

RECENT DEVELOPMENTS IN MEDIA, PRIVACY,  
AND DEFAMATION LAW

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The U.S. Supreme Court dominated this survey period, with decisions affecting media interests in privacy and access to information. Meanwhile, state and lower federal courts engaged in the serious jurisprudence involving celebrity, soccer balls, Serbian financiers, subpoenas and shield laws, canine software, and solicitations by fax blasts.

## I. PRIVACY

### A. *Intrusion*

In *City of Ontario v. Quon*, the U.S. Supreme Court examined whether a public employee has any right of privacy when sending text messages on a government-issued mobile device.<sup>1</sup> Ontario, California, issued Quon a mobile device and advised him that text messages could be saved and viewed by his supervisors.<sup>2</sup> Quon's usage volume triggered an investigation, which found that Quon was sending numerous personal messages,

1. 130 S. Ct. 2619, 2624 (2010).

2. *Id.* at 2625.

including sexually explicit messages to his then wife and girlfriend. After Quon was disciplined, he sued the City, claiming that the City violated his Fourth Amendment rights by obtaining and reviewing his text messages.<sup>3</sup> The Supreme Court declined to address an employee's expectation of privacy in work-issued technology and instead held that "[e]ven if Quon had a reasonable expectation of privacy," the City's search was reasonable because it was motivated by a legitimate work-related purpose and was not excessive in scope.<sup>4</sup>

The New Jersey Supreme Court addressed a similar issue in the context of a nongovernmental employer in *Stengart v. Loving Care Agency, Inc.*<sup>5</sup> Stengart used her company-issued laptop to exchange e-mails with her lawyer through her personal, password-protected, and web-based e-mail account. When she later filed an employment discrimination suit against the employer, the company hired a computer forensic expert to recover files stored on the laptop. When Stengart's e-mails with her attorney were discovered, the employer claimed that the company had a right to review them.<sup>6</sup> The New Jersey Supreme Court declined to adopt categorical rules regarding a private employee's right to privacy when using an employer-issued computer, but rather used a fact-based assessment to determine whether Stengart had a reasonable expectation of privacy in the e-mails. Relying on ambiguities in the company's computer policy and Stengart's use of her personal e-mail account rather than her company e-mail address, the court held Stengart had a reasonable expectation of privacy in the e-mails,<sup>7</sup> and "[i]t follows that the attorney client privilege protects those e-mails."<sup>8</sup>

### B. *Publication of Private Facts*

The "private facts" tort rests on the premise that government through the common law can prohibit publication of some information, "highly offensive" and "not of legitimate concern," even though it is true. The Restatement itself expressed uncertainty about the constitutionality of the "private facts" tort more than thirty years ago,<sup>9</sup> and notwithstanding its general

3. *Id.* at 2625–26.

4. *Id.* at 2630–31.

5. 990 A.2d 650 (N.J. 2010).

6. *Id.* at 655.

7. *Id.* at 663.

8. *Id.* at 664.

9. RESTATEMENT (SECOND) OF TORTS § 652D, Special Note on Relation of § 652D to the Amendment to the Constitution (1977) ("This Section provides for tort liability involving a judgment for damages for publicity given to true statements of fact. It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment. . . .").

recognition in many states, the “private facts” tort remains “fraught with difficulty.”<sup>10</sup> In *United States v. Stevens*,<sup>11</sup> the U.S. Supreme Court provided further support for attacks on the constitutionality of any attempt to punish truthful speech through this tort. The First Amendment principles of the decision extend far beyond the specific context of dog fight videos and a federal statute directed at combating animal cruelty that brought the case before the Court. The Court held that the First Amendment’s guarantee of free speech cannot be limited “simply on the basis that some speech is not worth it.”<sup>12</sup> The Court further held that “serious value” cannot be “used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value), but it is still sheltered from government regulation.”<sup>13</sup>

In *Ostergren v. Cuccinelli*, the Fourth Circuit addressed the constitutionality of a Virginia statute prohibiting communication of another’s social security number to the general public.<sup>14</sup> A different Virginia statute required counties to make land records, many of which contain unredacted SSNs, available online, and Ostergren, hoping to illustrate the government’s mishandling of SSNs, posted SSNs obtained from land records on her website. When threatened with prosecution, Ostergren sued for declaratory and injunctive relief, and the district court found the statute unconstitutional as applied. The Fourth Circuit affirmed, in part. The court found that Ostergren’s posting of SSNs was integral to her message that Virginia was failing to safeguard private information, and concluded that public records “by their very nature are of interest to those concerned with the administration of government.”<sup>15</sup> A prohibition on publication of lawfully obtained truthful information about a matter of public significance

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10. ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS* § 12.4 at 12–33 (2009) (4th ed. 2010). See also *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 693 (Ind. 1997) (plurality opinion) (because the privacy tort “involving disclosure of truthful but private facts encounters a considerable obstacle in the truth-in-defense provisions of the Indiana Constitution,” the court was not persuaded that it should endorse that tort); *Anderson v. Fisher Broad. Cos.*, 712 P.2d 803, 808–09 (Or. 1986) (“What is ‘private’ so as to make its publication offensive likely differs among communities, between generations, and among ethnic, religious, or other social groups, as well as among individuals. Likewise, one reader’s or viewer’s ‘news’ is another’s tedium or trivia. The editorial judgment of what is ‘newsworthy’ is not so readily submitted to the *ad hoc* review of a jury as the Court of Appeals believed. It is not properly a community standard. Even when some editors themselves vie to tailor ‘news’ to satisfy popular tastes, others may believe that the community should see or hear facts or ideas that the majority finds uninteresting or offensive.”).

11. 130 S. Ct. 1577 (2010).

12. *Id.* at 1585.

13. *Id.* at 1591 (emphasis in original).

14. 615 F.3d 263 (4th Cir. 2010).

15. *Id.* at 272 (citation omitted).

must be “narrowly tailored to a state interest of the highest order,” and the court found the statute could not possibly be “narrowly tailored” to protect privacy interests when Virginia made the same records available without redaction.<sup>16</sup>

In *Lorenzo v. United States*, a federal district court in California reaffirmed the notion that a police officer’s conduct is of legitimate public interest.<sup>17</sup> Lorenzo, a Border Patrol agent, brought privacy claims against the government after other federal agents released a video showing him killing an illegal immigrant smuggler during a border altercation. The court dismissed Lorenzo’s claim for public disclosure of private facts, holding that a “shooting at the border involving a law enforcement officer and an illegal alien is clearly a newsworthy event.”<sup>18</sup>

### C. Misappropriation

In *Hilton v. Hallmark Cards*, Paris Hilton, identified by the court as “a controversial celebrity known for her lifestyle as a flamboyant heiress” who is “famous for being famous,” sued Hallmark over a birthday card with an oversized photograph of Hilton’s head superimposed on a waitress.<sup>19</sup> Above the caption “Paris’ First Day as a Waitress,” the card depicted the waitress serving a customer food and saying, “Don’t touch that, it’s hot.” The customer asks, “What’s hot?” and the waitress replies, “That’s hot.”<sup>20</sup> The Ninth Circuit affirmed a denial of Hallmark’s motion to strike Hilton’s common law right of publicity claim. Hallmark based its motion on the affirmative defenses of “transformative use” and “public interest.”<sup>21</sup> The court concluded that it could not find the card transformative as a matter of law because, despite differences between *The Simple Life* and Hallmark’s card, “the basic setting is the same: we see Paris Hilton, born to privilege, working as a waitress.”<sup>22</sup> The court held the public interest defense inapplicable because the card did not publish or report newsworthy information—indeed, it did not report *any* information.<sup>23</sup>

16. *Id.* at 276.

