LEGAL AFFAIRS

Basinger in a Box: Verbal Contracts In The Film Industry

By Douglas Kari

When the jury weighed in against actress Kim Basinger, Hollywood dealmakers proclaimed that the verdict vindicated their practice of doing business on a handshake.

Main Line Pictures, a small production company, accused Basinger of breaching a verbal agreement to appear in the film Boxing Helena. n1 In defending the suit, Basinger emphasized that she never inked a written contract. n2

Hollywood pundits pronounced that the film industry's practice of reliance on oral contracts was at issue in the high-profile trial. n3 When the jury found an enforceable oral contract and held Basinger liable, many dealmakers breathed a collective sigh of relief. n4

What they should have done was dusted off their type-writers. The Boxing Helena case illustrates the difficulties in enforcing oral contracts, and provides a stark contrast to the favoritism afforded written contracts under California law. Although Main Line won the battle, victory came only after arduous discovery and a monthlong trial, and an appeal looms on the horizon. n5 The true message of the case is that in Hollywood, business as usual should give way to business in writing.

Helena On A Handshake

The case began with a twisted concept for a movie. The Boxing Helena story concerns a fictional woman whose legs are mangled in a car accident. A surgeon rescues Helena and amputates her legs. He becomes so obsessed with Helena that to keep control over her he also amputates her arms. Afterwards he holds her captive in a box. n6

Despite the bizarre script, Basinger took interest in the project. n7 She entered into negotiations with Main Line, and on the strength of her interest the company arranged financing to meet a proposed budget of \$7.2 million. n8 Four weeks before filming was to begin, however, Basinger walked away. n9

The effect on the project was devastating. With Basinger in the title role, the film had commitments for \$7.6 million in foreign presales and was expected to generate revenues of \$3 million for domestic distribution. n10 After she dropped out, the film was only able to generate

\$2.7 million in foreign presales and was unable to secure a domestic distributor. n11 The budget for the film had to be slashed by one-third. n12

Main Line, outraged by Basinger's change of heart, contended that she made a verbal commitment to appear in the film and was responsible for the monetary damage precipitated by her departure. n13 Basinger countered that she made no binding deal because she never agreed to the final script and disapproved scenes that she said called for "gratuitous nudity." n14 Her lawyer pointed to the lack of a signed written contract as evidence that she was free to leave. n15

The Oral History Of Hollywood

The film industry has a long history of doing business on a handshake. n16 This practice appears to have developed because filmmaking is a unique creative venture that requires participation from disparate players: producers, directors, actors and actresses, writers and financiers. n17 A project gains momentum as the necessary players add their blessings. Often the project finds itself under a tight deadline, such as the need to accommodate the schedule of a sought-after director, or the studio's insistence on a Christmas release date. n18

The widespread perception is that stopping to haggle the details of every relationship can cause a project to lose steam. n19 As stated by producer and manager Larry Brezner, who represents talent such as Robin Williams and Billy Crystal, "If everything had to be done purely on written contracts, nothing would get done in this town. If we depended strictly on business affairs and lawyers, we'd all be staring at blank movie screens." n20

Accordingly, it is common practice to start filming as soon as called for in the creative process, regardless of whether all the deals have been documented. n21 The tendency is to view written contracts as details for the lawyers and business people to hammer out later. Charlton Heston, in a comment printed in the Los Angeles Times, wrote that in more than 60 films he had never signed a complete contract prior to filming. n22

In the case of Main Line v. Basinger, many Hollywood dealmakers felt that this traditional way of doing business was itself on trial.

Main Line Bites Back

Main Line filed suit against Basinger in the Los Angeles County Superior Court in June of 1991. n23 The complaint accused her of breaching an oral agreement finalized on February 28, 1991 to star in Boxing Helena. n24

As would be expected in a case of this nature, months of hard-fought and costly litigation followed. Main Line had to get past a demurrer and motion for judgment on the pleadings. n25 Numerous disputes arose about document production and responses to interrogatories. n26 A dozen depositions, often multi-day, were taken. n27

Main Line also had to overcome a motion for summary judgment. n28 Then there were the usual pretrial skirmishes involving motions in limine and jury instructions. n29 In the end, each side had invested approximately \$750,000 in legal fees and expenses. n30

Jury selection finally began on February 22, 1993. n31 A month of trial followed, with the eight woman, four man jury viewing the film at the Writer's Guild Theater n32, hearing from numerous witnesses n33 and perusing more than 70 exhibits. n34 On March 24, 1993, after one-and-a-half days of deliberation, the jury reached a unanimous verdict on the oral contract claim. n35

In a courtroom packed with reporters and spectators, Basinger, flanked by beau Alec Baldwin n36, sat in stunned silence as she heard the verdict against her: \$7,421,694 for breach of oral contract, and an additional \$1.5 million for bad faith denial of contract n37 under Seaman's Direct Buying Service v. Standard Oil Co. n38 The next morning, a banner headline in the Daily Variety announced that "`Helena' Costs Kim Arm And Leg." n39

Hollywood Heralds The News

Many Hollywood dealmakers proclaimed that the verdict upheld their practice of conducting business by word of mouth. n40

"It's a good thing that the jury understood that Hollywood lives by the oral agreement when it comes to talent deals," said one senior business affairs executive. n41 California Lawyer pronounced that "the handshake is still the deal in Hollywood." n42 David Gersh of the Gersh Agency thought that the outcome sent a critical message. In his view, a verdict in favor of Basinger "would have opened the door for every actor to walk out of every picture prior to signing a contract." n43

However, a contrary view of the verdict also emerged. In a spirited defense of his companion, Alec Baldwin wrote that "no one wants to walk into a meeting watching every word they say . . . Creative endeavors are like children. You don't walk into a meeting and tell any bigtime director they have ugly children." n44

Other industry insiders agree with Baldwin. Rick Nicita, an agent with Creative Artists Agency, expresses concern that the verdict will "inject more fear in an already cautious business." n45 Indeed, even from the perspective of Main Line, the big winner in the Boxing Helena trial, the silver lining has a very dark cloud.

A Dubious Victory

One problem for Main Line - and other independent producers - is that they may find it increasingly difficult to make contact with key players. "It's going to be only producers with big-time credibility who will be able to submit stuff and get meetings with actors and actresses," says producer Howard Rosenman. "It'll be harder for little producers to get to bigger actors." n46

Another downside for Main Line is the time and money it invested to enforce the oral contract. From a business perspective, spending nearly two years and \$750,000 on intensive litigation simply to uphold one deal is a dubious victory. There is more delay and expense - and risk - yet to come. After the verdict, Basinger filed for bankruptcy and also vowed to appeal. n47

Also, Main Line is in business to make movies, not win lawsuits. Even with the notoriety generated by the trial, Boxing Helena has failed to garner much recognition as a film. n48 With Basinger in the title role the film would have been picked up by a domestic distributor long before now. n49

Basinger probably would have stayed on had she been faced with a signed contract; if she breached, there likely would have been a speedier resolution. In a number of important ways, the law shows marked favoritism towards enforcement of the written as opposed to the handshake agreement.

Favoritism For The Written Deal

It was movie mogul Samuel Goldwyn who coined the famous malapropism, "An oral agreement isn't worth the paper it's written on." n50 Despite the result in the Boxing Helena trial, the law supports that view.

A comment to the Restatement (Second) of Contracts describes four functions served by a contract being in writing. n51 First is the evidentiary function, to provide evidence of the existence and terms of the contract. Second is the cautionary function, to guard the would-be signators against hasty agreement. Third is the deterrent function, to discourage transactions of dubious value. Fourth is the signaling function, to distinguish a final agreement from tentative expressions of intent. n52

Because a written contract serves such important functions, the law is slanted in its favor. Under the Statute of Frauds certain contracts must be expressed in writing to be enforceable. n53 In other words, the law views some agreements as too weighty for a mere handshake deal. n54 Although movie contracts generally fall outside the Statute of Frauds, if a contract by its terms could not be performed within one year it would be unenforceable. n55

More often, copyright law comes into play in movie contracts. Under the federal copyright statutes, an agreement transferring a copyright, or transferring an exclusive license in a copyright - such as a grant of exclusive video rights - must be in writing. n56

Another feature that favors written agreements is the parol evidence rule. n57 Under the parol evidence rule, an integrated written agreement will take precedence over any prior or contemporaneous oral agreement. n58 Again, the law views the written agreement as something of a higher caliber.

Finally, the statute of limitations favors writings. In California a party has four years in which to file suit on breach of a written contract, n59 as opposed to two years if the contract is verbal. n60

The result in the Boxing Helena trial shows that oral contracts - even significant ones - can be enforced. But in the final analysis the case illustrates why the better practice, in Hollywood and elsewhere, is to insist on written agreements.

The Message Is Written

Some Hollywood dealmakers have already gotten the message. Shortly after the verdict, producer Sean Daniel declared that "the line `Hollywood is a town that's based on the handshake' is a sweet phrase that no longer applies." n61 Indeed, Disney has for some time insisted that deals be documented before shooting begins, and other studios may follow suit. n62

Ironically, in the Boxing Helena case, Main Line may owe its victory more to an extensive trail of paper than to any word of mouth. One of the key exhibits was a deal memo that had been hammered out by representatives of Main Line and Basinger. n63 Other exhibits included five drafts of a full written contract. n64 Eric

Landau, one of Main Line's attorneys, commented that Main Line had a "perfect written contract case except for the signature." n65

Howard Weitzman, Basinger's attorney, argued that the absence of a signature meant no final deal ever occurred. n66 Main Line countered by proving that in six of her last nine pictures, Basinger worked without a contract actually being signed. n67

In the end, the fact that so many terms had been reduced to writing - from the initial payment to the treadmill in Basinger's trailer - probably carried the day for Main Line. n68 One would bet that in the future Main Line will obtain signed agreements before the company president again mortgages his house. n69 Other Hollywood dealmakers should also realize that the true message of Boxing Helena is to stop talking and start typing.

NOTES

Douglas Kari is a litigation partner in the Los Angeles office of Orrick, Herrington & Sutcliffe. Scott Pearson, a third year student at USC Law Center, assisted with the research for this article.

- 1. Main Line Pictures Inc. v. Basinger, et al., Los Angeles County Superior Court, Case No. BC 031180. Basinger's talent agency, ICM, was also a defendant, but the trial judge, the Honorable Judith Chirlin, directed a verdict in its favor.
- 2. See trial transcript of closing arguments in Main Line v. Basinger, supra n. 1.
- 3. See, e.g., "Kim Basinger Court Case Shines Light on Deal Making," Los Angeles Times, Mar. 1, 1993, at F-1.
- 4. See, e.g., "Hollywood's Case of the Shakes," Daily Variety, Mar. 25, 1993, at 1.

- 5. Basinger's attorney, Howard Weitzman, has said repeatedly that she will file an appeal. See, e.g., "Actress Must Pay \$8.9M in Movie Contract Dispute," Los Angeles Daily Journal, Mar. 25, 1993, at 1.
 - 6. Los Angeles Times, supra n. 3, at 1.
- 7. A. Posner, "9« Million?," Premier Magazine, June 1993, at 39, 40.
- 8. "First Round of `Boxing' Starts Today," Daily Variety, Feb. 22, 1993, at 1, 20. The budget figure was provided by Eric Landau, Main Line's attorney.
 - 9. Id.
- 10. "Judge Drops ICM From `Helena' Suit," Daily Variety, Mar. 23, 1993, at 1, 19.
 - 11. Id.
- 12. Daily Variety, supra n. 8. Additional information on this subject was provided by Main Line's attorney.

- 13. See complaint in Main Line v. Basinger, supra n.
- 1. Main Line also contended that a deal memo and other writings constituted a written contract.
- 14. "Lynch: Basinger Not Deceived," Hollywood Reporter, Mar. 1, 1993, at 6.
- 15. See trial transcript of closing arguments in Main Line v. Basinger, supra n. 1. See also Daily Variety, supra n. 8, at 20.
 - 16. Daily Variety, supra n. 4, at 28.
- 17. Other participants include cinematographers, editors, hair and wardrobe personnel, production designers and production managers. One independent producer said that deals with the various participants generally come together "frantically" as the filming date approaches.
- 18. Boxing Helena was an example of this. Main Line president Carl Mazzocone testified that he was pushing to obtain a commitment from Basinger before the start

- of the 1991 American Film Market. See "`Helena' Tried To Beat Clock," Daily Variety, Mar. 4, 1993, at 21.
- 19. "Boulevard of Broken Deals," California Lawyer, May 1993, at 20.
- 20. "'Helena' Costs Kim Arm And Leg," Daily Variety, Mar. 25, 1993, at 1, 28.
 - 21. California Lawyer, supra n. 19.
- 22. C. Heston, "Of Trust, Manners and How Hollywood Works," Los Angeles Times, Apr. 12, 1993, at F-3.
- 23. See complaint in Main Line v. Basinger, supra n. 1.
- 24. Id. The February 28, 1993 date was elicited at trial. See Daily Variety, supra n. 10, at 19.
 - 25. See case files in Main Line v. Basinger, supra n. 1.
- 26. Details about discovery were provided by Main Line's attorney.
 - 27. Id.

