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MEDIALAWLETTER

Reporting Developments Through September 30, 2016

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MEDIA LAW RESOURCE CENTER

ANNUAL DINNER
WEDNESDAY, NOVEMBER 9, 2016

MLRC will bestow its
WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on

Daniel Ellsberg

The Tension Between National Security and an Independent Media

Apple v. FBI, the Snowden Disclosures, and the 45th Anniversary of the Pentagon Papers Case

Daniel Ellsberg

Max Frankel
Former Executive Editor, New York Times

Noreen Krall
Chief Litigation Counsel, Apple Inc.

Edward Snowden

Moderated by:
Floyd Abrams
Cahill Gordon & Reindel LLP

Cocktail Reception at 6:00 P.M.
Sponsored by AXIS PRO

Dinner at 7:30 P.M.

New York Marriott Marquis
Broadway Ballroom – 6th Floor 1535 Broadway, between 45th and 46th Streets

RSVP by Friday, October 21, 2016

Business Attire

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER — WEDNESDAY, NOVEMBER 9, 2016

RSVP for Dinner by Friday, October 21, 2016

Reservations are not refundable for cancellations received after Monday, October 31, 2016

Firm/Organization: _____

Contact Person: _____

Address: _____

_____

Phone: _____ Fax: _____

E-mail: _____

Please reserve: ____ Single seat(s) at $495 each

____ Table(s) for 10 at $4,950 each

____ Table(s) for 11 at $5,445 each

____ Table(s) for 12 at $5,940 each

Amount Enclosed for Dinner Reservations: $ _____

Please make checks payable to:

Media Law Resource Center, Inc.
266 W 37th Street, 20th Floor, New York, NY 10018

We appreciate your payment by check; to order please use this form and enclose payment. Individual tickets only may be purchased online at www.medialaw.org; just click on MRLC Annual Dinner.

Dietary restrictions/requests: _____

For further information please contact Debra Danis Seiden at dseiden@medialaw.org or 212-337-0200 ext. 204

DEFENSE COUNSEL SECTION
2016 Annual Meeting

Thursday, November 10, 2016

Family style lunch will be served

12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

CARMINE'S
ESTABLISHED 1990
NYC's Legendary Family Style Italian Restaurant

200 West 44th Street
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Upstairs Private Dining Room

Price per person: $65.00

RSVP by October 31, 2016

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Reservations are not refundable for cancellations received after Friday, November 4, 2016.

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MLRC
DEFENSE COUNSEL SECTION

2016 ANNUAL MEETING

$65.00 per person includes lunch.

To reserve your seat and pay by credit card
go to www.medialaw.org and click on DCS Annual Meeting

— OR—

Complete the form below and send payment by check payable to:

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Payment enclosed @ $65.00 per person: _____

Please reserve _____ seats at the DCS Annual Lunch Meeting for:

Firm Name: _____

Address: _____

Phone: _____ Fax: _____

Please list names of individuals attending below (print clearly)

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Reservations are not refundable for cancellations received after Friday, November 4, 2016.

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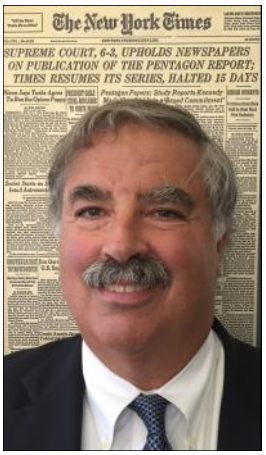
From the Executive Director's Desk

Media Law Family Feud and Other Highlights of the 2016 Virginia Conference



George Freeman

The Virginia Conference which ended last week had many substantive highlights: a discussion with Philadelphia's Deputy Police Commissioner about public access to videotapes and police bodycam film, and their effect on the community in volatile situations - a discussion which was eerily timely in light of the police shootings of black men in Tulsa and Charlotte, and the differing approaches of the videotapes' public dissemination by those two police departments; a Fred Friendly hypothetical case exercise raising also remarkably timely issues such as the surreptitious taping of campaign meetings, the kicking out of reporters from campaign events because of perceived unfavorable coverage and the airing of a presidential sex tape; very open and practical advice from two federal district court judges who once were media lawyers; a very eloquent speech by Floyd Abrams on the "oceanic " differences between the U.S. and the rest of the world regarding hate speech, libel and campaign contributions; and a review of hits and bloopers in the last ten years' Next Big Thing predictions.

We also inaugurated a new game - Journalistic Family Feud - which was great fun, but also - perhaps surprisingly to some - was quite thought provoking.

100 attendees answered legal and media oriented questions and four teams of five vied to match their answers. Some of the "survey says" answers were intriguing, others head scratching. For example, below are a few questions and survey responses.

Name a good former or current First Amendment Supreme Court justice.

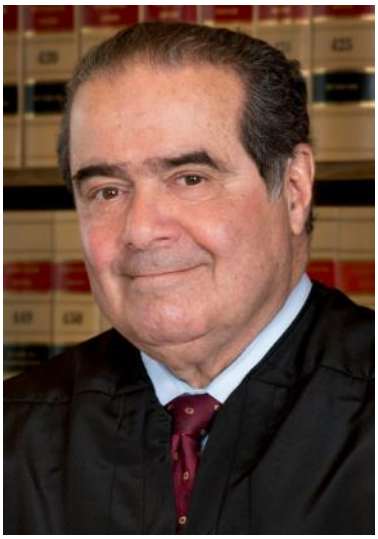
Brennan (47)
Black (10)
Holmes (7)
Brandeis (7)

Justice William O. Douglas, First Amendment absolutist, but survey loser.

First, the MLRC was proud to see Justice Brennan the landslide winner here inasmuch as we have named our Defense of Freedom Award after him. (Daniel Ellsberg will get the Brennan Award at this year's Annual Dinner.) But very surprising was the unequal support for Justice Hugo Black who garnered 10 votes and Justice William O. Douglas who received only 3 votes. Both were staunch First Amendment

supporters; indeed, they were the last two First Amendment absolutists on the Court, who believed that "no law" really meant no law. So why Black outpolled Douglas by such a margin is mysterious.

Equally head-scratching was that Justice Scalia was the landslide winner, with 25 votes, as the worst First Amendment justice. For all his faults, Scalia believed in the First Amendment (at least, his view of its original meaning) and voted on the right side in the hate speech case (R.A.V. v St. Paul) and the flag burning case, which, at least in my humble opinion, is the case which best defines one ‘s First Amendment loyalties. So I think Scalia got an unfair knock in our survey.



Antonin Scalia, unjustified winner of Worst First Amendment Justice survey.

Other than Times v. Sullivan and Gertz, name an important libel case.

Milkovich (20)
Falwell v. Hustler (13)
Harte-Hanks v. Connaughton (12)
Philadelphia Newspapers v. Hepps (11)
Masson v. New Yorker (7)
Butts v. Saturday Evening Post (7)

The answer of the 100 survey respondents here totally stunned me. The top answer, of 20 voters, was Milkovich, a case followed by pretty much no other court. Indeed, it was ignored or criticized by most lower courts who generally continued to use the four factor Ollman v Evans test of Judge Ken Starr and the DC. Circuit (the case I chose -its only vote- even though it was not a Supreme Court precedent).

Second in the survey was an interesting choice, Hustler v Falwell, which by the time it reached the Big Tent was not a libel case. But libel was originally pled, and the Supreme Court’s decision did have an effect on the libel environment, so maybe this is an ingenious pick.

Name a fun invasion of privacy/ROP case.

Hogan v. Gawker (15)
Zacchini v. Scripps-Howard (13)
Carson v. Here’s Johnny Portable Toilets (6)
Falwell v. Hustler (4)
Finger v. Omni (4)
Vanna White v. Samsung (4)

(Continued from page 8)

The question about fun privacy cases brought some fun answers and inspires some fun analysis. I was one of four who selected Finger v Omni, a case where a photo of a large family drew a privacy lawsuit when their photo was published in a magazine in connection with an article saying that men trying to have a baby through ivf should drink lots of coffee because that will energize their sperm. Amazingly, plaintiffs lost 7-0 in New York's highest court despite plaintiff's testimony that they had their kids the old fashioned way and that he didn't even drink coffee.

Getting three votes was Mosley v News Group Newspapers, based on reporting on a Nazi themed sadomasochistic sex with prostitutes party. Also winning three votes was Dustin Hoffman v LA Magazine, the celebrity's case arising from a computer generated photo of him in women's clothing.

Two cases which were not even privacy cases , but libel cases, got one vote each , but since they were fun and about sex, the confusion is understandable. One was Pring v Penthouse, about a fictional Miss Wyoming who levitated men by exotic sexual practices. The other was Jones v The Dirty, about a teacher and Cincinnati Bengal cheerleader who a post said had sex with the entire team.

But what I liked best about these survey responses was that the Johnny Carson porta potty case finished third, and that the crazy Vanna White case with its wonderful dissent was fourth.

Hustler v Falwell was not strictly a libel case, but libel was originally pled, and the Supreme Court's decision did have an effect on the libel environment.

What is your favorite magazine?