17. 719 F. Supp. 2d 1208 (S.D. Cal. 2010).

18. *Id.* at 1215.

19. 599 F.3d 894, 899 (9th Cir. 2010).

20. In her reality television show *The Simple Life*, Hilton uses the phrase “that’s hot” whenever she finds something interesting or amusing. She has registered the phrase as a trademark. *Id.*

21. *Id.* at 908–09.

22. *Id.* at 911.

23. *Id.* at 912. On September 16, 2010, the parties reported that the case had settled. See *Hilton v. Hallmark Cards et al.*, No. 2:07-CV-05818-PA-AJW (D. Cal. Sept. 16, 2010, Minute Order). Relying in part on *Hilton*, a district court for the Northern District of California held that the transformative use and public interest defenses did not bar a former college football player’s misappropriation claim against the producer of the “NCAA Football” series of

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#### D. False Light Invasion of Privacy

The Washington Court of Appeals reaffirmed that the state does not recognize false light invasion of privacy or a defamation claim based on the negative implication of true statements.<sup>24</sup> In *Yeakey v. Hearst Communications*, a crane operator unsuccessfully sued a newspaper that reported the plaintiff's drug use in a story about a crane collapse, notwithstanding his admission that the statements were true.<sup>25</sup>

In *Duer v. Henderson*, an Ohio appellate court held that a false light claim could not be brought on behalf of an estate against the author and publisher of a book entitled *Weird Ohio* because "torts of invasion of privacy are personal and must be brought by 'a living individual whose privacy has been invaded.'"<sup>26</sup>

### II. DEFAMATION

#### A. Strong Rulings for Fair Report Privilege in New Jersey and Illinois

Media outlets in New Jersey breathed a sigh of relief after the state's supreme court declined to adopt an initial pleadings exception to the fair report privilege.<sup>27</sup> *Salzano v. North Jersey Media Group* arose after publication of news reports about a bankruptcy filing that accused the plaintiff of misappropriating \$470,000. The intermediate court refused to apply the fair report privilege because the bankruptcy complaint was an initial pleading. In reversing, the supreme court identified a trend away from the initial pleadings exception and recognized the importance of press coverage in legal proceedings to society at large. It stated, "it is clear that so long as the publisher fully, fairly, and accurately reports the contents of a public proceeding, he has done what is necessary and is immune from a suit for

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video games. In *Keller v. Electronic Arts, Inc.*, No. 09-1967-CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), a former Arizona State and Nebraska quarterback sued video game producer Electronic Arts, Inc. ("EA"), alleging that EA used his likeness in a video game without his consent. In denying EA's motion to dismiss and special motion to strike, the court held that the depiction of Keller in "NCAA Football" was not sufficiently transformative to bar the claim as a matter of law because the video game did not "transform" Keller's character, but "represented [Keller] as what he was: the starting quarterback for Arizona State University." *Id.* at \*5. The court rejected EA's "public interest" defense because the game does not report the plaintiff's statistics or abilities, but simply allows consumers to control virtual football players on a virtual field. *Id.* at \*6.

24. *Yeakey v. Hearst Commc'ns*, 234 P.3d 332, 335 (Wash. Ct. App. 2010).

25. *Id.* at 334.

26. No. 2009 CA 15, 2009 WL 4985475, at \*8-9 (Ohio App. Dist. 2 Dec. 23, 2009) (quoting *Rothstein v. Montefiore Home*, 689 N.E.2d 108, 110 (Ohio Ct. App. 1996)).

27. *Salzano v. N. Jersey Media Grp*, 993 A.2d 778 (N.J. 2010).

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defamation based on false statements made, not by him, but by the participants in the proceeding.”<sup>28</sup>

An appellate court in Illinois held that in a world of flooded inboxes, a newspaper has no obligation to review updated e-mails to successfully assert a fair report defense.<sup>29</sup> The case arose from an e-mail bulletin sent by a local police station to a newspaper reporter. After receiving the e-mail, the reporter submitted a one-sentence brief naming the plaintiff as the arrestee in a retail theft. After the reporter left the newsroom, the police station sent out a second e-mail that corrected the name of the arrestee. The second e-mail was not opened until after publication of the brief naming the plaintiff. The court affirmed summary judgment, finding that the publication accurately reflected the first e-mail received by the newspaper. It stated that the law “does not include a timeliness component, or an obligation to review updated information, in determining the fairness and accuracy of a published report.”<sup>30</sup>

Meanwhile, the D.C. Circuit narrowly interpreted the fair report privilege, refusing to allow an international policy group to defeat a defamation claim even though it backed the allegedly defamatory information with a citation to a report issued by the U.S. Office of Foreign Asset Control.<sup>31</sup> The defendant published a report in 2003 criticizing the U.S. government for failing to aggressively investigate members of Serbia’s financial world. The report listed seventeen individuals allegedly associated with the Milosevic regime, relying on a frozen asset list from the OFAC to support the allegations. Both the list in the report and the OFAC frozen asset list from 1998 included the name of a bank owned by the plaintiff. However, the court determined that nothing in the report suggested that the plaintiff supported or benefitted from the regime, contrary to the published report’s allegations.<sup>32</sup> Therefore, the report published by the research group was not a fair and accurate report of the OFAC list, and thus was not privileged.<sup>33</sup>

### B. *Substantial Truth: “Almost” Counts with Gangs, Not Geography*

Substantial truth related to gang affiliation resulted in the dismissal of a lawsuit filed by a Mexican American prison inmate against A&E Television.<sup>34</sup> The inmate claimed that A&E libeled him by broadcasting a fight between

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28. *Id.* at 798.

29. *Eubanks v. Nw. Herald Newspapers*, 922 N.E.2d 1196 (Ill. App. 2010).

30. *Id.* at 1201; *see also Harper v. Comcast Cable*, 38 Media L. Rptr. 1235 (Colo. Dist. Ct., Denver County, 2009) (finding article based on grand jury indictment to be fair and substantially accurate and thus protected by the fair report privilege).

31. *Jankovic v. Int’l Crisis Group*, 593 F.3d 22 (D.C. Cir. 2010).

32. *Id.* at 27.

