520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through March 25, 2015

MLRC

From the Executive Director's Desk.....**03**
The Jinx and Sharing Incriminating Evidence with Authorities

MLRC Conference on Hispanic and Latin American Media Law.....**07**
Lawyers from the Americas Discuss Cross-Border Content and Distribution Challenges

SUPREME COURT

Twenty-Five Years After Milkovich, Supreme Court Separates Fact From Opinion in a Securities Act Case.....**11**
Court's Analysis May Be of Interest to Media Attorneys
Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund.

LIBEL & PRIVACY

N.D. Ill. **Court Denies Michael Jordan's Motion for Summary Judgment on Right of Publicity Claim**.....**17**
Ad Did Not Meet "Commercial Purpose" Prong of Illinois's "Right of Publicity" Law
Jordan v. Jewel Food Stores

S.D. Fla. **Florida Court Dismisses Libel Suit by Ex-Fugee**.....**19**
Article Non-actionable Expressions of Opinion
Michel v. NYP Holdings, Inc., d/b/a the New York Post

Ga. Super. **Ga. State, Anti-SLAPP Defense Prompts Early Libel Case Dismissal**.....**22**
Case Concerns Physician Disciplined In Cosmetic Surgery Deaths
Dodds v. CBS46 News

8th Cir. **Insurer Had No Duty to Defend Under "Intent to Injure" Exclusion**.....**24**
Court Rules Exclusion Makes Sense"
Sletten & Brettin Orthodontics, LLC v. Cont'l Cas. Co.

INTELLECTUAL PROPERTY

S.D.N.Y. **Summary Judgment for Oprah in "Own Your Power" Trademark Case**.....**26**
"Own Your Power" Not Protected; No Likelihood of Confusion; Fair Use Applies
Kelly-Brown v. Winfrey

INTERNET

FCC Releases Text of Net Neutrality Order.....**29**
Judicial Challenges Afoot

2d Cir. **Court Issues First Opinion Construing Immunity Provisions of CDA**.....**38**
Affirms Dismissal of Defamation Action
Ricci v. GoDaddy.com

4th Cir. **Court Affirms Order Setting Aside Default Judgment Against Yelp**.....**41**
Dismisses Libel Complaint Under Section 230 of the CDA
Westlake Legal Grp. v. Yelp, Inc.

ACCESS

Ga. **Doctor Disciplinary Hearing May be Opened to Cameras**.....**45**
Case May Expand Media Access to Quasi-Judicial Proceedings

D.D.C. **The Associated Press Sues U.S. Department Of State**.....**47**
Seeks Clinton State Department Emails
AP v. U.S. Department of State

PRIOR RESTRAINT

S.D. Ohio **No Prior Restraint or Criminal Contempt When Terrorism Suspect Gives Telephone Interview From Jail**.....**49**
Defendant and Lawyer Disagree on Wisdom of Interview
United States of America v. Cornell

4th Cir. **Court Vacates Unconstitutional Sealing and Gag Orders**.....**53**
Right of access to "Documents Submitted in the Course of Trial"
United States v. Blankenship

REPORTERS PRIVILEGE

N.J. **Online Newspaper Defies Subpoena for Videos of Local Board Meeting** **56**
Lack of Knowledge at Local Level on Shield Law and First Amendment Basics

INTERNATIONAL

Across the Pond: Updates on UK Media Law.....**59**
Anonymity, Whistleblowing, Prince Charles and the Black Spider Memos and More

From the Executive Director's Desk

By George Freeman

In early March, I thought I would take a respite from my monthly column; there was nothing I was inspired to write about. Then I attended the MLRC's Latin American Media Conference in Miami, and thought I would write about how interesting and engaging both the programs and the participants were, and how worthwhile it is to learn about familiar media issues from the perspective of people coming from different cultures and regimes than our own. A few days later that idea was trumped by the racist singing by a fraternity at Oklahoma University, and, more poignantly, the difficulties, but importance, of explaining to people why a state university's suspension of the offending students for the content of their non-inciting speech was undoubtedly unconstitutional; given the heinous nature of the offense, that legal result is certainly counter-intuitive and not likely to gain much support for First Amendment principles.

George Freeman

But then came The Jinx and the very difficult questions its filmmakers faced regarding whether and when they should share with the authorities the incriminating evidence they gathered and ultimately showed on their six-part documentary. For those who were too wound up in March Madness, The Jinx focused on the criminal life of Robert Durst, scion of the multimillionaire Durst real estate family, but, more critically, the likely murderer of his wife and best friend in two cases he has not so far been prosecuted for, and a third man in Texas for which he was inexplicably found not guilty by a jury. During the course of making the film for which Durst cooperated, the filmmakers first obtained a copy of an envelope the police had received from the apparent LA murderer and then on their own discovered a letter which Durst had written which had the same handwriting and misspelling (of Beverly Hills); even more significantly, they also obtained a seeming confession when Durst, apparently forgetting that he was wired with a microphone, walked into a bathroom and muttered that he "killed them all, of course."

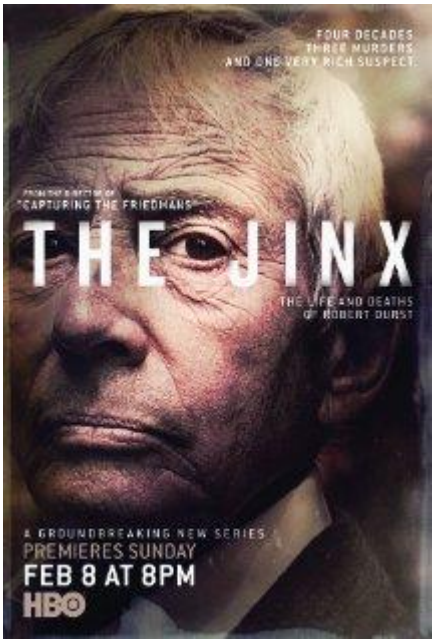
At the outset, I should note that I have a special interest in the story. My mom, and now I, own a home on a lake in upper Westchester about 4 houses down from where Durst lived and where he seemed to have killed his wife in 1982. It is widely believed that he the dumped her body in Lake Truesdale – so whenever I go swimming or boating on our lake, I often peer down into the blue depths, wondering if I will see her remains.

(Continued on page 4)

(Continued from page 3)

It is clear that a journalist, and, indeed, a regular citizen, has no legal – as opposed to moral - obligation to bring evidence to the attention of the authorities. A lawyer, not a journalist, has an obligation to report an intent to commit imminent crime. But here, what Durst said is backward-looking, so no obligation would attach even to an attorney, and the ethical prerogative for any citizen to come forth is much lower than if the evidence would have given indication of a future criminal act. Some might say that Durst's confession of multiple murders indicates a propensity to kill, but, first, it says nothing about the future, and, second, it doesn't really add to the wealth of knowledge which had already made pretty clear that the man was a sociopath.

Many believe the filmmakers should have given the evidence they gathered to the police as soon as they discovered it. The opposing view is coincident with the reporters' privilege: the filmmakers should never have gone to the authorities.



Ethically, many believe the filmmakers should have given the evidence they gathered to the police as soon as they discovered it. The opposing view is coincident with the reporters' privilege: the filmmakers should never have gone to the authorities since the evidence they found ought to remain independent of government; moreover, cooperating with the authorities might well compromise their ability for sources to trust and talk to them in the future, thereby decreasing information flowing to the public. Others might counter that what they did reflects a reasonable compromise: they went to the police soon after they were finished with their Durst interviews when they were well along in the production of the documentary. This enabled them to work with Durst without government entanglements and eviscerated any argument that they produced the film in cahoots with government, but still handed over valuable evidence which the police could – and now have – used.

Giving evidence to the authorities immediately sounds responsible, but, as journalists, raises a host of issues. Why is this case different from the normal case where not only do reporters not volunteer to go to the police, they often, at huge expense and risk, litigate against subpoenas aimed at compelling them to hand over newsgathered material. I suppose, but don't know, that the filmmakers felt this case was sui generis in that Durst was an unusually scary likely killer who had somehow evaded even prosecution for crimes they believed he had committed. Of course, whether journalists

(Continued on page 5)

(Continued from page 4)

should pick and choose in which cases to cooperate is itself a questionable premise, notwithstanding the loaded facts in this case.

Moreover, in addition to contradicting the normal interests at play in adhering to the reporters' privilege, had they turned over materials immediately, it would have raised other problems. It would have seemed duplicitous to be working with Durst in making the film if at the same time they were going behind his back to give the fruits of that process to prosecutors. Similarly, if they had turned over the materials immediately (which they did not), it would have opened the door for the argument that the filmmakers and the government were in cahoots – making the journalists look bad and allowing arguments about privacy and the like to be raised against the government. So turning over the materials immediately seemed like a not palatable course of action. (In the end, the actions of the LAPD, not always the font of good judgement, raised these issues themselves: by arresting Durst the day after the last episode of The Jinx, it certainly made it appear government was giving some nice publicity to the film; though the filmmakers have said they were unaware of the arrest until after it took place, the timing coincidence is suspicious at worst, and cheesy at best.)

I think many lawyers have been in the situation where journalists fight subpoenas reflexively, without truly understanding all the considerations and even the principles behind the reporters' privilege.

Then why turn them over at all? The primary answer is that it seems the socially responsible thing to do, and it might help bring a dangerous criminal to justice. They could have just let the documentary speak for itself – and, even without more – it would have helped law enforcement. But, practically speaking, that approach would have led to a subpoena from government and then the difficult and unpopular position of fighting to keep all evidence, except the film itself, away from the prosecutors. Of course, giving some materials to the cops does not preclude a later prosecution or defense subpoena for all outtakes and materials – something the filmmakers will have to wrestle with: turning everything over will be inconsistent with all their instincts, but fighting such a defense subpoena will be costly and has a very uncertain outcome. (The defense will doubtless argue they need the outtakes of all witnesses to put Durst's "confession" in a proper context.)

So the filmmakers chose a middle course: to turn over the confession sometime after their filming was complete, but well before the documentary aired. To me, that answer seems like a not unreasonable compromise: turn the materials over in the interest of justice and a responsible citizenry in this bizarre case, but to do so after they were done interacting with Durst and gathering materials for their work. Of course, whether the

(Continued on page 6)

(Continued from page 5)

LAPD now has enough evidence to bring a case in a 1980's murder is unknown, as is the question of whether the filmmakers, for all their cooperation, will then still be in a subpoena battle with the possibility of contempt looming.

I think many lawyers have been in the situation where journalists fight subpoenas reflexively, without truly understanding all the considerations and even the principles behind the reporters' privilege. What I like about this situation is that Andrew Jarecki and his team clearly struggled with all the implications and ramifications of the dilemma they faced, and decided upon a thoughtful and reasonable, if imperfect, path.

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

MEDIA LAW RESOURCE CENTER, INC.

520 Eighth Avenue, North Tower, 20 Floor, New York, NY 10018

medialaw@medialaw.org | www.medialaw.org | 212-337-0200

MLRC Conference on Hispanic and Latin American Media Law

Lawyers from the Americas Discuss Cross-Border Content and Distribution Challenges

On March 9, approximately 70 lawyers from around North and South America met at the University of Miami School of Communication for MLRC's third annual conference on Legal Issues of Concern for Hispanic and Latin American Media. This year's conference included delegates from Argentina, Brazil, Colombia, Costa Rica, Mexico and Peru.

Fernando del Rincón

This year's opening speaker was Fernando del Rincón, anchor for CNN en Español's *Conclusiones*, a primetime news and analysis show. He gave a memorable and frank talk on what lawyers who defend the press should know about the political, economic and cultural differences in Latin America to better serve journalists and protect freedom of the press.

His presentation segued into a related session on National Security and Justice for Journalists in Latin America, moderated by Chuck Tobin, of Holland & Knight; with panelists Cynthia Hudson,senior vice president and general manager CNN en Español; Katitza Rodriguez, EFF; and Francisco J. de Zavalía, Suaya, Memelsdorff y Asoc, Buenos Aires, Argentina.

(Continued on page 8)

(Continued from page 7)

Among other things the panel discussed the gulf between statutory protection for journalists and the realities on the ground in different locations — and the serious problems posed by the use of extra-judicial force against freedom of expression.

Jose Diaz-Balart

The afternoon speaker was José Diaz-Balart, the anchor of two programs on Telemundo, "Enfoque con José Díaz-Balart" and "Noticiero Telemundo" and the host of "The Rundown with Jose Diaz-Balart" on MSNBC. Among other things he spoke about the human dimension of the immigration reform debate — and, in the question and answer period, about the challenges posed by the softening of relations between the United States and Cuba.

The first afternoon session was an interactive discussion on Cross Border Copyright, Licensing, and Distribution led by Jose Sariego,Senior VP, Business & Legal Affairs, Telemundo; and André Schivartche, Schivartche Advogados, Sao Paulo, Brazil. Using a hypothetical involving the cross-border production of a telenovela, delegates discussed, among other things, creation and ownership issues, work for hire rules in different countries, moral rights issues, and jurisdiction issues.

(Continued on page 9)

Left to right: Chuck Tobin, Francisco J. de Zavalía, Cynthia Hudson, and Katitza Rodriguez.

(Continued from page 8)

The final session on Cross Border Libel, Privacy and Newsgathering was led by Gary Bostwick, Bostwick Law, Los Angeles and Eduardo Bertoni, CELE Universidad de Palermo, Buenos Aires, Argentina. The discussion session focused on problems posed by criminal libel in Latin America and the use of strategic litigation at the Inter-American Court of Human Rights to combat criminal punishment of speech.

Eduardo Bertoni

On Tuesday morning March 10, Eric Lieberman and Tania Kunen of Fusion hosted a breakfast meeting for Latin American lawyers, including a studio tour of their Newsport Building.

The conference was supported by The McClatchy Foundation and Miami Herald, Davis Wright Tremaine, Greenberg Traurig, Holland & Knight, and Thomas & LoCicero. MLRC also thanks the University of Miami for hosting the conference.

This years Conference Co-Chairs were Ana-Klara Anderson, NBCUniversal Golf Channel; Jose Sariego, Telemundo; and Kelli Slade, CNN. The Chairs Emeritus were Gary Bostwick, Bostwick Law; Lynn Carrillo, NBCUniversal; Maria Diaz, Thomson Reuters; and Adolfo Jimenez, Holland & Knight.

Jose Sariego, left, with Jose Diaz Balart

Panelists discussing the Nisman case in Argentina

Fernando del Rincón, CNN en Espanol, speaking to delegates

Thanks to Our Conference Sponsors

McClatchy

The Miami Herald

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

GT GreenbergTraurig

Holland & Knight

Thomas & LoCicero

Twenty-Five Years After Milkovich, Supreme Court Separates Fact From Opinion in a Securities Act Case

By Jeff Hermes

In 1990, the Supreme Court ruled in *Milkovich v. Lorain Journal Co.* that there was no "wholesale defamation exemption for anything that might be labeled 'opinion' " under the First Amendment. 497 U.S. 1, 18 (1990). The Court noted that its allocation of proving falsity to the plaintiff in *Philadelphia Newspapers v. Hepps* would protect loose, figurative language that could not be proven false, at least in cases involving media defendants opining on matters of public concern. *Id.* at 19-20.

