraudulent Attempts to Obtain and Sell Phone Records

Last fall, revelations regarding Hewlett-Packard's alleged spying on members of the press spurred Congressional hearings and a renewed interest in protecting the privacy of telephone records. *See MediaLawLetter* Oct. 2006 at 57-58.

Protection of telephone records and information became the subject of legislation in California – where former Hewlett-Packard Chairwoman Patricia Dunn and others – were charged with various criminal fraud and privacy-related charges – Cal. Penal Code § 638 (2006), and in New York, N.Y. Gen. Bus. Law § 399-dd(2) (2006). At that time, federal legislation, in the form of H.R. 4709, "The Telephone Records and Privacy Protection Act of 2006," was still awaiting action by the Senate.

New Federal Law

H.R. 4709 became law on January 12, 2007. Congress cited the need to prevent "pretexting," which it defined as a method "whereby a data broker or other person represents that they are an authorized consumer and convinces an agent of the telephone company to release the data[.]"

Also listed in the Congressional findings were the observations that "call logs may include a wealth of personal data[]" and "may reveal the names of telephone users' doctors, public and private relationships, business associates, and more."

The unauthorized release of such information could further crime and domestic violence and place in danger confidential informants, members of law enforcement, victims of crime and potential witnesses.

Finally, the Congress found that "pretexting" has occurred, and telephone record information has also been fraudulently obtained both via the Internet, by improperly using a phone company's website, and by "telephone company employees selling data to unauthorized data brokers[.]"

The new law specifically protects the "confidential phone records information" maintained by a "telecommunications carrier" (47 U.S.C. 153 § 3) or "IP-enabled voice service. "Confidential phone records information" is defined as information "relat[ing] to the quantity, technical configuration, type, destination, location, or amount of use of a service offered by a covered entity, subscribed to by any customer of that covered entity, and kept by or on behalf of that covered entity solely by virtue of the relationship between that covered entity and the customer[.]" It also includes the information included in a bill, itemization or account statement that the telecommunications carrier provides to the customer.

The new law adds the following section to 18 U.S.C. 47 ("Fraud and False Statements"):

Sec. 1039. Fraud and related activity in connection with obtaining confidential phone records information of a covered entity

(a) Criminal Violation- Whoever, in interstate or foreign commerce, knowingly and intentionally obtains, or attempts to obtain, confidential phone records information of a covered entity, by--

(1) making false or fraudulent statements or representations to an employee of a covered entity;
(2) making such false or fraudulent statements or representations to a customer of a covered entity;
(3) providing a document to a covered entity knowing that such document is false or fraudulent; or
(4) accessing customer accounts of a covered entity via the Internet, or by means of conduct that violates section 1030 of this title, without prior authorization from the customer to whom such confidential phone records information relates;
(5) shall be fined under this title, imprisoned for not more than 10 years, or both.

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(b) Prohibition on Sale or Transfer of Confidential Phone Records Information-

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally sells or transfers, or attempts to sell or transfer, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

(2) For purposes of this subsection, the exceptions specified in section 222(d) of the Communications Act of 1934 shall apply for the use of confidential phone records information by any covered entity, as defined in subsection (h).

(c) Prohibition on Purchase or Receipt of Confidential Phone Records Information-

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally purchases or receives, or attempts to purchase or receive, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

(2) For purposes of this subsection, the exceptions specified in section 222(d) of the Communications Act of 1934 shall apply for the use of confidential phone records information by any covered entity, as defined in subsection (h).

(d) Enhanced Penalties for Aggravated Cases- Whoever violates, or attempts to violate, subsection (a), (b), or (c) while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000, or more than 50 customers of a covered entity, in a 12-month period shall, in addition to the penalties provided for in such subsection, be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of this title, imprisoned for not more than 5 years, or both.

(e) Enhanced Penalties for Use of Information in Furtherance of Certain Criminal Offenses-

(1) Whoever, violates, or attempts to violate, subsection (a), (b), or (c) knowing that such information may be used in furtherance of, or with the intent to commit, an offense described in section 2261, 2261A, 2262, or any other crime of violence shall, in addition to the penalties provided for in such subsection, be fined under this title and imprisoned not more than 5 years.

(2) Whoever, violates, or attempts to violate, subsection (a), (b), or (c) knowing that such information may be used in furtherance of, or with the intent to commit, an offense under section 111, 115, 1114, 1503, 1512, 1513, or to intimidate, threaten, harass, injure, or kill any Federal, State, or local law enforcement officer shall, in addition to the penalties provided for in such subsection, be fined under this title and imprisoned not more than 5 years.

(f) Extraterritorial Jurisdiction- There is extraterritorial jurisdiction over an offense under this section.

(g) Nonapplicability to Law Enforcement Agencies- This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or political subdivision of a State, or of an intelligence agency of the United States.

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Supreme Court Strengthens Constitutional Protections Against Arbitrary and Excessive Punitive Damage Awards

By Theodore J. Boutrous, Jr. and James C. Ho

In a 5-4 opinion, the United States Supreme Court struck down a $79.5 million punitive damage award as unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

In *Philip Morris USA v. Williams*, No. 05-1256 (Feb. 20, 2007), the Court held for the first time that a jury may not issue a punitive damage award in order to punish a defendant for injuries suffered by nonparties to the litigation. Moreover, the Court set aside the Oregon jury verdict on the ground that the trial court had failed to establish sufficient procedural safeguards to prevent the issuance of such an award based on harm to nonparties.