33. *Id.*

34. *Bustos v. United States*, 38 Media L. Rep. 1747, 2010 WL 2017724 (D. Colo. 2010).

the plaintiff and another inmate as part of the television series *Gangland*. The plaintiff, who was identifiable, claimed the broadcast depicted him as an Aryan Brotherhood member, directly resulting in threats of violence and death from Aryan Brotherhood, D.C. Blacks, and Mexican American gang members. However, the court determined that the asserted defamatory statement was substantially true in that its effect on the viewer would be no different than that of the plaintiff's representations that he held himself out to be a member of a gang allied with the Aryan Brotherhood.<sup>35</sup>

Evaluating the truth from a different angle, the Southern District of New York rejected an application by HBO to extend discovery geographically after determining that information about the plaintiffs' activities in China would not support a "substantial truth" defense for HBO's depictions of manufacturing conditions in India.<sup>36</sup> The case involved a segment of a television program describing inhumane conditions for child laborers making soccer balls in India. The plaintiff, Mitre, was the only soccer ball manufacturer identified by name. Mitre alleged in the lawsuit that it did not use child labor to manufacture soccer balls. HBO sought to expand discovery beyond India to include China in support of a "substantial truth" defense. Because the segment focused almost exclusively on India, the court found that even if Mitre used child labor in China, that fact would not render the statements in the HBO segment substantially true.<sup>37</sup>

Meanwhile, campaign mudflinging in a New Jersey state senate race led to a case of first impression there.<sup>38</sup> In *G.D. v. Kenny*, an organization opposed to one of the candidates posted campaign flyers stating that his aide had been convicted on drug-related charges. The aide sued on grounds that the conviction had been expunged from his record, but the court held that the defendant could assert truth as a defense. Like courts in Massachusetts and Oregon, the New Jersey court saw "no value in permitting plaintiff to use the expungement statute as a sword, rather than the shield it was intended to be."<sup>39</sup>

### C. *West Virginia Addresses Libel by Implication*

A federal court in West Virginia heightened the standard for libel-by-implication claims in a defamation lawsuit brought by the owner of a child care facility after a mother publicly announced that her child was sexually

35. *Id.* at \*1.

36. *Mitre Sports Int'l Ltd. v. Home Box Office, Inc.*, 38 Media L. Rep. 1595, 2010 WL 1507792 (S.D.N.Y. 2010).

37. *Id.* at \*2.

38. *G.D. v. Kenny*, 984 A.2d 921 (N.J. App. Div. 2009).

39. *Id.* at 932 (relying on *Bahr v. Statesman Journal Co.*, 624 P.2d 664, *review denied*, 631 P.2d 341 (Or. 1981), and *Rzeznik v. Chief of Police of Southampton*, 373 N.E.2d 1128, 1130 (Mass. 1978)).

abused by another child while under the facility's care.<sup>40</sup> The mother spoke of the alleged abuse during an interview with a local television station, asserting that Kim's Kids Child Care abused her trust and her child. Although aware that the alleged sexual abuse occurred between two children, the news station failed to mention this or any other details specific to the alleged perpetrator, and the news report included a brief clip of the owner of Kim's Kids. The owner sued the television station for defamation, asserting that the broadcast falsely implied that she or another employee sexually abused the child. The plaintiff based her claims on the broadcast's failure to indicate that a child, and not another adult, was the accused perpetrator. Dismissing the plaintiff's claims entirely, the court applied a rigorous standard for libel-by-implication claims, holding that they require evidence that the defendant intended or endorsed the claimed implication.<sup>41</sup> In the news media context, this standard requires that broadcasters engage in conduct beyond mere selective reporting of materially true facts.

#### D. *Libel Tourism Bill Becomes Law*

On August 10, 2010, President Obama signed the Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act<sup>42</sup> to protect U.S. writers and speakers against "libel tourism." The Act forbids U.S. courts from recognizing or enforcing foreign libel judgments inconsistent with the free speech guarantees of the First Amendment or applicable state constitutions and laws. It provides a mechanism for Americans who lose a foreign libel suit to obtain an order declaring the judgment unenforceable. It was inspired by the decision in *Ebrenfeld v. bin Mahfouz*,<sup>43</sup> in which the Second Circuit held that it could not stop the plaintiff from enforcing a British libel verdict against the defendant, who had authored a book that accused a Saudi billionaire of terrorist financing.

### III. INTERNET LAW DEVELOPMENTS 2011

#### A. *Subpoena to Unmask Anonymous Speakers*

Courts generally continued on the path of providing significant protection to anonymous online speakers over the past year. For example, several more courts adopted variations of the popular *Dendrite* test,<sup>44</sup> requiring a subpoenaing plaintiff to "set forth a prima facie cause of action" and make other showings before the plaintiff may obtain the identity of one

40. *Tomblin v. WCHS-TV8*, 2010 WL 324429 (S.D. W. Va. Jan 21, 2010).

41. *Id.* at \*7.

42. Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010).

43. 518 F.3d 102 (2d Cir. 2008).

44. See *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

anonymously engaged in expressive speech. But a few recent developments may take this fast-developing area of law in a new direction, affording less protection to some anonymous speakers.

Some courts declined to apply the *Dendrite* formulation<sup>45</sup> in the cases before them, including the New Jersey court that decided *Dendrite* itself.<sup>46</sup> The most significant of these cases was the Ninth Circuit's decision in *In re Anonymous Online Speakers*.<sup>47</sup> In one of the first federal appellate decisions in this area, the Ninth Circuit reasoned that those who anonymously engage in "commercial speech" are entitled to less constitutional protection than those who anonymously engage in political speech, and therefore should not receive the benefit of the high bar to disclosure imposed under the *Dendrite* and *Cabill* tests.<sup>48</sup> After the panel's initial determination that the speech at issue in that case, criticism of a company's business practices, was "commercial speech" drew heavy criticism, the panel withdrew its original ruling and issued a new opinion that reached the same result (affirming the trial court's order to unmask three speakers) without determining whether their speech constituted "commercial speech." If other courts follow the panel's reasoning—that commercial speech is not entitled to the benefit of the *Cabill* and *Dendrite* tests—it may lead courts to develop a new test for (or to apply an existing lesser-burden test to) cases involving anonymous speech about commercial matters, including many matters of importance to consumers and policymakers.

Media companies continued to invoke reporter's privilege statutes in motions to quash subpoenas for anonymous posters' identities, with mixed

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45. See, e.g., *SaleHoo Groups, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210 (W.D. Wash. 2010) (adopting elements of *Dendrite* and quashing subpoena in action alleging defamation, trademark infringement, false designation of origin, and unfair competition); *USA Techs., Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (adopting streamlined version of *Dendrite* to quash subpoena in action for securities fraud and defamation); *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184, 193 (N.H. 2010) (adopting *Dendrite* in defamation action); *Swartz v. Doe #1*, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009) (applying *Dendrite* test to factual findings made by court after hearing).

46. See *Maxon v. Ottawa Publ'g*, 929 N.E.2d 666, 675-76 (Ill. App. Ct., 3d Dist., 2010) (rejecting trial court's application of *Dendrite/Cabill* standard and holding that Illinois Supreme Court Rule 224, which authorizes independent actions for the discovery of the "identity of one who may be responsible in damages," coupled with the motion to dismiss standard, provides the same level of protection given that Illinois is a fact pleading state); *Too Much Media, LLC v. Hale*, 993 A.2d 845, 861-62 (N.J. Super. Ct. App. Div. 2010) (rejecting named-defendant blogger's attempt to invoke *Dendrite*, in addition to shield law, in defamation action to protect identity of her sources, and more broadly asserting that the *Dendrite* standard is limited to "evaluating applications for discovery of the identity of anonymous users of Internet Service Provider (ISP) message boards" and has "never been extended beyond ISPs"); *Hester v. Doe*, No. 10-CVS-361 (N.C. Sup. Ct., Vance County, Jun. 28, 2010) (purporting to apply *Dendrite* in a defamation action but mistakenly asserting that the standard required only a "Rule 12(b)(6) motion to dismiss analysis").