Nevertheless, the Court found that other statements of opinion might imply false facts, and could be actionable based upon such implications. *Id.* at 18-19. The Court rejected the suggestion that prefatory comments such as "I think" or "in my opinion" would automatically dispel false factual implications, *id.* at 19, and noted that falsely stating that one holds a particular belief might itself be evidence of malice where the underlying belief turns out to be false and defamatory, *id.* at 20 n.7.

The Supreme Court has found itself taking another close look at the differences between fact and opinion. This time, the analysis is in the context of a case under the Securities Act of 1933 – but the results may be of interest to media attorneys.

Milkovich was arguably the last major defamation case decided by the Supreme Court (discounting niche cases such as *Air Wisconsin Airlines Corp. v. Hoeper* and decisions considering false statements in the abstract such as *U.S. v. Alvarez*), and development of the law of opinion has since been the domain of lower courts. But now, a quarter of a century later, the Supreme Court has found itself taking another close look at the differences between fact and opinion in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund.* This time, the analysis is in the context of a case under the Securities Act of 1933 – but the results may be of interest to media attorneys.

Background

The Securities Act of 1933 protects investors in a public offering by requiring companies to make a "full and fair disclosure of [relevant] information." 15 U.S. C. § 77a. Section 11 of the 1933 Act provides purchasers with a remedy for violation of this

(Continued on page 12)

(Continued from page 11)

obligation where "any part of the registration statement ... contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). There is no requirement that the plaintiff prove intent to defraud.

At issue in the *Omnicare* case was whether the following two sentences in Omnicare's registration statement constituted untrue statements of material fact or omitted material facts:

1. "We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws."
   - In conjunction with this statement, Omnicare disclosed a number of state-initiated "enforcement actions against pharmaceutical manufacturers" for offering payments to pharmacies that dispensed their products, and cautioned that the law might "be interpreted in the future in a manner inconsistent with our interpretation and application."
2. "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve."
   - Adjacent to this statement, Omnicare noted that the Federal Government had expressed "significant concerns" about some manufacturers' rebates to pharmacies and warned that business might suffer "if these price concessions were no longer provided."

Supreme Court Decision

The Supreme Court, in a decision written by Justice Kagan (with no dissents and concurrences from Justices Scalia and Thomas), viewed the case as raising the question of how § 11 of the '33 Act applies to statements of opinion, treating the issues of whether the statements were "untrue statements of material fact" and whether they "omitted to state a material fact" as separate questions:

> In resolving the first, we discuss when an opinion itself constitutes a factual misstatement. In analyzing the second, we address when an

(Continued on page 13)

(Continued from page 12)

> opinion may be rendered misleading by the omission of discrete factual representations.

Slip op. at 5.

The Court began its analysis by finding it relevant that the two statements were prefaced by "We believe," suggesting that the importance of these words was so obvious that it could be found in the dictionary:

> [T]hat argument wrongly conflates facts and opinions. A fact is "a thing done or existing" or "[a]n actual happening." Webster's New International Dictionary 782 (1927). An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." Id., at 1509. Most important, a statement of fact ("the coffee is hot") expresses certainty about a thing, whereas a statement of opinion ("I think the coffee is hot") does not. See ibid. ("An opinion, in ordinary usage . . . does not imply . . . definiteness . . . or certainty"); 7 Oxford English Dictionary 151 (1933) (an opinion "rests[s] on grounds insufficient for complete demonstration"). Indeed, that difference between the two is so ingrained in our everyday ways of speaking and thinking as to make resort to old dictionaries seem a mite silly. ...
>
> A company's CEO states: "The TVs we manufacture have the highest resolution available on the market." Or, alternatively, the CEO transforms that factual statement into one of opinion: "I believe" (or "I think") "the TVs we manufacture have the highest resolution available on the market." The first version would be an untrue statement of fact if a competitor had introduced a higher resolution TV a month before—even assuming the CEO had not yet learned of the new product. ... But in the same set of circumstances, the second version would remain true. Just as she said, the CEO really did believe, when she made the statement, that her company's TVs had the sharpest picture around. And although a plaintiff could later prove that opinion erroneous, the words "I believe" themselves admitted that possibility, thus precluding liability for an untrue statement of fact.

(Continued on page 14)

(Continued from page 13)

Id. at 6-7. This appears to be in sharp contrast to *Milkovich*, which rejected the import of such talismanic language, and which treated the "I believe" preface and its underlying predicate as two separate statements which might independently be true or false. 497 U.S. at 19, 20 n.7.

Justice Kagan did acknowledge that a statement beginning with "I believe" might be false if the speaker did not in fact hold that opinion. Slip op. at 8. Moreover, the Court noted that some sentences beginning with the talismanic language might contain "embedded statements of fact":

> Suppose the CEO in our running hypothetical said: "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access." That statement may be read to affirm not only the speaker's state of mind, as described above, but also an underlying fact: that the company uses a patented technology.

Id. at 8-9. Phrased in defamation parlance, the Court is noting that a disclosed factual basis for a statement of opinion might itself be false and actionable – a familiar concept. But the difference between the "opinion" in this example and the "fact" presented in support is not whether they can be proven true – both are verifiable – but that only one is flagged with the language of uncertainty.

The Court thus rejects liability for Omnicare for making "untrue statements of material fact," because there were no underlying facts presented and there was no dispute "that Omnicare's opinion was honestly held." *Id.* at 9. In essence, the Court's holding transforms the strict liability standard of § 11 into one where statements that might be considered negligent in a defamation case are protected – at least for the purposes of the first branch of liability under § 11 -- so long as the speaker indicates that they are not sure of their facts and fail to provide the factual basis for an opinion.

This seems bizarre at first, but Justice Kagan then hews closer to the logic of *Milkovich* in considering the second branch of liability under § 11, i.e., omission of material facts necessary to prevent a registration statement from being misleading. The Court recognizes that

> a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion – or otherwise put, about the speaker's basis for holding that

(Continued on page 15)

(Continued from page 14)

> view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience. *Id.* at 11.

In the context of Omnicare's legal opinion in its registration statement, the Court found that a bare opinion that a company has complied with the law might omit material facts when (1) it has not consulted with a lawyer or (2) the opinion contradicts the known advice of the company's lawyers or the government. *Id.* at 12. Similarly, revisiting its TV manufacturer hypothetical, the Court states that the CEO's bare opinion of her products' superiority would omit material facts if she had failed to review her competitors' product specifications or had received information contradicting her statements. *Id.* at 12 n.6. The difference between the Court's opinion and defamation law is that the latter focuses on the falsity of implied facts, while *Omnicare* – with its focus on investor reliance – looks at failure to dispel incorrect inferences.

This difference might appear superficial, but Court's analysis in *Omnicare* is arguably better at handling undisclosed facts that do *not* support a stated opinion. Defamation lawyers sometimes can find themselves defending the truth of a collection of facts inferred by the plaintiff that their clients never intended to assert. In contrast, by focusing on misimpressions that it is reasonable to expect the issuer to correct, the *Omnicare* court recognized that "[a]n opinion statement is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way. ... [O]pinions sometimes rest on a weighing of competing facts; indeed the presence of such facts is one reason why an issuer may frame a statement as on opinion, thus conveying uncertainty." *Id.* at 13. Looking to the common law of misrepresentation, the Court suggests that liability will exist where the speaker (1) fails to disclose that she is aware of no facts to support an opinion or (2) knows and fails to disclose facts that are "incompatible" with or "preclude" the opinion, *id.* at 14-15, but not merely where there are countervailing facts.

So, is Omnicare of any use to defamation lawyers? Omnicare is not, after all, a defamation case.

The *Omnicare* analysis thus avoids a logical fallacy that can creep into defamation cases; namely, that a statement of opinion based on undisclosed facts automatically implies that all relevant facts support the opinion. While there are libel cases stating that the disclosure of facts supporting an opinion prevents the inference that the defendant was also relying on other undisclosed and possibly false facts (*see, e.g., Standing Committee v. Yagman*, 55 F.3d 1430, 1439-40 (9th Cir. 1995)), defamation case law is less well developed on how to limit the scope of inferences from an opinion based on undisclosed facts.

(Continued on page 16)

(Continued from page 15)

On the other hand, *Omnicare* recognizes liability in the circumstance where the issuer of a registration statement simply fails to research an assertion before opining. Even if there is some tolerance for countervailing facts, the Court appears to recognize an overarching implication that the issuer made an attempt to investigate and weigh those facts and found some in support, slip op. at 14. In the context of a securities case, that makes some degree of sense, given that investors rely specifically on the belief that the issuer of a registration statement has done its homework. Defamation law would, in contrast, typically deal with this as an issue of fault with the focus remaining on the truth or falsity of the underlying facts, because it is the underlying facts that are "of and concerning" a defamation plaintiff.

The Court remanded the case for consideration of Omnicare's statements under these standards. Justice Scalia, who concurred in part and in the judgment, would have recognized broader protection for statements of opinion, rejecting the suggestion that a bald opinion of legality implies that the speaker has conducted an investigation of the facts:

> It seems to me strange to suggest that a statement of opinion as generic as "we believe our conduct is lawful" conveys the implied assertion of fact "we have conducted a meaningful legal investigation before espousing this opinion."

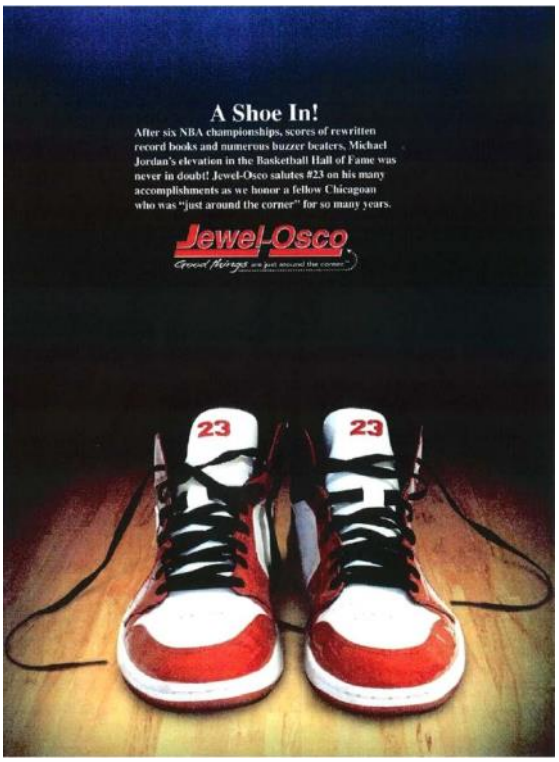
Omnicare, Opinion of Scalia, J., at 3.

So, is *Omnicare* of any use to defamation lawyers? *Omnicare* is not, after all, a defamation case, and as noted above there are aspects of the Court's analysis that are particular to the securities context with its audience of investors. The court takes pains to note that omissions that make a statement misleading in the securities context might not in a different context, and vice versa. *Omnicare,* slip op. at 14. But this is little more than a restatement of the principle that "context is king," which has always been true in defamation cases. The context of *Omnicare* might affect the result, but does not significantly change the fundamental questions asked by the Court; as the Court's use of the dictionary illustrates, the decision deals with basic issues of the interpretation of language, and how and when such speech can become misleading. To that extent, the *Omnicare* opinion might prove useful for media attorneys looking for another angle to argue thorny questions surrounding opinions and implied facts.

Jeff Hermes is a Deputy Director at MLRC.

Court Denies Michael Jordan's Motion for Summary Judgment on Right of Publicity Claim

Ad Did Not Meet "Commercial Purpose" Prong of Illinois's "Right of Publicity" Law



In the latest skirmish in Michael Jordan's right of publicity suit over an ad congratulating him on his induction into the basketball Hall of Fame, an Illinois federal district court denied summary judgment to Jordan on his state right of publicity claim, holding that the ad page did not satisfy the commercial purpose prong of the statute as a matter of law. *Jordan v. Jewel Food Stores*, No. 10 C 340 (N.D. Ill. March 12, 2015) (Finerman, J.).

The ruling came on remand from a 2014 Seventh Circuit decision that the ad page, designed by a Chicago-area supermarket, was commercial speech and potentially actionable. *See Jordan v. Jewel Food Stores, Inc.*, No. 12-1992 (7th Cir. Feb. 19, 2014) (Flaum, Skyes, Randa, JJ.). The Seventh Circuit found that the magazine page was clearly "image advertising" for the supermarket even though it did not promote a specific product. "The notion that an advertisement counts as 'commercial' only if makes an appeal to purchase a particular product makes no sense today, and we doubt it ever did," the Court wrote.

On his motion for summary judgment, Jordan argued that the Seventh Circuit conclusively established that the ad served a commercial purpose within the meaning of the Illinois right of publicity statute, 765 ILCS 1075/1 et seq. The district court disagreed, and faulted Jordan for failing to brief whether image or branded advertising constitutes a commercial purpose under the Illinois right of publicity statute. The district court noted that this question was not yet decided by Illinois courts. Moreover, the court noted that the Seventh Circuit panel expressed doubt that the First Amendment

(Continued on page 18)

(Continued from page 17)

commercial speech doctrine defined the commercial element of Jordan's state law right of publicity claim.

The court also granted Time magazine's separate motion for summary judgment to dismiss the supermarket's claims for contribution and third party indemnity. Right of publicity is an intentional tort under Illinois law and intentional tortfeasors are barred from seeking contribution liability under state law. And the supermarket had no claim for indemnity since Time faced no derivative liability for the content of defendant's ad.

Michael Jordan is represented by Clay A. Tillack, Frederick J. Sperling, and Sondra A. Hemeryck of Schiff Hardin LLP in Chicago. Jewel is represented by Anthony Richard Zeuli of Merchant & Gould P.C. in Minneapolis and David E. Morrison and Oscar L. Alcantra of Goldberg Kohn Ltd. in Chicago.

Florida Court Dismisses Libel Suit by Ex-Fugee

By Constance M. Pendleton and Yonatan Berkovits

In March, a Florida district court dismissed a libel action brought against the *New York Post* by Prakazrel Michel, AKA "Pras"—one of the founding members of the Grammy-winning rap group the Fugees. *Michel v. NYP Holdings,* (March 4, 2015).

Mr. Michel sued over an article published on the internet, as part of the *Post*'s gossip section, *Page Six*. The article reported that Michel had been scheduled to perform at a benefit concert sponsored by a charitable foundation called Hope For Them, but that Michel "bailed" on the concert and was a "no show." The article also reported on various allegations of misconduct by the charity.

The crux of Mr. Michel's claim was that the article was allegedly false because it used the term "his own foundation" to describe his relationship with Hope For Them, while Mr. Michel maintained he was not associated with the charity. However, even accepting Mr. Michel's allegations as true, the court determined that he could not prevail because the statements to which he objected were expressions of opinion based on disclosed facts, and as such, were not actionable under New York law.