New Yorker (34)
The Atlantic (9)
Sports Illustrated (8)
The Economist (7)

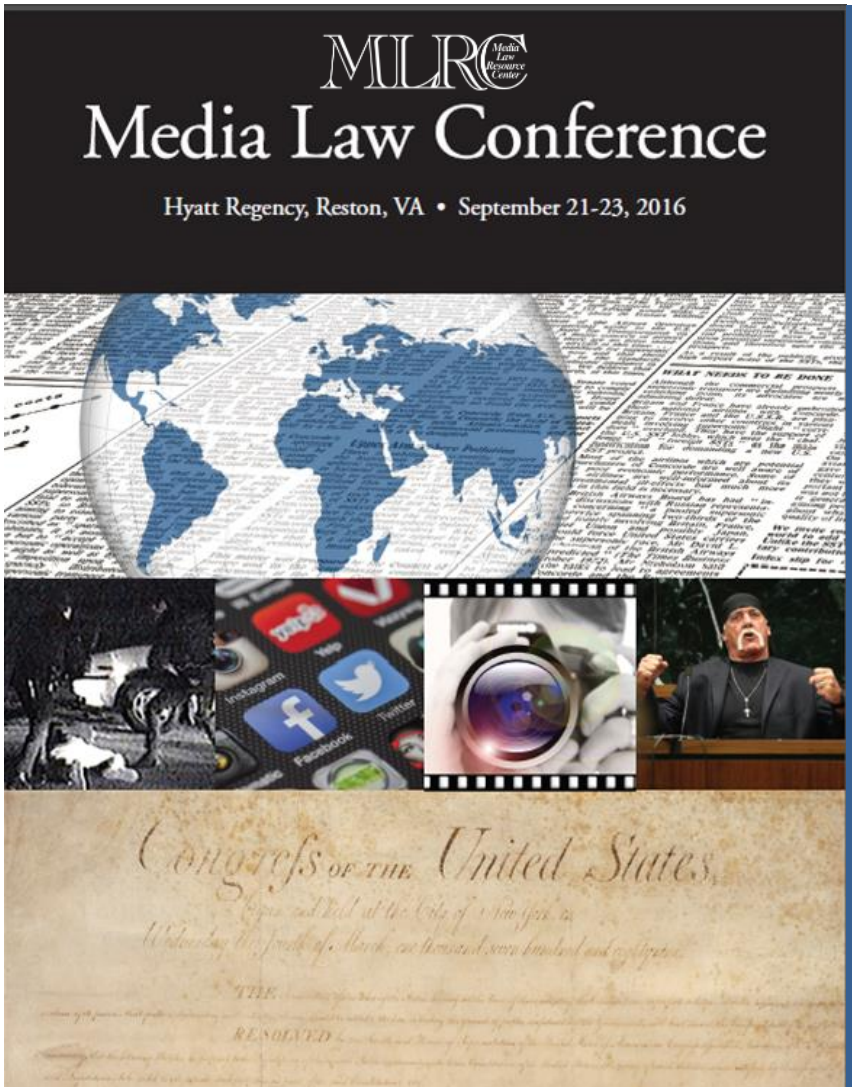
Finally, the survey confirmed what sophisticated readers media lawyers are. Although Sports Illustrated garnered the third most votes - with many respondents specifying its bathing suit issue - the others at the top of the survey were The New Yorker, The Atlantic and The Economist, all pretty serious journals.

I look forward to our next series of questions and survey says answers in two years.

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

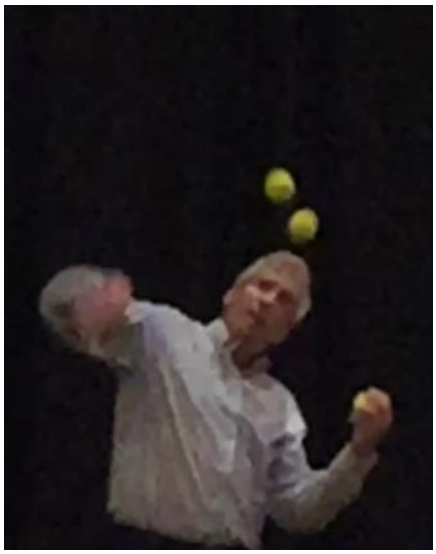
MLRC Media Law Conference 2016

Over 300 MLRC members from around the world convened in Reston, Virginia Sept. 21-23, for discussion and debate on the latest developments and trends in media law. The plenaries, breakouts and boutiques covered the field of media and First Amendment practice. We gratefully thank our sponsors and all our members who attended the event.



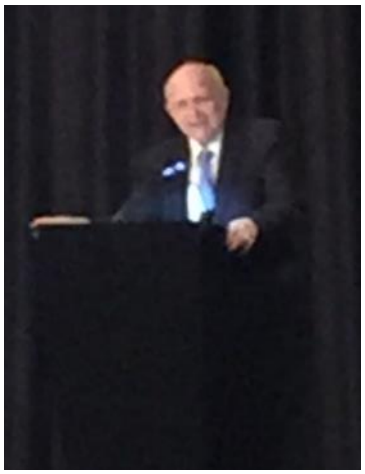
Mutual Insurance Company Limited
Greenberg Traurig
Baker Hostetler
Fish & Richardson
Frankfurt Kurnit
Hiscox
Thomas & LoCicero
Vinson & Elkins
Axis PRO
Butzel Long
Covington & Burling
Davis Wright Tremaine
Duane Morris
Fox Rothschild
Honigman
Jackson Walker
Jenner & Block
Kelley Drye
Levine Sullivan Koch & Schulz
Microsoft
Munger Tolles Olson
News Media Alliance
One Beacon
Pepper Hamilton
Vedder Price
Wilmer Hale
Chubb
Dentons
Haynes & Boone
Wiley Rein

The opening session: Rodney King, 25 Years Later; Fair Use and Police/Press Issues, with (l. to r.) Lizanne Vaughn, Getty Images; William Dunnegan, Dunnegan & Scileppi; Steven Perry, Munger Tolles & Olson; Mickey Osterreicher, National Press Photographers Association Francis T. Healy, Special Legal Advisor to the Philadelphia Police Commissioner; and moderator Daniel Waggoner, Davis Wright Tremaine



Comedian Chris Bliss riffed on free speech and comedy; and, more seriously, discussed his project to install monuments to the Bill of Rights in state capitols.

Panelists on the Fred Friendly-style hypothetical consider the legal and ethical implications of publishing excerpts from a leaked sex tape of a presidential candidate. (l. to r. Kevin Madden, Partner, Hamilton Place Strategies; Barbara Wall, SVP & Chief Legal Officer, Gannett; Sam Stein, Senior Politics Editor, Huffington Post; Tom Clare, Partner, Clare Locke; Ken Strickland, Washington Bureau Chief, NBC News; and co-moderator George Freeman, MLRC.



Top l. to r.: A View from the Bench Panel with Adam Liptak, Judge Wendy Beetlestone and Judge Mark Hornak; Floyd Abrams discussing The Soul of the First Amendment; Family Feud Hour; The Next Big Thing Panel, w. Jonathan Anschell, Marc Lawrence-Apfelbaum, Kurt Wimmer, Lynn Oberlander, Sandy Baron, Mickey Osterreicher, Nathan Siegel and Chris Beall; Networking at the Thursday night Reception and Dinner.

In Memorium

Southwest Florida Media Lawyer Steven W. Carta (1945-2016)

By Charles D. Tobin

My first real exposure to media law came in 1985, when I was covering courts for The News-Press, Gannett's newspaper in Southwest Florida. A prosecutor had read my stories and was eager to learn how I knew what the grand jury was looking into. So, of course, he subpoenaed me.

At that point in my life, I had not yet puzzled through whether Branzburg v. Hayes was a good or bad case for journalists. I had never heard of a shield law. I don't think I even knew the verb "to quash" existed.

I did know that I had a source to protect, and that in the professional life of a journalist, this was a huge deal. But I also knew that, at age 22 and barely out of college, having a deputy sheriff hand me a grand jury subpoena was really, really scary.

Steven W. Carta

That's when I first met Steve Carta, the newspaper's lawyer. At that time he had a head of straight black hair just starting to thin out, along with a nicely cropped beard and mustache. A slight guy, he was not imposingly confident upon first impression.

Until you looked into his eyes. Dark, focused, Iberian eyes that conveyed a passion for your cause. A gaze that let you know he was entirely devoted to making things come out okay for you.

Steve sat down at the newspaper with our editors and me and did what every good lawyer should. He patiently told us about our legal rights (at the time, Florida's reporter's privilege was common law-based and pretty strong), the risks (a few years earlier, the New York Times' Myron Farber famously had gone to jail to protect a source), the judge (not a hothead, but definitely a law-and-order type), and what a motion to quash would look like.

The newspaper and I decided we needed to protect the source and challenge the subpoena. At the motion to quash hearing, Steve got up in court and made what I now know as the routine three-part-test argument. His delivery was firm, precise, and not at all flashy.

I was dazed, scared, and didn't know what to think. It was my first time, sitting there as the client next to him during the argument, at the counsel table. I was much more accustomed to the safety of the benches behind the bar, where I would sit with my reporter's pad in hand, scribbling notes and planning the lede for the day's story.

To all of our surprise, when Steve finished his argument, the prosecutor rose, conceded, and withdrew the subpoena. The whole thing came to an abrupt end. I think I even went right back to the bench seats to cover the next hearing.

I already had taken the LSAT and was thinking about law school. And while it would take me another year to finally decide to go, I left journalism knowing exactly what kind of lawyer I wanted to be. That kind.

Steven W. Carta died on September 6 surrounded by his family at their Fort Myers home. He was only 70. He succumbed after a lengthy battle with cancer.

Steve and I had seen each other occasionally over the years after I became a lawyer. In 1990, I moderated a Florida Bar panel on subpoenas and, of course, he was the first person I asked to serve on it. Later, after I became an inhouse lawyer at Gannett, we worked on a years-long libel case together.

I vividly remember leaving his office in 1994 for a big hearing. I had decided to fly down from D.C. to argue it myself, instead of asking him to do it. It was a two-brief-bag type of hearing. Steve picked up one of my bags, and – without the slightest hint of resentment – said with a twinkle, "Chuck, I always knew I would end up carrying your briefcase for you."

I also will never forget a difficult mediation in another case we worked on together. It had gone nowhere for hours. When the mediator returned from a late-day caucus to report no further movement on the other side, Steve stabbed the table with his index finger and announced, "Now you listen!" He then pointed that finger at the mediator and, flashing those dark eyes with a fury I had not seen from him before, barked, "You have one job here, and that's to get them to move!"

He then pointed to the door and, quietly but firmly, commanded, "Now go do your job."

We settled a couple of rounds later that evening. I have used a variation of that approach myself in a few difficult mediations since then.