47. 2011 WL 61635 (9th Cir. Jan. 7, 2011) (withdrawing and replacing 611 F.3d 653 (9th Cir. 1010)).

48. *Id.* at \*6.

success. Colorado and North Carolina joined the growing list of jurisdictions in which courts have quashed such subpoenas under state shield laws, bringing the list to six (along with Oregon, Montana, Florida, and Illinois).<sup>49</sup> However, a court in Kentucky *rejected* the invocation of that state's shield law, on the ground that the statute was not meant to apply in the anonymous poster context.<sup>50</sup>

Another issue that is increasingly being litigated is whether website privacy policies are relevant to the decision whether to unmask anonymous posters. Several of those seeking anonymous posters' identities have argued that website owners' privacy policies, which generally ensure user privacy but provide that a user's identity may be revealed under certain circumstances, diminish anonymous speakers' expectations of privacy or even constitute a waiver of their First Amendment rights to remain anonymous altogether. Although one court in Tennessee declined to quash a subpoena on this basis,<sup>51</sup> two other courts found these arguments meritless. In *McVicker v. King*, a federal court in Pennsylvania held that the privacy policy at issue, although containing boilerplate language allowing for disclosures under certain circumstances, actually created an expectation of privacy in the user when taken as a whole.<sup>52</sup> In *Sedersten v. Taylor*, a Missouri federal court refused to find that users were contracting away their constitutional rights in the absence of any express waiver in the privacy policy.<sup>53</sup>

### B. Immunity Under § 230 of the Communications Decency Act

The Ninth Circuit's 2008 holding in *Fair Housing Council v. Roommates.com, LLC*<sup>54</sup> continues to have fairly limited impact, as courts throughout the country have distinguished it and have continued to extend immunity to websites hosting content provided by third parties.<sup>55</sup> In *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com*,<sup>56</sup> the Fourth Circuit affirmed the district court's

49. *People v. Bruce*, No. 09M3247 (Colo. Springs Mun. Ct. Oct. 27, 2009) (applying COLO. REV. STAT. § 13-90-119(2) to quash a subpoena issued to a newspaper website for the identity of an individual alleged to be an exculpatory witness to allegedly criminal conduct); *People v. Mead*, No. 10 CRS 2160 (N.C. Super. Ct., Gaston County, Aug. 16, 2010) (applying the North Carolina shield law, N.C. GEN. STAT. § 8-53.11, to grant a newspaper's motion to quash a subpoena issued by a criminal defendant).

50. *Clem v. Doe*, No. 08-CI-1296, at 3 (Ky. Cir. Ct., Madison County, Mar. 26, 2010).

51. *See Swartz v. Doe #1*, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009).

52. 266 F.R.D. 92 (W.D. Pa. 2010).

53. No. 09-3031-CV-S-GAF, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009).

54. 521 F.3d 1157, 1174 (9th Cir. 2008).

55. *See, e.g., Milo v. Martin*, 311 S.W.3d 210, 216-217 (Tex. App. 2010); *Shiamili v. Real Estate Grp. of New York, Inc.*, 68 A.D.3d 581, 583 (N.Y. App. Div. 2009); *Intellect Art Multimedia, Inc. v. Milewski*, 2009 WL 2915273, at \*7 (N.Y. Sup. Ct. 2009); *Blockowicz v. Williams*, 675 F. Supp. 2d 912, 914 (N.D. Ill. 2009); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009); *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010); *Black v. Google, Inc.*, No. 10-2381, 2010 WL 3746474 (N.D. Cal. Sept. 20, 2010).

56. 591 F.3d 250 (4th Cir. 2009).

dismissal of defamation and tortious interference with business expectancy claims against a consumer complaint site. The Chevy dealer contended that Consumeraffairs.com should be liable because it “‘solicit[ed]’ its customers’ complaints, ‘steered’ them into ‘specific categor[ies] designed to attract attention by consumer class action lawyers, contact[ed]’ customers to ask ‘questions about’ their complaints and to ‘help’ them ‘draft or revise’ their complaints, and ‘promis[ed]’ customers would ‘obtain some financial recovery by joining a class action lawsuit.’”<sup>57</sup> None of those activities was enough to make Consumeraffairs.com responsible for its users’ postings, the Fourth Circuit held. There is nothing illegal about developing or joining a class action lawsuit, and a “website operator who does not ‘encourage illegal content’ or ‘design’ its ‘website to require users to input illegal content’ is ‘immune’ under § 230 of the CDA.”<sup>58</sup> In *Johnson v. Arden*,<sup>59</sup> the Eighth Circuit upheld dismissal of defamation, trademark, and other claims brought by a couple who bred cats, also based on derogatory postings about their business on a consumer complaint site. The court held that the ISP that hosts complaintsboard.com could not be held liable for allegedly defamatory postings on that website.<sup>60</sup> “Because InMotion was merely an ISP host and not an information content provider, the Johnsons’ claims against InMotion fail as a matter of law” under § 230.<sup>61</sup>

A California state court addressed the issue of whether someone who forwards an allegedly defamatory e-mail after adding their own comments can claim § 230’s protection. The Fourth District Court of Appeals went beyond *Barrett v. Rosenthal*,<sup>62</sup> which had provided § 230 protection to a woman who posted another person’s mail to Internet newsgroups without adding her own comments.<sup>63</sup> The appeals court held that § 230 protected a veteran of the South Vietnamese military who relayed an allegedly defamatory e-mail to fellow veterans with his own neutral comments attached.<sup>64</sup> The defendant had forwarded a Vietnamese-language e-mail accusing the

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57. *Id.* at 256–57.

58. *Id.* at 257 (citing *Roommates.com*, 521 F.3d at 1175). Nemet’s allegations also weren’t enough to show Consumeraffairs.com was a content provider, since they didn’t “show any alleged drafting or revision by Consumeraffairs.com was something more than a website operator performs as part of its traditional editorial function.” *Id.* at 258.

59. 614 F.3d 785 (8th Cir. 2010).

60. *Id.* at 791–92. The Johnsons did not serve as the operators of complaintsboard.com.

61. *Id.* at 792.

62. 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55, 146 P.3d 510 (Cal. 2006).

63. In an unpublished opinion in 2008, another California Court of Appeals panel held that § 230 barred a defamation claim based on an e-mail’s embedded link to a website containing allegedly defamatory statements. *McVey v. Day*, No. B205465, 2008 Cal. App. Unpub. LEXIS 10462, at \*45–46 (Cal. Ct. App. Dec. 23, 2008).

64. *Phan v. Pham*, 182 Cal. App. 4th 323 (Cal. Ct. App. 2010), *review denied*, Case No. G041666, 2010 Cal. LEXIS 4419 (Cal. May 12, 2010).