Background

The article, "Ex-Fugee rapper bailed on his own 9-11 benefit concert," appeared on the *New York Post*'s website on October 5, 2014, in the *Page Six* section. It reported that Mr. Michel, a famous rapper who (along with Wyclef Jean and Lauryn Hill) had founded the Fugees, was scheduled to perform at a charity benefit for a foundation called Hope For Them but failed to appear, and quoted the foundation's president as explaining that, "Mr. Michel couldn't perform because he had the flu." The article also reported that the charity "bounced a check to the venue" where the benefit was held. The article further stated that the charity "falsely claimed MTV sponsored the fund-raiser" and "failed to register" with New York state officials," as required by law. The article used the term "his own foundation" to describe the relationship between Hope For Them and Mr. Michel, reporting that he was listed as one of the group's directors on its website. The Article also stated that "Michel was listed as a board member on the group's Web site early last week. By Friday, his name had disappeared, and Mike Jean [the foundation's President] told The Post the Grammy winner wasn't a board member."

Mr. Michel brought suit in Florida state court in Broward County, alleging defamation and intentional infliction of emotional distress, based on the publication of

(Continued on page 20)

(Continued from page 19)

the article. He claimed that the article was false because he had never guaranteed he would perform at the benefit concert and alleged that he had did not have any connection to the Foundation. He alleged that reputational damage caused by the article was injuring his business interests, including his efforts as part of a consortium attempting to purchase luxury hotels in New York and elsewhere. He sued NYP Holdings, Inc., d/b/a the *New York Post*, as well as the two reporters who wrote the article.

The Defendants removed the case to federal court on diversity grounds, and then filed their motion to dismiss in the Southern District of Florida, before Judge James I. Cohn.

Court Grants Motion to Dismiss

The court granted the Defendants' motion under Federal Rule of Civil Procedure 12(b)(6) and dismissed the case against all defendants.

First, Judge Cohn determined that, although the suit was brought in Florida, New York law applied to Mr. Michel's claims. Because federal courts sitting in diversity apply the choice of law rules of the forum state, the court used Florida's "significant relationships" test in making that determination. Because the article was about a charity event held in New York and was researched and written there, and because "much of Plaintiff's claimed damages revolve[d] around the article's threat to Plaintiff's business dealings in New York," Judge Cohn concluded that New York had the most significant relationship to the case. He also noted the plaintiff had not objected to the application of New York law.

Even apparent statements of fact may assume the character of statements of opinion" when they are published under circumstances "in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole."

Second, turning to the merits, the court held that the challenged statements in the article were not actionable because they were expressions of opinion. The court began with the principle that "New York provides broad free speech protection, beyond even that provided by the United States Constitution" and pointed out that "New York's Court of Appeals has spoken emphatically of the state's tradition of providing 'the broadest possible protection to the sensitive role of gathering and disseminating news of public events.'" As Judge Cohn wrote, "even apparent statements of fact may assume the character of statements of opinion" when they are published under circumstances "in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole."

(Continued on page 21)

(Continued from page 20)

The court found that the article, which appeared in the *Post*'s *Page Six* gossip column, was published in just such a context.

The court recognized that expressions of opinion will indeed be actionable where the publication implies the existence of undisclosed facts as the basis for the opinion, but here Judge Cohn determined that the facts upon which the reporters' opinion was based were fully disclosed. While "the article does state that Plaintiff 'bailed on' and 'was a no show' at the referenced Hope for Them charity event, and it describes Hope for Them as "his" foundation[,] it also provides the sources of these allegations," including "Plaintiff's listing as a board member on Hope for Them's website." The Court therefore determined that "[a]lthough the article suggests that the authors found these allegations at least somewhat credible, it also set out the basis for that opinion, 'leaving it to the readers to evaluate it for themselves.'"

Finally, Judge Cohn pointed to cases in which the New York Court of Appeals and other courts had "absolved speakers of liability for very serious allegations," including statements that a plaintiff had schemed to commit theft," and held protected "conjecture and speculation" in a non-fiction book that implicated its subject in a murder." Because the basis for the opinions in the *Page Six* article was disclosed, the court concluded that the article was simply not actionable.

The court also dismissed Mr. Michel's emotional distress claim, finding it duplicative of the claim for defamation, and entered judgment in favor of the Defendants.

Laura R. Handman, Constance M. Pendleton and Yonatan Berkovits of Davis Wright Tremaine LLP represented Defendants in this case, along with Dana J. McElroy of Thomas & LoCicero PL. Darren A. Heitner represented the Plaintiff.

Ga. State, Anti-SLAPP Defense Prompts Early Libel Case Dismissal

Case Concerns Physician Disciplined In Cosmetic Surgery Deaths

By Cynthia Counts and Bernie Rhodes

A Cobb County Superior Court judge has dismissed a libel claim in which a physician alleged that investigative television news coverage of the deaths of several of her cosmetic surgery patients led to the suspension of her license. *Dodds v. Murphy.*

Judge S. Lark Ingram concluded that the case was a SLAPP suit and that it met the criteria under Georgia's anti-SLAPP statute for early disposition of First Amendment cases. The complaint had been lodged against CBS46 News, its reporter Adam Murphy, and WSB-TV.

Background and Argument

The court concluded that the reports fell within the ambit of "commenting speech" in that "the investigative news series was made 'in connection' with various official proceedings.

The plaintiff, Nedra Dodds, operated a cosmetic surgery clinic in Kennesaw, Georgia. In February 2014, her license was suspended by the Georgia Composite Medical Board, which cited the particulars of her treatment of several patients. One patient, Erica Jenkins, died following a liposuction procedure during which her liver and diaphragm were lacerated. According to an account given to police by an employee present during the procedure, when the patient protested that she was in pain, Dodds told her to "be quiet" and that she had "paid for the procedure." It was also noted that "a rag was placed in Jenkins' mouth" to quiet her.

Another case involved a woman who wanted silicone removed from her buttocks, as well as liposuction. Heart failure from excessive bleeding ultimately was the cause of death as a result of Dodds suturing only two of the patient's nine surgical incisions. The board concluded that care given to the patient before, during and after surgery was all "significantly below" the acceptable standard of care and led to her death.

In her complaint, Dodds went so far as to allege that reporter Adam Murphy "pressured" the Board to suspend Dodds' medical license," and allege that "had it not

(Continued on page 23)

(Continued from page 22)

been due to [Murphy's] involvement there in fact would have been no suspension of the Plaintiff s license."

Georgia's anti-SLAPP statute was designed to protect citizens who participate in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances from the abuse of the judicial process.

In order to protect this purpose, the statute provides an early disposition mechanism for First Amendment cases. The statute includes verification requirements in which plaintiffs must affirm that their claim does not arise "from an act" by any person or entity that "could reasonably be construed as an act in furtherance of the right of free speech or the right to petition the government for redress of grievances . . . in connection with an issue of public interest or concern." O.C.G.A. § 9-11-11.l (b).

No verifications were filed in this case, so the only question for the court was whether the case stemmed from an act covered by the anti-SLAPP statute.

Citing well-established case law, the judge noted that acts covered by the anti-SLAPP statute include any statement "made in connection with an issue under consideration by an official proceeding" ("commenting speech") or "made to any official proceeding authorized by law" ("petitioning speech"). The Court held that CBS46 News' investigative news reports met ***both*** alternative definitions.

Specifically, the court concluded that the reports fell within the ambit of "commenting speech" in that "the investigative news series was made 'in connection' with various official proceedings, including (1) the police investigation into the deaths of Dodds' patients, (2) the medical examiner's investigation into those deaths (3) the civil lawsuits brought against Dodds, (4) the many complaints to the Board, and (5) the Board's actions against Dodds."

The court also concluded that the reports met the requirements of "petitioning speech," noting that the Plaintiff's own "allegations —that reporter Murphy successfully pressured the Board into suspending her medical license – conclusively establish that the statements she challenges fall within the anti-SLAPP statute's definition of protected activity."

Plaintiff was represented by Frank J. Marquez of Frank Marquez P.C.. Cynthia Counts of Counts Law Group represented Defendants CBS News 46 and Adam Murphy. Tom Clyde and Lesli Gaither of Kilpatrick, Townsend & Stockton LLP represented Defendant WSB-TV.

Court: Insurer Had No Duty to Defend Under "Intent to Injure" Exclusion

By Anna Smith

Applying Minnesota law, the Eighth Circuit recently held that an insurer was not required to defend insureds who allegedly posted false and defamatory reviews of a business competitor. *Sletten & Brettin Orthodontics, LLC v. Cont'l Cas. Co.*, No. 13-2918 (8th Cir. March 19, 2015).

Background

Douglas Wolff, a dentist, and St. Croix Valley Dental, PLLC ("St. Croix"), filed suit in Minnesota state court against Slettin & Brettin Orthodontics, LLC ("S&B") and Bryan Brettin, an orthodontist at S&B, claiming defamation and libel, civil conspiracy, and unfair competition. Wolff and St. Croix alleged Brettin, with the consent of S&B, used his neighbor's wireless network to pose as a patient of St. Croix and post defamatory comments online about St. Croix and Wolff's orthodontia.

The Eighth Circuit found that although the policy provided coverage for defamation in general, there was no ambiguity in the policy's exclusion of coverage for defamation committed with the intent to injure.

S&B and Brettin tendered the claim to under the Continental Casual Company ("Continental") general liability and personal injury liability policy that had been purchased by Daniel Sletten through Wells Fargo Insurance Services ("Wells Fargo") prior to his forming S&B. However, Continental refused to defend the lawsuit because the policy did not specifically identify S&B as a named insured. S&B and Brettin then sued Continental and Wells Fargo. After Continental and Wells Fargo removed the case to federal court, the district court dismissed the lawsuit on the defendants' motion to dismiss, holding that Continental had no duty to defend because the policy excluded coverage for acts done with the intent to injure and every claim in the underlying complaint pleaded that S&B and Brettin acted with the intent to injure Wolff and St. Croix.

Eighth Circuit Decision

On appeal, S&B and Brettin alleged that Continental was required to provide a defense because the policy was ambiguous. They argued that the policy purported to provide coverage for some claims based on intentional acts yet precluded coverage for

(Continued on page 25)

(Continued from page 24)

other intentional acts by defining an occurrence as an accident and including an "intent-to-injure" exclusion. However, the Eighth Circuit found that although the policy provided coverage for defamation in general, there was no ambiguity in the policy's exclusion of coverage for defamation committed with the intent to injure. As the court noted, "this exclusion makes sense because defamation is often committed without intending injury." Citing a Minnesota Supreme Court decision interpreting similar language in a bodily injury case, the court concluded that the policy's two defamation provisions were "opposite sides of the same coin."

The court also rejected S&B and Brettins' argument that the "intent-to-injure" exclusion rendered the policy's coverage for intentional acts, including defamation, illusory. First, the court concluded that even if S&B and Brettin were correct that the exclusion precluded coverage for defamation claims involving actual malice, the policy would still provide coverage for claims of defamation committed against private individuals. Second, it found the doctrine of illusory coverage could not provide S&B and Brettin with a remedy in this case because they were not seeking coverage for any of the policy's other covered intentional torts, such as battery or assault.

Therefore, the court held Continental did not have a duty to defend the underlying lawsuit. Although S&B and Brettin tried to argue that Continental had to provide a defense because Minnesota defamation law does not require proof of intent to injure, the court rejected this argument. Noting that the duty to defend is determined by looking at the allegations of the underlying complaint, the court found the claims in the underlying suit all arose out of the same alleged facts and all specifically alleged that S&B and Brettin acted with the intent to injure Wolff and St. Croix.

Anna Smith is a Claims Specialist at AXIS Insurance Company in Kansas City, Missouri.

Summary Judgment for Oprah in "Own Your Power" Trademark Case

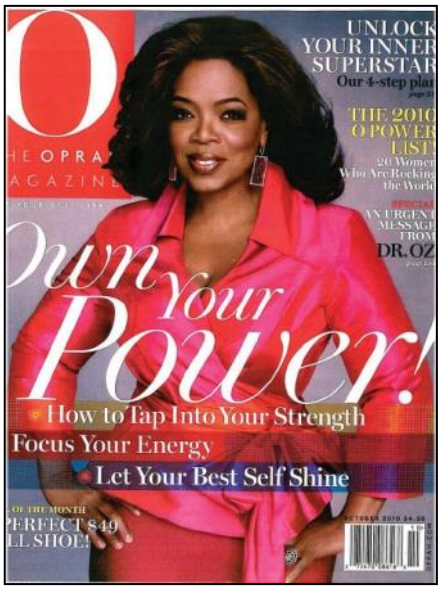
On March 5, 2015, Judge Crotty of the Southern District of New York granted summary judgment for the defendants in *Kelly-Brown v. Winfrey*, No. 11-cv-07875, a multiyear trademark dispute that has already seen one visit to the U.S. Court of Appeals for the Second Circuit and may see another. The case involved the following federally registered service mark, used by motivational speaker Simone Kelly-Brown in connection with workshops and seminars:

own your power

The color and scripted letters were claimed as part of the mark, disclaiming a mark in the words without these features.

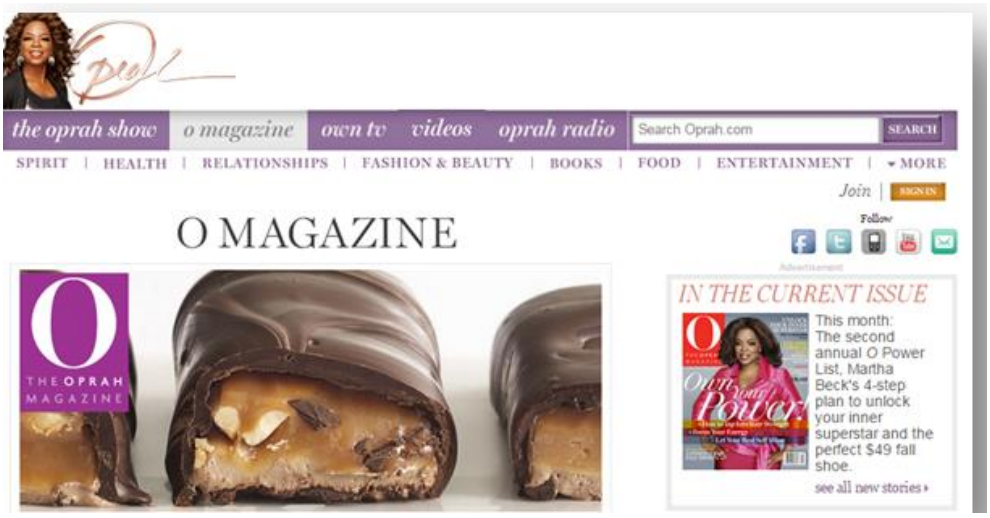
In 2011, Kelly-Brown filed suit against Oprah Winfrey, Harpo Productions, Inc., Harpo, Inc., Hearst Corporation, and Hearst Communications, Inc., claiming that this mark was infringed by the use of the phrase "Own your power" on the cover of *O, The Oprah Magazine*, at a magazine-related event, and in other media. The challenged uses included the following:

(Continued on page 27)



(Continued from page 26)

The phrase also appeared on the *O Magazine* website:



Kelly-Brown asserted a panoply of trademark-related state and federal causes of action in the U.S. District Court for the District of New Jersey, which transferred the case to the Southern District of New York. The Southern District in turn dismissed the claims in their entirety, finding in particular that the defendants' uses of "Own your power" were fair. The Second Circuit reversed in part, holding that the defendants had not adequately established a fair use defense, but affirmed the dismissal of certain federal claims on other grounds. (MLRC's earlier coverage of the 2nd Circuit decision is here.)