- 28. See case files in Main Line v. Basinger, supra n. 1. 29. Id.
- 30. This estimate was provided by Main Line's attorney. Also, on May 19, 1993, Judge Chirlin awarded Main Line attorneys' fees and costs of \$713,522. See "Another Bout in Boxing Case," Los Angeles Times, May 20, 1993, at F-2.
 - 31. Daily Variety, supra n. 8, at 1.
- 32. When the house lights dimmed early, Judge Chirlin called out, "Excuse me, I'm trying to run a court here." Premiere Magazine, supra n. 7, at 39.
- 33. Id. at 40. See also "Lynch: Basinger Loved Script," Hollywood Reporter, Feb. 26, 1993, at 3; "Basinger Says She Had Right To Quit Boxing," Hollywood Reporter, Mar. 9, 1993, at 3; "Block: No Deal For Boxing," Hollywood Reporter, Mar. 10, 1993, at 3.
- 34. See trial exhibits in Main Line v. Basinger, supra n. 1.

- 35. Los Angeles Daily Journal, supra n. 5.
- 36. Baldwin sat with Basinger during much of the trial. A photograph reflecting their grim expressions upon hearing the verdict appears in the Daily Variety, supra n. 20, at 28.
- 37. Los Angeles Daily Journal, supra n. 5. On May 19, 1993, Judge Chirlin struck this aspect of the damage award as duplicative of the breach of contract damages. See Los Angeles Times, supra n. 30.
- 38. 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158 (1984).
 - 39. Daily Variety, supra n. 20.
 - 40. See, e.g., Daily Variety, supra n. 4, at 28.
 - 41. Id.
 - 42. California Lawyer, supra n. 19.
 - 43. Daily Variety, supra n. 4, at 28.
- 44. A. Baldwin, "Hollywood's The Loser In The Basinger Verdict," Los Angeles Times, Apr. 5, 1993, at F-3.

- 45. "Verdict `A Warning To All Talent," Hollywood Reporter, Mar. 25, 1993, at 8. See also "Little Guy Sends Chill Through Hollywood," Los Angeles Times, Mar. 26, 1993, at F-1.
 - 46. Id.
- 47. "Basinger Files Chapter 11," Daily Variety, May 27, 1993, at 1, 16. The bankruptcy came as no surprise, given that during the punitive damages phase counsel for both sides stipulated that Basinger's net worth is \$5,387,382. See "Jury Refuses To Add Punitive Damages For Kim Basinger," Los Angeles Times, Mar. 26, 1993, at B-3.
- 48. It generated only \$2.7 million in foreign presales and as of this writing does not have a domestic distributor. Daily Variety, supra n. 10.
- 49. After the trial Main Line finally secured a domestic distribution deal. See "`Boxing' Rights On Their Way To Orion Corner," Hollywood Reporter, May 21, 1993,

- at 1. One independent producer said that with Kim Basinger in the title role the film would have had a domestic distribution deal long ago. "People will pay to see Kim Basinger take her clothes off," he explained.
 - 50. Goldwyn is quoted in Daily Variety, supra n. 4.
- 51. Comment to Restatement (Second) of Contracts, section 72(c).
- 52. Id. These principles also apply to other contract formalities, such as the requirement of consideration.
- 53. California's Statute of Frauds is found at Civil Code section 1624.
- 54. See 2 Corbin on Contracts, section 275 (1960); R. Scott and D. Leslie, Contract Law and Theory, at 324 (1988) (discussions of the policies underlying the Statute of Frauds).
- 55. Civil Code section 1624(1). However, courts are often reluctant to enforce the Statute of Frauds. See, e.g., Sunset-Sternau Food Co. v. Bonzi, 60 Cal. 2d 834,

- 36 Cal. Rptr. 741, 389 P.2d 133 (1964); Lockwood v. Smigel, 18 Cal. App. 3d 800, 96 Cal. Rptr. 289 (1971) (both cases declining to apply the Statute of Frauds). See also 1 B. Witkin, Summary of Cal. Law, section 261 at 259 (9th ed. 1987) (stating that in recent years "the doctrine has fallen into disfavor.")
- 56. 17 U.S.C. section 204(a). See Valente-Kritzer Video v. Pinckney, 881 F.2d 772, 774 (9th Cir. 1989), cert. denied, 493 U.S. 1062 (1990) (stating that "section 204(a) not only bars copyright infringement actions but also breach of contract claims based on oral agreements.")
- 57. California's parol evidence rule is codified at Code of Civil Procedure section 1856.
- 58. See Masterson v. Sine, 68 Cal. 2d 222, 227, 65 Cal. Rptr. 545, 436 P.2d 561 (1968) (discussing the policies underlying the parol evidence rule).

- 59. Code of Civil Procedure section 337(1). If a writing is not the basis of the obligation the four-year limitation is inapplicable, even though a writing is indirectly involved. 3 B. Witkin, Cal. Procedure, Actions section 363 at 391 (3d ed. 1985).
 - 60. Code of Civil Procedure section 339(1).
 - 61. Hollywood Reporter, supra n. 45, at 8.
 - 62. California Lawyer, supra n. 19.
 - 63. Premiere Magazine, supra n. 7, at 40.
 - 64. Id.
- 65. The comment was made in an interview for this article.
- 66. See trial transcript of closing arguments in Main Line v. Basinger, supra n. 1.
 - 67. Daily Variety, supra n. 8, at 20.
 - 68. Premiere Magazine, supra n. 7, at 40.

69. Main Line president Carl Mazzocone mortgaged his house to finish Boxing Helena. Daily Variety, supra n. 10, at 19.[ELR 15:2:3]

RECENT CASES

Federal District Court upholds constitutionality of must-carry provisions of 1992 Cable Act; United States Supreme Court declines to delay implementation of rules

The Cable Television Consumer Protection and Competition Act of 1992, in part, requires cable television system operators to carry the video signals of certain television broadcast stations requesting that their signals be carried. In response to lawsuits brought by Turner Broadcasting and other cable operators and

programmers, a Federal District Court for the District of Columbia has ruled that the "must-carry" provisions of the Cable Act do not violate the cable parties' First Amendment rights.

Judge Thomas Penfield Jackson noted that in October 1992, Congress overrode a presidential veto to enact the Cable Act. The Act limits the discretion of cable operators to refuse to carry the signals of local broadcast stations and prevents cable operators from carrying broadcast signals without a broadcaster's consent.

Section 4 of the Act requires cable system operators with more than 12 channels to carry, upon request, the signals of licensed "local" commercial broadcast television stations whose signals are received over-the-air in the same television market as the cable system. The operator is not required to devote more than one-third of its active useable channels to deliver local broadcast signals, but if there are not enough local broadcast stations

to fill the one-third "set-aside," the cable operator must carry the signals of "qualified" low power broadcast stations. Operators must carry local broadcast stations on a "basic service tier" that must be made available to all subscribers.

Cable systems with 12 or fewer channels must deliver the signals of at least three local commercial broadcast stations unless the cable system has 300 or fewer subscribers, in which case it is not subject to the requirements of section4. An operator must carry the entire programming schedule of each commercial station it is required to carry, and it may not accept or request payment for doing so.

Section 5 of the Act requires cable system operators able to deliver signals on more than 36 channels to carry the signals of every local noncommercial educational broadcast television station requesting carriage, unless the educational station's programming substantially

duplicates that of another station carried by the system. Systems with 12 or fewer channels must carry one qualified non-commercial station, and systems with 12 to 36 channels must carry between one and three such stations.

Section 6 of the Act, which becomes effective on October 5, 1993, prohibits cable operators from retransmitting the signals of any commercial broadcasting station without obtaining the station's consent. Local broadcasters will have the option of requesting mandatory (but uncompensated) carriage on a system or negotiating a carriage agreement with the cable system operator. In a footnote, the court commented that prior to the 1992 Act, cable operators were free to carry the signals of local broadcasters subject only to the compulsory license provisions of the copyright law.

Judge Jackson pointed out that the court consolidated five cases brought by cable operators challenging the above-noted provisions of the Act, and that in December 1992, the court (see below) declined to exercise jurisdiction over any claim other than the must-carry claim, and denied all motions for a preliminary injunction with respect to sections other than sections 4 and 5. The cable operators had challenged section6, the retransmission consent provision, on the ground that it was not severable from section4, and must be struck if the court declared section4 unconstitutional. Since the court has upheld the constitutionality of section4, the cable operators have lost their initial challenge to section6; Judge Jackson expressed no opinion on the severability issue.

The court proceeded to consider the cable operators' claim that the must-carry provisions force cable system operators to devote a portion of their signal-carrying capacity to deliver the signals of "a privileged class of competing 'speakers,' i.e., over-the-air broadcasters," thus reducing the number of channels remaining

available for other programming. The must-carry provisions also allegedly violate the First Amendment rights of the cable operators by inhibiting the operators' "editorial discretion" to determine the programming messages available to their subscribers.

The court pointed out that the "perceived need" for must-carry was based on the premise that "local broadcast stations, unable to secure carriage on cable systems serving the same viewer markets, will, over time, lose their audiences and perish...As the audiences of broadcasting stations decline,...their advertising revenues will decrease correspondingly. Local over-the-air broadcasting operations, once they become unprofitable, will expire." Cable carriage of local broadcasting thus has been considered essential not only to insure the continuing availability of local programming to cable system subscribers, but also "to preserve the vitality of a free source of over-the-air programming to television viewers unwilling or unable to obtain a cable connection."

Judge Jackson recalled that the 1992 Act was passed after "an exhaustive factfinding process," with Congress' principal finding being that "the concentration of economic power in the cable industry was preventing noncable programmers from effectively competing for the attention of a television audience." Congress also found that there was insufficient competition within the cable industry; that many operators share common ownership; and that many large entities that operate cable franchises also own and operate programming services.

It also was found that many factors created barriers to entry for non-cable programmers, primarily broadcasters, attempting to obtain carriage on cable. Congress determined that mandatory carriage was necessary to remedy unfair trade practices, to preserve local broadcasting for those who do not receive cable television, and to insure that the public will continue to have access to a wide diversity of sources of video programming.

The court expressed the view that, in enacting the 1992 Cable Act, Congress "employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity...; not a market in 'speech.'" Congress sought to regulate the means of delivering video signals to individual receivers - not the information imparted by the video signals. Judge Jackson compared the use of video signals to convey a message to the use of printing presses, broadcast transmitters, loudspeakers, or film projectors. The Cable Act was industry-specific antitrust and fair trade practice regulatory legislation; to the extent First Amendment speech was affected at all, it was a byproduct of the fact that video signals have no other function than to convey information, stated the court.

Judge Jackson reiterated the holding that the mustcarry provisions are "essentially economic regulation[s] designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." The provisions, according to the court, were unrelated to the content of any messages that the cable operators, broadcasters, and programmers might consider delivering.

The government did not have to demonstrate that it used the least restrictive means to accomplish the economic regulation of the cable industry, stated Judge Jackson; sections 4 and 5 of the Act would be found constitutional if they met the criteria set forth in United States v. O'Brien, 391 U.S. 367 (1968) and in Ward v. Rock Against Racism, 491 U.S. 781 (1989; ELR 11:5:11).

Before turning to those criteria, the court recalled that in Quincy Cable TV, Inc. v. Federal Communications Commission, 768 F.2d 1434 (D.C.Cir. 1985; ELR 7:6:15), cert. denied, 476 U.S. 1169 (1986) and in Century Communications Corp. v. Federal Communications Commission, 835 F.2d 292 (D.C.Cir. 1987; ELR 9:11:13), clarified, 837 F.2d 517 (D.C.Cir.), cert. denied, 486 U.S. 1032 (1988), the Federal District Court for the District of Columbia had held unconstitutional FCC rules requiring cable operators to carry the signals of local broadcasters. Neither case was controlling, stated Judge Jackson; the court, in both opinions, noted that must-carry rules are not per se unconstitutional and held that the Commission had not demonstrated the existence of a governmental interest, whether "compelling" or "significant," warranting the First Amendment burdens imposed by the regulations at issue, or demonstrating that the means chosen to achieve such an interest were necessary at all. In contrast, observed Judge Jackson, the record in support of the 1992 Cable Act was

made by Congress, and "federal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts."

Judge Jackson rejected the use of a strict scrutiny standard. The cable operators, according to the court, conceded that the must-carry provisions were not content-based, and that the provisions were not subject to strict scrutiny merely because they treated operators and programmers differently from other components of the media.

If the must-carry provisions were content-related at all, they were only marginally so, to the point of de minimis, stated Judge Jackson. Congress apparently sought "to level the economic playing field in the television industry, at large, even if in doing so it may coincidentally inhibit some freedom of choice of the cable operators as to whose signals are to be carried and under what conditions." The court declined to resort to the First

Amendment to unduly inhibit Congress, absent an indication of a purpose, "whether avowed or covert," to effect a degree of content-control by mandating carriage of "local" broadcasters' signals.

In applying the O'Brien-Rock Against Racism standard, the court noted that Congress' objective in enacting the mandatory carriage requirements was to promote fair competition among video "speakers" in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not. The court cited cases establishing that the importance of broadcasting generally, and in particular, local broadcasting, to the American public is "beyond dispute."

Judge Jackson rejected the cable operators' argument that local broadcasting was "alive and well," referring to the evidence received by Congress demonstrating that cable operators have been denying carriage to local broadcasters, attaching onerous conditions to their agreements to carry broadcasters, and "exiling" broadcasters to remote channel positions. Congress apparently credited evidence that the unfavorable treatment of broadcasters resulted from the cable operators' attempts to gain a competitive advantage, and was not a response to consumer demand. The conduct of cable operators served to artificially diminish the audiences of local broadcasters and thus decrease their revenues. In all, local broadcast television appeared to be "in serious jeopardy."

Even if it were shown that the broadcast industry was not in imminent danger, the court stated that it was indisputable that cable operators dominate the video signal distribution market, and agreed with Congress' conclusion that this market power provided cable operators with "both incentive and present ability to block non-cable programmers' access to the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy."