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plaintiff of having been disciplined by the South Vietnamese Navy for abusive behavior,<sup>65</sup> and he introduced the e-mail with his introductory comment: “Everything will come out in the daylight, I invite you and our classmates to read the following comments.”<sup>66</sup> Citing *Roommates.com*, the appellate court held that the introductory statement didn’t materially contribute to the alleged defamation. “All [the defendant] said was: The truth will come out in the end. What will be will be. Whatever.”<sup>67</sup>

Not all courts, however, have extended § 230 immunity to website operators, finding sufficient involvement in generating or developing the offensive content to treat the website operator as an “information content provider.” The U.S. District Court in Connecticut refused to provide § 230 immunity for videos entered in a contest sponsored by the Quiznos sandwich chain that criticized Subway’s offerings, saying Quiznos may have “actively solicited disparaging representations about Subway and thus [may have been] responsible for the creation or development of the offending contestant videos.”<sup>68</sup> Quiznos’ contest websites had encouraged video entries showing “why you think Quiznos is better” as part of an advertising campaign touting the claim that some Quiznos subs had more meat than similar Subway sandwiches. The case settled shortly after the judge’s ruling.<sup>69</sup> A U.S. district court in Idaho ruled that plaintiffs’ assertion that a moderator for a bodybuilding website had posted a disparaging statement about plaintiffs’ dietary supplements was sufficient to overcome a § 230 immunity claim in a motion to dismiss.<sup>70</sup>

### C. *Personal Jurisdiction*

This year saw a strong trend toward loosening the standards for applying personal jurisdiction in Internet-related defamation cases, with two federal appeals courts and two state supreme courts holding that statements directed at people or businesses based in the forum state are sufficient to provide personal jurisdiction.

In a case involving a dispute over software used to trace the lineage of purebred dogs, the Seventh Circuit held that defendants in Colorado, Michigan, Ohio, and Canada could be sued in Illinois for allegedly defaming the Illinois-based businessman who developed and sold the software.<sup>71</sup>

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65. *Id.* at 324.

66. *Id.*

67. *Id.* at 328.

68. *Doctor’s Assocs. v. QIP Holder LLC*, No. 3:06-cv-1710(VLB), 2010 U.S. Dist. LEXIS 14687, at \*69–71 (D. Conn. Feb. 19, 2010).

69. *See Doctor’s Assocs. v. QIP Holders LLC*, No. 3:06-cv-1710(VLB), 2010 U.S. Dist. LEXIS 62667 (D. Conn. June 23, 2010).

70. *Cornelius v. Deluca*, 709 F. Supp. 2d 1003, 1022–23 (D. Idaho 2010).

71. *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. Ill. 2010).

The fact that defendants knew Tamburo lived in Illinois (and even included his Illinois address in some messages urging readers to harass him) was enough to establish a prima facie case of personal jurisdiction in Illinois, the court held.<sup>72</sup> In *Silver v. Brown*,<sup>73</sup> the Tenth Circuit favorably cited *Tamburo* in ruling that a New Mexico court had jurisdiction over a Florida man who created a blog criticizing a New Mexico consulting firm and its founder. The Floridian, a dissatisfied former customer of the New Mexico firm, expressly aimed his conduct at New Mexico and knew the primary effects would be felt there, the court said.<sup>74</sup>

The highest state courts in Ohio and Florida also ruled that personal jurisdiction may be exercised over individuals who post statements online about domiciliaries of those states. In *Kauffman Racing Equip., L.L.C. v. Roberts*,<sup>75</sup> the Ohio Supreme Court found jurisdiction over a disgruntled Virginia customer who complained online about an allegedly defective engine block he had purchased from an Ohio racing engine manufacturer. Jurisdiction was proper because the disgruntled customer targeted his efforts—postings on various racing and automotive websites—at Ohio, and the plaintiff company produced evidence that five Ohioans had read those postings.<sup>76</sup> Notably, the defendants in *Silver* and *Kauffman Racing* were both disgruntled former customers of the plaintiffs who had a contractual relationship with the plaintiff (even if the claims were not contractual ones).<sup>77</sup>

The Florida Supreme Court, answering a certified question from the Eleventh Circuit, ruled that the tort of defamation is completed when the allegedly defamatory online material about a Floridian is accessed in Florida (and thus is “published” there).<sup>78</sup> Under Florida’s long-arm statute, a person commits the tort of defamation in Florida when someone in Florida reads the allegedly defamatory material.<sup>79</sup> The court repeatedly said, however, that it was answering only the question of when a court could exercise personal jurisdiction under Florida’s long-arm statute, not whether it would be a violation of due process to do so.<sup>80</sup>

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72. *Id.* at 697.

73. 382 F. App’x 723, 730–31 (10th Cir. 2010).

74. *Id.*

75. 930 N.E.2d 784 (Ohio 2010).

76. *Id.* at 794.

77. Similar cases involving alleged defamation in the context of soured contractual relations include *Noble Roman’s, Inc. v. French Baguette, LLC*, 684 F. Supp. 2d 1065 (S.D. Ind. 2010) (franchisor suit over online gripes by former franchisee), and *Northwest Voyagers, LLC v. Libera*, No. CV09-378-C-EJL, 2009 U.S. Dist. LEXIS 96618 (D. Idaho Oct. 19, 2009) (“adventure tour” company suit over negative comments on travel websites and in e-mails by defendants, who got sick on a company-led tour to Mount Kilimanjaro).

78. *Internet Solutions Corp. v. Marshall*, No. SC09-272, 2010 Fla. LEXIS 943, at \*38–39 (Fla. June 17, 2010).

79. *Id.*

80. *Id.* at \*40–43.

In contrast to the above cases, the Eighth Circuit held that posting an allegedly defamatory or trademark-infringing comment about a Missouri business (and mentioning its location) does not subject the poster to personal jurisdiction there.<sup>81</sup> The court held that Missouri did not have jurisdiction over California and Colorado residents alleged to have posted defamatory complaints about the Missouri cat breeding business: “We therefore construe the *Calder* effects test narrowly, and hold that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction.”<sup>82</sup> Similarly, the Third Circuit upheld the dismissal of a defamation action by a Pennsylvania attorney over defendants’ claims, picked up by Russian-language news sites, that the lawyer had participated in a smear campaign against their businesses.<sup>83</sup> Absent more specific contacts, Pennsylvania does not have personal jurisdiction over those who make allegedly defamatory statements about its residents, the court held.<sup>84</sup>

#### D. *Single Publication Rule*

Courts throughout the country have continued to apply the “single publication rule” to information posted on the Internet.<sup>85</sup>

Adding a new wrinkle to this body of case law, a federal court in Kentucky held that providing hyperlinks to a document posted earlier was not republication.<sup>86</sup> The plaintiff, an attorney, claimed he was defamed by a

81. *Johnson v. Arden*, 614 F.3d 785, 796–97 (8th Cir. 2010).

82. *Id.* at 797.

83. *Marks v. Alfa Group*, 369 F. App’x 368, 370–71 (3d Cir. 2010).

84. See also *Scott v. Lackey*, No. 1:02-CV-1586, 2010 U.S. Dist. LEXIS 4350, at \*34–37 (M.D. Pa. Jan. 20, 2010); *Stubbs v. Collins*, No. 08-cv-1567, 2010 U.S. Dist. LEXIS 17984 (W.D. Pa. Mar. 1, 2010); *Nasuti v. Kimball*, No. 09-cv-30183-MAP, 2010 U.S. Dist. LEXIS 65629 (D. Mass. June 29, 2010); *Diagnostic Devices, Inc. v. Pharma Supply, Inc.*, No. 3:08-cv-149-RJC, 2009 U.S. Dist. LEXIS 101633 (W.D.N.C. Oct. 30, 2009); *Martin v. Dobson*, No. 3:09cv00208, 2010 U.S. Dist. LEXIS 16607 (S.D. Ohio Feb. 5, 2010); *Xcentric Ventures, LLC v. Bird*, 683 F. Supp. 2d 1068 (D. Ariz. 2010).