Steve and I did one more case together after I joined Holland & Knight in 2001, but we fell out of touch in the past decade. We exchanged a pleasant email last year, when something I am forgetting at the moment reminded me of him, and I sent him a note. He responded to my email immediately with all the good cheer of a longtime friend. He gave no hint that, at the same time he wrote me back, he was fighting for his life.

Like media lawyers in many small-midsize cities, the majority of Steve's solo practice focused on other types of work. I know he also represented a large local landowner and a regional chain of appliance stores, and that he had a thriving commercial litigation practice. He was never active in MLRC or the ABA Forum on Communications Law.

But over the years – and particularly in the heyday of Florida public records litigation in the 70s and 80s – The News-Press, Fort Myers Florida Weekly, and local TV stations WINK and WBBH always knew that he was their greatest legal champion. Run a Westlaw or Lexis search, and you will find dozens of public access precedent with Steve's name, the overwhelming majority of them wins that we all still cite.

Barbara Wall, Senior Vice President and Chief Legal Officer at Gannett, who worked with Steve for 35 years, nicely sums up his legacy this way: "Steve was precisely the type of lawyer every newspaper needs – uniformly respected in the local legal community, always willing to be a zealous advocate for our cause (even when unpopular with the local powers that be), and a complete pleasure to work with."

The Florida legal and journalism communities, and I, are really fortunate to have had Steve Carta in our corner for as long as we did.

Charles D. Tobin in partner with the Washington D.C. office of Holland & Knight LLP

No Harm, No Foul, Sayeth the Court—Despite What the Jury Said

Plaintiff Loses When It Can't Prove Damages Under Oklahoma Law

By Robert D. Nelon and Elisabeth E. Muckala

The focus of defamation cases is often on the issues of falsity or fault, with legal issues of opinion or privilege sometimes thrown in. In a recent case tried in federal court in Oklahoma, however, the issue of damages—or the lack thereof—was the deciding issue of substance in the case. After a jury trial, the court granted the defendant's motion for judgment as a matter of law despite the jury verdict giving a high seven–figure award to the plaintiff. *Choctaw Town Square, LLC v. KOKH Licensee, LLC*, Case No. CIV–13–1246–F (W.D. Okla.) The case is an interesting tale of twists and turns in litigation that finally ends up with the right result, despite some trips down proverbial rabbit trails.

Background

KOKH, LLC is a Sinclair Broadcast Group entity that operates the FOX affiliate television station on Channel 25 in Oklahoma City. In November 2013 KOKH broadcast what it thought was a mundane day–turn story about a dispute between Choctaw Town Square ("CTS"), an Arkansas–based commercial developer and the City of Choctaw, a suburb of Oklahoma City. CTS had entered into a series of economic development agreements with Choctaw to build a shopping center, to be known as "Choctaw Town Square," anchored by a Walmart Supercenter.

The case is an interesting tale of twists and turns in litigation that finally ends up with the right result, despite some trips down proverbial rabbit trails.

In late 2012, disputes erupted between the developer and the city, especially over closing costs associated with the sale of city–owned property to Walmart (Choctaw expected to pay $132,000 but CTS demanded and was eventually paid $1.9 million) and the adequacy of CTS's documentation of invoices to the city. When Choctaw balked at the closing costs and demanded more expense documentation and a new lending agreement, CTS sued Choctaw for breach of contract in the Western District of Oklahoma and walked off the job in February 2013.

Choctaw counterclaimed against CTS, asserting a variety of claims, including fraud. (CTS also filed suits against Choctaw's Mayor and City Manager; and it was named as a defendant in a state–court wrongful termination suit filed by the former City Manager of Choctaw, who

(Continued on page 16)

(Continued from page 15)

alleged that CTS had forced the city to fire him when he had previously demanded better documentation of the project.)

As a result of CTS's suit against the city, Choctaw asked the Oklahoma State Auditor & Inspector to audit the records about the commercial development. The State Auditor agreed to conduct a special audit; the city provided the auditor with the documents it had from CTS but CTS refused to participate in the audit. On November 14, 2013, the State Auditor issued his report and published it on the agency's public website. He concluded that both the city and the developer could be faulted in the way they had handled their relationship: City officials, the State Auditor said, had not been good stewards of public money because the city entered into a one–sided development agreement with CTS that gave too much discretion and control to the developer, and the city had given in to the developer's exorbitant demands for payment of closing costs; the developer had taken full advantage of its lopsided agreement with Choctaw, could document only about a third of the expenses it had billed the city, some of which were "questionable," had overcharged the city in some respects, and had engaged in what the State Auditor called "questionable developer practices." The State Auditor did not, however, express any legal conclusion whether or not CTS had engaged in fraud.

KOKH broadcast what it thought was a mundane day–turn story about a dispute between an Arkansas –based commercial developer and the City of Choctaw

At the time the State Auditor issued his report, KOKH's dayside reporter was dating (and by the time of the trial had married) the son of the Mayor of Choctaw. She told KOKH's Assignments Manager that the State Auditor had issued a report, and together they looked up the report on the State Auditor's website. The Assignments Manager thought the auditor's report was newsworthy; but she, the News Director, and the dayside reporter all agreed that the dayside reporter could not cover the story because of her relationship with the Mayor's son. The Assignments Manager decided to present the audit report as a possible news story to the reporters and producers assembled at the afternoon editorial meeting. There it was decided that a nightside reporter should do a story on the audit report.

After the meeting, that reporter and a photographer set off to gather information for a 9 pm broadcast. The reporter interviewed the State Auditor and the City Manager of Choctaw for her story (the photographer inadvertently deleted the interview video, so the City Manager was interviewed a second time), and she obtained a comment from the lawyer for CTS. (For broadcast, the reporter edited out part of the lawyer's statement that theorized that the audit report was the result of collusion between the State Auditor and the Mayor of Choctaw, who were both CPAs) The reporter scripted a video package and during the newscast did a live stand–up from the construction site.

(Continued on page 17)

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While the reporter was in the field, the show producer read portions of the audit report. After deciding that the Choctaw audit report would be the second story in the newscast, the producer wrote an anchor lead–in to the newscast that said " ... and, a city defrauded out of thousands of dollars." She then selected some graphics to put on top of the video package that said "City Defrauded." The audit report, however, did not use the word fraud. Neither did the reporter in her script. Nevertheless, the anchor lead–in and graphics were approved by the Executive Producer. The news report aired at 9 pm on November 14, 2013.

Defamation Suit and Discovery

CTS sued in federal court eleven days later, on November 25, asserting claims of libel, slander, and false light invasion of privacy based on the "city defrauded" and several other passages in the broadcast. (The case was assigned to the same judge handling CTS's case against the City of Choctaw.) The complaint originally identified CTS and an affiliated corporation as plaintiffs and named several Sinclair entities as defendants. When the defendants filed a motion to dismiss, the court deferred a ruling on the substance of the motion, instead questioning whether the court had jurisdiction given the meager jurisdictional allegations about the various LLCs named in the complaint.

The producer wrote an anchor lead–in to the newscast that said " ... and, a city defrauded out of thousands of dollars."

The court directed CTS to file an amended complaint, which it did in March 2014. The amended complaint cured the jurisdictional omissions and added several individuals—a husband, wife, and their son who were the principals of CTS—as plaintiffs. The defendants again moved to dismiss. In May 2014 the court granted the motion in part and denied it in part, dismissing the individuals and CTS's affiliated corporation as plaintiffs (because the broadcast was not "of and concerning" them) and dismissing the Sinclair entities other than KOKH and a related entity that technically held KOKH's broadcast license, KOKH Licensee, LLC.

The court also dismissed CTS's false light claim. It denied the motion, however, regarding the sufficiency of CTS's allegations on its libel claim against KOKH and Licensee, saying that it was satisfied that CTS had alleged sufficient facts "that the defendants acted with the requisite degree of fault, *i.e.* actual malice." The court's ruling left CTS with a single claim of defamation against KOKH and Licensee.

The parties engaged in discovery. The remaining defendants strongly suspected that CTS had not suffered any actual damage as a direct result of the KOKH broadcast. After all, as its name implied, CTS had been formed for the purpose of developing Choctaw Town Square in Choctaw, Oklahoma, a project that failed and was in litigation; there was no indication in its

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pleadings or in information being developed in CTS's parallel suit against the City of Choctaw that CTS had any other development prospects; and CTS's initial disclosures in the KOKH case tellingly said that it had yet to develop any damages theory. Accordingly, the defendants' written discovery requests focused on the nature, cause, and amount of any damage CTS claimed occurred as a result of the broadcast.

CTS was asked to identify any municipality with which it had discussed or negotiated a commercial development agreement and to produce the relevant documents. CTS admitted in its discovery responses that it had given only passing thought to developments in a couple of Oklahoma towns other than Choctaw and did not have any commercial development agreement in the works. On top of that, there was good reason to believe that the failure of the Choctaw project, the bitter litigation between CTS and the City of Choctaw, and the State Auditor's criticism of CTS in the audit report were far more likely to be the sources of CTS's inability to create any other development business than was KOKH's news report.

The damages issue was a key component in the defendants' litigation strategy. Under both an Oklahoma statute (Okla. Stat. tit. 12, §1447.3) and case law (*Mitchell v. Griffin Television, LLC*, 2002 OK CIV APP 115, 60 P.3d 1058), in an action against a broadcaster, damages must be proven, not presumed, even if the defamation is *per se* and even if the plaintiff proves actual malice. All other elements of the tort aside, if CTS could not prove it actually suffered a loss of profits because of a false and defamatory statement in the broadcast, it could not prevail on its defamation claim against the defendants.

Summary Judgment Denied

While the defendants' discovery focused on damages, CTS's discovery was devoted to trying to develop evidence that Sinclair Broadcast Group and one of its subsidiaries was, along with KOKH, the "employer" of KOKH's newsroom staff. (In December 2014 the court allowed CTS to amend its complaint to add Sinclair Broadcast Group and a subsidiary as defendants.) After successfully fending off several motions to compel filed by CTS, one result of which was the court's *sua sponte* decision to stay the case against the Sinclair defendants for abusive discovery, the defendants filed a summary judgment motion at the end of March 2015. The motion raised primarily three arguments: The statements about which the plaintiff complained were (for various legal reasons) not actionable; there was no evidence of actual malice; and the plaintiff had no evidence of actual damages.