Judge Jackson next found that the must-carry provisions were sufficiently, "if not surgically," tailored to Congress' larger economic market-adjusting objectives. And the provisions did not unnecessarily burden a substantial amount of the cable operator's own speech. Although the must-carry provisions may reduce the overall quantity of cable operator and programmer speech "opportunities," there remained "plentiful" alternative channels of communication for cable speakers to deliver their messages.

The court next rejected a claim brought by the National Interfaith Cable Coalition seeking to enjoin the enforcement of sections4 and 5 of the Cable Act on the ground that the provisions violated the religion clauses of the First Amendment.

Judge Stanley Sporkin, concurring in the court's decision, emphasized that any burden imposed by the 1992 Cable Act on speech was so remote and incidental to the purpose of the Act, that the must-carry provisions did not implicate the First Amendment to the extent claimed by the cable operators. The case did not involve free speech and the First Amendment, in Judge Sporkin's view, but market domination and control. And Congress' findings with respect to the competitive imbalance between the cable and broadcast industries deserved the court's deference.

After reviewing the development, and regulation of, the cable industry, Judge Sporkin recalled that the objective of the 1992 Act is to enhance the diversity of programming, and that the must-carry provisions are an integral interim measure to accomplish this end. In a footnote comment, Judge Sporkin adverted to the fact that technology eventually will enable cable systems to

accommodate all broadcasters requesting carriage, thereby eliminating the need for the must-carry provisions.

Judge Stephen F. Williams, in dissent, recalled that section 612 of the Cable Communications Policy Act of 1984, refined in section of the 1992 Act, addressed the "bottleneck" issue raised by the limited control of access to cable systems; the cited sections provide for neutral, compulsory access via the leasing of time by independent programmers at reasonable prices set by the FCC. The channels available for lease were limited to a specified proportion of each operator's channels, but Congress may expand the fraction of channels available. Section 612 excluded programmers affiliated with the cable operator.

In contrast, stated Judge Williams, the must-carry provisions extend the privilege of access only to local commercial and noncommercial television stations. Congress

based its decision to provide such access "quite explicitly, on a finding about ... content - that [local stations] were 'an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."

Judge Williams would have found that the Act was content-based since the must-carry provisions require cable operators to replace the programs they would have chosen, regardless of origin, with programs selected by local broadcasters. Given the finite number of cable channels, replacing a cable operator's choice of programs with those of local broadcasters serves "to suppress the alternative programs as completely as if Congress had ordered them shut down; there is nothing 'incidental' about the burden," declared Judge Williams.

For the dissent, the must-carry provisions, while not in the form of taxes, were "in substance indistinguishable from a tax-subsidy combination - a tax falling exclusively on cablecasters, in an amount large enough to fund a subsidy for local broadcasters to enable them to lease cable channels." In all, Judge Williams would have applied a strict scrutiny test.

Under such a test, the dissent would have first considered the congressional purpose (as reformulated by the dissent) of preserving open access to cable in order to assure diverse programming. For Judge Williams, it was far from clear that giving local broadcasters an entitlement to be carried would increase program diversity at all. Cable operators now carry "the vast majority" of local stations; thus, the must-carry provisions, if they have any effect at all, will likely replace the programming chosen by cable operators with programming derived from "congressional dictate."

An alternative to the must-carry provisions would be expanding the access provisions of section612 of the 1984 Act, noted the dissent - with those access

provisions being far less burdensome in the sense of minimizing government interference in the choice of who will have access to cable. Among other factors, the benefitted group "precisely fits" the legislative concernall unaffiliated programmers. Unaffiliated programmers were "conspicuously missing" from must-carry, stated Judge Williams.

Furthermore, the 1992 Act amended section612 by clarifying and broadening the FCC's authority to set maximum reasonable rates and other reasonable terms and conditions for access. In the presence of section612, and Congress' authority to expand its scope, the must-carry provisions did not provide a reasonable fit with the diversity rationale, stated the dissent.

Congress also invoked the preservation of local broadcasting, but Judge Williams expressed doubt that "forcing local affairs content on First Amendment speakers could ever qualify as a compelling interest..." Even if an interest in local content were "compelling," far less restrictive means were available to serve such an interest. And assuming that the government has a compelling interest in preserving access to local broadcasting, there was no evidence that such access was in jeopardy.

Judge Williams emphasized that there was no finding of any present or imminent harm to local broadcasting; that the evidence of some dropping of broadcast channels in itself failed to show any widespread problem; that the proliferation of local broadcast stations since the end of the FCC's original must-carry rules undermined any inference of a problem; and that even if there were a perceptible hazard, the record did not address the less intrusive alternatives. Thus, the must-carry provisions violated the First Amendment, concluded the dissent.

Judge Williams rejected the argument that special characteristics of cable justified government management of the channels, noting that the federal government was not attaching conditions to the grant of a property interest in the manner of state, city and county governments which grant consent for the placement of cable. The dissent also noted the apparent irrelevancy of the fact that cable's initial growth depended on government assistance in securing the right to retransmit the programs of broadcast channels, free of charge.

The special character of cable was limited to the "bottleneck" control of access to an important medium, and section612 of the 1984 Act, as amended, provided a speech-neutral solution to the problem, declared the dissent. The must-carry provisions burdened the protected speech of cable operators, in favor of local broadcasters, and, in requiring cable operators to carry a special group of competing speakers, Congress directly restricted the cable operators' exercise of editorial discretion. The interests advanced by Congress did not support such a burden, stated Judge Williams, nor did the record indicate a real threat to over-the-air television. Judge Williams, accordingly, would have declared the must-carry provisions unconstitutional abridgements of the First Amendment rights of cable operators and unaffiliated programmers.

On April 29, 1993, Chief Justice William Rehnquist, as Circuit Justice for the District of Columbia Circuit, declined to enjoin the enforcement of sections 4 and 5. The Act was presumptively constitutional, noted Justice Rehnquist, who pointed out that even the dissenting Federal District Court Judge recognized that the government may regulate cable television as medium of communication. Furthermore, the cable operators and programmers were not merely seeking a stay of a lower court's order, but an injunction against the enforcement of the Act; the implementation of the provisions in issue would not prevent the court, in the future, from exercising its appellate jurisdiction to decide the merits of the cable parties' appeal.

Turner Broadcasting System, Inc. v. United States of America, 1993 U.S.Dist.LEXIS 4399 (D.D.C.1993); Turner Broadcasting System, Inc. v. Federal Communications Commission, Case No. A-798 (U.S.Sup.Ct., April 29, 1993) [ELR 15:2:8]

Federal District Court reviews jurisdictional claims concerning 1992 Cable Act

In Time Warner Entertainment Company v. Federal Communications Commission, the first of the two cases decided in December 1992 to which the court referred in the opinion discussed above, Time Warner and other parties challenged most of the provisions of the Cable

Television Consumer Protection and Competition Act of 1992, and certain provisions of the Cable Communications Policy Act of 1984, as imposing unconstitutional restrictions on their First Amendment rights of free speech.

Judge Jackson, sitting as a single-judge court, after noting that a three-judge court was scheduled to consider a consolidated general challenge to sections 4 and 5 of the Act, found that the court had jurisdiction to consider the motions raised by the cable television system owner/operators and programmers, but denied all applications for preliminary relief.

The FCC argued that the cable parties were required to bring their claims challenging specified sections of the Cable Act before a Federal Court of Appeals because the ultimate review of any FCC orders issued pursuant to the Cable Act of 1992 rested exclusively with that court.

Judge Jackson pointed out that the Federal Court of Appeals has the jurisdiction to review decisions of the District Court, as well as those of the FCC, including those decisions which would have the effect of either prohibiting or postponing action by the FCC under the cable statutes. And the instant case involved a constitutional challenge to congressional legislation which, according to the cable parties, never would justify future agency action.

Judge Jackson proceeded to find that the cable parties did not demonstrate a level of irreparable harm requiring the issuance of a preliminary injunction with respect to any of their claims.

The Cable Act of 1992 directed the FCC to promulgate regulations governing the conduct of "vertically integrated programmers," i.e., those programmers in which a system operator has an "attributable interest." Although the cable parties challenged this provision, the

court noted that none of the asserted injuries would occur until the FCC adopted implementing regulations, entered orders for compliance, and imposed sanctions for noncompliance. Judge Jackson determined that absent evidence of present injury, the court would not enjoin the "vertically integrated programming" provision.

The cable parties also challenged the statutory provision directing the FCC to promulgate rules and regulations establishing limits on the number of subscribers that a cable system operator can reach and to "consider the necessity and appropriateness" of promulgating regulations limiting the ability of multichannel program distributors to create or produce programming.

Although both of the provisions raised substantial First Amendment issues, stated the court, there was, again, no present First Amendment injury. Judge Jackson rejected the argument that the threat of future regulation alone improperly burdened First Amendment freedoms. Section 7(c) of the Cable Act of 1992 authorizes local or municipal entities to operate as multichannel program distributors even if the entity is affiliated with the local franchising authority - such operators do not need to participate in the franchising process. Private systems operators objected to affiliations between the government and operator systems with whom the cable parties compete. Once again, the cable parties' asserted injuries were found entirely speculative.

Section 3(a) of the Act permits the FCC and local franchising authorities to establish rate regulations for certain cable systems. Operators are required to provide subscribers with a basic service tier on which the operator carries all mandatory carriage stations; all public, educational or governmental stations which must be carried pursuant to a franchising agreement; and all regular broadcast stations provided by the operator. The FCC is directed to promulgate reasonable rates for each

operator's basic service tier. Under the statute, operators may not require subscribers to purchase any service, other than the basic tier, as a precondition to receiving any other pay-per-view or pay-per-channel service. And the operator must use a uniform rate structure throughout the geographic area in which its service is offered.

Many of the provisions in section3 will not become effective until the FCC promulgates appropriate regulations, observed the court. The cable operators did not demonstrate that the prospect of future regulations or the mere existence of statutory provisions not yet in effect caused a present First Amendment deprivation.

Section 7(b) of the Act, in conjunction with section611 of the Cable Act of 1984, gives local franchising authorities the power to request in franchise proposals that channel capacity be dedicated to "public, educational, or governmental" use, and to demand assurances from cable operators that such channels will be

provided. Once the franchising proposal is accepted, the franchising authority may enforce the requirements; the cable operator may not exercise any editorial control over the public, educational or governmental programming it is required to carry, but may specify, in its franchise agreement, that it will not carry obscene programming.

Section 612(b)(1) of the Cable Act of 1984 requires cable operators to designate some of the channel capacity for use by commercial programmers that are unaffiliated with the operator. The cable operator also may not exercise editorial control over this "leased access" programming, except that it may consider content in establishing a reasonable price to charge the unaffiliated lessee, and may enforce a policy of prohibiting programming that the cable operator reasonably believes to be obscene. Section 9 of the Cable Act of 1992 directs the FCC to determine and establish reasonable rates that

operators may charge unaffiliated users, and to establish reasonable terms and conditions for such use.

These provisions raised substantial First Amendment issues, stated the court. However, the cable operators did not demonstrate immediately impending injury of a magnitude warranting a preliminary injunction. The claims of irreparable injury were "belied by the fact that [the cable operators] waited eight years to bring this motion for 'emergency' relief." In addition, any public, educational or governmental use obligations incurred by the cable parties would result from franchises between the operator and the local authority, franchises which were not the direct result of action by the federal parties before the court.

The cable parties and the ACLU as amicus curiae, also challenged section 10(d) of the 1992 Act, which eliminates all immunity for cable operators that transmit obscene message on public, educational or governmental

or leased access channels. It was argued that the statute might result in cable operators being held criminally or civilly liable for showing programming that they must carry and cannot edit. Although any such imposition of liability without fault may represent "questionable legislative policy," noted Judge Jackson, in the absence of actual or impending proceedings there was no irreparable First Amendment injury.

Section 15 of the Act requires operators to give advance notice to subscribers if the operator intends to provide a premium channel - one that offers movies rated X, NC-17, or R - to those subscribers that do not receive the channel. The cable operators argued that providing notice would deter operators from showing previews because of the expense of blocking such previews from objecting customers. The alleged injury, again, was completely speculative and "largely self-inflicted [for] the First Amendment does not guarantee

that a speaker may force his message upon an unwilling captive audience." Offering uninvited previews of programs that may offend some subscribers, in advance of affording the recipients an opportunity to refuse them, would be a marketing choice of the cable parties, concluded the court.

In the case of Turner Broadcasting System, Inc. v. Federal Communications Commission, decided one day after the decision in Time Warner, a three-judge panel of the Federal District Court decided that under section 23 of the Act, the court "at most may have discretion to entertain the attacks on parts of the Act other than sections 4 and 5..." Assuming the court had such discretion, Federal Court of Appeals Judge Stephen F. Williams (presumably sitting by designation) stated that the court believed that "prudential factors" argued for exercising such discretion against jurisdiction.

Judge Williams noted that there were many reasons for the special treatment of the must-carry provisions, but that the cable parties did not present any reason why Congress might have wanted similar treatment for any issue that a party might happen to attach to a lawsuit challenging section 4 or section 5. Having three judges rule on every procedural or substantive challenge to the Act would place considerable burdens on the federal judicial system, stated Judge Williams, in finding that section 23 provided mandatory jurisdiction solely over constitutional attacks on sections 4 and 5.