85. *E.g.*, *Yeager v. Bowlin*, No. Civ. 2:08-102-WBS-JFM, 2010 U.S. Dist. LEXIS 718, at \*38–39 (E.D. Cal. Jan. 6, 2010) (plaintiff test pilot could not maintain privacy and publicity action against operators of website selling signed lithographic prints because repeated sales of identical products are subject to the single publication rule); *Roberts v. McAfee, Inc.*, No. C 09-4303 PJH, 2010 U.S. Dist. LEXIS 20455, at \*29–30 (N.D. Cal. Mar. 8, 2010) (dismissing defamation claim of company’s former general counsel over news release announcing his firing and holding, “Under California law, website postings are subject to the single-publication rule for purposes of accrual of the statute of limitations, notwithstanding the fact that the website may operate/exist on a continuous basis.”); *Young v. Suffolk County*, 705 F. Supp. 2d 183, 212–13 (E.D.N.Y. 2010) (plaintiff’s libel claims barred by statute of limitations because under single publication rule, the fact an article remains accessible online does not constitute republication); *Ladd v. Uecker*, 780 N.W.2d 216, 220 (Wis. Ct. App. 2010) (adopting the single publication rule in Wisconsin for the first time and holding, “We reject the notion that each ‘hit’ or viewing of the information should be considered a new publication that retrogers the statute of limitations.”).

86. *Salyer v. S. Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912 (W.D. Ky. 2009).

passage in a 2006 report called “A Few Bad Men” that said he had been dishonorably discharged and barred from practicing in military courts because of his membership in a white supremacist organization. The court rejected his argument that a 2008 hyperlink to the 2006 report republished the allegedly defamatory material, explaining: “The hyperlinks, while adding a new method of access to ‘A Few Bad Men,’ did not restate the allegedly defamatory statements and did not alter the substance of that article in any manner.”<sup>87</sup>

A New York state trial court also held that hyperlinks to other websites do not constitute republication of the content posted there.<sup>88</sup> The case is related to the libel action against producers of the movie *American Gangster* thrown out earlier by the Second Circuit.<sup>89</sup> The plaintiffs, a group of law enforcement officers, claimed they were defamed by accusations in a magazine article (on which the movie was based) that they stole from a convicted drug trafficker. The plaintiffs also argued that the release of a digital edition of a book with the allegedly defamatory material was a republication for statute-of-limitations purposes. The court rejected both arguments: “Although there does not appear to be any governing caselaw regarding digital ‘Kindle Editions’ of books, pursuant to the holding of *Firth v State of New York* [*supra*], such editions should be treated as merely ‘a delayed circulation of the original edition,’ rather than as a republication thereof.”<sup>90</sup>

#### IV. ACCESS

##### A. *Developments in the U.S. Supreme Court*

This survey period is remarkable for the number of Supreme Court rulings affecting access to information. *Doe v. Reed*<sup>91</sup> upheld the State of Washington’s public information law. *Citizens United v. FEC*,<sup>92</sup> best known for striking down the expenditure limits of the Federal Election Campaign Act,<sup>93</sup> also upheld the disclosure requirements of the statute. *Skilling v. U.S.*,<sup>94</sup> better known for dismissing Skilling’s conviction under the “honest ser-

87. *Id.* at 918.

88. *Haefner v. New York Media*, 2009 WL 6346547, at \*4–5 (N.Y. Sup. Ct. 2009) (citing *Firth v State of New York*, 775 N.E.2d 463 (N.Y. 2002)).

89. *Diaz v. NBC Universal, Inc.*, 337 F. App’x 94 (2d Cir. 2009).

90. *Haefner*, 2009 WL 6346547, at \*6.

91. 130 S. Ct. 2811 (2010).

92. 130 S. Ct. 876 (2010).

93. In the course of that holding, the Court noted the difficulty in drawing lines between the speech of media corporations (protected under the statute) and the speech of corporations generally. *Id.* at 884.

94. 130 S. Ct. 2896 (2010).

VICES” statute, also rejected Skilling’s challenge to the denial of his motion to transfer venue from Houston on grounds of the pretrial publicity there regarding the demise of Enron. *Presley v. Georgia*<sup>95</sup> held that the public (and by implication the press) must be allowed to attend the *voir dire* portion of a criminal trial.

In upholding the disclosure requirements of Federal Election Campaign Act, *Citizens United* emphasized the right of the recipient of information, that being the electorate, to receive information.<sup>96</sup> Disclosure requirements, as opposed to expenditure bans, may “burden speech” but do not prevent anyone from speaking.<sup>97</sup> The Court did not subject disclosure requirements to strict scrutiny, but to “exacting scrutiny,” which requires a “substantial relationship” between the disclosure requirement and a “sufficiently important governmental interest.”<sup>98</sup> The Court approvingly cited its prior opinion in *McConnell v. Federal Election Commission*<sup>99</sup> that these disclosure requirements would help citizens “make informed choices in the political marketplace.”<sup>100</sup> The opinion’s focus on the rights of recipients of information provides solid analytical support for open meetings and records laws that have the stated purpose of putting more information into the hands of the public.

*Doe v. Reed* involved a request under the State of Washington’s Public Records Act (PRA) for copies of the referendum petition filed with the secretary of state to challenge a state law expanding the rights and responsibilities of state-registered domestic partners, including same-sex domestic partners.<sup>101</sup> The petitioners sought injunctive relief to prevent release, claiming that the PRA was unconstitutional as applied to referendum petitions in general and as applied to this particular referendum because there was a “reasonable probability” that the signatories would be subject to “threats, harassment and reprisals.”<sup>102</sup> The district court had granted injunctive relief based solely on the facial challenge, and the Ninth Circuit reversed, finding that the plaintiffs were unlikely to succeed on their claim that the PRA was unconstitutional as applied to referendum petitions in general.<sup>103</sup> The Supreme Court, citing its ruling in *Citizens United* and applying its “exacting scrutiny” standard, upheld the Ninth Circuit ruling

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95. 130 S. Ct. 721 (2010).

96. 130 S. Ct. at 907.

97. *Id.* at 914.

98. *Id.*

99. 540 U.S. 93 (2003). The court overruled *McConnell* on its holding on expenditure limits.

100. *Citizens United*, 130 S. Ct. at 914.

101. 130 S. Ct. 2811, 2815 (2010).

102. *Id.* at 2816–17.