The defendants supported their actual malice argument with the affidavits of KOKH's producer and Executive Producer that they believed the "city defrauded" words to be accurate based on the findings in the audit report. As to damages, CTS's sole claim was that it had presented a commercial development proposal to the City of Guthrie, Oklahoma (a town just

(Continued on page 19)

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north of Oklahoma City) and had suffered a loss of profits (calculated by an expert that was ultimately proffered by CTS) when the proposal went nowhere after the broadcast. In its motion (and in a *Daubert* motion challenging CTS's expert's opinions), KOKH presented the affidavit of the Guthrie City Manager, who said that she had instantly rejected CTS's proposal; the proposal was a bad deal for the town, she said, and was never seriously considered by town officials. The City Manager said KOKH's news report had no effect on her decision not to do business with CTS. She had not seen the broadcast—in fact, she didn't own a TV.

The plaintiff's response to the summary judgment motion was tepid. It virtually conceded that except for the "city defrauded" language, the other statements in the broadcast were substantially true or privileged. It argued, on the actual malice question, that it really wasn't a public figure; and that despite the affidavits of KOKH's producer and Executive Producer, the use of the words "city defrauded" when the State Auditor didn't conclude there was any fraud was enough in itself to demonstrate reckless disregard of the truth. As to damages, CTS offered up a new theory. It presented the affidavit of the owner (who just happened to be the sister of CTS's principal owner) of All–Star Electric, a small business in Oklahoma City, that she declined to hire her brother's commercial development company to build some metal buildings because she was afraid *her* customers *might* have seen KOKH's news report and *might* be disgruntled if she subcontracted with CTS.

In a mixture of wins and losses for the defendants, the court denied the defendants' summary judgment motion .

In a mixture of wins and losses for the defendants, the court denied the defendants' summary judgment motion in June 2015. In its opinion, the court agreed with the defendants that the verbiage in the news report other than the "city defrauded" language was either substantially true or privileged. However, it rejected the defendant's argument that "city defrauded was, in context, either fair comment or an opinionative statement about the state auditor's findings. The court concluded that "city defrauded" was a statement of fact that could be proved true or false (and hinted, given the state auditor's findings, that the court leaned toward the falsity side).

As to the issue of fault, the court—in the most surprising aspect of its opinion—declined to consider whether the plaintiff had created a genuine issue of fact about actual malice because the court concluded, *sua sponte*, that the plaintiff was a private figure. Despite having described actual malice as "the requisite degree of fault" in its order on the defendants' motion to dismiss, the court applied the three–part status test in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), to conclude that there was no evidence in the record to show that CTS was a public figure. (The defendants had not presented that evidence in their summary judgment motion because they assumed the court's earlier "requisite degree of fault" comment disposed of the need to do so.)

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The court went on to say that, despite the requirement under Oklahoma law that a private defamation plaintiff prove professional negligence, almost invariably through expert testimony, and even though the plaintiff had no journalism expert, there was a fact issue about fault because a "side by side comparison of the audit report and the news report" would allow the jurors to "draw the inferences [about fault] that will flow from that comparison."

Regarding damages, on the other hand, the court gave the defendants a partial, but significant, win. The court concluded that CTS had failed to create a genuine issue of fact regarding damages based on the theory that it failed to land a development contract with Guthrie because of the broadcast. The court said "there is simply no way, as a matter of causality, that CTS can tenably isolate the news story and assert that the news story was the reason CTS did not successfully woo the City of Guthrie.... CTS has not proffered evidence sufficient to support a finding by a reasonable jury that the news story caused a loss because the City of Guthrie declined to do business with CTS." (Four days after ruling on the defendants' summary judgment motion, the court granted the defendants' *Daubert* motion; held the plaintiff's damages expert's opinions inadmissible as unreliable; and, applying Fed.R.Civ.P. 56 (g), granted the defendants further relief, saying "Guthrie damages are eliminated as a matter of law.")

Regarding damages, on the other hand, the court gave the defendants a partial, but significant, win.

In its summary judgment ruling the court did not give the defendants a complete victory regarding damages. It concluded there was still as issue of fact based on the sister's affidavit that she wouldn't do business with CTS, her brother's company, because of the KOKH news report. The court volunteered the comment that the sister's affidavit was "suspiciously convenient" and that it "would not take an overly cynical jury to conclude that the All–Star Electric theory of damages is a bit much [and] her story may strain credulity." Nevertheless, the court said, its duty was not to weigh the evidence but to apply the Rule 56 standard of whether a genuine issue of fact existed. The court concluded there was such a genuine issue on damages and denied summary judgment. However, the court's ruling left CTS with the "All–Star Electric damages"—by its admission worth only about $37,500—as its only damages theory.

At the time of the court's ruling on summary judgment, the trial of the case was set for the August 2015 docket. The court moved the case to the November 2015 docket because of its own scheduling problems; then, on CTS's motion over the opposition of the defendants about putting the case "on the shelf" for several months, the court continued the case until the April 2016 docket. (CTS's stated ground for continuance was its preference to try the City of Choctaw case before the KOKH case, on the absurd theory that if a jury in the Choctaw case found that CTS had not engaged in fraud, that finding would preclude KOKH from contending that "city defrauded" was substantially true or merely opinion.) The defendants opted to use

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the lag time to raise other pre–trial issues. In August 2015, through a motion *in limine* about the nature of fault evidence that would be admissible at trial, the defendants asked the court to revisit its private–figure ruling.

The *in limine* motion was bolstered with evidence that KOKH's news report was in the midst of an already–public controversy about the Choctaw Town Square development and the litigation between CTS and the City of Choctaw; that CTS had played a willing role in the controversy and had ready access to the media to comment about it; and that KOKH's news report was germane to the controversy, thus making CTS fit the *Waldbaum* definition of public figure. The defendants gently suggested that they had been lulled into not introducing that evidence earlier by the court's "requisite degree of fault" statement in ruling on the motion to dismiss. CTS did not file a brief opposing the *in limine* motion, and in March 2016 the court granted the motion in a reasoned opinion. It again applied a *Waldbaum* analysis and ruled that CTS was a limited–purpose public figure that "will be required at trial to prove that the allegedly defamatory statements were made with actual malice."

The defendants also filed a motion *in limine* in October 2015 to exclude the All–Star Electric damages theory. After the court denied the motion for summary judgment regarding the All–Star Electric damages theory—because of evidence that surfaced for the first time in the affidavit in CTS's response to the motion—the defendants deposed the sister. It turned out that her testimony was even flakier, more speculative, and less relevant than what her affidavit indicated. All–Star Electric, it seems, was on the verge of closing its doors as an electrical contractor; it had only one customer (the one that had asked All–Star to build the metal buildings); All–Star had done work for that customer for 30 years and the customer didn't care who All–Star used as a subcontractor; and the sister never asked and the customer had never said a word about the KOKH news report. To allow a jury to base a damages award on this testimony, the defendants argued, would be to allow sheer speculation that the news report had caused any damage whatsoever.

The defendants' October *in limine* motion also sought to exclude a new theory of damages that surfaced in a July 2015 motion by CTS to continue the trial. CTS indicated that it intended to put on evidence (the testimony of CTS's owner) that before the broadcast CTS made a profit (from the Choctaw project), that after the broadcast it made no profit, and that the broadcast therefore was the cause of CTS's "lost profits." CTS pegged the lost–profits damages at somewhere between $3 million and $6 million. The defendants argued that this damages theory was based on the fallacious *post hoc ergo propter hoc* theory of logic that "because event Y followed event X, event Y must have been caused by event X."

The court denied the defendants' *in limine* motion regarding the plaintiff's damages theories in March 2016, but the court's opinion was revealing. As to All–Star Electric, the court said that the sister would be permitted to testify; but the court volunteered that the rules of evidence

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were intentionally permissive because "we tend quite strongly to give our juries credit for collectively having a modicum of common sense." The court went on, referring back to its view that the sister's proffered testimony was "suspiciously convenient," to say that the "record now before the court detracts not one whit from that observation. The proffered testimony has, at this juncture, cleared the legal hurdles that have been thrown up, but, on a jury of eight, there may well be six or seven—if not eight—sets of eyeballs rolling when the plaintiff's CEO trots out his sister, in a fairly solitary role, to support a theory of damages that is noticeably attenuated, albeit admissible."

As to the *post hoc* damages theory of lost profits, the court said its analysis of the defendants' motion was constricted: "The present analytical problem is exacerbated by the fact that the record now before the court does not show in any concrete way what the lost profits evidence will consist of, although it is apparent that Mr. Eldon Blackaby will be testifying as to plaintiff's profits." In essence, the court's denial of the motion was a frustrated recognition that the court would have to await the actual presentation of evidence at trial to know whether or not it was competent and admissible.

The defendants filed a number of other motions *in limine*—in all, a total of seven—to limit the evidence the plaintiff could present at trial. Most of the motions were either granted or denied as moot when the plaintiff indicated it would not present the evidence to which the defendants objected.

Five of the eight jurors selected were college–educated; two had advanced degrees; and one (who, predictably, was later selected as foreperson) was a dentist.

Trial

Jury selection took place on April 12, 2016. (The assigned judge was out of town, so another judge on the court conducted *voir dire*.) The defendants were generally pleased with the jury. Five of the eight jurors selected were college–educated; two had advanced degrees; and one (who, predictably, was later selected as foreperson) was a dentist.

The trial began on April 19, 2016. In its Final Pretrial Report, CTS listed 39 witnesses and 344 exhibits, most of which seemed irrelevant to the defamation claim against KOKH and were relevant only to prove that CTS had been wronged by the City of Choctaw. As the trial began, the court advised CTS's counsel that the trial of the defamation case against KOKH was not going to be a trial of the issues in CTS's suit against the City of Choctaw, which had settled in March.