The court also rejected the argument for jurisdiction based on the supplemental jurisdiction of section 1367(a); severed from the lawsuit all claims other than those challenging the constitutionality of section4 or section5; and relinquished those claims to the Federal District Court for the District of Columbia apart from the three-judge panel.

Judge Sporkin concurred in the court's decision to exercise its discretion to decline to consider the various pendent claims raised by various parties, stating that it was prudent for the court to focus on sections 4 and 5.

Judge Jackson expressed his dissent, noting that the court did not present any evidence of a "clearly expressed" congressional intention to repudiate the language of section 23, which, in Judge Jackson's view, would have required a three-judge panel to hear the lawsuit in its entirety.

Time Warner Entertainment Company v. Federal Communications Commission, 810 F.Supp. 1302 (D.D.C.1992); Turner Broadcasting System, Inc. v. Federal Communications Commission, 810 F.Supp. 1308 (D.D.C.1992) [ELR 15:2:11]

Court rules on action brought by cable television franchisee, programmers and distributor challenging Montgomery, Alabama cable television ordinances

Storer Cable Communications, ESPN, Inc., Satellite Services, Inc. and Turner Network Television challenged the legality of two regulatory ordinances enacted by the city of Montgomery, Alabama.

In 1976, Storer obtained a franchise from the city, and, for fifteen years, was the only cable franchisee in Montgomery. In 1990, the city granted a franchise to Montgomery Cablevision, but during and directly after the consideration process, the city passed the two ordinances at issue.

Ordinance 9-90 provided, in pertinent part, that no franchise should be deemed "to authorize the grantee to utilize its cable television system to provide any service

in such a manner as to unlawfully damage any business competitor or third party...Nor shall any grantee, by act or omission, engage in any anticompetitive practice in violation of any statutes or regulations of the United States or the State of Alabama..."

With respect to establishing rates, the ordinance stated that "in no event should rates be established so low for any class of subscriber or for any geographic location as to prevent, discourage, restrict, or diminish competition on the furnishing of cable services."

Ordinance 48-90 contained provisions prohibiting cable television exhibitors, distributors and program suppliers from monopolizing or restraining trade in the area of cable television programming or services and specified types of unlawful licensing activities.

In May 1990, prior to the passage of Ordinance 48-90, Montgomery Cablevision demanded that Turner and ESPN provide the company with certain programming which they were licensing to Storer Cable on an exclusive basis in the Montgomery area. The programming companies denied the request, and subsequently, along with Storer and Satellite Services sued the city of Montgomery and its mayor, claiming that the new ordinances violated the United States Constitution, federal law, and Alabama law. Montgomery Cablevision filed a counterclaim charging the Storer parties with violations of the Sherman Act and Ordinance 48-90.

Federal District Court Chief Judge Myron H. Thompson noted that the Storer parties brought their federal constitutional claims under 42 U.S.C.A. section1983 and directly under the Constitution; that section1983 provides a cause of action against municipalities for alleged violations of the First Amendment, the contracts clause and both the equal protection and due process clauses; and that the court possessed subject matter jurisdiction over all of the federal claims

raised and pendent jurisdiction over the state law claims. Eleventh Amendment immunity did not bar the Storer parties from seeking relief under state law; the amendment forbids federal courts from deciding claims based on state law when such claims are brought against the state itself - the immunity does not apply to municipalities or their officials.

The Storer parties argued that Ordinance 48-90 amounted to a per se ban of exclusive licensing agreements for the provision of cable programming. By purportedly destroying one of the rights granted to the holders of the copyrights, i.e., the right to engage in the exclusive licensing of copyrighted materials, the ordinance, according to Storer, was preempted by the Copyright Act.

After careful analysis, Judge Thompson stated that a licensing arrangement between a cable programmer and a cable exhibitor whereby the exhibitor is granted the exclusive right to show the programmer's product within a geographic area would not, without more, violate the ordinance's prohibition on restraints of trade and monopolization. Section 3 of the ordinance proscribed exclusive agreements only if "unreasonable," and required proof of competitive injury to show a restraint of trade or monopolization. Since a party raising a section 3 claim would have to prove "an additional, meaningful element" other than that the challenged party engaged in conduct protected by the Copyright Act, Judge Thompson ruled that the Copyright Act did not preempt section 3. The court then noted that section 4 of Ordinance 48-90 designated exclusive licensing agreements as proscribed conduct. The provision, standing alone, would not allow a party to simply rely on the occurrence of the challenged conduct but would require a showing of "purpose or effect," i.e, a "reasonable possibility" of competitive harm, as is required under the Clayton and Robinson-Patman Acts. However, section 7 of the ordinance, a burden shifting clause, relieved parties bringing a claim under the ordinance from having to demonstrate a reasonable possibility of competitive harm. A party seeking to establish a proscribed act thus might bypass the "purpose or effect" element of section 4; if the opposing party then fails to meet the burden of establishing a permissible purpose, he/she will be held liable without a showing that there exists an "extra element" other than that the copyright holder legitimately exploited a copyright monopoly.

The combination of the sections placed "too high a burden" on the copyright privilege, wrote Judge Thompson. A party holding a copyright for cable programming who grants another an exclusive distribution or exhibition license would be in "automatic jeopardy" of liability as a result of the section, as would be the licensee.

Judge Thompson declared that the least disruptive solution would be to strike down section 7, to the extent the section raised a presumption that exclusive licensing contracts were illegal, while allowing section 4 to stand.

The court next rejected the Storer parties' claim that Ordinance 48-90 was preempted by the Lanham Act, commenting that the statute's preemptive scope was not the same as that of the Copyright Act. Judge Thompson pointed out that the case law indicated that state laws are not preempted even if they operate to compel a mark owner to license its mark, so long as the mark continues to be associated with the owner's product or endorsement. Even if Ordinance 48-90 served to coerce the Storer parties to license their programming to Montgomery Cablevision, they did not show how customer confusion would result from their products being carried to viewers by other cable operators - the programs in

question would be genuine programs, as their marks purported them to be.

In turning to the question of whether the ordinances were preempted by the Cable Communications Policy Act of 1984, the court found that the Storer parties established that the Cable Act preempted a portion of Ordinance 9-90, but did not show that the act preempted Ordinance 48-90.

Judge Thompson adverted to section 543 of the act which preempts federal, state and local regulation of the rates charged by cable companies. The city argued that the ordinance did not regulate the rates for the provision of cable services because it did not establish a specific pricing schedule or "freeze" rates at a set level, but only prohibited anti-competitive rate setting, and thus was a general exercise of the city's police power. The contested portion of the ordinance, noted the court, was entitled "Rates Charged to Subscribers;" its language

prohibited certain rates which would give undue preference to certain customers and rates which would be so low as to diminish competition - the ordinance clearly was a rate regulation.

The court next found that the ordinance's prohibition against rate discrimination was compatible with the Cable Act, but that the ban on predatory pricing was not within the exception to Section 543(a)'s ban on rate regulation and was preempted. The Cable Act, stated Judge Thompson, preempted the following sentence of the ordinance, except to the extent that it applied to basic cable service: "No rate established shall afford any undue preference or advantage among subscribers, but separate rates may be established for separate classes of subscribers and rates may reflect the increased cost of providing service to isolated or sparsely populated areas." And the Cable Act preempted the following sentence in its entirety: "In no event shall rates be

established so low for any class of subscriber or [for] any geographic location as to prevent, discourage, restrict, or diminish competition [in] the furnishing of cable services."

With respect to Ordinance 48-90, the court found that the ordinance was content-neutral, and that to the extent that it might require the Storer parties to license programming, it would do so "on the basis of the market effects of the targeted licenses, not on the content of programming." The ordinance would not interfere with the editorial decisions of the Storer parties, and was not preempted by the Cable Act.

The court also rejected Turner's claim that Ordinance 48-90 was preempted by the Sherman Act.

In turning to the Storer parties' state law claims, the court found that Ordinance 48-90 was designed to achieve its purpose, i.e., "to promote and insure free and open competition among corporations or persons

franchised under Ordinance 50-76 to operate cable television systems and to provide cable television service to the citizens of Montgomery," and was not clearly an arbitrary and unreasonable law. Judge Thompson stated that Turner Network did not show that the city of Montgomery "could not have reasonably believed that the exclusive licensing agreements at issue in this case are in some part responsible for diminishing effective competition in the Montgomery cable market."

Judge Thompson agreed with Turner that municipalities cannot assert a broad public interest in the existence of a business and use the interest as a basis for various economic regulations. But the city of Montgomery, confronted with a lack of competition in the Montgomery cable market and the "virtual monopoly" position of Storer Cable, responded with an ordinance aimed at the source of the apparent problem - certain licensing practices of the Storer parties. The means chosen by the city

to correct the perceived problem might not provide the best solution, and might not have their intended effect, but it was not shown that the ordinance addressed speculative concerns or was not reasonably related to the presumptive purposes.

The court rejected Turner Network's argument that Montgomery's mayor and city council enacted Ordinance 48-90, not in the interests of Montgomery citizens, but solely to benefit Montgomery Cablevision. Even if this were true, stated Judge Thompson, the court was not authorized to inquire into the motives prompting the adoption of the ordinance, particularly when, on its face, the ordinance apparently served the citizens of Montgomery, did not favor any cable service provider over any other, and applied equally to Montgomery Cablevision and Storer Cable.

Storer claimed that the city, by enacting Ordinance 48-90, breached the company's franchise agreement.

The court observed that the provision in the ordinance granting the city the right to terminate the franchise of a party breaching the ordinance might be considered an amendment to the franchise agreement. But neither party addressed this point or discussed how the court would determine whether any such amendment would substantially interfere with Storer's rights and obligations, and the court denied summary judgment on this claim to all parties.

Judge Thompson proceeded to consider the federal constitutional issues raised by the Storer parties. Citing the history, language and policies of the Cable Act, the court declined to find that local cable ordinances should be subject to "two rounds of preemption scrutiny, first under the Cable Act and next directly under the commerce clause." The Cable Act provided a "relevant and highly detailed congressional declaration of policy;" the challenged ordinances were consistent with that policy;

and the commerce clause and the ordinances were not an unconstitutional direct regulation of interstate commerce, ruled the court.

The Storer parties did not demonstrate that Ordinance 9-90 imposed any burden on interstate commerce at all, continued Judge Thompson. Any cost burden imposed upon Storer Cable as an operator, would not, of itself, burden interstate commerce - the effect of the ordinance on a single out-of-state supplier was "irrelevant" for commerce clause purposes, so long as the interstate flow of cable programming was not excessively burdened.

Turner Network and ESPN claimed that Ordinance 48-90 involved additional burdens on interstate commerce, noting that the companies no longer would be able to draft a single national agreement covering every cable operator but would have to enter into special agreements with those operators doing business in

Montgomery. It also was argued that limiting exclusive licensing agreements also might limit a significant source of program financing provided by cable operators in return for exclusive exhibition licenses.

Judge Thompson commented that the court was not convinced "that the imposition of additional paperwork rises to the level of a burden on interstate commerce." However, because the programming parties raised the possibility that Ordinance 48-90, standing alone, would have a "corrosive effect" on the industry, the court granted the companies an opportunity to establish their claims at trial. The court also noted that interstate commerce "could very well be excessively burdened if Montgomery were to become a blockaded fortress in the sea of interstate cable programming," and granted the programming parties an opportunity to demonstrate the severity of this burden, and its likelihood of occurrence.

The court, upon extensive review, then found that Ordinance 48-90 raised little, if any, First Amendment concern, in that the ordinance ("so far as it survived preemption scrutiny"), was a legitimate trade practice regulation, and did not impair expressive activity or unreasonably "single out" the press for burdensome treatment. Judge Thompson stated that the ordinance did not prohibit Storer Cable from transmitting whatever programming the company wished to transmit, and did not prohibit the programming parties from licensing programming to Storer. The Storer parties retained "their unimpeded freedom to communicate whatever it is they wish to communicate to the citizens of Montgomery."

The Storer parties also claimed that Ordinance 48-90 violated the contracts clause of the United States Constitution by invalidating the agreements designating Storer as the exclusive exhibitor of certain programs in the Montgomery area; since the claim was at "the heart"

of the factual disputes between the parties, Judge Thompson declined to resolve the question on the present record before the court.

Assuming, for purposes of analysis, that Ordinance 48-90 would ban those provisions of the licensing agreements which granted Storer Cable the exclusive rights to exhibit certain programming, a significant factual dispute remained over the importance of the exclusivity clauses to the parties' overall contractual relationships. The Storer parties did not set forth why the exclusivity provisions were criticial to the contracts and relationships at issue, and the court therefore could not yet determine how substantial a part of the contracts the exclusive licensing provisions were.

Judge Thompson concluded by finding that the ordinances were not unconstitutionally vague in violation of the due process clause

and that Ordinance 9-90 did not violate the equal protection clause. Ordinance 9-90 did not create any "suspect" classifications; did not impinge on any fundamental right; and appeared to serve as a "reasonable remedy" for the perceived harm, to the citizens of Montgomery, of price discrimination and predatory pricing.

Storer Cable Communications v. City of Montgomery, 806 F.Supp. 1518 (M.D.Ala. 1992) [ELR 15:2:13]

Dispute between Texas broadcaster and satellite music programming service is remanded

In November 1982, Angelo Broadcasting entered into a two year contract whereby Satellite Music Network agreed to provide Angelo with an adult contemporary program format for the broadcaster's FM station and a country and western format for Angelo's AM station. Angelo used the satellite service on the AM station for the entire two years, but, after using the service on the FM station for eighteen months, refused to continue to pay the monthly service fee.