103. *Id.*

on the facial challenge while noting that the “as applied” challenge was not before it.<sup>104</sup> Justice Roberts wrote: “[P]ertinent to our analysis is the fact that the PRA is not a prohibition on speech, but instead a *disclosure* requirement. ‘[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking.’”<sup>105</sup> The “exacting scrutiny” standard requires a “substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest.<sup>106</sup> The opinion identifies these governmental interests as combating fraud and fostering governmental transparency and, more generally, extends to “promoting transparency and accountability in the electoral process.”<sup>107</sup> Plaintiffs had argued that it was unnecessary to have the public review the petitions because the Washington secretary of state already verifies and canvasses the names on the petition. The court rejected this argument, noting that “public disclosure can help cure the inadequacies of” the secretary’s process and that “disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.”<sup>108</sup> Only Justice Thomas dissented from Justice Roberts’ opinion rejecting the plaintiffs’ facial challenge to application of the PRA to referendum petitions.<sup>109</sup>

In *Skilling v. United States*, Skilling challenged the trial court’s refusal to transfer venue on the basis of pretrial publicity and the last-minute guilty plea of a co-defendant. The Fifth Circuit had found the volume of pretrial publicity in combination with the co-defendant’s plea created a “presumption of juror prejudice,” but that this had been cured by “proper and thorough” *voir dire*.<sup>110</sup> The Supreme Court found that the facts in *Skilling* did not warrant even a presumption of juror prejudice. First, the court noted that “[a]t the time of Skilling’s trial, more than 4.5 million individuals eligible for jury duty resided in the Houston area. Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain.”<sup>111</sup> Second, “although news stories about Skilling were not kind, they contained no confession or other blatantly

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104. *Id.* at 2817, 2821.

105. *Id.* at 2818 (emphasis in original and quoting *Citizens United*, 130 S. Ct. at 914).

106. *Id.*

107. *Id.* at 2819.

108. *Id.* at 2820.

109. *Id.* at 2837 (Thomas, J., dissenting opinion). Relying in part on *Doe v. Reed*, the West Virginia Supreme Court of Appeals held that a petition signed by voters seeking to force a ballot referendum on a new county zoning ordinance was a public record under that state’s Freedom of Information Act, finding that release of the signatures would not chill voters wishing to petition their government. *Shepherdstown Observer Inc. v. Maghan*, 700 S.E.2d 805, 813–15 (W. Va. 2010).

110. 130 S. Ct. 2896, 2911–12 (2010).

111. *Id.* at 2915 (internal citation omitted).

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prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.”<sup>112</sup>

In *Presley v. Georgia*, the Supreme Court reversed and remanded the conviction of a defendant holding that his Sixth Amendment right to a fair trial had been violated by excluding the public from the *voir dire*.<sup>113</sup> While Presley’s claim was predicated on the Sixth Amendment, the Court’s opinion reiterated that the public trial right extends beyond the accused and can be invoked under the First Amendment.<sup>114</sup> The *Presley* opinion puts the press’s and public’s First Amendment right to public trial and a defendant’s Sixth Amendment right to a public trial on the same footing,<sup>115</sup> and in both instances the trial court must use the same test:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.<sup>116</sup>

The trial court is obligated to examine alternatives to closure even if specific suggestions are not put forward by the defendant, or, by implication, the public or press: “Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.”<sup>117</sup>

### B. *Access to Deliberations of Governmental Bodies*

As reported in last year’s survey, a major contest regarding the Texas Open Meetings Act<sup>118</sup> (TOMA) ended in dismissal on grounds of mootness after the last of the plaintiffs, who had been charged with violation of TOMA for e-mail communications as a quorum, resigned his position as a councilmember of the City of Alpine.<sup>119</sup> As expected, the case was refiled with different plaintiffs and is again pending before the same judge in the Western District of Texas as *City of Alpine v. Abbott*.<sup>120</sup> The posture of the case has shifted considerably. The (mooted) panel ruling in the prior challenge held that the criminal provisions of TOMA were subject to a strict scrutiny standard under the First Amendment as a regulation of content-based speech.<sup>121</sup> The district court had ruled that the state could regulate the

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112. *Id.* at 2916.

113. 130 S. Ct. 721, 725 (2010).

114. *Id.* at 723 (citing *Press-Enter. Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*)).

115. *Id.* at 724.

116. *Id.* (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984)).

117. *Id.* at 724–25.

118. TEX. GOV’T CODE ANN. § 551.001 *et seq.*

119. *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009).

120. No. 09-CV-00059 (W.D. Tex. filed Dec. 14, 2009).

121. *Rangra v. Brown*, 566 F.3d 515, 521 (5th Cir. 2009).

speech of its public officials to prohibit them from communicating via e-mail as a quorum, finding that this constituted holding an illegal closed meeting.<sup>122</sup> However, that ruling was based upon an extension of the holding in *Garcetti*<sup>123</sup> that elected officials, like public employees, enjoy no First Amendment protection of their speech made pursuant to their official duties. The panel did not sustain this extension of *Garcetti* and reversed and remanded, finding that speech of public officials did not fall into the same category as public employees and was afforded the full panoply of First Amendment rights afforded political speech.<sup>124</sup> Plaintiffs and defendant filed separate motions for summary judgment in *Abbott* on July 12, 2010, and there was no reference to *Garcetti* in the papers.<sup>125</sup> Rather, the Texas attorney general defended TOMA by citing both *Doe v. Reed*<sup>126</sup> and *Citizens United*,<sup>127</sup> arguing that TOMA's requirement of open meetings is merely a disclosure requirement and therefore subject to the "exacting scrutiny" requirement followed in those cases. That is, the government need only establish a "substantial relation" between the disclosure requirement and a "sufficiently important governmental interest."<sup>128</sup>

An important case this survey period found a limited First Amendment right of access to governmental proceedings of governmental bodies other than courts, specifically, hearings of New York City's Transit Adjudication Bureau (TAB).<sup>129</sup> The court applied the *Richmond Newspapers*' "experience" and "logic" test to find a presumptive right of access.<sup>130</sup> Although the "experience" of TAB hearings was a relatively brief quarter century, the court held that the experience of TAB Hearings is one of presumptive public access because its own procedures allowed access unless a respondent objected and also because the violations in question had been returnable to a criminal court where the public had always been provided a right of access. However, the crux of the court's analysis was under the "logic" prong, which asks "whether public access plays a significant positive role in the functioning of the particular process in question."<sup>131</sup> The court concluded

122. *Rangra v. Brown*, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006).

123. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

124. *Rangra*, 566 F.3d at 522-24.

125. *City of Alpine v. Abbott*, Docket Nos. 24 and 25, 09-CV-00059 (W.D. Tex. filed July 12, 2010).

126. 130 S. Ct. 2811 (2010).

127. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

128. *Doe v. Reed*, 130 S. Ct. at 2818; *Citizens United*, 130 S. Ct. at 914.

129. *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 675 F. Supp. 2d 411 (S.D.N.Y. 2009).

130. *Id.* at 431-32 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589-98 (1980)).

131. *Id.* at 434 (quoting *Press-Enter. Co. v. Superior Court of Cal., Riverside Cnty.*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*)).

that a right of access to TAB hearings would serve all of the salutary functions of the First Amendment right of access.<sup>132</sup> The logic of the court's analysis in this case furthers expansion of the First Amendment right of access to noncourt governmental bodies.