Accordingly, the judge said, the plaintiff should cut down its witness and exhibit list because it had just four trial days to makes its case of defamation. Virtually all of the evidence came in during the plaintiff's case–in–chief. (The defendants called just one witness, the current

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Choctaw City Manager). The plaintiff called the State Auditor and one of his deputies to talk about the audit report and to confirm that that the State Auditor did not reach a conclusion that CTS engaged in fraud. The KOKH employees who had a hand in the broadcast were also put on the stand.

The thrust of CTS's case was that the "city defrauded" language was chosen as part of a conspiracy between the station and the Mayor of Choctaw—after all, a KOKH reporter was now married to his son—to make the Mayor look good and CTS look bad, and that everyone at the station knew the words were false. Much of the plaintiff's evidence developed through the testimony of KOKH employees was directed to this conspiracy theory. CTS's counsel tried to make something not only of the reporter's relationship with the Mayor's son, but tried to create suspicion about KOKH's institutional conduct.

Counsel suggest that the video of the State Auditor and City Manager interviews was not accidentally deleted but was destroyed to hide something (though the photographer explained how the deletion happened in the field and the video had nothing to do with the producer's selection of lead–in and graphics). He insinuated that the dayside reporter got a draft of the audit report from her future father–in–law rather than from the State Auditor's website. (The draft and final versions were identical except for an innocuous footnote added to the final version, a footnote not readily visible in the image displayed during the news story. The defendants were unable to address the mystery of the missing footnote until they called the City Manager as their witness.)

Counsel for CTS complained that the comment he gave to the reporter was improperly edited (though the State Auditor testified it was nonsense to think that his audit report was affected by the fact that both he and the Mayor were CPAs). The court seemed to think the conspiracy evidence was idiotic, and the judge kept telling CTS's counsel to move things along. The defendants argued that the CTS's theories were composed of a bunch of meaningless and unconnected dots that did not satisfy the plaintiff's evidentiary burden. Nevertheless, it is hard to know whether the conspiracy theory resonated with the jury because, incredibly, they sat stone–faced throughout the vast majority of trial.

As to damages, the only witness was Eldon Blackaby, CTS's principal owner. His sister was not called—and the jury never heard a word about All–Star Electric, the source of the one theory of damages by which CTS escaped summary judgment. The plaintiff's lawyer bumbled through the damages evidence, unable to construct a cogent presentation of CTS's financial documents, until an afternoon break on the fourth day of trial. Blackaby met with his counsel over the break, and when they returned, CTS presented a streamlined—if meritless—damages model.

Blackaby proposed that CTS's damages could be calculated this way: From CTS's profit and loss statements and tax returns, he calculated that from its inception in 2010 through 2014

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CTS made a profit (including the disputed $1.9 million fee from the Walmart sale) of $1,175,313.49. He claimed that during that time CTS incurred legal fees of $676,138.92 (from prosecuting and defending all the lawsuits in which CTS was involved, including the one against KOKH) that would normally not be incurred in the course of a commercial development. According to Blackaby, CTS's profits calculation should exclude those extraordinary legal fees, resulting in an actual net profit from 2010 through 2014 of $1,851,452.41.

Blackaby testified, however, that in calculating CTS's profitability, he would not only exclude legal fees as an expense, he would also toss out the net loss in 2013 (CTS's work on the Choctaw development ended early that year and most of its loss during 2013 was the result of legal fees). Then, he said, adding the profits in 2011 and 2012 (the latter being the year CTS received the Walmart fee), plus the three months of start–up operation in 2010, and dividing the total profits by 2.25, the average annual profit for CTS on the Choctaw development would be $843,396.65—what Blackaby described as a "conservative average." Blackaby testified that if one plugged that number in for the four years after KOKH's broadcast—2014, 2015, 2016, and 2017—CTS's projected profits during that time would total $3,373,586.61. That sum, Blackaby said, was the amount of damages CTS was seeking.

The defendants had a strong sense as the trial progressed that the court found little merit to the plaintiff's case and actually expected the jury to return a verdict for the defendants.

The defendants scoffed at the concept and the number, but the jury bought the concept, if not the number. After instructions and closing argument on April 25, 2016, the jury deliberated for about three hours and returned a verdict for the plaintiff for $705,837.99. (We weren't permitted to discuss the case with jurors after the trial, but we suspect the jury did its own calculation about how much profit CTS would have made *if* it could land another commercial development project.) The jury found that the news report had been broadcast with actual malice (it could find for the plaintiff only if it did so) and by separate interrogatory said the broadcast was made in reckless disregard of the rights of the plaintiff, opening the door under Oklahoma law to punitive damages. However, in a second–stage proceeding on punitive damages, the jury returned a zero verdict, tellingly indicating the punitive nature of its actual damages award. A judgment on the jury verdict was entered for the plaintiff on May 13, 2016.

During the trial, the court denied KOKH's motions for judgment as a matter of law (it did grant judgment as a matter of law to Licensee) but throughout the trial alluded to the likelihood of a renewed Rule 50 motion post–trial. The defendants had a strong sense as the trial progressed that the court found little merit to the plaintiff's case and actually expected the jury to return a verdict for the defendants. Remarkably, when the jury retired to consider punitive damages, the judge remained on the bench, commenting openly on the record that he didn't

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think the jury would be out long. He then volunteered that, while he wasn't deciding or indicating any decision on any issue he may address in the future, he had serious concerns about the jury verdict—particularly whether the evidence afforded the jury any guidance as to the substance and calculation of any damage award—and indicated he expected the defendants to file a renewed motion for judgment as a matter of law under Rule 50.

The defendants filed a Rule 50 motion for judgment as a matter of law on June 9, 2016, raising questions regarding the sufficiency of the evidence on actual malice and damages from which a reasonable jury could find for the plaintiff. The defendants asked, alternatively, that the court grant a new trial if it denied the motion for judgment. After briefing was complete, the court held a hearing on July 26, 2016.

Ruling from the bench, the court denied the Rule 50 motion on the actual malice ground, saying that the evidence was marginal but that the court was not going to reverse the jury on that issue. However, the court said the plaintiff's proof of damages was wholly insufficient to support the verdict; there was no proof, the judge said, that CTS had any prospect for another commercial development from which it might have profited; there was no proof that any profits would approximate what CTS had earned on the Choctaw project; and there was no proof that KOKH's broadcast had any impact whatsoever on CTS's ability to develop new business or generate a profit. Indeed, the judge said, CTS's decision to sue Choctaw and walk off the job was far more likely to have affected CTS's business than the news report. The court directed the entry of a superseding judgment in favor of the defendants. That judgment was entered on July 27, 2016.

The defendants sensed early on that CTS's greatest vulnerability was on the issue of damages. Its counsel never really understood the concept that damages could not be presumed.

In the normal course, KOKH filed its bill of costs and a supporting brief, asking for just under $12,000. As the time within which CTS could appeal approached, its counsel inquired whether KOKH would withdraw its request for costs if CTS did not appeal. In an exchange of emails, KOKH agreed. CTS let its appeal time lapse, and KOKH withdrew its bill of costs, leaving it with a judgment in its favor.

The lawsuit lasted 32 months. The defendants sensed early on that CTS's greatest vulnerability was on the issue of damages. Its counsel never really understood the concept that damages could not be presumed, and because CTS did not actually suffer any damages, the plaintiff's counsel had little to work with. Once the court excluded the plaintiff's expert witness under *Daubert* and ruled that "Guthrie damages were excluded as a matter of law," the plaintiff was left with only the sister's testimony (wisely abandoned at trial) and a hollow *post hoc* theory that because CTS didn't make any money after it walked off the Choctaw project, it must have been KOKH's fault.

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By conjuring up a sister act CTS was able to avoid summary judgment, get to a jury, and get the jury to buy into the *post hoc* damages theory. The court's hands were tied in dealing with damages under Rule 56, but Rule 50 (at least post–trial) and lack of damages were hurdles the plaintiff could ultimately not surmount.

The defendants were represented by Robert D. Nelon and Elisabeth E. Muckala of Hall, Estill, Hardwick, Gable, Golden & Nelson of Oklahoma City. The plaintiff was represented by Derrick Davidson of Bentonville, AR. Shortly before trial, Thomas G. Ferguson of Walker, Ferguson & Ferguson Law of Oklahoma City joined as local counsel for the plaintiff.

Rolling Stone to Face Defamation Trial Over "Rape on Campus" Article

UVA Dean Produced Sufficient Evidence of Actual Malice

A Virginia federal district court recently ruled that University of Virginia Dean Nicole Eramo is a limited public figure for purposes of her libel suit against Rolling Stone over its now discredited "Rape on Campus" article and that she submitted sufficient evidence of actual malice to send the case to trial. *Eramo v. Rolling Stone, LLC.*, No. 3:15-CV-00023 (W.D. Va. Sept. 22, 2016) (Conrad, J.)

Among other things, a jury could find actual malice based on following a preconceived story line, failing to investigate and fact check, and ill will toward plaintiff and UVA. The jury will also decide if Rolling Stone's subsequent editor's note apologizing to anyone affected by the article was published with actual malice by affirmatively reiterating the challenged statements.

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Background

At issue in the case is Rolling Stone's November 19, 2014 article by Sabrina Erderly entitled "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA." The article purported to tell the story of "Jackie" a UVA freshman brutally gang-raped at a Phi Kappa Psi fraternity party. The article gained enormous media attention, but quickly fell apart under independent media examination. Within a few weeks, Rolling Stone published an editor's note acknowledging discrepancies in Jackie's account and "apologiz[ing] to anyone who was affected by the story."

Rolling Stone commissioned an independent investigation which concluded that publication was an avoidable "journalistic failure." And local police later concluded that no rape as described in the article occurred.

At the time of publication, Eramo was in charge of handling student sexual assault complaints and providing support to victims. She sued Rolling Stone and Erderly for statements in the article and in subsequent media interviews. Her complaint alleged that the article and related media appearances destroyed her reputation as an advocate and supporter of sexual assault victims.