A Texas trial court jury returned a verdict in favor of Angelo on its claim alleging fraud and the violation of the state Deceptive Trade Practices Act. The jury awarded Angelo damages of \$200,000 for loss of the benefit of the bargain, \$500,000 for damage to the radio stations' value, and \$200,000 for out-of-pocket loss. The jury also found that Satellite Music knowingly committed false, misleading, or deceptive acts or practices, and assessed additional damages of \$1 million.

After further proceedings, the trial court entered judgment for Angelo on the statutory claim, and awarded the broadcaster \$700,000 as actual damages, \$1 million as additional damages, \$2,000 as statutory damages, about

\$820,000 as prejudgment interest, and about \$170,000 as reasonable and necessary attorneys' fees. The court granted Satellite Music judgment for unjust enrichment in the amount of about \$15,000, plus attorneys' fees of \$109,000 and entered judgment notwithstanding the verdict on Angelo's fraud claim.

An appellate court ruled that the trial court erred in awarding Satellite Music recovery for unjust enrichment. The music service had fully performed under the contracts and the only sum Angelo had not paid was liquidated.

The court then determined that there was some evidence to support the jury's finding of actionable fraudulent misrepresentation, and that the trial court erred in granting Satellite Music's motion for judgment notwithstanding the verdict on Angelo's fraud claim. However, there also existed some evidence to support a finding of "puffery" on the part of the satellite network. An

instruction on puffery would have assisted the jury in answering the issue submitted on fraud, noted Judge Kinkeade; thus, the trial court erred in refusing to submit Satellite Music's puffery instruction to the jury.

Judge Kinkeade expressly declined to hold that Angelo established fraud as a matter of law, and further found that the trial court erred in awarding attorneys' fees to Satellite Music.

The court concluded by commenting on the trial court's decision to abate the case post-trial to allow Angelo to give Satellite Music the requisite notice under the Deceptive Trade Practices Act. The trial court then allowed Angelo to file a trial amendment alleging statutory notice and entered judgment on Angelo's full statutory claim. Judge Kinkeade stated that the court had found no case where any Texas court "has ever abated a case post-trial to allow for the giving of presuit notice and then entered judgment for actual and additional [DTPA]

damages upon the verdict resulting from the trial." The trial court's actions in allowing a post-trial abatement and awarding Angelo statutory damages abused its discretion and the court erred in awarding Angelo statutory damages, declared Judge Kinkeade.

Judge Kinkeade rendered a "take-nothing" judgment in Angelo's favor on Satellite Music's claims for unjust enrichment and for attorneys' fees; reversed the trial court's award of damages under the Deceptive Trade Practices Act and instructed the trial court to abate the cause of action for sixty days to provide Angelo the opportunity to give the requisite notice. On remand, noted the court, Angelo's notice letter may not demand that Satellite Music reimburse the broadcaster for expenses incurred in connection with the lawsuit, except as to pre-suit expenses. The judgment notwithstanding the verdict on Angelo's fraud claim was reversed and remanded for further proceedings.

Angelo Broadcasting, Inc. v. Satellite Music Network, Inc., 836 S.W.2d 726 (Tex.App. 1992) [ELR 15:2:16]

Television station may proceed with antitrust and unfair competition claims against cable television system

Sunbelt Television Inc. operates a local television station in Southern California; the station reaches about 63 communities. Jones Intercable, Inc. manages a cable television system under non-exclusive franchises granted by local governments.

Sunbelt claimed that Jones' refusal to carry Sunbelt's television channel on its local cable network violated section 2 of the Sherman Act and constituted unfair competition under state law.

A Federal District Court in California has denied Jones' motion to dismiss the complaint except as to Sunbelt's claims of attempted monopolization and denial of an essential facility.

Jones had argued that the First Amendment barred Sunbelt's antitrust claims because Jones' decision not to carry Sunbelt's television station was a protected First Amendment right. Judge Keller noted that the "must carry" decisions cited by Jones in support of the company's argument did not provide blanket protection to the cable operator - statutes that affect program selection, "be they FCC 'must carry' rules or the Sherman Antitrust Act, are not necessarily Constitutionally infirm," observed the court.

It then was noted that the Supreme Court consistently has ruled that media antitrust parties are not immune from suit if their programming decisions are guided by anti-competitive motives. Judge Keller emphasized that the Sherman Act's incidental restriction of free speech would be no greater than was essential "to protect the competitive marketplace..." and rejected Jones' First Amendment defense.

Sunbelt claimed that Jones had acquired monopoly power in providing television station services in the Palmdale/Lancaster area, pointing out that Jones had total control of the local cable system market and that various factors substantially interfered with commercial television reception - consumers had to choose "between cable or static." Accordingly to Sunbelt, Jones willfully maintained total control by refusing to allow Sunbelt to broadcast on its cable system, thereby engaging in conduct constituting monopoly leveraging and denial of an essential facility.

Judge Keller recalled that the Ninth Circuit rejected monopoly leveraging as a theory of section 2 liability separate from monopolization or attempted monopolization, and granted Jones' motion to dismiss the issue.

The essential facility doctrine, as described by Judge Keller, "imposes a duty on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market to make that facility available on a nondiscriminatory basis." Sunbelt failed to assert that Jones' cable service was an essential facility (as the term has been used in antitrust actions); the complaint did not state that Jones' cable facilities could not reasonably be duplicated by Sunbelt or some other competitor. The court dismissed the claim without prejudice and granted Sunbelt leave to amend.

With respect to Sunbelt's attempted monopolization claim, the court found that Sunbelt sufficiently alleged the requisite elements of the cause of action, except that it was unclear what market Jones Intercable was allegedly attempting to monopolize. To the extent that Sunbelt sought to state a claim that Jones attempted to monopolize the television station services market in the Palmdale/Lancaster area, the court dismissed the claim without prejudice and granted Sunbelt leave to amend.

Judge Keller concluded that Sunbelt clearly stated a cause of action under California's Unfair Competition law.

Sunbelt Television, Inc. v. Jones Intercable, Inc., 795 F.Supp. 333 (C.D.Ca. 1992) [ELR 15:2:17]

Donald Wildmon may not prevent United States distribution of British documentary on censorship and the arts

In December 1990, Donald Wildmon participated in an interview conducted by Paul Yule, a producer for

Channel Four television in Great Britain; Yule used portions of the interview in "Damned in the U.S.A," a film concerning censorship and the arts in the United States.

Prior to filming, Wildmon presented Yule with a contract whereby Wildmon offered his participation in the project in return for the interviewer's promise to refrain from making "the contents of the interview" available in "a manner inconsistent with this agreement." The contract stated that Yule would "refrain from making the interview available to any other media outlet including any portions that are not used in the television presentation made by Berwick Universal Pictures, London for Channel 4. In addition, Mr. Yule agrees that any material obtained from the interview...shall not form the basis of any other media presentation...in England, the United States or any other country without written permission from American Family Association."

As described by Federal District Court Judge Davidson, the film, "while fairly airing Wildmon's views," depicted the work of many of the artists, including Robert Mapplethorpe, challenged by Wildmon and his organization.

When Wildmon learned that the film was being released in the United States, he sued for breach of contract; Berwick Universal Pictures, the film's distributor, brought a counterclaim for declaratory judgment.

Judge Davidson, upon finding that the contract was ambiguous, stated that extrinsic evidence did not show that the producers and the station agreed, as argued by Wildmon, that the film could only be shown in Great Britain. Rather, Wildmon intended to limit the utilization of the lengthy interview for purposes or presentations other than Yule's film. And although Yule did not tell Wildmon that the primary subject of the film was Robert Mapplethorpe or that the film would contain graphic

images, Wildmon, stated Judge Davidson, "knew or should have known that the film was to be a work about a debate...if Wildmon intended to make control over distribution of the entire film dependent upon his approval of its content, he should have drafted this intention much more clearly."

The court also observed that the public interest favored a narrow reading of the terms of the contract. The contracting parties did not clearly promise to limit the flow of information as was the case in Cohen v. Cowles Media Co., 111 S.Ct. 2513 (1991; ELR 13:3:11); an ambiguous contract "should be read in a way that allows viewership and encourages debate," stated Judge Davidson, who granted declaratory judgment in favor of the Berwick parties and dismissed Wildmon's claim.

The District Court, however, concluded by "inviting" Wildmon to move for a stay pending appeal. Wildmon and American Family Association accepted the

invitation and the court stayed judgment pending appeal and enjoined the distribution and/or exhibition of the film during that time.

A Federal Court of Appeals panel subsequently ruled that the District Court erred in staying the effect of its own order and judgment and in granting the requested injunction. The case did not involve a serious legal question; the likelihood of Wildmon's success on the merits was "slim;" and there was no showing of irreparable injury to Wildmon in the absence of a stay. The parties themselves had adverted to the possibility of a breach and specified the remedy as liquidated monetary damages. The court ordered the stay lifted and the injunction vacated.

Wildmon v. Berwick Universal Pictures, 983 F.2d 21 (5th Cir. 1992); 803 F.Supp. 1167 (N.D.Miss. 1992) [ELR 15:2:18]

Keith Hernandez may proceed with breach of contract, breach of fiduciary duty and fraud claims against former investment advisor

In 1976, Keith Hernandez signed with the St. Louis Cardinals. John H. Childers managed Hernandez's business, tax, financial and investment matters from 1976 until 1988 and negotiated the initial Cardinals contract for Hernandez.

In 1989, Hernandez sued Childers and his company, Talent Services, Inc., for breach of fiduciary duty, common law fraud, and breach of contract arising from the failure of a tax shelter investment. It was alleged that after the 1979 baseball season, Childers negotiated a five year, \$3.8 million contract for Hernandez. Hernandez was to receive a \$750,000 signing bonus. Childers

suggested that Hernandez, in order to defer tax liability, invest in a research and development program known as Sealock.

Hernandez signed the offering materials, but the materials were placed in escrow to await legal and accounting reviews. Childers, however, proceeded with the transaction by directing Hernandez's attorney to take the signed documents and Hernandez's check out of escrow. Hernandez claimed that Childers assured him that the investment had been favorably reviewed. Hernandez obtained a large tax deduction.

In 1982, the Internal Revenue Service challenged Hernandez's 1980 tax return, citing, in part, the Sealock investment. The tax deduction was disallowed; Sealock later dissolved with a loss of nearly all of Hernandez's \$245,000 investment; and Hernandez paid about \$800,000 in back taxes in 1989.

A Federal District Court, after initially dismissing Hernandez's securities and negligence claims, and the breach of contract claim as to Childers, denied Childers and Talent Services' motion for summary judgment.

Judge Norgle found that Hernandez's breach of fiduciary duty and fraud claims were not time-barred because the evidence did not show that a reasonable person in Hernandez's circumstances would have been aware of the alleged wrongs before February 21, 1984. Although Sealock was audited in 1982, and the Internal Revenue Service corresponded with Talent Services and Childers regarding the audit, Hernandez claimed he did not receive the letters. It was alleged that Childers repeatedly assured Hernandez about the investment. Hernandez did not learn until 1986 of Childers' failure to obtain a review of the investment; did not know Childers received a commission from the investment until investigating the

lawsuit against the advisor; and only learned in 1986 that he faced an \$800,000 liability.

It was not until March 20, 1984, when the Internal Revenue Service notified Talent Services that the deduction was disallowed, that Hernandez could have been aware that he suffered any harm, stated Judge Norgle, and the lawsuit, filed February 21, 1989, thus was within the five year statute of limitations.

Without specifying each allegation of fraud or breach of fiduciary duty, the court found that the parties disputed many of the facts and that summary judgment therefore was inappropriate as to these claims, and as to the breach of contract claim as well.

Hernandez v. Childers, 806 F.Supp. 1368 (N.D.III. 1992) [ELR 15:2:18]

NFL Retirement Plan's award of disability benefits to former player Donald Brumm is upheld

Donald Brumm played for the St. Louis Cardinals football team from 1963 to 1969 and in 1972, and for the Philadelphia Eagles from 1970 to 1971. While playing football, Brumm suffered many knee and back injuries, but was not disabled. In 1977, Brumm was injured while driving a truck; Brumm continued to work in various jobs until December 1984, when he became unemployed.

In November 1984, Brumm requested benefits from the Bert Bell NFL Retirement Plan. Brumm stated that his disability started on October 4, 1977, several years after he left football and the day before his truck accident. A medical report indicated that Brumm was not totally and permanently disabled but was limited to sedentary employment.

In April 1985, the Retirement Board denied Brumm's application for benefits and subsequently denied his appeal.

Brumm also had applied for Social Security disability benefits; an Administrative Law Judge concluded that although Brumm's physical disabilities alone did not entitle him to the requested benefits, the former player's physical limitation, in combination with certain psychological limitations, rendered Brumm disabled as defined by the Social Security Act; the onset of disability was found to have been December 15, 1984.

The Retirement Board then requested a neutral psychological evaluation; the psychologist stated the Brumm was totally and permanently disabled from a combination of depressive disorder and back pain. The Board approved disability benefits for Brumm effective December 1, 1986 through March 1, 1987, and

subsequently approved the continuation of disability benefits of \$750 per month.

When Brumm sued the Plan under the Employee Retirement Income Security Act, challenging the amount of damages, Federal District Court Senior Judge Scott O. Wright noted that the Plan defined three different types of disability. The highest payments authorized by the plan were intended for players who received a debilitating injury while playing football and who retired from football as a result of that injury. An arbitrator determined that a player would be eligible for such payments if the player incurred a disability resulting from one identifiable injury and was totally and permanently disabled within a reasonable time after leaving football.