After remand, the Southern District dismissed the plaintiff's New Jersey statutory claims because of a lack of connection between the state and either the defendants or their alleged wrongdoing. This left only Kelly-Brown's claims under § 32 of the Lanham Act for trademark infringement and reverse confusion, her claims under § 43 of the Lanham Act for false designation of origin and unfair competition, and a handful of common law claims.

Following discovery, the district court granted summary judgment for the defendants on the remaining claims. The court held that the Lanham Act §§ 32 and 43 claims failed for three reasons: "(1) the phrase 'Own Your Power' is not protected; (2) even if the phrase were protected, there is not a shred of evidence establishing a likelihood of consumer confusion; and (3) even if Plaintiffs were to establish a likelihood of consumer confusion, the fair use defense applies."

On protectability, the court found that the defendants had successfully rebutted the presumption of validity from Kelly-Brown's federal registration, demonstrating that the mark – limited to the light blue scripted letters shown above – lacked distinctiveness or

(Continued on page 28)

(Continued from page 27)

secondary meaning. Even assuming that the mark was valid, the court found that the plaintiffs satisfied none of the Second Circuit's *Polaroid* factors for likelihood of confusion, given the disparate size and nature of the parties' businesses, the weakness of Kelly-Brown's mark, and the fact that the defendants' use did not mimic the stylized lettering and color of the registered mark.

The court's discussion of trademark fair use followed the Second Circuit's earlier ruling in the case, which stated that "[i]n order to assert a successful fair use defense to a trademark infringement claim, the defendant must prove three elements: that the use was made (1) other than as a mark, (2) in a descriptive sense, and (3) in good faith." *Kelly-Brown v. Winfrey*, 717 F.3d 295, 308 (2nd Cir. 2013).

On use as a mark, the Court of Appeals had held that Kelly-Brown's pleadings had plausibly alleged that the defendants' use of "own your power" had "collectively created a sub-brand using the phrase as a symbol to attract public attention." However, the district court found that the plaintiffs, after discovery, had failed to present any evidence of such brand development, given that all of the alleged uses were in connection with a single 2010 conference and did not continue thereafter. The court also noted the inconsistency of the defendants' presentation of the term and the fact that it appeared alongside the defendants' own trademarks, indicating an intent to brand the message to "own your power" with the defendants' marks rather than to develop "Own Your Power" as a mark in and of itself.

With respect to descriptive use of the term, the court found "own your power" to be a commonly used phrase, in popular currency since at least 1981 as a "motivational exhortation to harness or achieve mastery over one's own power." The defendants presented evidence that Winfrey had used the phrase as early as 1993 in a college commencement speech and that it was a frequently used phrase in the media. In contrast, the plaintiffs failed to present evidence that there was anything unique or uncommon about the defendants' usage, which the court found to be part of their "overall message of self-empowerment."

Finally, the court found that the defendants' use was not in bad faith, noting the defendants' use of the phrase alongside their own marks and their avoidance of the plaintiffs' stylized version of the phrase.

Having resolved the plaintiffs' federal claims, the district court also granted the defendants summary judgment on the remaining state claims. Because they sounded in New Jersey common law, the court held, they failed for the same reasons as the plaintiff's New Jersey statutory claims.

Kelly-Brown filed a notice of appeal to the Second Circuit on March 20, 2015.

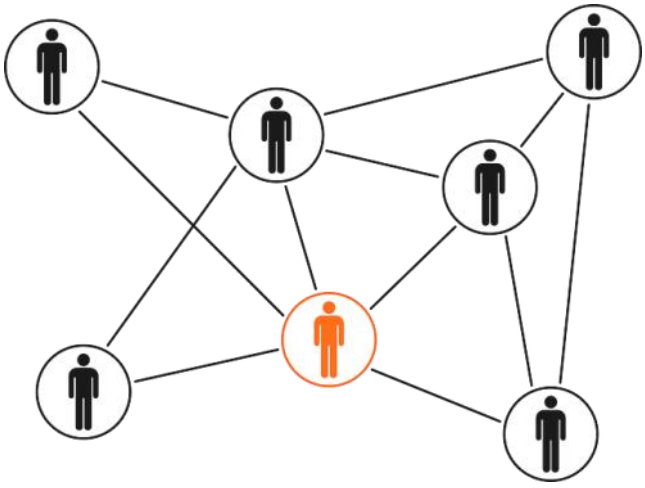
FCC Releases Text of Net Neutrality Order

Judicial Challenges Afoot

By Cliff Sloan, John Beahn and Joshua Gruenspecht

On March 12, the Federal Communications Commission (FCC or Commission) issued the text of its long-awaited network neutrality regulations, which if allowed to stand will have far-reaching implications for the media, content, broadband, Internet and technology industries. The complicated nature of the FCC's net neutrality action was confirmed by the nearly 400-page Report and Order on Remand, Declaratory Ruling, and Order (Order) released by the Commission.

Issuance of the Order is the culmination of nearly ten years of fractious regulatory and judicial proceedings and follows President Obama's public endorsement last fall of stringent net neutrality regulations. For proponents, the core of "net neutrality" is the principle that gatekeepers of the Internet should be legally prohibited from favoring some content or traffic and disfavoring other content or traffic. For opponents, on the other hand, the regulatory structure for "net neutrality" is profoundly ill-advised because the heavy hand of extensive government regulation will inhibit and stifle innovation in what has been a successful, dynamic, and creative arena.



The newly issued regulations represent the FCC's third attempt at solving the net neutrality regulatory conundrum.

A number of parties have stated their intentions to quickly appeal the newly issued rules in federal court, and two already have filed suit. These judicial challenges will play out during the next year (or two or three), meaning that the release of the text of the regulations represents only the end of the latest chapter in the continuing saga of net neutrality.

Background

The newly issued regulations represent the FCC's third attempt at solving the net neutrality regulatory conundrum. The first attempt began in 2005 when the

(Continued on page 30)

(Continued from page 29)

Commission issued its Internet Policy Statement, which contained a number of net neutrality principles. In 2008, Comcast filed suit in the U.S. Court of Appeals for the D.C. Circuit to overturn the Policy Statement after the FCC attempted to enforce the net neutrality principles against the company. The D.C. Circuit overturned the FCC's action in early 2010, ruling that the agency lacked the statutory authority to enforce the net neutrality principles under the Communications Act. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

The FCC tried again in 2010 when it adopted net neutrality regulations for the first time. These regulations imposed a series of obligations on broadband Internet service providers, including an anti-discrimination rule that prevented wireline broadband providers from engaging in unreasonable discrimination in the transmission of lawful Internet traffic. The regulations also included an anti-blocking rule that prohibited all broadband providers—wireline and wireless—from blocking or degrading lawful Internet content and applications. A transparency rule also required all broadband providers to publicly disclose information regarding their network management terms and practices.

Again, however, the FCC order implementing these rules was struck down by the D.C. Circuit. *Verizon Communications Inc. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). In a January 2014 decision, the court vacated the anti-blocking and anti-discrimination regulations, finding that the Commission had improperly attempted to impose these common carrier obligations without expressly reclassifying broadband services as common carrier services under Title II of the Communications Act of 1934. The D.C. Circuit's ruling commenced yet another contentious regulatory debate about whether and how the FCC could issue net neutrality regulations under its existing authorities. The recently released Order responds directly to that January 2014 decision, and represents the FCC's most sweeping attempt to address net neutrality.

Analysis

The Order released by the Commission on March 12 is an unusual regulatory action in that it actually contains three separate FCC actions. First, it includes a Report and Order on Remand that establishes the revised net neutrality rules. Next, it contains a Declaratory Ruling that takes the controversial step of reclassifying broadband internet access services as "common carrier" telecommunications services under Title II. Finally, it includes a Forbearance Order that establishes the statutory framework that will apply to providers of broadband internet access services going forward.

(Continued on page 31)

(Continued from page 30)

Report and Order on Remand – Net Neutrality Rules

The Report and Order on Remand establishes a number of net neutrality rules that will apply to providers of broadband Internet access services (BIAS, to use the acronym deployed by the FCC throughout its Order), which the FCC defines, in part, as "[a] mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service."

Three aspects of this definition are of particular importance. First, the definition includes wireless services. This is not an accident as the FCC has determined that wireless broadband services will be subject to the full slate of net neutrality rules. This determination significantly departs from the FCC's prior net neutrality actions, which had exempted wireless services from the more onerous requirements. It also departs from the Commission's tentative conclusions in its original May 2014 notice of proposed rulemaking (NPRM) that commenced the net neutrality proceeding that led to the Order. Second, the BIAS definition only covers "mass-market retail service[s]."

In other words, broadband services offered on an individualized basis to end user customers or on a wholesale basis to other broadband providers or telecommunications carriers are not BIAS services directly subject to the net neutrality rules. Third, the definition includes "any capabilities that are incidental to and enable the operation of the communications service." The Order clarifies that this includes certain technical services that allow the interconnections between end users and edge providers. However, the Order also declines to apply the full set of net neutrality protections to these interconnection services. Questions surrounding the set of services covered and the remaining Title II rules that may apply to those services are highly technical and will require case-by-case analysis.

In addition to defining BIAS services subject to the rules, the Report and Order on Remand also delineates a category of services called "non-BIAS data services" that are not subject to the net neutrality regulations. According to the FCC, these specialized services are IP data services that do not travel over BIAS services or otherwise provide access to the Internet generally. Non-BIAS data services have received much attention in recent weeks, with press reports speculating whether rumored over-the-top video services will be categorized as non-BIAS data services exempt from the net neutrality regulations. The FCC recognized that the exemption for non-BIAS data services could be used in ways it did not anticipate. As a result, the FCC reserved the right to regulate any service as a BIAS service, subjecting it to the net neutrality rules, if it determines

(Continued on page 32)

(Continued from page 31)

that the service is the "functional equivalent" of a BIAS service or the service is being offered to evade the rules.

In the Report and Order on Remand, the FCC establishes three bright-line net neutrality rules applicable to providers of BIAS services:

- *No blocking of any lawful Internet traffic, content or applications*. This rule prohibits any BIAS provider from blocking any lawful Internet traffic, including content, applications or services, subject to a reasonable network management exception. However, BIAS providers will be permitted to block illegal or unlawful content, such as traffic that contains copyright-infringing content.

- *No throttling of any lawful Internet traffic*. Under this rule, providers of BIAS services may not impair or degrade lawful Internet traffic on the basis of content, applications or service. Like the anti-blocking rule, this rule is subject to a reasonable network management exception. The rule does not prohibit BIAS providers from reducing the speed of all traffic. For instance, reducing the speed of traffic on a content-agnostic basis to ensure that a customer's data cap requirement is not exceeded may be permissible, as long as such reduction does not otherwise violate the general conduct standard described below. That said, BIAS providers may not specifically reduce the speed of traffic on the basis of the content, application or service. In other words, a provider of BIAS services would not be able to reduce the speed of traffic related to a gaming application solely because that application competes with the provider's own gaming service.

One of the most contentious aspects of the FCC's net neutrality proceeding was the regulatory classification that would apply to broadband services.

- *No paid prioritization.* This rule prohibits BIAS providers from favoring some traffic over other traffic in exchange for consideration (monetary or otherwise) or to benefit an affiliate. Net neutrality advocates have long hoped to implement a binding rule that prohibits broadband providers from engaging in paid prioritization. In the Commission's view, paid prioritization deals require BIAS

(Continued on page 33)

(Continued from page 32)

> providers to discriminate against all other traffic and content. While the rules prohibiting blocking and throttling are subject to a reasonable network management exception, the paid prioritization prohibition will not be given any leniency.

The FCC also adopted a revised and enhanced transparency rule, which was the one prior regulation the D.C. Circuit left in place in its January 2014 decision. Under the newly issued rule, providers of BIAS services must now offer specific information about network management practices affecting consumers and edge providers, including certain network maintenance practices (e.g., technical and engineering traffic prioritization), performance characteristics (e.g., effective upload and download speeds, latency and packet loss) and/or terms and conditions of service to end users (e.g., data caps).

In addition to these rules, the FCC also adopted a catch-all rule governing the general conduct of BIAS providers. While net neutrality opponents view this conduct rule as a very broad grant of authority by the FCC to itself, the Commission maintained that this conduct standard is necessary to outlaw future harmful practices that are not specifically prohibited by the three bright-line rules. Under the conduct standard, BIAS providers may not "unreasonably interfere with or unreasonably disadvantage" end users or edge providers in respect to Internet content, traffic or applications. The FCC provided a list of factors that it would use in examining whether a specific broadband provider practice violated the conduct standard. These factors include, but are not limited to, the following: the practice's impact on innovation and investment, its consumer protection effects and any impact on competition.

While the FCC indicated that it would apply the general standard to judge future broadband practices, it declined to judge certain current practices—at least at this time. Two of these practices, zero rating and data allowances, received significant attention during the FCC's proceeding. Instead of deciding whether these practices satisfy the general conduct standard, the FCC stated that it would defer any decision at this time to gauge marketplace developments.

Declaratory Ruling – Reclassification Under Title II

One of the most contentious aspects of the FCC's net neutrality proceeding was the regulatory classification that would apply to broadband services. Advocates for stringent net neutrality regulations, including President Obama, pressed the FCC to reclassify broadband services as "telecommunications services" – and thus "common

(Continued on page 34)

(Continued from page 33)

carriers" with extensive legal responsibilities - under Title II of the Communications Act. These advocates argued that reclassification under Title II would provide the strongest legal protections for Internet openness and innovation, particularly in light of the prior court decisions holding that the FCC had exceeded its authority under other statutory provisions. Opponents of net neutrality vehemently objected to Title II reclassification, noting that many sections of Title II stem from the original 1934 version of the Communications Act, which imposed a wide range of obligations on traditional telephone carriers operating in a monopoly environment.

In the Declaratory Ruling, the FCC took the momentous step of extending Title II to BIAS services, both fixed and wireless. In doing so, the FCC concluded that Title II provides it with the strongest legal authority for implementing the net neutrality rules. Although the FCC relied on Title II as its primary legal justification for the regulations, it also stated that Section 706 of the Communications Act serves as a secondary authority supporting its issuance of the rules. In its January 2014 decision, the D.C. Circuit cited Section 706 as one of the statutory authorities the Commission might attempt to use in adopting net neutrality regulations. In using both Title II and Section 706, the Commission clearly hopes to increase its chances of having the new regulations withstand the expected judicial review.

Forbearance Order – Title II Framework

While the Commission chose to extend Title II to broadband services, it refrained from applying the full breadth of the statutory requirements to broadband providers. It did so in the Forbearance Order aspect of its action and pursuant to specific authority granted to the FCC under the Communications Act. This authority allows it to "forbear" from application of any statutory requirement that it concludes to be (i) no longer in the public interest, (ii) necessary to protect consumers or (iii) needed to ensure that telecommunications services are offered on just and reasonable rates and terms of service.