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Public Figure Status

Ruling on plaintiff's status, the court found that the University of Virginia's response to student sex assault allegations was a pre-existing controversy. Dean Eramo, through her work and media appearances, had voluntarily assumed a position of special prominence on this issue. Among other things, she discussed the issue in national and local television news broadcasts, in the school's newspaper, and in op-ed articles.

Plaintiff had argued that the Family Educational Rights and Privacy Act (FERPA) had prevented her from speaking to the media about the controversy. But while FERPA prevented her from speaking about individual student cases, it did not prevent her from speaking generally about UVA's handling of sex assault allegations.

Evidence of Actual Malice

As to fault, the court acknowledged that failure to investigate alone cannot support actual malice, but plaintiff produced evidence of a combination of factors that could support a finding of actual malice:1) Erdely had a preconceived story line and may have consciously disregarded contradictory evidence. 2) Erdely failed to contact the person who allegedly found Jackie after the rape and did not contact the alleged wrongdoers. 3) Ederly's notes could support the finding that she found some of Jackie's claims suspicious. 4) Rolling Stone did not fact check the

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article. 5) At least three people told Erdely that her portrayal of Eramo was inaccurate. 6) Eramo submitted evidence that Erdely harbored ill will toward Eramo and intended to injure the UVA administration. Moreover, post-publication discussions at Rolling Stone about the article could also support a finding of actual malice as those internal discussions could relate back and provide inferential evidence of defendant's knowing or reckless disregard of falsity at the time of publication.

Opinion Defense

The court rejected Rolling Stone's argument that all the statements at issue about Eramo were protected opinion. Looking to context, the article was presented as a "special report" and investigation. And Erdely had written at least five other "solemn" articles about rape on campus. Thus the article was "largely a report of a factual occurrence." Only one of the statements at issue, the phrase "a whole new kind of abuse," was too subjective to be proved false.

The remaining statements at issue could all be proven true or false. "For example, a jury could find that the 'trusted UVA dean' either did or did not discourage Jackie from sharing her story, that Eramo did or did not tell Jackie that 'nobody wants to send their daughter to the rape school,' and that Eramo did or did not have a nonreaction to Jackie's assertion that two other individuals were raped at the same fraternity."

Liability for Editor's Note ?

Finally the court held that the jury should decide whether Rolling Stone's editor's note, added to the original article, was an actionable republication of the statements about Eramo.

> [A] reasonable jury could find that the defendants did not act with intent to recruit a new audience. Likewise, there is a genuine dispute regarding whether defendants 'affirmatively reiterated' the challenged statements. From deposition testimony, the court believes a reasonable jury could determine that the December 5th Editor's Note 'effectively retracted' only the statements regarding the alleged rape, not the statements about Jackie's interactions with Eramo.

Rolling Stone is represented by Elizabeth McNamara, Alison B. Schary, and Sam Bayard of Davis Wright Tremaine, LLP. Plaintiff is represented by Tom Clare and Elizabeth Locke, Clare Locke, LLP, Alexandria, VA.

Misappropriation Claims Over Grand Theft Auto Dismissed on Appeal

New York Misappropriation Law Does Not Extend to Videogames

In a combined opinion, a New York appellate court dismissed misappropriation lawsuits brought by actress Lindsey Lohan and reality TV star Karen Gravano against Take-Two Interactive Software, maker of the popular Grand Theft Auto videogame series. *Gravano v. Take-Two Interactive Software, Inc., et al.; Lohan v. Take-Two Interactive Software, Inc., et al.*, (N.Y. App. Sept. 1, 2016) (Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.)

Lohan and Gravano had separately sued under New York Civil Rights Law § 51, the state's statutory misappropriation law, claiming that characters in Grand Theft Auto V were based on their persona and image.

Lohan claimed that a red bikini wearing character in the game misappropriated her voice, look and "signature peace sign pose." Gravano, the daughter of infamous mafia hitman Salvador Gravano and star of the "Mob Wives" reality TV series claimed a videogame character used her unique phrases and paralleled her life as the daughter of a mafia member turned state's witness. Their complaints withstood motions to dismiss at the trial court stage.

The appellate court reversed and dismissed. First, the court found that as a matter of law the videogame was not based on and did not use their names or likenesses. More importantly, the court held that even if the videogame characters were representations of Lohan and Gravano, such use is simply not "advertising or trade" within the meaning of the New York statute.

The court cited to *Brown v Entertainment Merchants Assn.*, 564 US 786, 790 (2011), where the Supreme Court held that videogames are fully protected by the First Amendment. The New York appellate court added: "This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire."

As Professor Eugene Volokh noted this was "Quite a different result — and a better one, from a First Amendment perspective — than the video game decisions handed down recently by the Ninth Circuit."

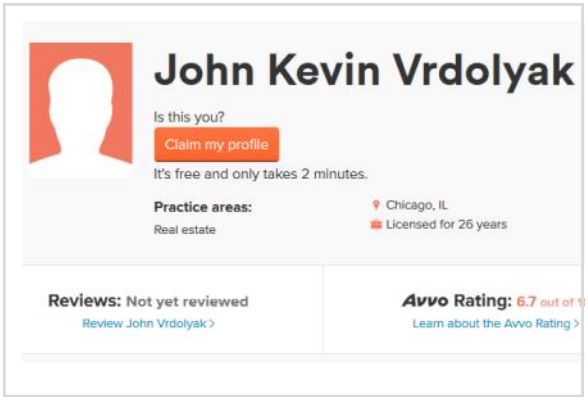
Jeremy Feigelson, Debevoise & Plimpton LLP, New York, represented Take-Two Interactive Software. Gravano was represented by Law Office of Thomas A. Farinella, P.C., New York. as represented by The Pritchard Law Firm, New York.

Class Action Right of Publicity Suit Against AAVO Dismissed

Online Attorney Profiles Not Commercial Use

An Illinois federal district court dismissed for failure to state a claim a putative right of publicity class action suit against online attorney directory Avvo. *Vrdolyak v. Avvo*, (N.D. Ill. Sept. 12, 2016) (Gettleman, J.). The court held that Avvo's attorney profile pages are akin to newspaper or phone book listings of professionals and thus fully protected by the First Amendment.

The plaintiff, a Chicago lawyer, sued Avvo alleging its lawyer profile pages violate the Illinois Right of Publicity Act ("IRPA"), by using lawyers' identities for commercial purposes without consent. The Avvo profile pages list without charge an attorney's name, education, address, phone number, and practice area, as well as a rating on a scale of 1 to 10. Lawyers can claim their pages and add additional information. Lawyers can pay Avvo to have their profiles appear as sponsored links on the listings of other lawyers; and also pay Avvo so that no sponsored links appear on their pages.



Plaintiff IRPA theory relied primarily on the Seventh Circuit's decision in *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515 (7th Cir. 2014). That case involved a special commemorative edition of *Sports Illustrated* magazine marking Michael Jordan's induction into the Basketball Hall of Fame. The Seventh Circuit held that the supermarket engaged in a form of brand advertising by paying for a page in the issue that congratulated Jordan.

Plaintiff's theory, however, failed in the instant case because Avvo's actions were akin to the First Amendment protected action of *Sports Illustrated* and not the supermarket-defendant.

> Defendant publishes non-commercial information and sells and places advertisements within that information. *Sports Illustrated* publishes a magazine that contains fully protected non-commercial speech. Within the magazine it sold and published advertisements, including Jewel's. Jewel's advertisement was commercial speech. The "Sponsored Listings" are commercial speech. Jewel's ad did not convert the entire commemorative issue into commercial speech. Nor do the Sponsored Listings turn the entire attorney directory into commercial speech. Consequently, the court concludes that defendant's publications are fully protected by the First Amendment, and as plaintiff apparently concedes, the application of IRPA to them do not survive a strict scrutiny analysis.

FAA Waivers Allow for Greater Newsgathering Opportunities with Drones

By Jennifer M. Nowak and Christine N. Walz

On August 29, 2016, the new Federal Aviation Administration ("FAA") regulations allowing for greater commercial use of drones weighing less than 55 lbs. became effective. These regulations open up significant opportunities for newsgathering. Under the regulations, operators may also request waivers for operations outside the parameters of some of the rule's provisions.

Since the final drone regulations became effective, the FAA has issued 79 waivers that allow for operations outside the parameters of the rule. The majority of the waivers allow for UAS operations outside of daylight hours, with specific mitigating factors that are listed in the waivers. Other waivers allow for operation out of the pilot's visual line of sight with mitigation, and allow for flights of multiple UAS with mitigation.

News organization CNN recently received a waiver to permit flights over people. Its waiver allows operations over people in a "closed-set" type of setting, with a tethered UAS weighing 1.37 pounds or less, and only over people who have agreed to be involved in the operation.

For news organizations contemplating waivers, the FAA has released two helpful documents:

First, it is has released specific instructions on how to apply for a waiver, including instructions for seeking a blanket waiver to allow for operations outside of Class G Airspace.

Second, it has provided guidance that outlines the performance-based standards that an applicant must satisfy in order to obtain a waiver. For example, an application requesting deviation from the prohibition of flights over people must provide "a method such that any malfunction of the sUAS will not cause injuries to non-participating persons on the ground" and "mitigate risk to non-participants through an operational risk assessment, testing, and data, addressing design features, operational limitations, or a combination thereof specific to the operation".

Taken together, these documents provide a helpful framework for news organizations as they seek to expand the circumstances under which they can operate drones for newsgathering.

Jennifer M. Nowak and Christine N. Walz are with Holland & Knight, LLP. Jennifer is in the firm's Washington, D.C. office and Christine is in the firm's New York office.

Ninth Circuit Court Affirms Yelp's CDA Immunity for a User's Negative Review

By Robert L. Rogers, III

Earlier this year the Ninth Circuit Court of Appeals chipped away at the immunity afforded to websites under the Communications Decency Act (the "CDA") in *Jane Doe v. Internet Brands*. But in September, the Ninth Circuit issued a strongly worded defense of CDA immunity when affirming the dismissal of an action against Yelp in *Kimzey v. Yelp! Inc*. Rebuking the lawsuit as "push[ing] the envelope of creative pleadings in an effort to work around § 230," the Ninth Circuit rejected "creation by transformation" allegations that not long ago had been embraced by some courts as a means of avoiding Section 230, and also confirmed that websites do not lose Section 230 immunity by re-posting content created by others.