The arbitrator stated the lower payments would be provided for players who were totally and permanently disabled, but whose disability rose from a number of injuries, not one identifiable football injury.

The Plan, observed the court, provided the Board with considerable discretionary authority and the Board acted reasonably in adopting the arbitrator's interpretation of "a football injury."

The court then found that, based on the evidence concerning Brumm's initial application, the decision to deny benefits was supported by substantial evidence, as was the subsequent decision to award Brumm the lower level of benefits, and granted the Plan's motion for summary judgment.

Brumm v. Bert Bell N.F.L. Retirement Plan, 802 F.Supp. 258 (W.D.Mo. 1992) [ELR 15:2:19]

Further rulings are issued in football players' antitrust actions against NFL

In September 1992, a Federal District Court jury in Minneapolis decided that the National Football League's limited free agency system violated federal antitrust laws (ELR 14:5:19). The jury determined that the Right of First Refusal/Compensation Rules of Plan B had a substantially harmful effect on competition in the relevant market for the services of professional football players; that the rules, although contributing to competitive balance in the NFL, were more restrictive than reasonably necessary to achieve the objective of establishing or maintaining the league's competitive balance; and that the players suffered economic injury as a result of Plan B. The jury awarded damages, amounting to \$540,000, before trebling, to only four players of the eight players involved in the lawsuit.

Judge Doty had reviewed Plan B in an earlier decision in the action brought by Freeman McNeil and seven

other players whose contracts expired on February 1, 1990.

The NFL parties, in 1988, had proposed to the National Football League Players Association, a new system of player restraints known as "Plan B." The NFL implemented Plan B, in February 1989, without the approval of either the players or the association (at the time the collective bargaining representative of the players), and subsequently executed many of its provisions.

One provision of the plan would have eliminated individual contract negotiations with players as of February 1, 1993 by establishing a wage scale setting the price for all players' services.

McNeil and the other players alleged that the proposed Plan B wage scale was an agreement among competitors to fix the prices to be paid for the players' service and constituted a per se violation of the Sherman Act. The NFL argued that the wage scale was not included in Plan B as implemented in 1989, and that the team owners had no further plans to unilaterally impose a wage scale.

Judge Doty found that the players did not demonstrate a significant threat of injury from an impending violation of the antitrust laws which would justify the issuance of the requested permanent injunction. However, the court declined to grant the NFL's motion for summary judgment, stating that the wage scale proposal, if implemented, would likely violate section1 of the Sherman Act. The court also concluded that such a wage scale would likely injure the players by eliminating their ability to engage in individual salary negotiations with their teams and that the injury was of the type that the Sherman Act was designed to prevent.

The NFL next argued that it was incapable of conspiring with the twenty-eight member clubs because they

functioned as a single economic entity, i.e., as "co-owners engaged in a common business enterprise, the production and marketing of professional football entertainment." Judge Doty recalled that this argument was rejected by the decisions in Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984) and in North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir), cert. denied, 459 U.S. 1074 (1982).

The court then rejected the NFL's claim that the challenged restraints operated solely in a labor market and therefore were outside the scope of the antitrust laws. The NFL had conceded that the court, in considering the player restraints that were the predecessors of the restraints in issue in the present case, already had expressly rejected this claim in Powell v. National Football League, 930 F.2d 1293 (8th Cir.1989; ELR 10:9:17;

10:4:15), cert. denied, 111 S.Ct. 711 (1991) and in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

The NFL proceeded to argue that any damage liability was not incurred until the court determined that the parties reached an impasse and that the nonstatutory labor exemption no longer applied. Judge Doty noted that the Eighth Circuit, in the 1989 Powell decision, rejected impasse as the definitive endpoint of a bargaining relationship, and indicated that the exemption would continue to protect the NFL's player restraints, the matter in issue in that decision, as long as there was an "ongoing collective bargaining relationship" between the parties.

In the instant case, stated Judge Doty, the labor exemption ended at the end of the parties' collective bargaining relationship - neither a judicial determination nor a National Labor Relations Board decertification was required to establish this "triggering event." In its May

1991 order, the court had determined that the end of the collective bargaining relationship occurred about eighteen months before the court's decision; the NFL's liability for antitrust damages therefore accrued as of no later than December 1989, stated Judge Doty.

The players also sought partial summary judgment with respect to the NFL's monopoly power in the market for services of professional football players in the United States. The court agreed that, on the basis of prior cases, the NFL was precluded from relitigating the determination that the services of major league professional football players in the United States constituted a relevant market for purposes of the players' claims.

Judge Doty conducted a similar analysis in finding that the NFL was collaterally estopped from contesting the existence of a relevant market for major league professional football in the United States and the NFL's monopoly power in that market.

The players argued that, in view of prior decisions and because the NFL had monopoly power in the market of major league professional football in the United States, the NFL had monopoly power in the relevant market of professional football players' services in the United States. The players conceded that the issue had not been resolved by another court, and Judge Doty therefore concluded that the players were not entitled to collateral estoppel on that issue and denied their motion for partial summary judgment with respect to the NFL's monopoly power in the relevant market of professional football players' services in the United States.

Judge Doty concluded by pointing out that while there has been prior litigation concerning various NFL player restraints, all of the cases applied the rule of reason rather than a per se analysis. The court therefore denied the players' motion for partial summary judgment seeking the application of a per se rule.

Judge Doty, in a separate case decided in September 1992, but after the jury's decision in the McNeil matter, granted a temporary restraining order sought by Keith Jackson and other football players to prohibit the National Football League and member teams from continuing to restrict the players pursuant to Plan B. The players' contracts with their respective teams all had expired as of February 1, 1992.

In granting unrestricted free agency to the players, the court found that it was likely that the NFL parties would be collaterally estopped from relitigating the legality of the Plan B rules. The Jackson parties planned to seek collateral estoppel on the identical issue to that raised in the McNeil litigation; the NFL parties were the same as in McNeil, and had had "a full and fair opportunity" to litigate the legality of the Plan B rules.

The players made a sufficient showing of irreparable harm, noted the court, citing, in part, "the undisputed brevity and precariousness of the players' careers in professional sports, particularly in the NFL."

It also was noted that injunctive relief was available because of the court's determination that the nonstatutory labor exemption terminated after the players abandoned their union and the finding in McNeil that the Plan B rules violated the Sherman Act.

The court deferred ruling on the players' motion for preliminary injunctive relief pending an evidentiary hearing.

McNeil v. National Football League, 790 F.Supp. 871 (D. Minn. 1992); Jackson v. National Football League, 802 F.Supp. 226 (D.Minn. 1992) [ELR 15:2:20]

Injunction barring university and NAIA from interfering with basketball player Eric Manuel's athletic scholarship is upheld

Eric Manuel obtained a permanent injunction prohibiting the National Association of Intercollegiate Athletics and Oklahoma City University from interfering with his scholarship to play varsity basketball for the university until Manuel completed ten semesters, or until he graduated, whichever occurred earlier.

An Oklahoma appellate court declined to dismiss an appeal of the trial court's decision, noting that the association by-laws provided for retroactive sanctions for violations by member schools and that the dismissal of the appeal, on grounds of mootness, could leave unresolved the issue of potential liability for the university's alleged rules violations for honoring Manuel's contract and scholarship.

After describing the circumstances resulting in Manuel's association with Oklahoma City University and the eligibility rule at issue, the court found that the association arbitrarily applied the eligibility rule to Manuel. The court stated that the association chose to interpret the rule, in Manuel's case, to mean that if a student athlete had become ineligible under NCAA rules, he was automatically ineligible under the association's rules. The language of the rule, however, provided that an athlete had to complete eligibility at a four year institution before being ineligible to compete at an association school. It was noted that there was evidence that Manuel did not complete his eligibility at the University of Kentucky, the only four year institution he attended prior to attending Oklahoma City University. Manuel was not suspended from the University of Kentucky, received an associate degree from a junior college and

was "immediately eligible" to play for Oklahoma City University.

The court pointed out that the association by-laws did not require those disciplined by the NCAA to be similarly disciplined by the NAIA, or require that the NAIA must declare a student ineligible because of the fact that he was ineligible in the NCAA. In all, it was found that the NAIA, in effect, created a special rule for Manuel.

The trial court did not abuse its discretion in granting Manuel's permanent injunction, concluded the court, stating that the manner in which the association chose to interpret its rules with regard to Manuel appeared, from the evidence, to be contrary to the way the association interpreted its rules in the past as to other student athletes. "Equal application of its rules to all participants cannot prove detrimental" to the association, concluded the court, which also commented that public policy

considerations would be served by the issuance of the injunction.

Manuel v. Oklahoma City University, 833 P.2d 288 (Okla.App. 1992) [ELR 15:2:21]

Court orders Colgate University to grant varsity status to women's ice hockey team

Several former members of the Colgate University women's club ice hockey team alleged that the school's 1988 decision to maintain women's ice hockey as a club sport violated Title IX.

Colgate, an all male school until 1970, had a competitive men's varsity ice hockey team; ice hockey was an "emphasized" sport, which, according to Federal District Court Magistrate Judge Hurd, meant that the team

received additional financial aid and other support. A club team, stated the court, is more "unofficial," with more informal schedules, practices, and competition. Its equipment, facilities, and travel are of a more 'make shift' nature."

The university, on several occasions, rejected the women's ice hockey team's application for varsity status, purportedly because women's ice hockey is rarely played on the secondary level; championships are not sponsored by the NCAA at any intercollegiate level; the game is only played at about fifteen colleges in the east; and because hockey is expensive to fund. At trial, the school also claimed that there was a lack of general student interest in women's ice hockey, and a lack of ability by the members of the women's team.

Title IX of the Education Amendments of 1972, Pub.L. 92-318, as amended, 20 U.S.C. section1681, et seq., prohibits gender discrimination in education programs or

activities receiving federal financial assistance. Colgate, although subject to Title IX, argued that the statute prohibited discrimination in an athletic program as a whole, but that the complaint did not allege, and the evidence did not show, that there was any gender discrimination in the overall athletic opportunities available to women at Colgate. In rejecting this argument, the court noted that Colgate "spent far more on men's sports than women's sports over the years;" and that there was a substantial gap between the amount spent for men's varsity sports and for women's varsity sports.

The statute requires that equivalent benefit and opportunities must be provided to men and women. The women hockey players adverted to the difference in financial support received from Colgate by the women's club team and the men's varsity team - for 1990/1991, the men's team received fifty times the financial support from the university as the women players. Furthermore,

the women had to pay dues of \$25 per year to be on the team; the men did not have to pay dues.

The court also pointed out that the men were outfitted with uniforms and equipment; the women players supplied their own skates; had to use old and inadequate equipment; shared a very small locker room with other teams; paid Colgate to rent a van when traveling to games, provided their own driver, and made their own travel arrangements. It was noted that the men were given prime practice times and had priority for extra practice, and had a full-time head coach and one fulltime assistant coach who were paid a total of about \$86,000; the women's team was coached by volunteer students who were paid a few hundred dollars a year.

The men's ice hockey players at Colgate, stated Magistrate Judge Hurd, were treated as "princes." The women players were treated as "chimney sweeps," and, in all, set forth a prima facie case of unequal treatment because

of gender, resulting in a presumption that Colgate violated Title IX.

The court then found that Colgate's reasons for denying equality to the women's ice hockey players were a pretext for discrimination in violation of Title IX. The only real reason for the denial of varsity status was the cost involved, stated Magistrate Judge Hurd, and although this reason was not a pretext, a school may not justify gender discrimination on the basis of financial concerns alone. Funding need not be equal for both teams, but Colgate must provide equivalent benefits and opportunities.

Magistrate Judge Hurd declared that "equal athletic treatment is not a luxury. It is not a luxury to grant equivalent benefits and opportunities to women. It is not a luxury to comply with the law. Equality and justice are not luxuries. They are essential elements which are

woven into the very fiber of this country. They are essential elements no codified under Title IX."

The court ordered Colgate to grant the women's ice hockey team varsity status starting with the 1993-1994 school year and to provide the team all the amenities that accompany such a designation; cautioned that the women players were entitled to equal athletic opportunity, but not necessarily equal funding; and declined to award compensatory damages to the women players.

Cook v. Colgate University, 802 F.Supp. 737 (N.D.N.Y. 1992) [ELR 15:2:22]

Pennsylvania school district's policy barring male students from playing on girls' high school field hockey team violates Title IX John Williams sued a Pennsylvania school district, claiming that his exclusion from his high school's girls' field hockey team violated Title IX of the Education Amendments of 1972, the Equal Rights Amendment of the Pennsylvania Constitution, and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

The school district limited the field hockey team to female students and did not provide a school field hockey team for boys. A Federal District Court stated that Williams was prevented from playing interscholastic field hockey solely on the basis of his gender, and found that field hockey was not a contact sport for purposes of the athletic regulations under Title IX, and that the high school's athletic opportunities for boys were limited as a result of the expansion of opportunities for girls in athletics. It appeared to the court that "where there has been at least eighteen years of limitations on athletic

opportunities for boys and... such limitations are presently in force, the Title IX requirement of previous limitation on athletic participation for the excluded sex has been met."

Senior District Judge Troutman, upon ruling that the school district violated Title IX, stated that although not required to address Williams' constitutional claims, the court would do so "for the sake of completeness." The school district's claim that it properly limited opportunities for boys in its sports program was rejected. The court declared that for the current high school students, the years for which the school district was trying to make amends (the sixties and seventies) were "equivalent to prehistoric times, since most, if not all, of them were not then in existence." Providing a remedy for past discrimination against girls in athletics did not constitute a government interest important enough to justify the policy of prohibiting male students from trying out and playing for designated girls' teams when no comparable boys' team was offered, declared the court.