According to the FCC, application of many of the Title II requirements to broadband providers was not necessary for net neutrality purposes. While Title II comprises nearly 50 different sections of the Communications Act, the Forbearance Order states that the Commission will forbear from applying 27 of those sections (corresponding to over 700 FCC rules), while retaining at least part of a number of other provisions and the related rules, such as:

- Section 201 (requirement for just and reasonable service and charges);

(Continued on page 35)

(Continued from page 34)

- Section 202 (prohibition against unreasonable discrimination);
- Sections 206-209, 216-217 (processes governing complaints filed with the Commission and related enforcement provisions);
- Section 222 (requirements governing customer privacy);
- Section 224 (requirement that providers of telecommunications services be granted fair access to poles and conduits);
- Section 254 (universal service fund obligations of telecomm carriers); and
- Sections 225 and 255 (access by persons with disabilities).

The Forbearance Order notes that the Commission intends to closely review implementation of several of these sections. For example, while the Commission extended Section 254, which imposes universal service fees (USF) on telecommunications services, it stated that it will refer the question of the imposition of USF fees on BIAS services to the Federal-State Joint Board on Universal Service, suggesting that universal service obligations for BIAS providers may be forthcoming.

Litigation Scenarios

Several broadband providers and industry associations already have stated their intent to challenge the regulations in federal court. Two already have done so, including the United States Telecom Association, which filed a Petition for Review in the D.C. Circuit on March 23.

One of the first decisions that net neutrality opponents will need to make is whether to seek a judicial stay of the Order and the regulations. To obtain a stay, opponents would have to convince a reviewing court that they are likely to succeed on the merits of their appeal of the regulations and that they would be irreparably damaged by imposition of the regulations. Judicial stays of FCC actions are not unprecedented. In fact, the D.C. Circuit recently stayed the effectiveness of an FCC order in the Comcast/ Time Warner merger review. At the same time, judicial stays are far from automatic, and depend on the court's evaluation of the showing made by those who have sought the stay.

Whether or not a stay is granted, opponents are likely to raise a number of claims regarding the FCC's statutory authority to issue the regulations, its compliance with the requirements of administrative law during the related proceeding, and the constitutionality of the Order in any challenges to the FCC's action.

(Continued on page 36)

(Continued from page 35)

In asserting that the FCC lacked statutory authority for its action, challengers are likely to argue that Title II reclassification is beyond the Commission's statutory authority over all BIAS providers and for mobile broadband providers, in particular. Challengers are also likely to assert that Section 706 provides insufficient statutory authority to support some or all of the regulations, including the paid prioritization rule and the general conduct standard.

Several broadband providers and industry associations already have stated their intent to challenge the regulations in federal court. Two already have done so,

Challenges focusing on compliance with administrative procedures will claim that the net neutrality rules were not the product of reasoned decision-making on the FCC's part. In particular, challengers likely will argue that the FCC acted arbitrarily and capriciously by failing to adequately explain its decision or to sufficiently justify the choices it made on the basis of the facts in the record. In addition, challengers will argue that the record in the proceeding does not support the FCC's conclusions and that the Commission failed to provide adequate justification for its changes in position regarding the regulatory classification of BIAS services. Challengers may also assert that the Commission's original 2014 NPRM provided insufficient notice of the sweeping changes that were ultimately enacted and that the President and the White House impermissibly interfered with the independent agency's rulemaking process.

Lastly, challengers may make a number of constitutional arguments. They may claim a violation of the First Amendment because the net neutrality rules impermissibly impinge on BIAS providers' right to edit or control the information they carry. Separately, they may also claim that the transparency rule compels carrier speech without an adequate basis. They may also raise Fifth Amendment/takings claims, suggesting that the rules are a *per se* taking because they give edge providers an effective right of access to BIAS provider property, or that they serve as a regulatory taking because they unjustifiably interfere with BIAS providers' investment-based expectations.

The outcomes of these challenges may depend heavily on which court ultimately reviews the FCC's action. The U.S. courts of appeals have exclusive jurisdiction to review FCC orders, with the D.C. Circuit reviewing many FCC orders pursuant to specific authority granted to it under the Communications Act. If multiple appeals of the Order are made in different circuits, however, a system of random selection—a

(Continued on page 37)

(Continued from page 36)

lottery—will be used to determine which appellate court will review the Commission's action.

Any judicial decision, of course, could be subject to further review, including by the United States Supreme Court.

Accordingly, the ultimate fate of the new net neutrality rules – and the question whether they receive the judicial validation that was denied to the FCC's two previous attempts at imposing net neutrality – will not be known until the litigation challenging the rules on a wide range of grounds is resolved and decided.

Cliff Sloan is a litigation partner in the Washington, DC office of Skadden, Arps, Slate, Meagher & Flom. John Beahn is a counsel, and Joshua Gruenspecht an associate, in the communications practice in Skadden's Washington office.

MLRC UPCOMING EVENTS

May 14-15, 2015

Legal Frontiers in Digital Media
Mountain View, CA

September 28-29, 2015

MLRC London Conference
London, England

November 11, 2015

MLRC Annual Dinner
New York, NY

November 12, 2015

DCS Annual Meeting
New York, NY

www.medialaw.org

2nd Circuit Issues Opinion Construing Immunity Provisions of CDA

Affirms Dismissal of Defamation Action

By Robert L. Rogers, III

In its first opinion construing immunity provisions of the Communications Decency Act (the "CDA"), the Second Circuit Court of Appeals in *Ricci v. GoDaddy.com* joined "the consensus" of its sister courts in other Circuits by holding that a website operator is immune under the CDA from liability for defamatory statements posted by others on its website.

Background

The case involved alleged defamatory statements made about a teamster in a newsletter published by his union that was republished on a website hosted by GoDaddy.com. Plaintiffs Peter and Barbara Ricci alleged that members of Mr. Ricci's union distributed printed newsletters containing misrepresentations about them, which were subsequently published on thewestchesternewsletter.com. GoDaddy.com is a privately held internet domain registrar that hosts numerous webpages on its servers, including the website at issue here.

In their lawsuit against GoDaddy.com and the teamsters union, the plaintiffs acknowledged that GoDaddy.com had no role in creating the alleged defamatory newsletters, but nevertheless sought relief against GoDaddy.com for defamation. The Riccis sought to impose liability upon GoDaddy.com because it hosted the website on which the newsletters were republished, refused to remove the newsletters, and allegedly refused to investigate the plaintiffs' complaints about statements in the republished newsletters. The trial court dismissed the plaintiff's action against GoDaddy.com based upon CDA immunity.

Section 230(c)(1) of the CDA immunizes website operators for content posted on their websites by others by prohibiting "providers of interactive computer services" from being treated as "the publisher or speaker of any information provided by another information content provider." In Section 230(c)(2), the CDA immunizes website operators for their editorial activities, including actions to "restrict access to or availability of material that [they] consider to be obscene, lewd, lascivious, filthy, excessive, violent, harassing, or otherwise objectionable."

(Continued on page 39)

(Continued from page 38)

In the nearly two decades since its initial passage, courts throughout the United States have construed these provisions to bar lawsuits seeking to hold website operators liable for their exercise of a publisher's traditional editorial functions—such as deciding whether to publish, remove, postpone, or alter content.

Second Circuit Decision

In considering the Ricci's appeal, the Second Circuit Court held that it was "joining the consensus" of other courts that have applied the CDA to immunize website operators for their refusal to remove defamatory statements posted by others.

"The Riccis allege only that GoDaddy 'refused to remove' from its web servers an allegedly defamatory newsletter that was authored by another. These allegations do not withstand the Communications Decency Act, which shields GoDaddy from publisher liability (with respect to web content provided by others) in its capacity as a provider of an interactive computer service."

The Second Circuit Court held that it was "joining the consensus" of other courts that have applied the CDA to immunize website operators for their refusal to remove defamatory statements posted by others.

Aside from serving as the Second Circuit Court's first pronouncement on CDA immunity, *Ricci v. GoDaddy.com* is significant because of the Second Circuit Court's decision to not adopt the reasoning of the Ninth Circuit Court of Appeals in a rogue decision issued last year, by affirming that GoDaddy.com was immune from the Riccis' claims seeking relief for its alleged failure to investigate their claims that content posted on thewestchesternewsletter.com was defamatory.

Late in 2014, the Ninth Circuit Court of Appeals in *Internet Brands v. Jane Doe No. 14* departed from precedents of multiple courts throughout the United States by reversing the dismissal of a negligent failure to warn action against a website operator, holding that the CDA did not immunize the operators of ModelMayhem.com from failing to warn a user about two men that had allegedly used ModelMayhem.com to search for rape victims. The Ninth Circuit relied in part on allegations that those operators had been informed about the activities of the specific rapists who later raped the plaintiff.

Although the Ninth Circuit Court is in the process of reconsidering *Internet Brands*, *Internet Brands* has alarmed many website operators because it contradicted numerous cases holding that website operators are immune from liability for injuries caused to users by other users, even if the operators were informed by the plaintiff about the harm being caused by the defendant and did nothing to prevent it. Indeed, the need to spare

(Continued on page 40)

(Continued from page 39)

website operators from the time and expense associated with investigating their users' complaints (and the chilling effect such expense would have upon the development of the internet as a marketplace for ideas) was a major reason that Congress adopted the CDA and immunized website operators from liability for their editorial decisions.

In affirming the dismissal of the Ricci's defamation action, the Second Circuit Court here follows the precedents of the majority of other courts—and does not adopt the Ninth Circuit Court's reasoning in *Internet Brands*—by affirming that the CDA immunizes website operators from liability for failing to investigate claims by users that content posted by other users is defamatory or harmful.

Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP and works in the firm's Orlando office. The Plaintiffs/Appellants were not represented by counsel. Defendant/Appellee GoDaddy.com, LLC was represented by Aaron M. McKown and Paula L. Zecchini of Ring Bender, LLLP. Defendant/Appellee Teamsters Union Local 456 was represented by Christopher A. Smith of Trivella & Forte, LLP.

Fourth Circuit Affirms Order Setting Aside Default Judgment Against Yelp

And Dismisses Libel Complaint Under Section 230 of the CDA

By Laura R. Handman and Micah J. Ratner

On March 18, 2015, the U.S. Court of Appeals for the Fourth Circuit affirmed a district court's order setting aside a $200,000 default judgment and dismissing a libel action against Yelp Inc. ("Yelp") arising out of a critical review posted by a client of legal services provided by the plaintiffs. *Westlake Legal Grp. v. Yelp, Inc.*, 2015 WL 1219043 (4th Cir. Mar. 18, 2015) (per curiam) (unpublished). The Fourth Circuit held that the Rooker-Feldman doctrine did not bar jurisdiction, that vacatur was proper due to lack of service and notice, and that Yelp was entitled to dismissal because its automated system to filter reviews was a traditional editorial function immune from liability under Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(1).

The Fourth Circuit affirmed a district court's order setting aside a $200,000 default judgment and dismissing a libel action against Yelp Inc. arising out of a critical review.

State Court Proceedings

Plaintiffs, Thomas K. Plofchan, Jr. and Westlake Legal Groups (collectively "Westlake") are an attorney who practices in Virginia and his law firm. Co-defendant Christopher Schumacher, who did not appear in the case, is Westlake's former dissatisfied client who posted a review of Westlake's service on Yelp.

On May 11, 2012, Westlake filed a libel complaint, in the Circuit Court for Loudoun County, Virginia ("Circuit Court"), naming Schumacher and Yelp as defendants. Westlake alleged that Schumacher defamed Westlake in a July 7, 2009 review posted on Yelp's website regarding Westlake's legal services. Westlake sought compensatory damages of $200,000, punitive damages of $200,000, and injunction taking down the review.

(Continued on page 42)

(Continued from page 41)

On May 17, 2012, Westlake purported to serve Yelp's registered agent National Registered Agents Inc., but another registered agent at the same address, CT Corporation, received the process. The same day, CT sent a letter to Westlake informing Westlake that it was not Yelp's registered agent and rejecting process. No one forwarded process to Yelp, so Yelp had no notice of the suit. Schumacher did not receive Westlake's purported service on him either.

Even though CT sent a notification to Westlake that Yelp had not received process, Westlake filed a motion for default judgment against Yelp with the Circuit Court on June 29, 2012, representing to the court that Westlake had served Yelp with process. Westlake was silent in the motion about the lack of service on Mr. Schumacher. Relying on Westlake's representation that they served Yelp, on October 2, 2012, the Circuit Court granted Westlake's motion in part and entered a default judgment, holding both Yelp and Schumacher jointly and severally liable for the total amount demanded as compensatory damages, $200,000 plus costs, but striking Plaintiffs' claim for punitive damages. The Circuit Court also issued an injunction ordering Yelp to take down Schumacher's review.

The court found that vacating the judgment would not prejudice Westlake.

More than 15 months passed during which Westlake did not attempt to collect on the judgment and did not inform Yelp about the suit or that Westlake had obtained a default judgment against Yelp. Yelp did not have any notice that it was a party to the action until April 15, 2014, when Yelp's registered agent forwarded Yelp new documents from Westlake attempting to collect on the judgment. Soon after learning of the action, on April 28, 2014, Yelp filed in state court a motion to vacate the default judgment, a motion to file a late responsive pleading, and a motion to stay collection proceedings. The court granted the motion to stay collection proceedings (subject to Yelp posting a bond) but did not hear the others motions before removal.

District Court Proceedings

Yelp removed the action to the U.S. District Court for the Eastern District of Virginia, invoking diversity jurisdiction, 29 days after first receiving the complaint and 30 days after first learning of the action. Yelp filed a motion to vacate the default judgment under Rule 60(b) as void for lack of service and notice, and a motion to dismiss for failure to state a claim on statute of limitations and Section 230 immunity grounds.

(Continued on page 43)

(Continued from page 42)

Westlake moved to remand, arguing that removal was untimely because they served Yelp more than two years before and Yelp had waived removal by moving in state court to vacate the default judgment and obtaining a stay of collection proceedings before removal. The district court, Judge Liam O'Grady, denied the motion to remand, holding that the time limit for removal did not run against Yelp because it had no notice of the suit, and Yelp timely removed within 30 days of first receiving the complaint and notice. The district court also held that Yelp's pre-removal motions were protective measures in state court that did not waive its right to remove.

On August 19, 2014, the district court also granted the motion to set aside the default judgment under Federal Rule of Civil Procedure 60(b) and dismissed the complaint under Rule 12(b)(6). *Westlake Legal Grp. ex rel. Thomas K. Plofchan, Jr., PLLC v. Schumacher*, No. 1:14-CV-564, 2014 WL 4097643, at *5 (E.D. Va. Aug. 19, 2014). First, the district court set aside the default judgment under Rule 60(b)(4) as void for lack of service. *Id.* at *2-3. The district court then determined that, even if service had been proper, Yelp's lack of actual notice justified relief from the default judgment as void under Rule 60(b)(4) or for other reasons justifying relief under Rule 60(b)(6). *Id.* at *3 & n.3.