This decision is an important development that is likely to have a significant impact on a wide spectrum of major civil litigation across the country.

In an opinion authored by Justice Stephen G. Breyer, the Court squarely held for the first time that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." Such awards, the Court reasoned, deny defendants the opportunity, guaranteed by due process, to present every available defense, as they would ordinarily be able to do when specific plaintiffs present specific circumstances in pursuit of relief.

Moreover, such awards magnify the potential for arbitrary decisionmaking and lack of notice that animates the Court's Due Process jurisprudence with respect to punitive damages: "[T]o permit punishment for injuring a non-party victim would add a near standardless dimension to the punitive damages equation. . . . The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty and lack of notice – will be magnified."

The Court acknowledged that a plaintiff may submit evidence of harm to nonparties in order to demonstrate the degree of the defendant's reprehensibility in its conduct against the plaintiff, consistent with the Court's earlier decisions in *BMW v. Gore* and *State Farm Mutual Automobile Ins. v. Campbell*, so long as that evidence is not also used to punish the defendant for harms inflicted upon nonparties to the litigation.

However, because the trial court failed to establish procedures to ensure that the jury used evidence of harm to nonparties in a constitutionally appropriate manner, the Court set aside the jury award.

As the Court explained, "state courts cannot authorize procedures that create an unreasonable and unnecessary risk" that juries will misuse such evidence, and that "[a]lthough the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases."

Moreover, the Court placed the burden directly on the States to ensure that juries are given sufficient, meaningful guidance on the critical issues: "[T]he Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking . . . to punish for harm caused strangers."

Accordingly, the Court vacated the punitive damage award in its entirety and remanded the case to the Oregon Supreme Court to determine whether a new trial or reduction of the award was the appropriate remedy.

Last week's decision is the latest in a series of recent rulings by the U.S. Supreme Court strengthening constitutional protections against arbitrary or excessive punitive damage awards. For example, in *BMW v. Gore*, 517 U.S. 559 (1996), the Court noted that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."

Accordingly, the Court held that the Due Process Clause provides three guideposts for determining whether a punitive damage award is unconstitutionally excessive: the degree of reprehensibility of the defendant's conduct, the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages award and the civil penalties and awards authorized or imposed in comparable cases.

In *State Farm Mutual Automobile Ins. v. Campbell*, 538 U.S. 408 (2003), the Court expanded on and strengthened the three guideposts set out in *BMW v. Gore*. In particular, the Court established a general constitutional presumption against awards that exceed a single digit ratio between punitive and compensatory damages.

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Supreme Court Strengthens Constitutional Protections Against Arbitrary and Excessive Punitive Damage Awards

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Following on the heels of *BMW v. Gore* and *State Farm*, the *Philip Morris* ruling is especially noteworthy, as it may portend a significant new trend in the Supreme Court's punitive damages jurisprudence. While *State Farm* and *BMW v. Gore* focused on the failure to provide fair notice of the severity of the punishment that could be imposed, the right to fair notice of the conduct that can give rise to punishment is even more fundamental.

Whereas *BMW v. Gore* and *State Farm* require courts to examine the size of a particular punitive damage award to determine whether it is unconstitutionally excessive, *Philip Morris* requires courts to establish certain procedural safeguards, without which a punitive damage award of any size will be treated as constitutionally suspect.

In addition, the concerns with standardless, speculative civil jury verdicts expressed by the Court in *Philip Morris* could have implications for defamation cases. Although damages may be presumed in defamation cases where the plaintiff has satisfied the heightened standards required under the First Amendment and *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court has also described the doctrine of presumed damages as "an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

It remains to be seen whether the Court will consider imposing even stricter requirements on defamation plaintiffs under the Due Process Clause than those already imposed under the First Amendment, especially where presumed damages also provide the compensatory damage predicate for an additional award of punitive damages.

Finally, the *Philip Morris* decision is especially significant because it marks the first time since their confirmation to the U.S. Supreme Court that Chief Justice John G. Roberts, Jr. and Justice Samuel A. Alito, Jr. have expressed their views on whether and to what extent the Due Process Clause protects defendants against arbitrary and excessive punitive damage awards. First, they declined to join Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg, who dissented in *Philip Morris* and have traditionally opposed the development of stronger constitutional protections against punitive damage awards.

Second, although Justice John Paul Stevens authored *BMW v. Gore* and joined the majority in *State Farm*, he dissented in last week's ruling, although he reiterated in *Philip Morris* his agreement with the earlier decisions. The *Philip Morris* decision thus not only☺ confirms that there is now a 6-3 majority on the U.S. Supreme Court in favor of robust constitutional protections against arbitrary and excessive punitive damage awards.

It also suggests that Chief Justice Roberts and Justice Alito may be prepared to expand upon the Court's modern punitive damages jurisprudence even further than Justice Stevens, one of the original framers of this jurisprudence, is willing to do – especially in the context of requiring that clear standards and meaningful procedural safeguards exist before such punishments may be imposed.

Theodore Boutrous is a partner, and James Ho, of counsel, with Gibson, Dunn & Crutcher LLP. Mr. Boutrous filed a brief amicus curiae on behalf of the Product Liability Advisory Council in Philip Morris USA v. Williams.