Judge Troutman found that "unsupported assumptions and broad generalizations" were cited to support the school district's reliance upon physical differences between boys and girls as a rationale for prohibiting all boys from participating on all designated girls' teams. The court determined, on the basis of the evidence, that there was a demonstrated lack of interest in playing on girls' teams in general among males at the subject high school, as well as a general lack of interest among males in playing field hockey at all. The school district's fears concerning the purported potential of boys to dominate the field hockey team to the detriment of girls' athletic opportunities were "completely unfounded or so ephemeral as to be insufficient justification for a policy which discriminates against boys in order to protect equal athletic opportunities for girls."

Having found that the school district's policy of banning boys from the field hockey team constituted a violation of the equal protection clause in that it was not demonstrated that the policy was substantially related to an important government interest, the court mentioned that although the school district's action may have constituted a due process violation, it was questionable whether such a finding would lead to an effective remedy in this case.

The court concluded by stating that if the school district's policy violated the equal protection clause, it also violated Pennsylvania's Equal Rights Amendment, and by ordering that John Williams be permitted to participate in field hockey on the same basis as female students at his high school.

Williams v. School District of Bethlehem, Pa., 799 F.Supp. 513 (E.D.Pa. 1992) [ELR 15:2:23]

Former owner of New England Patriots may proceed with antitrust action against National Football League

In 1987, William Sullivan, Jr., the owner of the New England Patriots sought to sell a forty-nine percent interest in the Patriots to an investment banking company which was not engaged in the operation or management of professional football teams. Sullivan claimed that the National Football League and other parties, including twenty-one of the twenty-eight NFL member clubs prevented the sale by selectively enforcing an NFL rule which prohibits the sale, in whole or in part, of an interest in an NFL franchise to any company not engaged in the business of professional football. According to Sullivan, NFL commissioner Paul Tagliabue and former commissioner Pete Rozelle permitted the owner of the San Francisco Forty-Niners to sell his majority ownership interest in that club to a company not engaged in the business of professional football; the commissioners allegedly concealed the sale from Sullivan.

In response to Sullivan's antitrust action, a Federal District Court in Rhode Island ruled that the court lacked personal jurisdiction over the NFL parties. Chief Judge Francis J. Boyle cited the NFL's contacts with the state, but found that the NFL's activities were not sufficient to show that the League had systematic and continuous contacts with the state such that the exercise of general personal jurisdiction would not offend traditional notions of fair play and substantial justice.

Chief Judge Boyle observed that the NFL did not purposefully avail itself of the privilege of conducting business within the state, did not maintain an office, agent for service of process, license to do business, telephone listing, bank account or post office box in Rhode Island. Furthermore, the NFL owned no real or personal property in Rhode Island and did not pay any state taxes.

The court also determined that it lacked jurisdiction over the NFL member clubs due to their lack of any systematic and continuous contacts with Rhode Island, and that there was no basis for jurisdiction over the member clubs under the Clayton Act.

After finding that jurisdiction was lacking over Rozelle and Tagliabue, and that venue did not exist in Rhode Island, the court concluded by transferring the case, in the interests of justice (and given the substantial discovery conducted by the parties), to the Federal District Court in Massachusetts; the NFL parties agreed to submit to personal jurisdiction and venue in that court.

A Federal District Court in Massachusetts has denied the NFL's motion to dismiss. Judge Harrington noted that William Sullivan alleged that the NFL's rule limited his ability to raise the capital necessary to maintain a profitable franchise and to compete with other football franchises. Charles W. Sullivan, a vice president of the New England Patriots from 1975 to 1988 claimed that the rule interfered with his ability to refinance Sullivan Stadium and to compete for the staging of sports and entertainment events.

The court found that the question of whether an agreement among the owners of teams in a professional football league violates the antitrust law would require an examination of the business practices of the industry and a determination of whether such an agreement would promote or reduce competition. It will remain for a fact finder, applying the rule of reason, to decide whether, under the circumstances of the case, the league rule imposed an unreasonable restraint on competition.

Sullivan v. Tagliabue, 785 F.Supp. 1076 (D.R.I. 1992); 795 F.Supp. 56 (D.Mass. 1992) [ELR 15:2:23]

Salary dispute between defunct indoor soccer team and former player is remanded

In 1984, Kai Haaskivi signed a standard player agreement with the Cleveland Indoor Soccer Company, Ltd. which operated the Cleveland Force soccer team. Haaskivi's salary for the 1988-1989 season was \$133,000; the player originally was scheduled to receive a salary of \$190,000, but the amount was reduced by one-third in accordance with a renegotiated collective bargaining agreement. The Force ceased operations in late July 1988, after having paid Haaskivi about \$70,000. Haaskivi subsequently obtained employment with the Baltimore Blast for a salary of \$90,000.

Cleveland Indoor Soccer sued to recover about \$26,000 paid to Haaskivi, claiming that this amount represented an excess payment to which Haaskivi was not entitled under the standard player agreement. An Ohio trial court granted the club's motion for summary judgment.

An Ohio appellate court has reversed the trial court decision. The court stated that absent a breach by Haaskivi, it appeared that Cleveland Indoor Soccer might be obligated to pay him the full sum due and owing under the contract. Cleveland paid Haaskivi only about \$70,000 and there was a question of fact as to whether the club was further obligated to pay the \$63,000 balance due.

Haaskivi had a duty to mitigate any damages he might sustain if he was terminated prior to the expiration of his guaranteed term. Haaskivi complied with his obligation by obtaining employment - that Haaskivi was able to earn more than the sum still due and owing by Cleveland Indoor Soccer did not entitle the club "to a windfall of the excess monies," stated the court.

Haaskivi had claimed that the club represented to his agent that if he would accept a thirty percent reduction in salary, the club would continue in existence. The player accepted the reduction and chose to forgo his option of free agency. The court found that there was sufficient evidence that a material issue of fact existed with respect to Haaskivi's fraud claim, and that the club's motion for summary judgment on this issue should have been denied.

The trial court also was directed on remand to consider whether Haaskivi was entitled to additional payments for conducting summer soccer camps for the club, and whether the club had fulfilled its payment obligation under the player contract. Cleveland Indoor Soccer Company, Ltd. v. Haaskivi, 605 N.E.2d 1315 (Ohio App. 1992) [ELR 15:2:24]

96-year old woman whose photograph was used in story on pregnancy of "World's oldest newspaper carrier" obtains \$850,000 in punitive damages; court remits award of compensatory damages

As reported at ELR 13:11:10, the October 2, 1990 issue of the "Sun" used an archive photograph of Nellie Mitchell to illustrate an article entitled "World's oldest newspaper carrier, 101, quits because she's pregnant!" The fictitious story purported to report on "papergal Audrey Wiles," who had been a newspaper carrier in Australia for 94 years.

Mitchell, who, at the time of the publication, was 96 years old, had operated a newsstand and delivered

newspapers in her Arkansas community for almost fifty years.

A Federal District Court in Arkansas denied Globe International Publishing's motion for summary judgment with respect to Mitchell's libel claim.

Mitchell's conservator filed an amended complaint alleging defamation, false light invasion of privacy, and intentional infliction of emotional distress. The jury found for Globe on the defamation cause of action, but awarded Mitchell compensatory damages of \$650,000 and punitive damages of \$850,000 for invasion of privacy and outrage.

A Federal Court of Appeals has upheld the judgment entered on the jury's verdict as to liability and punitive damages, but remanded the matter for "a substantial remittitur of compensatory damages."

Globe argued that, as a matter of law, no reader reasonably could construe the story as conveying actual

facts about Mitchell, and that the article was "an obvious, non-actionable 'fiction.'" But Senior Judge Heaney observed that apart from the assertion of pregnancy, every other aspect of the story at issue - such as an implication of sexual impropriety and that Mitchell was quitting her profession - was subject to reasonable belief. Even the report of the pregnancy, stated the court, could be proved either true or false, and was not "an opinion, metaphor, fantasy, or surrealism." Judge Heaney therefore declined to find as a matter of law that readers could not reasonably have believed that the story portrayed actual facts or events concerning Mitchell.

It then was found that the circumstances of the case suggested that the article might be believed by readers as conveying actual facts about Mitchell "despite the apparent absurdity of a pregnant centenarian." There was more than sufficient evidence, declared Judge Heaney, to conclude that Globe intended its readers to believe the article. And although there was less evidence of Globe's intention to have its readers believe facts specifically about Mitchell, the court concluded that it was demonstrated that the publisher recklessly failed to anticipate that result.

With respect to Globe's contention that there could be no actual malice in a fictional work, Judge Heaney found that Globe did not intend the article to be an obvious work of fiction, but held out the publication as factual and true.

The format and style of the tabloid suggested that it was a factual newspaper - the Sun did not indicate that its stories were false or exaggerated, and "mingle[d] factual, fictional, and hybrid stories without overtly identifying one from the other." The fact that the Sun published disclaimers and caveats on advertisements, but did not print any warning or explanation on the

fictional "news" stories, supported, for the court, the conclusion that Globe intended its readers to believe that the Sun printed factual material. This conduct, stated Judge Heaney, was the type of "calculated falsehood against which the First Amendment can tolerate sanctions without significant impairment of its function (emphasis by the court)."

Judge Heaney also pointed out that the Globe was on notice that the photographs of Mitchell were purchased from Baxter County, Arkansas - the photographs were identified on the back as having been purchased from a local newspaper. A Sun editor testified that he knew the individual pictured in the photograph was a real person, but assumed she was dead. Although Globe's failure to investigate and confirm its assumption of Mitchell's death would not alone support a finding of actual malice, "the purposeful avoidance of the truth [was] in a different category."

In all, the evidence was sufficient to support the jury's verdict awarding damages for false light invasion of privacy; the court did not reach the question as to whether the evidence supported the separate tort of outrage.

Judge Heaney concluded by finding that the District Court did not abuse its discretion in declining to remit the award for punitive damages, but that the award of \$650,000 in compensatory damages was "shocking and exaggerated" - there was no evidence that the article adversely effected Mitchell's health, and no evidence of lost earnings, permanent injury, medical expenses, diminution of earning capacity, or future pain and suffering. The District Court abused its discretion in not granting a remittitur on compensatory damages, and the matter was remanded for a substantial remittitur.

Peoples Bank and Trust Company of Mountain Home v. Globe International Publishing, Inc., 978 F.2d 1065 (8th Cir. 1992) [ELR 15:2:25]

Wyoming Supreme Court, over strong dissent, grants summary judgment to Hustler magazine in antipornography activist's libel action

Attorney Gerry Spence represented anti-pornography activist Andrea Dworkin in a libel action against Hustler magazine and other parties (ELR 11:7:15; 11:10:19). An article about Spence in the July 1985 issue of Hustler referred to Dworkin, in part, as a "militant lesbian feminist," and a "shit-squeezing sphincter in her own right." "In her latest publicity-grab," continued the article, "Dworkin has decided to sue Hustler for invasion of privacy among other things. Dworkin seems to be an odd

bedfellow for 'just folks,' 'family values' Spence. After all, Dworkin is one of the most foul-mouthed, abrasive manhaters on Earth. In fact, when Indianapolis contemplated an antiporn ordinance co-authored by Dworkin, she was asked by its supporters to stay away for fear her repulsive presence would kill the statute...Considering that Dworkin advocates bestiality, incest and sex with children, it appears Gerry 'this Tongue for Hire' Spence is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes."

Dworkin, along with representatives of Wyoming womens' groups, sued the Hustler parties alleging libel and other claims.

A Wyoming trial court granted summary judgment to the Hustler parties on all claims.

The Wyoming Supreme Court, in affirming the trial court decision, noted that the state's constitution

provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right, and in all trials for libel, both civil and criminal, the truth, when published with good intent and [for] justifiable ends, shall be a sufficient defense, the jury having the right to determine the facts and the law, under the direction of the court."

Dworkin argued that under Wyoming law, a jury was required to decide the libel claim, and that the court improperly entered summary judgment. But Judge Golden, after careful consideration, held that the Wyoming constitution did not preclude the trial court's use of summary judgment.

The court compared the state's free speech/libel constitutional provision with the free speech clause of the First Amendment to the United States Constitution, and stated that the federal "floor" in public figure/media

party libel cases would apply in evaluating the Hustler parties' liability to Dworkin.

Applying Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990; ELR 12:2:8; 12:6:19), the court found that the Hustler statements were not actionable as a matter of law. The language used in the article - abusive epithets, vulgarities and profanities - was rhetorical hyperbole which, as a matter of law, cannot reasonably be understood as a statement of fact, noted Judge Golden, who also observed that certain formats "signal the average reader to expect a departure from what is actually known by the writer as fact." The tone of the Hustler article was "pointed, exaggerated and heavily laden with emotional rhetoric;" an average reader of the regular monthly feature in which the comments appeared would expect strong, opinionated statements in that column, which was "akin to an editorial page."

The court then pointed out that the statements in the article, with four exceptions, were not capable of being proved by objective means as either true or false, and indeed were "hopelessly vague, imprecise, indefinite and amorphous." Furthermore, the challenged statements, continued Judge Golden, appeared in the context of a debate about pornography, and "in such a heated and spirited confrontation, of which the statements [were] a part, abusive epithets, exaggerated rhetoric and hysterical hyperbole are expected."