Second, the district court granted the motion to dismiss. *Id.* at *4. The court found the action time-barred under Virginia's one-year statute of limitations for libel, finding that Westlake filed more than three years after Schumacher posted the review. *Id.* The court rejected Westlake's "attempt to rely on the 'continuing publication rule,'" reasoning that, "[e]ven if that post was republished several times," as Westlake argued, "repeated defamations do not constitute a continuing tort"—implicitly applying the single-publication rule. *Id.* (quotation and citation omitted).

The district court also held that "[e]ven if Plofchan's defamation claim against Yelp was not barred under Virginia's statute of limitations, it would still fail under the Communications Decency Act[.]" *Id.* The district court was not persuaded by Westlake's argument that Yelp's automated review recommendation software, that plaintiffs contended favored the critical review in suit over other reviews, made Yelp the creator or developer of the review, thus rendering Section 230 immunity inapplicable. The district court dismissed with prejudice, and Westlake appealed to the Fourth Circuit.

Fourth Circuit Appeal

Westlake argued for the first time in its reply brief on appeal that the federal court lacked subject-matter jurisdiction over the action under the Rooker-Feldman doctrine,

(Continued on page 44)

(Continued from page 43)

which generally bars lower federal courts from reviewing state-court judgments on appeal. On March 18, 2015, in an unpublished *per curiam* opinion, the Fourth Circuit affirmed the district court's order.

First, the court found the Rooker-Feldman doctrine inapplicable, reasoning that "Yelp has not brought a new federal court case seeking to challenge a state court judgment." *Westlake Legal Grp.*, 2015 WL 1219043, at *1. Rather, Yelp "removed an existing a state case where a motion to set aside the judgment was pending." *Id.* Second, the Fourth Circuit did not reach whether removal was timely in the first instance, holding that the timeliness and waiver are not, in any event, jurisdictional defects. *Id.* Therefore, the Fourth Circuit would not disturb post-judgment denial of the motion to remand. *Id.*

The Fourth Circuit then affirmed the order setting aside the default judgment. The court found that vacating the judgment would not prejudice Westlake. The court did not reach Westlake's challenge to the district court's finding that the judgment was void for lack of service because, "the court's finding that exceptional circumstances justified relief," under Rule 60(b)(6) based on Yelp's lack of notice of the action, "adequately supports its ruling." *Id.* at *2.

Finally, the court affirmed dismissal of the complaint with prejudice under Section 230. The court explained that "[d]ismissal of a case on this basis is appropriate unless the complaint pleads nonconclusory facts that plausibly indicate that 'any alleged drafting or revision by [the defendant] was something more than a website operator performs as part of its traditional editorial function,' thereby rendering it an information content provider." *Id.* at *2 (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255-56 (4th Cir. 2009)). The court found that, "at most" "Yelp has an automated system that filters reviews" and that "[s]uch activities constitute traditional editorial functions that do not render Yelp an information content provider." *Id.* at *3. The court did not, therefore, reach whether updates to the website constitute republication for statute of limitations purposes.

Laura R. Handman and Micah J. Ratner of Davis Wright Tremaine LLP and Aaron Schur, Senior Director of Litigation at Yelp Inc., represented Defendant-Appellee Yelp Inc. Thomas K. Plofchan, Jr. and Lavanya K. Carrithers of Westlake Legal Group represented Plaintiffs-Appellants Westlake Legal Group and Thomas K. Plofchan, Jr.

Doctor Disciplinary Hearing May be Opened to Cameras

Case May Expand Media Access to Quasi-Judicial Proceedings

By Bernie Rhodes, Emily Caron and Cynthia Counts

The presence of video cameras in Georgia courtrooms has been a regular part of news reporting for decades, but now that kind of transparency – for the first time in Georgia – may be recognized by other quasi-judicial proceedings, specifically disciplinary hearings for physicians.

A Fulton County Superior Court judge has upheld the order of an administrative law judge permitting CBS46 News to video and audio record portions of a hearing where a surgeon is appealing her license suspension.

The physician, Nedra Dodds, operated a cosmetic surgery clinic in Kennesaw. In February 2014, her license was suspended by the Georgia Composite Medical Board, which cited the particulars of her treatment of several patients. One patient died following a liposuction procedure during which her liver and diaphragm were lacerated. According to the account that an employee present at the time gave to police, when the patient protested that she was in pain, Dodds told her to "be quiet" and that she had "paid for the procedure." It was also noted that "a rag was placed in Jenkins' mouth" to quiet her.

A Fulton County Superior Court judge has upheld the order of an administrative law judge permitting CBS46 News to video and audio record portions of a hearing where a surgeon is appealing her license suspension.

Another case involved a woman who wanted silicone removed from her buttocks, as well as liposuction. Heart failure from excessive bleeding ultimately was the cause of death as a result of Dodds suturing only two of the patient's nine surgical incisions. The board concluded that care given to the patient before, during and after surgery was all "significantly below" the acceptable standard of care and led to her death.

Dodds filed an appeal, seeking to get her license reinstated. CBS46 News filed an access request to record and broadcast any hearings on the matter. Dodds filed a motion opposing the request.

In his ruling, Administrative Law Judge Michael Malihi largely agreed with the arguments advanced by CBS46 News. While noting that prohibitions on the release of patient treatment information precluded an unrestricted grant of media coverage, he concluded that the signed privacy waivers from the families of the two dead patients

(Continued on page 46)

(Continued from page 45)

opened the door to coverage of hearing testimony about those cases. Moreover, Judge Malihi embraced the concept that allowing electronic media coverage of portions of the hearing comported with the state's policy favoring open judicial proceedings, especially "in light of the seriousness of the allegations."

Dodds then petitioned for an interlocutory review of the administrative law judge's order. Following oral arguments, Superior Court Judge Henry M. Newkirk denied the petition on December 19.

Arguing for access, counsel for CBS46 News noted, "There is no sound basis to treat the public's right of access to administrative adjudicatory hearings any differently than its right to attend judicial proceedings where similar procedures are followed. If an administrative proceeding 'walks, talks, and squawks very much like a lawsuit," it should be treated like a judicial proceeding, which is presumptively open. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2003). Moreover, where patient privacy issues occur, the court can employ less restrictive alternatives, such as anonymizing patient information or identifying patients only by initials, to protect the patient, rather than close an entire judicial proceeding from the public.

CBS46 News noted, "There is no sound basis to treat the public's right of access to administrative adjudicatory hearings any differently than its right to attend judicial proceedings where similar procedures are followed.

Counsel for CBS46 News also argued that "because the State has no compelling interest in keeping patient information confidential where the patient has waived his or her privacy rights, prohibiting public access to such testimony and evidence would violate the First Amendment."

Dodds' attorney argued that Georgia law is unequivocal in barring public disclosure of any evidence relating to a particular patient raised during a disciplinary hearing by the Georgia Composite Medical Board.

Attorneys for Dodds filed an Application for an Interlocutory Appeal with the Georgia Court of Appeals to reverse Newkirk's order, but the Court of Appeals issued an order denying the application in January.

Cynthia Counts is the principal at Counts Law Group and represents CBS46 News. Bernard J. Rhodes and Emily R. Caron of Lathrop & Gage, LLP, represent Meredith Corporation. Claire Murray and Daniel Huff, both with Huff, Powell & Bailey, represent Dr. Nedra Dodds.

The Associated Press Sues U.S. Department Of State

On March 11, 2015, The Associated Press ("AP") filed an action under the Freedom of Information Act ("FOIA") against the U.S. Department of State, seeking the release of records documenting the official actions of the State Department, including those of former Secretary of State Hillary Rodham Clinton and other high-ranking State Department officials, in connection with some of the most prominent events of the nation's recent history. *AP v. U.S. Department of State*, No. 1:15-cv-345 (D.D.C.).

Background

The AP suit covers six FOIA requests submitted to the State Department since March 2010. The requests seek then-Secretary of State Hillary Clinton's calendars and schedules as well as a broad swath of State Department records regarding the raid in which Osama bin Laden was killed, surveillance and other anti-terrorism programs conducted by the U.S. Government, the Special Government Employee status given to former Clinton Deputy Chief of Staff Huma Abedin, and the State Department's dealings with defense contractor BAE Systems. Five years after the first FOIA request was submitted, AP argued that the State Department had failed to respond substantively to any of the requests.

The requests seek then-Secretary of State Hillary Clinton's calendars and schedules as well as a broad swath of State Department records .

Complaint

In March 2015, former Secretary Clinton confirmed that she used a personal email account, rather than a government account, for government business during her tenure as secretary of state. AP noted that at no time over the past five years had the State Department indicated it did not have possession or control over the email messages and other records. The AP argued that, regardless of whether emails concerning official government business are sent to or from an official State Department account, or from a so-called personal account maintained by government officials, the State Department both possesses and controls such emails as a matter of law and has an obligation to release them under FOIA.

AP also noted that its journalists had contacted the State Department repeatedly to inquire about the status of its FOIA requests, and that the State Department offered

(Continued on page 48)

(Continued from page 47)

several estimated completion dates, which it then repeatedly failed to meet. On January 12, 2015, AP submitted an administrative appeal concerning the State Department constructive denial of its FOIA requests. The State Department replied four days later that the requests, "are not subject to administrative appeal at this time, since no specific material has been denied in response to the requests," but that "a requester shall be deemed to have exhausted his administrative remedies if an agency fails to respond within the applicable time limit specified in the [FOIA], which is twenty days."

Request for Relief

AP requested that the court declare the records public and order the State Department to disclose the records within 20 days. AP also requested an award of attorney's fees.

The lawsuit is filed in the United States District Court for the District of Columbia and has been assigned to District Judge Richard J. Leon.

The AP is represented by Jay Ward Brown and Dave Schulz of Levine Sullivan Koch & Schulz, LLP and Karen Kaiser and Brian Barrett of The Associated Press.

Recent MLRC Publications

MLRC Bulletin 2014 Issue 3: Articles and Reports on Significant Developments
2014 MLRC Copyright Roundtable; Righting The Law Of Publicity: Why the Supreme Court Should Re-Visit the Zacchini Case; Establishing the Reach and Limits Of CDA § 230: 2014 Year in Review; When Your Past Is Another's Future: Orders Compelling the Removal of Defamatory Speech As Prior Restraints; Christmas Comes Early for Newsrooms: EU Privacy Working Group Says Newspapers' Search Engines Are Not Subject to RTBF

Catalog of Subpoena Decisions by Category of Material and Reasons Sought
An update of the 2010 catalog summarizing subpoena decisions, including those from the last few years, arising in no fewer than 10 scenarios – from accident and crime scenes to reporters as eyewitnesses to using subpoenas to impeach witnesses.

MLRC Model Shield Law
The MLRC Model Shield Law was developed by the MLRC Model Shield Law Task Force. It will update a prior Model that we developed a number of years ago. The Model Shield Law has been designed to assist in the creation, or updating, of state shield laws.

Key Points on DOJ Policy
MLRC memo representing some of the key points from the Final Rule publication.

No Prior Restraint or Criminal Contempt When Terrorism Suspect Gives Telephone Interview From Jail

Defendant and Lawyer Disagree on Wisdom of Interview

By Susan Grogan Faller and Susan Jahangiri

The Court's Order begins with the sentence, "At approximately 7:30 p.m. on Thursday, March 5, Defendant [Christopher Lee Cornell a/k/a Raheel Mahrus Ubaydah, through one of his Public Defenders], filed a motion asking the Court to issue an order to show cause to WXIX Fox [19] News, Tricia Mackey (sic), a reporter for that station, and the Boone County, Kentucky Jail, why they should not be held in contempt for violating this Court's January 16, 2015 Order." At that time, I (Susan Grogan Faller) was swimming laps and did not learn about this motion or related matters until after an emergency hearing that took place 45 minutes after the above filing. At issue was FOX19 NOW's planned broadcast at 10:00 p.m. of portions of an interview that Cornell had given to reporter Tricia Macke that day via three 20-minute phone calls to the station's recording bay. The 8:15 p.m. hearing was resolved by an agreement to postpone the broadcast until after a 10:00 a.m. hearing the next morning, rather than the Court issuing an Order on the basis of the Thursday night hearing.

The end of the story is that on the following day, March 6, 2015, the District Court judge in the Southern District of Ohio ruled in the case *United States of America v. Cornell*, Case No. 1:15-mj-00024, (S.D. Ohio W.D.), that FOX19 NOW could air the interview with Christopher Cornell.

Background

Christopher Cornell, a twenty-year-old man who allegedly plotted to attack the United States Capitol, is facing three felony counts for attempted murder of government employees and officials, solicitation to commit a crime of violence, and possession of a firearm in furtherance of an attempted crime of violence. Cornell was arrested at a gun shop after allegedly plotting with an FBI informant to place pipe bombs at the Capitol and shoot federal employees. He pled not guilty on January 21, 2015.

Cornell had reached out to FOX19 NOW by making multiple collect calls to the news station. Cornell's attorneys were aware of and approved of the arrangement that

(Continued on page 50)

(Continued from page 49)

Cornell had a portable telephone outside his jail cell that he was free to use between 7:00 a.m. and midnight without restriction. Robin Tyndall, Executive Producer at FOX19 News, accepted a call from Cornell from jail in Boone County, Ohio, at approximately 10:00 p.m. on March 4, 2015, during the 10:00 news broadcast. Cornell said he wanted to "get his story out" and that his lawyer would allow him to talk with FOX19 NOW.

By 1:00 p.m. on Thursday, March 5, 2015, FOX19 NOW had learned that co-counsel for Cornell objected to an interview with Cornell. Co-counsel referred reporter and anchor Tricia Macke to a prior Order from the Magistrate Judge. The prior Order read as follows, "At the detention hearing held on this matter on January 16, 2015, counsel for the Defendant, Karen Savir, orally requested an order from the Court directing the detention facility holding the Defendant not to permit outside contact by anyone with the Defendant without her express approval. Having considered the request, the Court hereby GRANTS the request and ORDERS that no one be permitted to visit or otherwise contact the defendant without the express approval of Mr. Cornell's attorney. IT IS SO ORDERED". (Footnote deleted, pertaining to exemptions for facility personnel and inmates.) The three FOX19 NOW witnesses, Tricia Macke, the Executive Producer and the News Director, Kevin Roach, testified at the hearing that they contacted their corporate counsel (which was not the law firm representing them at the hearing), and decided to proceed with the interview. They did not seek relief from or a clarification of the Order, and the Court was critical of this decision. On March 5, 2015, Cornell called three times and spoke with Tricia Macke for a total of an hour about his plans, his beliefs, and his identification with the Islamic State.

Cornell's defense attorneys requested that FOX19 NOW be enjoined from airing the interview and requested a show cause order against FOX19 NOW, Tricia Macke and the Boone County Jail why they should not be held in criminal contempt.

Emergency Hearing

Cornell's defense attorneys requested that FOX19 NOW be enjoined from airing the interview and requested a show cause order against FOX19 NOW, Tricia Macke and the Boone County Jail why they should not be held in criminal contempt. The motion claimed that the Order prohibited outside contact with Cornell at the jail without the express consent of Cornell's counsel and that Macke and FOX19 NOW knowingly violated the Order by interviewing Cornell without counsel's consent.