Background

In *Kinzey*, the owner of a locksmith business sued Yelp, a website that invites users to review and rate businesses, for a negative review initially posted in 2011 on yelp.com by "Sarah K," an anonymous poster who was never employed by Yelp. Approximately one year later, another user posted a comment to Sarah K.'s review claiming that it was fraudulent, had named the wrong business, and had been posted by Yelp *itself* and not Sarah K. In response, Sarah K updated her review to dispute the commenter's claims and re-affirm the statements she initially posted. Her review subsequently appeared in Google searches for Kinzey's business.

The Ninth Circuit rejected "creation by transformation" allegations that not long ago had been embraced by some courts as a means of avoiding Section 230.

Kimzey then filed suit against Yelp, alleging that Yelp had falsely defamed his business by posting Sarah K.'s review, both on its own website and as an "advertisement" on Google as part of a "traffic acquisition" program. He also asserted counts for racketeering and violation of Washington's Consumer Protection Act, based in part on allegations that Yelp participated in an "illegal scheme" that used fictitious locksmith businesses to promote itself.

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." To attempt to avoid the CDA, Kinzey alleged that Yelp "developed or created" Sarah K.'s review in two ways: First, by finding it on another website and re-posting it on its own website, and second, by developing the star system used to rate Kinzey's business based on the reviews of users like Sarah K. The U.S. District Court for the Western District of

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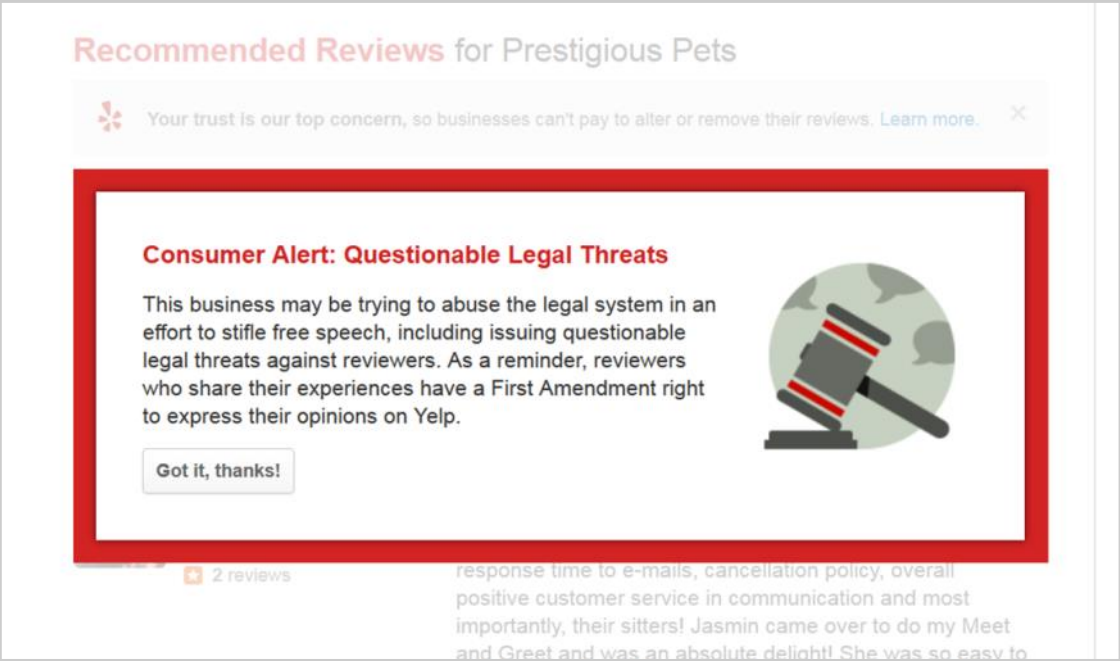

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Washington rejected these arguments and dismissed Kinzey's complaint on grounds that Yelp was immune from all of Kinzey's claims under the CDA.

Ninth Circuit Decision

In affirming the dismissal of Kinzey's lawsuit, the Ninth Circuit Court began by summarily rejecting the RICO and Washington Consumer Protection Act claims on grounds that Kinzey failed to allege key elements, including any racketeering activity. The Court then dissected Kinzey's two theories for avoiding CDA immunity.

The Court focused first on Kinzey's claim that Yelp actually created the review by re-posting it on its website. The Court rejected this theory because "to make a plausible claim that Yelp authored a review, a plaintiff must plead facts tending to demonstrate that the review was not, as is usual, authored by a user." Mere "threadbare allegations of fabrication of statements" or that Yelp "adopted [Sarah K.'s statements] from another website and transformed them into its own stylized promotions on Yelp and Google" is not sufficient. "It cannot be the case that the CDA and its purpose of promoting the free exchange of information and ideas over the internet could be so easily eviscerated."

The Court then examined Kinzey's "creation by transformation" theory—that Yelp transformed the review into its own content by using it as an advertisement or by designing its star-rating system, which in essence rendered Yelp the "author" of the one-star rating given by Sarah K. "These characterizations have superficial appeal, but they extend the concept of information content provider too far and would render the CDA's immunity provisions

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meaningless." Republishing another user's post on another website without materially changing its content does not transform a website into the creator of the user's post, the Court held, regardless of how many times the post appears in searches on other websites. "Nothing in the text of the CDA indicates that immunity turns on how many times" a website publishes content provided by its users.

Regarding Yelp's rating system, the Circuit Court referred to its "material contribution" test in *Roommates.com*, under which a website might be treated as the creator of its user's statement under CDA analysis if it makes a "material contribution" to the defamatory statement. Here, Yelp's rating system "does absolutely nothing to enhance the defamatory sting of the message beyond the words offered by the user," since it is based on rating inputs from third parties and merely reduces this information into a single, aggregate metric. "The star-rating system is best characterized as the kind of neutral tool operating on voluntary inputs that we determined did not amount to content development or creation in *Roommates.com*."

Kinzey v. Yelp is a victory for website operators, particularly in the Ninth Circuit Court, which earlier this year in *Jane Doe No. 14 v. Internet Brands, Inc*. re-adopted the exception it had carved out of CDA immunity for negligent failure to warn claims websites, even after it reconsidered the virtually identical opinion it had issued in the same case two years earlier. *Internet Brands* involved unusual facts in which the plaintiff sought relief for injuries caused by persons who had never posted content on the defendant's websites. *Kinzey* confirms that—at least for claims seeking relief for statements posted on their websites by other users—the Ninth Circuit will continue to uphold the robust immunity afforded under the CDA.

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In so doing, the Ninth Circuit conformed with the Sixth Circuit's key 2014 decision in *Jones v. Dirty World Entertainment Recordings, LLC*, in which the Sixth Circuit rejected similarly far-fetched "creation by transformation" allegations as a basis for treating a website as the creator of a user's defamatory statements—but allegations that had previously been embraced by at least two District Courts. *Kinzey* diminishes the odds that a split may develop among the Circuit Courts of Appeal concerning such "creation by transformation" allegations. *Kinzey* also provides clarity for websites that re-post content of other users by confirming that such conduct does not waive CDA immunity.

Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP and works in the firm's Orlando office. The Plaintiff/Appellant was not represented by counsel. The Defendant/Appellee was represented by Venkat Balasubramani of Focal PLLC and Aaron Schur of Yelp! Inc..

Florida Judge Erred In Sequestering Reporter Without Prior Notice And Showing Of Relevancy

By Cindy Gierhart

A Florida appellate court recently held that a trial judge improperly sequestered a reporter who was called as a surprise witness the morning of trial, without prior notice and without a showing that his testimony was relevant to the proceedings. *Palm Beach Newspapers, LLC v. Colin*, No. 4D16-2165 (Fla. Dist. Ct. App. Sept. 14, 2016).

Palm Beach Post reporter John Pacenti had written a blog about a paternity case that appeared on the newspaper's website the morning of the trial. When he appeared in the courtroom to cover the trial for the newspaper, the attorney for the father in the case announced that he intended to call Pacenti as a witness regarding a statement he published that morning. The judge ordered Pacenti to leave the courtroom, per the sequestration rule. Pacenti objected. The judge replied, "you're subject to the rules of sequestration as any other witness."

But as the Florida 4th District Court of Appeal wrote in this case, "the rule of sequestration cannot be indiscriminately invoked to exclude reporters from the courtroom." This rule was initially articulated in a 1978 Florida case, *Gore Newspapers Co. v. Reasbeck*, 363 So. 2d 609 (Fla. Dist. Ct. App. 1978). In *Gore*, the defense attorney in a criminal motion hearing asked each person who walked into the courtroom to identify himself and then stated that each was a potential witness. The judge in *Gore* unquestioningly ordered each person (including three reporters) to leave the courtroom. The appellate court recognized this as a "charade . . . to exclude the press from that proceeding."

The court's opinion is significant because it appears to be the first Florida case since *Gore*, decided nearly 40 years ago, to squarely address sequestration of reporters and the interplay with the Florida journalist's privilege .

The court's recent opinion in *Palm Beach Newspapers* is significant because it appears to be the first Florida case since *Gore*, decided nearly 40 years ago, to squarely address sequestration of reporters and the interplay with the Florida journalist's privilege under Section 90.5015, Florida Statutes. The case establishes for the first time criteria that a judge must consider before sequestering a journalist, including prior notice and a showing of relevancy.

The appellate court in this case found that the trial judge erred in allowing Pacenti to be called as a witness without any prior notice or showing that his testimony was relevant, even though Pacenti's sequestration was brief. Reporters especially must be given prior notice, the

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court held, because they enjoy a qualified reporter's privilege, and they do not "have a meaningful opportunity to assert the privilege" if called without notice.