After examining the four statements in the article which appeared more likely to be objectively capable of proof or disproof, the court found that Dworkin did not meet the burden of proving, with convincing clarity, not only the falsity of the statements, but also that Hustler uttered the statements with knowledge of their falsity or in reckless disregard for the truth. In all, neither the statements considered individually nor the article

considered as a whole constituted actionable defamation.

Dworkin claimed that the Wyoming Constitution required the Hustler parties to prove that the statements, even if "true" or constitutionally protected, were published with good motives and for justifiable ends. Judge Golden stated that the constitutional phrase "when published with good intent and [for] justifiable ends" violated the First Amendment of the United States Constitution in libel actions in which a court applies the standard set forth in New York Times v. Sullivan, 376 U.S. 254 (1964) to public figures who have been criticized by a media party regarding a matter of public concern.

Judge Cardine, specially concurring, agreed in the opinion of the court on the basis of United States Supreme Court precedent. But Judge Cardine expressed less than enthusiastic support for "a state of law which

allows a publisher to create a money-making business out of cruel, obscene, random attacks upon public figures."

In a lengthy dissent, Judge Urbigkit focused on the inappropriateness of deciding the instant matter by summary judgment and rejected the view that the First Amendment of the United States Constitution required that the Wyoming Constitution's reference to "good motives and for justifiable ends" should be "abrogated or ignored" as a criteria for liability or the lack thereof. The issue, for Judge Urbigkit, was whether, as a matter of law, Hustler's comments could be found actionable under the Wyoming Constitution as limited in certain respects by the First Amendment decisions of the United States Supreme Court. The majority's use of a summary judgment proceeding to invalidate state constitutional requirements and guarantees was, in Judge Urbigkit's

opinion, unnecessary and inappropriate and amounted to "appellate adjudicatory fact finding."

After careful review of defamation law, Judge Urbigkit stated that if the dissent chose to engage in fact finding, it would have found that Hustler acted with the highest degree of intended malice, bad faith and viciousness, and that "no semblance of good faith and honest motive is to be portrayed." The state's constitution provided that truth, good faith and honest intent should be significant factors in determining immunity for challenged material; the mandatory text of the constitution should not have been rejected by any decision made on the subject by summary judgment, emphasized Judge Urbigkit.

Dworkin v. L.F.P., Inc., 839 P.2d 903 (Wyo. 1992) [ELR 15:2:26]

Magazine obtains summary judgment in libel action brought by individual mentioned in article about alleged conspiracy to assassinate John F. Kennedy

The January 1992 issue of Gentleman's Quarterly Magazine included an article entitled "The Case Against Jim Garrison." Author Nicholas B. Lemann recounted his memories of growing up in New Orleans, including comments about District Attorney Jim Garrison's 1969 prosecution of Clay Shaw for allegedly conspiring to assassinate President John F. Kennedy. Lemann, according to Federal District Court Judge Charles Schwartz, Jr., expressed the view, contrary to Oliver Stone's sympathetic portrayal of Garrison in the film "JFK," that Shaw's prosecution was not well supported and was a "tremendous embarrassment" to the city.

The article contained one reference to Perry Russo, who was Garrison's principal witness against Shaw.

Lemann referred to Russo as "a young insurance salesman-cum-grifter who claimed to have overheard Shaw and Ferrie discussing the assassination at a party." Various sources, stated Judge Schwartz, confirmed that Russo's testimony in the Shaw case was controversial and widely regarded as "unreliable." It was observed that Russo, in opposing summary judgment, did not dispute the evidence showing his substantial involvement in the prosecution of Clay Shaw and the apparent unreliability of his conflicting testimony in those proceedings. It also was noted that Russo essentially admitted that he had no reason to believe that Lemann or anyone at the magazine bore him any animosity.

Judge Schwartz noted that the term "grifter" may be defined as a "gambler", a confidence man or swindler, and or as a dishonest person," and the Lemann's reference to Russo intended to communicate "both the long-standing controversy over testimony against Shaw, and

Russo's admittedly strange existence on the fringes of respectable society."

Russo had sought out an interview with a Baton Rouge newspaper in February 1967; the interview and subsequent television appearances brought him to the attention of the Garrison investigation.

In response to Russo's defamation action, Judge Schwartz found that the word "grifter" was not defamatory per se and that the term, while "unflattering," was not defamatory as a matter of law. Lemann did not make any specific charge concerning Russo, and, again, mentioned Russo only once in the challenged article.

In view of the enormous public attention (emphasis by the court) which was focused on the controversy surrounding the prosecution of Clay Shaw and Russo's "pivotal role" in that prosecution, the court further found that Russo was a limited purpose public figure. Since Russo failed to submit sufficient proof to permit the court to conclude by clear and convincing evidence that Gentleman's Quarterly acted with constitutional malice, Judge Schwartz granted the magazine parties' motion for summary judgment.

Russo v. Conde Nast Publications, 806 F.Supp. 603 (E.D.La. 1992) [ELR 15:2:27]

Briefly Noted:

First Amendment/Lottery Advertising.

As reported at ELR 12:10:17, a Federal District Court in Virginia declared that two provisions of the federal lottery statute, 18 U.S.C. sections 1304 and 1307, unconstitutionally infringed commercial speech. A Federal Court of Appeals, although designating its opinion as

"unpublished" and noting that unpublished opinions are not binding precedent in the circuit, has affirmed the District Court's decision.

The statutes prohibit radio broadcasts of lottery advertising and information by licensees located in non-lottery states. Edge Broadcasting, a Virginia-based corporation, operated a North Carolina radio station, located about three miles from the North Carolina and Virginia border. Virginia has been authorized to sponsor a lottery; in North Carolina, it is a misdemeanor to operate or advertise a lottery.

The court found that information about the Virginia lottery was entitled to First Amendment protection, and that the government's goal of permitting non-lottery states to discourage gambling would not be advanced by precluding the radio station from broadcasting Virginia lottery advertisements. The North Carolina residents within the area of the station's signal were "inundated"

with Virginia's lottery advertisements" through televised, broadcast and print media. Prohibiting Edge's station from advertising the lottery would be ineffective in shielding North Carolina residents from lottery information, stated the court, in holding that the statutes were an unconstitutional restriction on commercial speech as applied to the broadcasts at issue.

A dissenting judge would have found that the fact that less than two percent of North Carolina's population might have been exposed to the challenged broadcasts did not change the fact that Congress had the right to enact the legislation. Judge Widener also observed that it is likely that a majority of radio and television broadcasts cross state lines - carrying the court's decision "to its logical conclusion" would serve to completely invalidate the statutes involved.

Edge Broadcasting Co. v. United States, 20 Med.L.Rptr. 1904 (4th Cir. 1992) [ELR 15:2:28]

Racetrack Exclusion.

Michael Ferraro and Edward Babcock sued the Finger Lakes Racing Association alleging prima facie tort, intentional interference with contract and defamation. A New York trial court granted the association's motion for summary judgment on the former causes of action, finding that the exclusion of Ferraro and Babcock was not based upon an improper or malicious motive, but was based upon legitimate business interests and the interest of thoroughbred horse racing.

An appellate court has upheld the trial court's ruling with respect to the issues of prima facie tort and intentional interference with contract, but found that the court erred in denying the association's motion for summary judgment seeking the dismissal of the defamation claims. The association demonstrated that the statements (not cited by the court) of its general manager were not published with actual malice, and was entitled to summary judgment dismissing the complaint in its entirety.

Ferraro v. Finger Lakes Racing Association, Inc.; Babcock v. Finger Lakes Racing Association, Inc., 583 N.Y.S.2d 66 (N.Y.App. 1992) [ELR 15:2:28]

Jockey Suspension.

The New York State Racing and Wagering Board suspended Angel Cordero, Jr.'s license for ten days, apparently for an infraction committed at the Saratoga

racetrack. An appellate court dismissed Cordero's petition for review.

The New York Court of Appeals has modified the appellate court judgment by annulling the part of the determination directing that the penalty be served during Saratoga racing days.

As described by the court, the Board's "Saratoga policy" requires that, following an administrative appeal, a suspension imposed for an infraction committed at the Saratoga racetrack be served at the Saratoga meet the following year. The court rejected the Board's argument that the Saratoga policy only affected the implementation of a penalty, not a jockey's conduct, and thus was not a rule. It was found that the policy established a mandatory procedure pertaining only to when and where a Saratoga suspension must be served in the event of an appeal (emphasis by the court), and therefore met the statutory definition of a rule.

The parties had agreed that if the court found that the policy was an administrative rule, it could not be applied in the instant case because it was not formally promulgated by the Board pursuant to statutory rule-making procedures. The matter was remitted to the trial court with directions to remand to the Board for further proceedings.

Cordero v. Corbisiero, 587 N.Y.S.2d 266, 599 N.E.2d 670 (N.Y. 1992) [ELR 15:2:28]

Arbitration.

In May 1990, the North Carolina Dance Theater hired Brent Bennish to perform as a dancer during the 1990-1991 season. The parties' contract incorporated by reference the "North Carolina Dance Theater 1990-91"

Dancer Guidelines," including an arbitration provision whereby either the theater or the artist could demand arbitration of any claim arising out of or relating to the employment contract.

The theater terminated Bennish's employment effective August 1990 and subsequently demanded arbitration. Bennish refused arbitration and filed a lawsuit alleging breach of contract and misrepresentation. The trial court denied the dance theater's motion to compel arbitration and stay the proceedings pending arbitration.

A North Carolina appellate court agreed with the dance theater that the contract involved substantial interstate activity and thus was within the scope of the Federal Arbitration Act. The court therefore reversed the trial court decision, remanded the matter for an order compelling arbitration, and directed the substitution of a neutral arbitrator.

Bennish v. North Carolina Dance Theater, Inc., 422 S.E.2d 335 (N.C.App. 1992) [ELR 15:2:28]

Copyright Infringement/Music.

In July 1982, Richard Wesley Peden and Tommy Conners conveyed to Jay Collier the copyright in the musical composition "The Highway Never Ends." Collier allegedly agreed to return the ownership of the copyright to Peden and Conners. Peden and Conners then assigned the copyright to SBK Blackwood Music, Inc. and Larry Music Co.; the companies, in turn, assigned the copyright to J.D. Sandefer.

In March 1991, Collier's ownership of the copyright was recorded by the Copyright Office.

When Sandefer sued Collier and other parties for copyright infringement, Collier denied any agreement to

reconvey the copyright to Peden and Conners. A Tennessee trial court granted Collier's motion for summary judgment.

In affirming the trial court decision, a Tennessee appellate court found that the uncontradicted evidence indicated that there was no agreement to reconvey; that Sandefer did not establish a claim under the doctrine of unjust enrichment; and that Collier was entitled to damages for frivolous appeal in an amount to be determined upon remand.

Sandefer v. Collier, 1993 Tenn.App.LEXIS 67 [ELR 15:2:29]

School Athlete Injury.

An Ohio appellate court has remanded for further proceedings a trial court decision granting summary judgment to the Ohio High School Athletic Association, the National Federation of State High School Associations, and the National Operating Committee on Standards for Athletic Equipment in a lawsuit brought by John P. Wissel, a high school football player who was rendered a quadriplegic when he tackled an opposing player. The court affirmed the trial court's grant of summary judgment on Wissel's strict liability causes of action, and agreed that there was no evidence upon which the court could reasonably conclude that the various associations, by their alleged failure to make the game safer, actually increased the risk of harm to Wissel above that which would have existed had the associations not provided the services that they did. Furthermore, there was no basis upon which to reasonably conclude that Wissel

suffered harm because of his "reliance" on the associations' conduct.

However, the court proceeded to find that Wissel was owed a general duty of reasonable care by his high school in conducting its football program. The school, in turn, allowed the conduct of its football games to be largely governed by the policies and decisions of the associations. It appeared to the court that Restatement Section 324A, rather than Section 323 (which Wissel had asserted as the basis of his negligence claim), may have stated the proper applicable law. Since the trial court was not presented with, and therefore did not consider or decide the motions for summary judgment on this basis, Presiding Judge Doan vacated the grants of summary judgment and remanded the matter for further consideration in light of Section 324A.

Wissel v. Ohio High School Athletic Association, 605 N.E.2d 458 (Ohio App. 1992) [ELR 15:2:29]

Rodeo Association.

A Colorado appellate court has affirmed a trial court decision dismissing with prejudice an action brought by Jimmy Powers against the Professional Rodeo Cowboys Association. Powers, a rodeo cowboy and a director of the association, claimed that the association violated his rights by restricting him from copying and distributing its membership list and from communicating with association members. Powers sought to contact the members concerning a proposed contract for the national finals rodeo competition.

The trial court had found that pursuant to the association's articles of incorporation and bylaws, the board of directors, not the general membership, was responsible for a decision on the proposed contract and denied injunctive relief. The court, in subsequently dismissing Powers' action, found that the association had suffered legal prejudice because of the expenditure of costs and effort; that Powers did not sufficiently explain his failure to proceed with the case after the denial of his requests for preliminary relief; and that the association might confront possible duplicative future litigation.

The appellate court, noting that it appeared that the remaining issue for trial in the matter was primarily legal and that the trial court was very likely to rule in the association's favor, declined to find that the trial court abused its discretion in refusing to dismiss without prejudice. The court, observing that it was "abundantly clear" that Powers did not seek to proceed with the litigation, was not taken by surprise by the motion, and did

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not request a hearing, concluded that the trial court properly dismissed the case with prejudice.

Powers v. Professional Rodeo Cowboys Association, 832 P.2d 1099 (Colo. App. 1992) [ELR 15:2:29]

DEPARTMENTS

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