(Continued on page 51)

(Continued from page 50)

On March 6, 2015, during the almost five hour evidentiary hearing, Boone County Lieutenant Jason Maydak, and the FOX19 NOW witnesses testified and counsel argued there was no intent to violate the January 16 order and certainly no willful disobedience of a lawful court order as required to find criminal contempt under 18 USC § 402. FOX19 NOW argued that if the order forbade legal contact with Cornell by news media, this would be an unconstitutional prior restraint. Lieutenant Maydak of the Boone County Jail testified that because the other Federal Public Defender (out of town at the time) had agreed that Cornell should have a phone, knowing that the Boone County Jail could not restrict his calls, the Lieutenant thought the January 16 Order was no longer in effect.

Southern District of Ohio District Court Decision

The Court denied the motion for contempt and held that a temporary restraining order prohibiting broadcasting of the interview would not issue. The Court held that it could not find that FOX19 NOW, Tricia Macke, or the Boone County Jail willfully violated the Order. The Court noted that Cornell initiated the contact by making an unsolicited call to the station and referred to "the somewhat ambiguous wording of the order."

The Court denied the motion for contempt and held that a temporary restraining order prohibiting broadcasting of the interview would not issue.

The Court further ruled that an order enjoining the broadcast would be a prior restraint, citing *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 570 (1976), for the proposition that the First Amendment prohibits prior restraint on speech in all but the most extraordinary circumstances. Defense counsel argued that Cornell's rights to a fair trial might be jeopardized by the broadcast of the interview, especially given the significant media coverage of the case. But *Nebraska Press* prevailed, and the Court denied the request for a temporary restraining order.

Post Script: Motions for Modification of the January 16 Order

On March 10, 2015, the United States filed a motion requesting a modification of the conditions of Cornell's confinement with respect to his telephone access, based on the risk to national security issues and to clarify any ambiguities for the Boone County Jail. The United States argued that Cornell only be allowed access to a phone upon a request by him to call an individual approved by the Court. In a footnote, the United States suggested that Cornell's contacts with the media be conducted in accordance with the

(Continued on page 52)

(Continued from page 51)

provisions of 28 C.F.R. § 540.60, *et seq*. 28 C.F.R. § 540.63 deals with personal interviews and refers to section 540.62(e) which states that interviews of inmates by reporters may be permitted only by special arrangement and with approval of the Warden.

On March 16, 2015, Cornell's counsel filed a response in opposition to amend the order of detention and a motion to enforce the no-contact order issued by the Magistrate Judge on January 16, 2015. In this response, defense counsel noted that the United States had not participated in the March 5 and 6, 2015, show-cause proceedings and did not then express concerns about national security. Defense counsel requested a clarified order directing the Boone County Jail not to permit outside contact by anyone with Cornell without counsel's express approval and defining contact to include communications initiated by a member of the public or made in response to a contact by Cornell. The order would exempt a pre-approved list of individuals.

On March 17, 2015, the Court held a hearing at which the United States and Cornell's counsel presented oral argument. The Court denied the Government motion and granted the defense motion.

Susan Grogan Faller represents FOX19 NOW. Also appearing on its behalf in this matter was attorney Michael K. Allen, who frequently appears on FOX19 NOW as a legal analyst. Defendant Christopher Cornell was represented by Federal Public Defender Richard W. Smith-Monahan. His co-counsel, Federal Public Defender Karen Savir, was out-of-town at the time of the prior restraint hearing.

Fourth Circuit Vacates Unconstitutional Sealing and Gag Orders in *United States v. Blankenship*

By Matthew L. Schafer

Last month, the Fourth Circuit Court of Appeals issued a writ of mandamus vacating as unconstitutional a district court order sealing nearly all public filings in the high-profile criminal trial of Don Blankenship, a former coal executive, and gagging nearly everyone with information about the circumstances surrounding that trial.

The *per curiam* order is a reaffirmation of the constitutional imperative that where "the right of an accused to a fair trial is at stake, the public will not be denied access" without specific findings demonstrating that closure is necessary to prevent a "substantial probability" of harm to the defendant's fair trial right. *In re The Wall St. Journal*, No. 15-1179, 2015 WL 925475, at *2 (4th Cir. Mar. 5, 2015) (citation omitted). In addition, the order also stands for the proposition that gag orders – entered without the necessary findings and circumstances – generally will not survive appellate review. *Id.*

The Fourth Circuit issued a writ of mandamus vacating as unconstitutional a district court order sealing nearly all public filings in the high-profile criminal trial of Don Blankenship

The underlying prosecution involved Don Blankenship, the former CEO of Massey Energy, for alleged criminal activity related to a 2010 mine disaster that resulted in the death of twenty-nine miners. On November 13, 2014, the United States indicted Mr. Blankenship on three counts relating to the explosion of a mine under the control of a Massey Energy subsidiary. In two similar counts, the government alleged that Mr. Blankenship conspired to willfully violate mine safety standards by, for example, "concealing and covering up" routine safety violations. The government also charged Mr. Blankenship with securities fraud after Massey Energy filed an allegedly false statement with the Securities and Exchange Commission shortly after the explosion. The statement asserted that the company did "not condone" safety violations.

A day after the indictment issued, Judge Irene C. Berger of the U.S. District Court for the Southern District of West Virginia held in a two-page *sua sponte* order that it was "necessary to take precautions to insure" that a jury could be empaneled in the case. As such, the court ordered that "any and all" filings in the case be "restricted to the case participants and court personnel." Additionally, Judge Berger ordered that "the parties,

(Continued on page 54)

(Continued from page 53)

their counsel, other representatives or members of their staff, potential witnesses, including actual and alleged victims, investigators, family members of actual and alleged victims as well as of the Defendant" must not make any statements "regarding the facts or substance" of the case.

On December 1, 2014, *The Wall Street Journal*, Associated Press, *The Charleston Gazette*, NPR, and Friends of West Virginia Public Broadcasting, Inc. moved to intervene and to vacate the sealing and gag order, emphasizing that the *sua sponte* orders were not supported in law or in fact. Just over a month later, the court granted the motion to intervene but denied in large part the motion to vacate. According to the court, it had a "duty to take specific, reasonable steps to guard against prejudice at the outset" given the publicity the case had received at that point. As such, the court found the sealing order constitutional because it protected Mr. Blankenship's right to a fair trial while also accommodating the public's access right by keeping the docket public albeit the filings sealed. Nevertheless, the court modified the order, allowing public access to documents that previously had been made public and orders of the court. The court also found the gag order constitutional largely because it was "not directed toward the press" and refused to modify it.

The constitutional right of access to criminal trials includes the right of access to "documents submitted in the course of trial"

In mid-February, the intervenors filed a petition in the Fourth Circuit for a writ of mandamus to the district court directing it to vacate the sealing and gag orders. Petitioners also filed a motion to expedite consideration of the hearing, emphasizing the contemporaneous nature of the right of access and the constitutional harm resulting from a denial of that right, which the court granted. By the time petitioners filed for a writ of mandamus, Mr. Blankenship had filed multiple substantive pretrial motions, including motions to dismiss the indictment – all of which remained under seal.

As to the sealing order, petitioners argued that the order violated the public's constitutional right of access because the district court failed to make factual findings of a substantial probability of prejudice to Mr. Blankenship's fair trial right and, in any event, adequate alternatives existed to wholesale sealing, like *voir dire* of potential jurors. In addition, petitioners contended that the sealing order was invalid because it was not narrowly tailored and would not be effective based on the previously released information from Mr. Blankenship, federal investigators, and the media – all of which meticulously detailed the circumstances leading up to the mine's explosion.

(Continued on page 55)

(Continued from page 54)

The petitioners also asserted that the gag order was unconstitutional because it indiscriminately applied to scores of people and was unconstitutionally vague and overbroad, as it failed to define to whom, when, and what it applied to. Moreover, petitioners argued that no proper basis for the order existed because the district "imposed the order on the mere *fact* of prominent prior publicity," without inquiring into what the *nature* of the publicity was.

In the March 5, 2015 *per curiam* order issued by Judges Roger Gregory, James Wynn, and Andre Davis, the Fourth Circuit found that the constitutional right of access to criminal trials includes the right of access to "documents submitted in the course of trial," like documents filed in the *Blankenship* case. *Id.* at *1. This right "will not be denied," the court explained, "absent 'specific findings . . . demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Id.* (citation omitted).

Applying these standards, the court credited what it called the "district court's sincere and forthright proactive effort to ensure to the maximum extent possible that Blankenship's right to a fair trial before an impartial jury would be protected," but held that it was "constrained to conclude that the order[s] entered here cannot be sustained." *Id.* at *2 (citations omitted). Thus, the court granted the petition, and ordered the district court to vacate the orders. *Id.* In turn, on March 6, 2015, the district court vacated the orders, releasing hundreds of pages of filings onto the public docket.

The Petitioners were represented in this matter by David A. Schulz and Katherine M. Bolger, with the assistance of Patrick Kabat and Matthew L. Schafer, of Levine Sullivan Koch & Schulz, LLP and Sean P. McGinley of DiTrapano Barrett DiPiero McGinley & Simmons, PLLC. The United States was represented by Assistant United States Attorney Steven Robert Ruby. Don Blankenship was represented by William Woodruff Taylor, III of Zuckerman Spaeder LLP.

Online Newspaper Defies Subpoena for Videos of Local Board Meeting

Lack of Knowledge at Local Level on Shield Law and First Amendment Basics

By Raymond M. Baldino and Joshua M. Lurie

New Jersey's Shield Law along with the freedom of press was recently tested in late February in a case involving a hyperlocal online newspaper *New Brunswick Today*. The newspaper defied a subpoena issued by a municipal ethics board demanding the paper's video footage of board meetings.

The subpoena was issued by the New Brunswick City Attorney. As the City attorney later told *The Star Ledger*, he did so to "preserve" the meeting (even though the board's bylaws already require the preservation of meetings in shorthand or tape recording). The subpoena also contained language that enjoined the newspaper from publishing the video prior to complying with the subpoena *duces tecum*.

The case demonstrated not only the ongoing hostility between the City and the newspaper's editor, Charlie Kratovil, (who told *The Star Ledger* in a March 5 article that he would have voluntarily shared the videos if asked), but also a lack of awareness at the municipal level of the rights of the press, including the bar on prior restraints on the press.

Background

Mr. Kratovil exemplifies the conundrum of the "citizen journalist" who both covers the news, and is, in some respects, its subject. This is an issue that last emerged related to New Jersey's shield law in a decision involving similarly contentious local blogger Tina Renna. *See In re Grand Jury Subpoena,* N.J. Super. April 12, 2013) (shield law covers self-described "citizen watchdog" journalist).

Kratovil has also been in consistent conflict with the city he covers. The subpoena appears to arise out of, and is the latest incarnation of Mr. Kratovil's imbroglio with the city that is the regular target of his muckraking. Mr. Kratovil filed an ethics complaint against a Rutgers University tennis coach who is also the city's planning board attorney, Benjamin Bucca, alleging improprieties and conflicts of interest by refusing to recuse

(Continued on page 57)

The case demonstrated not only the ongoing hostility between the City and the newspaper's editor, Charlie Kratovil, but also a lack of awareness at the municipal level of the rights of the press, including the bar on prior restraints on the press.

(Continued from page 56)

himself in a land deal between Rutgers and the city. Mr. Kratovil testified at the Ethics Board meeting prompted by his complaint.

While testifying, he exercised his free speech rights to reprimand the Board for its failure to follow procedure, such as failing to hold meetings with all members present. He had previously documented the failure of the Ethics Board to hold regular meetings or to properly record its decisions. Mr. Kratovil's ethics complaint resulted in a "not guilty" verdict, but the activist journalist did not spare the Board from his spirited colloquy, even asking at one point, "what kind of Ethics Board is this?"

Subpoena Issued

On February 25, *New Brunswick Today*, and Mr. Kratovil in his capacity as a journalist for the paper, received the previously mentioned subpoena from the Ethics Board, requiring him to testify at the hearing, or in the alternative to produce the videos that *New Brunswick Today* had recorded of the prior meetings. The document also contained language that purported to enjoin the newspaper from releasing the videos prior to appearing – a clear prior restraint.

On behalf of Mr. Kratovil, we sent a letter on February 27 to the Ethics Board attorney enunciating that the subpoena was improper, unconstitutional, and would not be responded to since it sought material protected by New Jersey's Shield Law Statute, one of the broadest and strongest in the nation. The letter also objected to the prior restraint as violation of the First Amendment and freedom of the press. Mr. Kratovil announced his intention to defy the subpoena in a story run by *New Brunswick Today* – which it did.

The Star Ledger, one of New Jersey's largest papers in both paper and online readership, turned its attention to the unusual subpoena on March 5, and its interviews with City officials revealed the surprising lack of knowledge about the Shield Law on

(Continued on page 58)

(Continued from page 57)

the part of the Ethics Board or its attorneys. When asked whether the Shield Law would protect the paper, the Board's attorney wrongly stated it would not apply because the subpoena did not ask the paper to turn over a news source – even though New Jersey's shield law statute extends to journalistic materials as well.

One member of the Ethics Board even denied that Kratovil was a journalist at all. New Brunswick has not formally retracted the subpoena or acknowledged fault, and has advised us that it is still considering its options in regard to the subpoena and, ostensibly may take action in the future to penalize either the paper or Mr. Kratovil for the refusal to comply with the improper subpoena. Notwithstanding, the meeting that Kratovil was summoned to produce the materials at was cancelled due to snow, it is unknown whether it has been rescheduled, and no further subpoena has been issued by the City.

Joshua M. Lurie and Raymond M. Baldino of member firm Furst & Lurie, LLP, in Montclair, New Jersey, represented Charlie Kratovil and New Brunswick Today in this matter.

Across the Pond: Updates on UK Media Law

Anonymity, Whistleblowing, Prince Charles and the Black Spider Memos and More

By David Hopper

Anonymity Set Aside

YNB –v- TNO [2015] EWHC 826

One is beginning to see the approach of the newly-appointed media specialist judge Mr Justice Warby. Early indications are that he is striking a fair balance between libel and privacy claimants and freedom of expression. In this case a well-known professional footballer had obtained an anonymity order against his former girlfriend with whom he had had a brief sexual relationship and he had obtained a temporary injunction preventing her selling her story of her tryst to a tabloid newspaper. The footballer had made the not unknown accusation against the girl that she was blackmailing him with a threat to reveal their affair in the press unless she was paid money and, as is normally the custom; the court had acted to stop the apparent blackmail while protecting the victim of the alleged blackmail.

One is beginning to see the approach of the newly-appointed media specialist judge Mr Justice Warby. Early indications are that he is striking a fair balance between libel and privacy claimants and freedom of expression.

However, when the matter came back before Mr Justice Warby it appeared that the Judge had not originally been told the full picture. It appeared that it was in fact the footballer who had offered her money not to tell her story and he only accused her of blackmail when she turned down his monetary offer. The court took the view that there had been material non-disclosure and discharged the injunction although it was not disposed to permit her to air a video of certain sexual acts. The anonymity order was lifted, although we will not know the footballer's identity until the question of whether there will be an appeal to the Court of Appeal has been resolved but the probability is that his misguided attempt to silence his former girlfriend will fail and he will be shown to have shot himself in the foot.