The court also found that the trial judge erred in not considering the relevancy of the testimony before sequestering the reporter. When opposing counsel objected that she didn't know what the attorney intended to question Pacenti about, the judge replied, "I don't know either obviously." Yet the judge sequestered Pacenti anyway, without any consideration of the relevancy of his testimony.

Once Pacenti left the courtroom, the attorney questioned counsel about whether they told Pacenti that their client, the mother, wanted to move the baby to Maine, "where her parents lived and away from Judge Colin's family." (Judge Martin Colin is the father of the man in the paternity suit. He was also the subject of a series of articles Pacenti had published that alleged conflicts of interest between the family law judge and his wife, a guardian.) The fact that the mother wanted to move the baby to Maine was articulated in her petition and well known to the court. The attorney seemed to focus on the fact that she may want to move "away from Judge Colin's family."

Both attorneys for the mother denied making the statement to Pacenti. Pacenti was then called as an impeachment witness and again objected. The judge said he could wait outside the courtroom until his attorney arrived (meanwhile missing the trial), so he agreed to testify after learning from the attorneys what the questioning entailed. He confirmed that the attorneys did not make the statement and that he was merely reporting facts stated in the court filings.

Pacenti and Palm Beach Newspapers argued in the petition to the court that a decision "would come too late to help reporter Pacenti" but was essential to provide guidance to trial judges across the state about reporters' due process rights. The petition argued that it was not moot because "the issues are capable of repetition, yet evading review."

The petition also argued that the trial court violated Florida's reporter's privilege, but the appellate court found that Pacenti waived the privilege when he agreed to testify for the limited purpose of confirming his information came from the court pleadings.

Cindy Gierhart is an associate with the Washington, D.C., office of Holland & Knight LLP. Palm Beach Newspapers and the reporter were represented by L. Martin Reeder Jr. and C. Bryce Albu of Reeder & Reeder P.A., Jupiter, FL.

Nexstar-Media General Merger May Signal New DOJ Approach to Broadcast Television Mergers

Retransmission Fees, in Addition to Advertising, Examined

By David C. Kully

In the past three years, the Antitrust Division of the United States Department of Justice (DOJ) has filed six antitrust lawsuits seeking to block the merger of broadcast television station groups. Each case was settled with a consent decree, filed simultaneously with the complaint, requiring the divestiture of stations in local markets in which both companies operated stations.

In five of the six cases, the DOJ's theory of how the mergers would harm competition was the same. In its complaint in each of those five cases, DOJ alleged that, in local markets in which both station owners operated stations, the merger would eliminate competition between the merging companies in the sale of spot advertising and result in an increase in the prices that advertisers would have to pay to advertise on their local television stations.

In the sixth case, however, a September 2, 2016 challenge to the acquisition by Nexstar Broadcasting Group of Media General, DOJ alleged for the first time new grounds for concern about the merger's likely anticompetitive effects: that Nexstar, through its acquisition, would acquire greater bargaining leverage in retransmission consent negotiations with multichannel video programming distributors (MVPDs). That, under the government's theory, would force those providers to pay higher retransmission fees.

Retransmission consent refers to the process of MVPDs – cable or satellite television providers – obtaining permission from local broadcast television stations to include the local stations in the packages of channels they offer to subscribers. MVPDs typically agree to pay fees to local stations – particularly stations affiliated with the ABC, CBS, NBC, or FOX networks – for rights to "retransmit" their broadcast signals. In the relatively rare instances in which MVPDs and local broadcast stations have been unable to agree on retransmission fees, the MVPDs have lost rights to carry the local stations, resulting in "blackouts" of the stations for the MVPDs' subscribers.

The DOJ's new retransmission consent concerns will have no immediate practical impact on the ability of a broadcast television station to acquire local rival stations, because the FCC's

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Local Ownership Rules continue to prohibit the ownership of two top-four stations in any market, and the government will also likely continue to challenge these mergers as harmful to advertisers. But this new approach – no longer looking exclusively at advertising as the competitive market, but now adding retransmission consent to the mix – may reflect a permanent shift in how DOJ views these mergers. If advertisers increasingly turn to cable and satellite networks or other outlets as alternatives to spot advertising on broadcast television stations, and if the FCC relaxes or, in particular instances, waives its Local Ownership Rules, DOJ's new concern about the effect of a merger on retransmission consent negotiation would still remain as a potential impediment to the completion of a transaction.

More significantly, the absence of any immediate practical impact in the merger context might reflect the DOJ's desire to send a broader message to broadcasters. The concerns about the heightened retransmission consent bargaining leverage that Nexstar would obtain through its acquisition of Media General would apply equally to joint negotiations by rival stations unrelated to any merger. Broadcasters coordinating retransmission consent negotiations with competitors might in the future find themselves facing an investigation into a potential violation of Section 1 of the Sherman Act.

The DOJ's Traditional, Advertiser-Focused Analysis

The DOJ brought five cases between 2013 and 2015 challenging the merger of owners of broadcast television stations.

- *United States v. Gray Television, Inc., et al.*, No. 15-cv-2232 (D.D.C.) (complaint filed Dec. 22, 2015; consent decree entered March 3, 2016).

- *United States v. Media General, Inc., et al.*, No. 14-cv-1823 (D.D.C.) (complaint filed Oct. 30, 2014; consent decree entered Jan. 13, 2015).

- *United States v. Nexstar Broadcasting Group, Inc., et al.*, No. 14-cv-2007 (D.D.C.) (complaint filed Nov. 26, 2014; consent decree entered Feb. 27, 2015).

- *United States, et al., v. Sinclair Broadcast Group, Inc., et al.*, No. 14-cv-1186 (D.D.C.) (complaint filed July 15, 2014; consent decree entered Nov. 25, 2014).

- *United States v. Gannett Co., Inc., et al.*, No. 13-cv-1984 (D.D.C.) (complaint filed Dec. 16, 2013; consent decree entered Nov. 18, 2014).

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Each complaint alleged that the merger would harm competition in the sale of broadcast television spot advertising in the local markets in which both of the merging parties operated stations. The complaints laid out the many ways in which, in the view of the DOJ, broadcast television spot advertising is materially different from other television advertising and from advertising in other media. According to the DOJ, broadcast television spot advertising provides a unique vehicle for efficiently reaching a large number of viewers in a particular local area with a memorable message. Network television advertising lacks the local focus of spot advertising offered by local stations. Advertising on cable and satellite networks reaches fewer viewers. And advertising on radio, in newspapers, or through billboards cannot provide the combination of sight, sound, and motion that makes television advertising particularly memorable and effective. Because advertisers have no good substitutes for broadcast television spot advertising in the event of a price increase, and because it would be difficult for advertisers to "buy around" the popular, network-affiliated stations operated by the merging parties, the government concluded in each case that the merger, if left unchallenged, would result in higher prices to advertisers.

As the viewing habits of consumers continue to evolve, the DOJ might at some point conclude (or a court might be persuaded) that advertising on local cable or satellite networks or on online video sources are reasonable substitutes for broadcast television spot advertising to which advertisers could turn to avoid merger-related price increases. For now, however, DOJ continues to act to protect competition between broadcast television stations in the sale of spot advertising.

The DOJ's New Interest in Retransmission Consent Negotiations

On September 2, 2016, the DOJ announced its challenge to the acquisition by Nexstar Broadcasting Group of Media General Corporation, as well as the settlement of its claims based on Nexstar's agreement to divest television stations in six local markets. *See United States v. Nexstar Broadcasting Group, Inc.*, No. 16-cv-1772 (D.D.C.). As in each of its five previous challenges to broadcast television mergers in the past three years, the complaint alleged that the merger would harm competition in those six markets in the sale of broadcast television spot advertising and result in higher prices for advertisers.

But the complaint also alleged that, after the merger, MVPDs would have to pay higher retransmission fees to Nexstar to carry its stations in the six markets. The government's lawyers observed that, before the merger, Nexstar and Media General could threaten during retransmission consent negotiations to withhold only its own local station in each market. An MVPD facing that threat would assume that many of its subscribers would turn during a blackout to other stations – including from Nexstar's station to Media General's, or vice versa –

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and the threat to the MVPD of losing a significant number of subscribers during the blackout would be relatively low. After its acquisition of Media General, Nexstar's leverage in retransmission consent negotiations with MVPDs would increase substantially, as MVPDs would fear that the loss of two stations would produce an intolerable level of subscriber attrition. Nexstar's increased bargaining leverage, the DOJ alleged, would allow it to obtain higher retransmission consent fees from MVPDs, which MVPDs would pass through to consumers in the form of higher subscription fees.

Implications of DOJ's New Theory of Harm

As reflected in its approach in the five recent broadcast television merger cases that preceded its challenge to Nexstar's acquisition of Media General, the government believed its allegations of harm to competition in the sale of spot advertising provided adequate grounds on which to base its broadcast television merger challenges. The FCC's Local Ownership Rules also continue to block a broadcast television station from acquiring its local rivals. The new retransmission consent allegations would not at this point appear to materially strengthen the government's hand in these cases.

Why then did DOJ depart in the Nexstar/Media General complaint from its usual approach?

In 1996, DOJ challenged under Section 1 of the Sherman Act an agreement among the three network-affiliated broadcast television stations in Corpus Christi, Texas, to coordinate in the licensing of their retransmission rights. *See* *United States v. Texas Television, Inc., et al.* (S.D. Tex.) (complaint filed Feb. 2, 1996; consent decree entered January 10, 1997). In the 20 intervening years, the DOJ did not again assert, in either the merger context or outside of the merger context, that the coordination among local broadcasters in retransmission consent negotiations with MVPDs would be likely to harm competition.

By adding allegations concerning the effect of the merger of Nexstar and Media General on bargaining leverage in retransmission consent negotiations, DOJ appears to be sending a signal concerning its current views on joint negotiations of retransmission rights by competing broadcasters. Even under circumstances in which FCC rules permit such joint negotiations, broadcasters should be aware of the government's likely interest and understand that coordinating retransmission consent negotiations might carry consequences under Section 1 of the Sherman Act.

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