(Continued on page 60)

(Continued from page 59)

Whistleblowing Not Defamatory

Rufus –v- Elliott [2015] EWHC 807

In a robust decision Mr Justice Warby threw out a footballer's claim that he was libelled by the suggestion that he had released to the public a racist text sent to him by a former friend, also a footballer. The Claimant denied releasing the text but the judge took the view that no reasonable person would actually had thought the worse of him if he had indeed done so and so another unmeritorious case bit the dust.

Claimants Must Prove Serious Harm:

Ames and McGee –v- Spamhaus Projects Limited [2015] EWHC

A series of allegations were made against two Californian-based entrepreneurs on the website operated by Spamhaus Projects Limited and a claim was brought in England against Spamhaus in respect of the UK publications from the website starting in December 2013. They had included the Claimants in their list of the Top 10 World's worst spammers. That just pre-dated the coming into force of the Defamation Act 2013, but in respect of the publications after 1 January 2014 it was for the Claimant to prove that serious harm to his reputation had been or was likely to be caused. On the facts the Judge found that the two Claimants did meet the threshold so that their action could proceed.

The case is interesting for the analysis by Mr Justice Warby of the decision in *Cook – v- MGN Limited 2014 EWHC 2831* where the Judge had indicated that in all but the most obvious cases involving, for example, allegations of very serious misconduct, evidence had to be produced of serious harm. Mr Justice Warby said that it was no longer enough to establish a tendency to have a substantial impact on a person's reputation for it to amount to a real and substantial tort. There is now no tort unless and until serious harm to reputation has either been caused or is likely to be caused by the publication.

Cases should therefore normally start with a consideration of whether the serious harm requirements under Section 1 Defamation Act 2013 have been met. The court should ask itself whether one of the requirements, that is to say actual serious harm or the likelihood of serious harm is satisfied or, as appropriate, is arguable or has a real prospect of being satisfied. If the answer is no, then there is no tort at all and the case will be inevitably dismissed. If the answer is yes, it may be hard to establish – at an interlocutory stage – that the tort alleged fails the real and substantial tort test.

(Continued on page 61)

(Continued from page 60)

This will normally be determinative of whether the threshold has been met but the Judge accepted that there could be cases where there could be a further challenge on the basis of abuse of process based on the Jameel case. He indicated that there may also be defamation cases in which the pursuit or continued pursuit of the claim cannot be justified as a necessary or proper interference with freedom of expression, even though the publication has caused serious harm to reputation or such serious harm is likely to be caused.

The serious harm test is the test that will be applied first. It will normally require evidence to produce it, but there may still be circumstances such as very restricted publication or some public interest argument that it would not be an appropriate use of the court's resources to allow the case to continue, so that the case could be struck out on Jameel abuse of process grounds. However, the issue will normally be determined on the question of whether or not there has been serious harm.

Russians Can Sue in England

Vladimir Sloutsker –v- Olga Romanova [2015] EWHC 545

It is quite possible that the judge would have reached a different decision if he had been called upon to apply the new law.

This related to a series of four publications in Russian, principally in a Russian language newspaper. The Clamant had been a Senator in the Russian Federation and was the former Chairman of the Russian-Jewish Congress and he was considered by Mr Justice Warby to have a significant and widespread reputation in the UK. The allegations were serious and considered by the court to have caused the Claimant serious harm. They included allegations of fabricating evidence, conspiracy to murder and the corruption of the judge and prosecution in criminal proceedings. However, the publication pre-dated the coming into force of the Defamation Act and the requirement that the Claimant had to show that England was clearly the most appropriate jurisdiction in which to hear the libel case.

It is quite possible that the judge would have reached a different decision if he had been called upon to apply the new law. As it was, the Defendants had parted company with their solicitors and did not appear at the hearing. The judge applying the old law concluded that if the Claimant were to obtain a defamation judgment in Russia, it would not vindicate his reputation in the United Kingdom. The case has the hallmarks of a Pyrrhic victory but it remains to be seen if this was the last hurrah of forum shoppers or whether Russians will continue to attempt to bring libel actions in the United Kingdom, given that a vindication in their own courts may be felt unlikely to convince doubters.

(Continued on page 62)

(Continued from page 61)

Controlling Costs

Tim Yeo –v- Times Newspapers Limited [2015] EWHC 209

This was another interesting decision by Mr Justice Warby which gives guidance on costs budgeting. The system of costs budgeting only applies to costs going forward. Costs incurred up to the date of the hearing of the costs budget application are not dealt with in the costs budget, although they can be assessed in terms of reasonableness after the conclusion of the litigation. Mr Justice Warby showed a willingness to trim costs budgets. He made it clear that provisions for contingencies would only be permitted if the work relating to the particular contingency was identifiable, was more likely than not to be required and did not otherwise fall within the main categories of precedent H which is the framework for categorising permission costs.

This was one of a series of libel actions relating to politicians over lobbying or using unorthodox means for fundraising for their parties. The rules as to what is permissible may very well be stricter in England than they are in the United States. The Sunday Times had written disobligingly of the Conservative MP Tim Yeo "*Top Tory in new lobbygate row*." Needless to say, Tim Yeo had been speaking not to a genuine businessman offering him a lucrative retainer but undercover journalists employed by the newspaper offering him a consultancy in what turned out to be a fictitious foreign company. The judge slashed the Claimant's costs budget from £559,915 to £370,000 and the Defendant's budget fared somewhat better being reduced from £415,972 to £346,553.

This was one of a series of libel actions relating to politicians over lobbying or using unorthodox means for fundraising for their parties.

Mr Justice Warby gave fairly short shrift to the attempt to plead malice so as to defeat the Reynolds defence. The Claimants "*sought to plead malice if and insofar as might be necessary*". The judge indicated that it was not the practice to plead malice where a Reynolds defence was raised. The issue would be whether the journalists had acted responsibly and if the various public interest yardsticks were met. This substantive case still remains to be heard.

Ruling for Claimant Reversed by Court of Appeal

Cruddas –v- Calvert [2015] EWCA 171

In a case with somewhat similar facts, the Court of Appeal was willing to reverse some of the findings or Sir Michael Tugendhat in favour of Peter Cruddas a former Tory

(Continued on page 63)

(Continued from page 62)

Co-Treasurer to whom he had awarded £180,000 damages. The newspaper had in effect accused Cruddas in another secretly recorded sting to talk too freely and to improperly and corruptly offer access to the Prime Minister and other leading political figures. The journalists posed as potential donors and the upshot of their conversation was an article entitled "*Rotten to the core. Sack the Treasurer and clean up lobbying*." Cruddas resigned shortly thereafter.

The Court of Appeal overruled the findings of Sir Michael Tugendhat and concluded (unlike him) that the secret recordings *did* show that Cruddas offered donors an opportunity to influence government policy and to obtain unfair advantages through secret meetings with senior political figures. The paper did not succeed in its entirety and still remained liable to pay Cruddas £50,000 and half the trial costs as they failed to make out the case that Cruddas was guilty of breaching electoral law relating to foreign donations, the journalists having posed as Middle East investors in a Liechtenstein fund. The case is another example of the perils of suing for libel in relation to political matters which used to be so common. With the reimbursement of £130,000 in damages plus the loss of half his legal trial costs and the liability to pay the costs of the paper in the Court of Appeal, it was calculated that the Court of Appeal hearing must have cost Cruddas no less than £300,000.

From a jurisdictional point of view the interesting feature was that the claim was confined to the publications in Colorado.

Colorado Lawyer Wins £50,000 Libel Damages

Timothy Bussey and Bussey Law Firm –v- Page

[2015] EWHC 563

This was a somewhat unusual case heard by Sir David Eady. A troll based in the North of England had posted the views via Google Maps saying of the unfortunate Mr Bussey that he was a scumbag, that he paid for false reviews and lost 80% of his cases, all of which was untrue of the blameless Mr Bussey. After records had by reason of applications to the court been obtained from Google these posts had been traced to the account of Jason Page. He claimed that some third party had, unknown to him, obtained access to his account. However, given the password and the security procedures involved and the fact that there was evidence that Page had showed himself willing for payment to supply such reviews, the judge felt that it was overwhelmingly probable that these offensive posts had been made by Page.

From a jurisdictional point of view the interesting feature was that the claim was confined to the publications in Colorado, it being asserted that for all intents and purposes the relevant laws in Colorado and in England were substantially similar and

(Continued on page 64)

(Continued from page 63)

that the requirements of double-actionability were met. The judge indicated that given that there was no question of any belief in the truth of the allegations made against Mr Bussey, the malice standard was met. Bussey had limited his claim to £50,000. The judge indicated that he would have otherwise awarded Mr Bussey £45,000 damages and the firm £25,000 damages but they had capped their damages claim at £50,000. Costs were believed to be of the order of £100,000 but again this probably, given the status of the defendant, belongs to the Pyrrhic victory department, although potential clients of the Bussey law firm will have the reassurance of knowing that Mr Bussey's reputation was vindicated in England.

Can the Police Keep Old Personal Data in their Databank?

R (Catt) v Commissioner of Police of the Metropolis and ACPO and R (T) v Commissioner of Police of the Metropolis

The Supreme Court held that the police were entitled to retain old personal data.

By a majority of 5 to 2, the Supreme Court held that the police were entitled to retain old personal data, one relating to a 91 year old peace activist and another to a woman who had had a relatively minor dispute in which insults of a racial nature were made. The court had no doubt that their privacy rights were engaged. The principles applied appear clearly from the circumstances relating to the case involving the 91 year old. He had been involved in demonstrations over a period of 60 years, more recently with a violent organisation called Smash-EDO, which was aimed at an American arms manufacturing company based in the United Kingdom. The 91 year old had never been charged with a criminal offence, although he had been twice arrested for obstructing the highway. He was, however, on the Domestic Extremism Database and some of the demonstrations had resulted in violence.

In the balancing exercise by a majority of 6-1 the Supreme Court took account of the fact that this involved activities in public and the question was whether the actions of the police in retaining this data fell within Article 8 (2) European Convention of Human Rights which required that it should be in accordance with the law and necessary in that it was proportionate to the objectives concerned. The court concluded that the police had acted in accordance with the law and that the interference with the privacy rights was proportionate and the case gives some guidance on how such intelligence can be gathered and retained. A more detailed analysis is available on my firm's privacy blog.

(Continued on page 65)

(Continued from page 64)

Prince Charles and the Black Spider Memos

R [Evans] –v- HM Attorney General [2015] UKSC 21

Prince Charles, as heir to the throne, in a period in September 2004 and March 2005 and written some 27 letters to seven government departments giving his observations on various political issues of the moment. Rob Evans was a journalist at the Guardian and he had successfully applied to the Upper Tribunal under the Freedom of Information Act 2000 for production of these letters. The Attorney General had intervened issuing a certificate under Section 53 Freedom of Information Act preventing the publication of these private letters to Ministers on the grounds, as he perceived it, of public interest. The Court of Appeal upheld the decision of the Upper Tribunal and concluded that the public were entitled to see the letters written by the Prince of Wales.

This was upheld by Lord Neuburger in the Supreme Court in a Judgment which delivered the majority decision by 5 to 2 that the Attorney General had no right to overrule the decision of the Tribunal because he took a different view on the facts. For him to be able to do so would be unique in the law of the United Kingdom, Lord Neuburger observed. It was, he said, fundamental to the rule of law that the decisions and actions of the executive are, subject to necessary well-established exceptions such as declaration of war and jealously guarded statutory exceptions, reviewable by the courts at the suit of interested citizens.

The black spider refers to the quality of the Prince's handwriting.

For the decision of the Upper Tribunal to be overruled, there needed to be a material change in circumstances since the Tribunal's decision or evidence that the decision of the Tribunal was demonstrably flawed in fact or law. There was no such evidence in this case. It will be a few months before we are entitled to see what it was that Prince Charles was anxious that we should not see. The law has, however, changed in the interim in 2010 by Section 37 of the Freedom of Information Act which specifically gives absolute exemption under the Freedom of Information Act to correspondence from the Monarch and to nearest heirs to the throne. The black spider refers to the quality of the Prince's handwriting.

(Continued on page 66)

(Continued from page 65)

Can a Data Controller Be Sued for Misuse of Private Information, Breach of Confidence, Breach of the Data Protection Act 1988 and for Damages for Distress without the Need for Proof of Pecuniary Loss?

Vidal Hall –v- Google [2015] EWCA 311

The Court of Appeal had to decide whether users of browsers could bring a class action against Google. The alleged circumstances which remain to be tried, was that in the period 2011-2012 Google had been collecting by the use of cookies browser general information without the knowledge or consent of the internet users to offer improved services to advertisers by the use of cookies who received their browsing history. Google claimed that there was no such jurisdiction to bring a claim. In particular, Section 13 (2) Data Protection Act required proof of pecuniary damages. Here they were suing for damages for distress without actual financial loss.

The Court of Appeal held that Section 13 (2) did not properly apply the European Data Protection Directive (95/46 EC) and was therefore incompatible with European Law under Article 47 of the EU Charter of Fundamental Rights. The Court of Appeal recognised that damages would be small but considered that important issues were raised and that there was a serious issue to be tried as to whether browser general information was personal data and whether there had been actionable misuse of private information. They refused permission to appeal to the Supreme Court, but it will be open to Google to apply direct for permission to the Supreme Court. The issues are more fully explored on the RPC blog.

Two unsavory Russians who at the turn of this century sued Simon & Schuster, have had their comeuppance.

Schadenfreude Corner – They Are Nailed in the End

Two unsavory Russians who at the turn of this century sued Simon & Schuster, have had their comeuppance. Gafur Rakhimov who took exception to the picture drawn of him in Andrew Jennings' book the "*Great Olympic Swindle*" he has now been designated by the US Department of the Treasury as a member of trans-national criminal organisations and US persons are prohibited from conducting financial and commercial transactions with the entities who has believed to belong to and freezes their assets in the US jurisdiction.

Grigori Loutchansky likewise took exception to his description in Jeffrey Robinson's book "*The Laundryman*" also published by Simon and Schuster. He had however, been

(Continued on page 67)

(Continued from page 66)

him ordered to pay into court £25,000 security for costs for pursuing his action. Discretion obviously got the better part of valour and he did not pursue it and recently the action has been struck out with the Defendants obtaining not only the £25,000 plus the interest which accumulated on that sum plus a significant contribution to the defence costs.

Andrew Mitchell, the former Tory Chief Whip of Plebgate fame had been accused of calling the police guarding Downing Street plebs when they sought to make him dismount from his bicycle when he passed through the security gates not only lost his action against *The Sun* newspaper which is calculated to have cost him a couple of million pounds but he has also had to pay £80,000 damages to the policeman who he accused of lying when he reported Mr Mitchell as having called him a pleb.

Think twice before you sue!

David Hooper is a lawyer with RPC in London.

MLRC Upcoming Events

May 14-15, 2015

Legal Frontiers in Digital Media
Mountain View, CA

September 28-29, 2015

MLRC London Conference
London, England

November 11, 2015

MLRC Annual Dinner
New York, NY

November 12, 2015

DCS Annual Meeting
New York, NY