### C. Access Under Freedom of Information Acts

Among the prominent cases covered in last year's survey was the district court ruling in favor of Bloomberg L.P. and against the Federal Reserve Board under the federal Freedom of Information Act (FOIA) to determine the identities of the recipients of loans of the lending facilities operated out of the Federal Reserve, such as the Term Auction Facility (TAF).<sup>133</sup> On appeal, the Second Circuit also held for Bloomberg.<sup>134</sup> The court held that the information at issue, i.e., the identity of the borrowing bank, the dollar amount of the loans, the loan origination and maturity dates, and the collateral securing the loan, was not "obtained from" the borrowing banks within the meaning of FOIA Exemption 4 (trade secrets and confidential information) and the court therefore did not reach the question whether such information is "privileged or confidential" as to the borrowing banks.<sup>135</sup> The court also rejected the Board's request to extend the reach of Exemption 4 to encompass the so-called program-effectiveness test, adopted by the First and District of Columbia Circuits, which allows agencies to withhold information as confidential under Exemption 4 if they believe that withholding it "serves a valuable purpose and is useful for the effective execution of its statutory responsibilities."<sup>136</sup> The court stated that "a test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine 'the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA].'"<sup>137</sup>

The Kentucky Supreme Court reaffirmed the principle that under the state's open records law, settlement agreements with governmental bodies may not be sealed because "[t]here could be no viable contention that an agreement which represents the final settlement of a civil lawsuit whereby a governmental entity pays public funds to compensate for an injury it inflicted is not a public record."<sup>138</sup>

132. *Id.* at 437.

133. *Bloomberg L.P. v. Bd. of Governors, Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

134. *Bloomberg L.P. v. Bd. of Governors, Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010).

135. *Id.* at 148–49.

136. *Id.* at 150 (citation omitted).

137. *Id.* (citation omitted).

138. *Cent. Kentucky News-Journal v. George*, 306 S.W.3d 41, 46 (Ky. 2010) (quoting *Lexington-Fayette Urban Cnty. Gov't v. Lexington Herald-Leader*, 941 S.W.2d 469, 471 (Ky. 1997)).

## V. NEWSGATHERING

In this era of smart phones and wireless Internet, judges must decide whether reporters should be permitted to blog, tweet, and stream video from their courtrooms during trials. Some judges appear to embrace new technologies that expand the public's access to the courtroom, while others opt to exclude live media.

A reporter covering a criminal trial in Georgia sought the court's permission to tweet updates about the proceedings from the courtroom to his newspaper's Twitter site.<sup>139</sup> Analyzing the reporter's request under Federal Rule of Criminal Procedure 53, which prohibits the "broadcasting of judicial proceedings," the court concluded that electronic messages that were sent from the courtroom during the proceedings and were instantly available for public viewing fell within the term "broadcasting."<sup>140</sup> To the court, the expansive definition of "broadcasting" in the dictionary included tweeting, and the 2002 amendment to Rule 53 that removed the modifier "radio" preceding "broadcasting" meant that the rule was intended to account for the capabilities of modern technology.<sup>141</sup> Because the court determined that the term "broadcasting" included tweeting, the judge denied the reporter's request to tweet from the courtroom during the trial. The court also concluded that Rule 53 does not violate the First Amendment by unconstitutionally restricting the freedom of the press because prohibiting tweeting does not restrict an individual's legitimate right to access the proceedings.<sup>142</sup>

Not all federal judges have reached the same conclusion. Kansas federal District Judge J. Thomas Martin allowed a reporter to tweet updates from the courtroom during a racketeering gang trial,<sup>143</sup> and Judge Reggie B. Walton of the U.S. District Court for the District of Columbia gave two press credentials to the Media Bloggers Association and allowed two bloggers to sit in the press room and post blog updates during the criminal trial of Lewis "Scooter" Libby.<sup>144</sup>

Some state courts permitted live blogging from the courtroom. During the high-profile trial of three brothers charged with first-degree murder,<sup>145</sup> a reporter for *The Florida Times-Union* blogged inside the courtroom. The

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139. United States v. Shelnut, No. 4:09-CR-14, 2009 WL 3681827 (M.D. Ga. Nov. 2, 2009).

140. *Id.* at \*1.

141. *Id.*

142. *Id.* at \*2.

143. Michael W. Jones, *Twitter in the Courtroom*, TECH.BLORGE.COM (Mar. 7, 2009), <http://tech.blorge.com/Structure:%20/2009/03/07/twitter-in-the-courtroom>.

144. Thomas Pierce, *Bloggers Join Frenzy at Media-Saturated Libby Trial*, NPR.ORG (Feb. 1, 2007), <http://www.npr.org/templates/story/story.php?storyID=7098188>.

145. Morris Publ'g Co. v. Florida., No. 1D10-226, 2010 WL 363318 (Fla. Dist. Ct. App. Jan. 20, 2010).

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interactive blog allowed the reporter to field and to respond to questions from users during the trial. Three days after the reporter began his coverage, the trial judge removed him from the courtroom because the reporter allegedly was distracting. The *Times-Union* filed an emergency petition for review. Florida's District Court of Appeal overturned the trial judge's order, holding that the reporter could use the laptop in the courtroom unless the trial court found "a specific factual basis to conclude that such use cannot be accommodated without undue distraction or disruption."<sup>146</sup>

While some judges have permitted tweeting and live blogging, the U.S. Supreme Court rejected a trial court's decision to broadcast a federal, non-jury civil trial involving a federal constitutional challenge to California's controversial Proposition 8, an amendment to the state constitution that limited state-sanctioned marriages to opposite-sex couples.<sup>147</sup> After the trial court ruled that the trial could be broadcast live via streaming audio and video to other courthouses around the country, the defendants in the underlying lawsuit sought a stay on the grounds that the district court's ruling was based on an improper, last-minute amendment to the local rules that did not comply with federal law. The Supreme Court ruled that the amendment to the trial court's local rules probably did not comply with federal law and that irreparable harm likely would result if the trial court improperly broadcast the proceedings.<sup>148</sup> The Court's decision does not preclude federal courts from broadcasting future trials; the Court clearly stated that its decision does not address whether court proceedings generally should be broadcast.<sup>149</sup> Rather, the decision purported to be based on the trial court's failure to comply with the proper procedure for amending its local rules.

A federal judge permanently enjoined an online financial news service, *theflyonthewall.com*, from publicizing reports about stock downgrade and upgrade recommendations issued by Barclays Capital, Morgan Stanley, and Bank of America's Merrill Lynch.<sup>150</sup> At great expense to themselves, the three banks create and provide their clients with equity research reports about publicly traded securities. Most of the reports are released while the domestic markets are closed; however, the information in these reports may cause the markets to move quickly once they open. The reports, which provide the banks' clients with an informational advantage over other investors, help the banks distinguish themselves from their competitors and attract and retain clients. The banks sued *thefly-*

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146. *Id.* at \*1.

147. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

148. *Id.* at 711–13.

149. *Id.* at 709.

150. *Barclays Capital, Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

onthewall.com, claiming that the online service had engaged in “hot news misappropriation” by redistributing the banks’ recommendations before the banks had the opportunity to share them with their own clients or before their clients had the opportunity to utilize the information.<sup>151</sup> Following a bench trial, the court found that theflyonthewall.com misappropriated the banks’ commercially valuable, time-sensitive equity research recommendations and analyses by posting the banks’ reports on its website without authorization.<sup>152</sup> As a remedy, the court issued a permanent injunction to restrict theflyonthewall.com’s ability to disseminate information from the banks’ reports so that such dissemination would not interfere with the banks’ abilities to derive the full benefit of their efforts in creating the reports.<sup>153</sup>

## VI. REPORTERS PRIVILEGE

### A. *No News Is Good News at the Federal Level*

This was not a banner year for the reporter’s privilege at the federal level. In Congress, the federal Free Flow Act failed to reach the Senate floor, despite being rewritten to win Judiciary Committee approval,<sup>154</sup> and Wikileaks’ publication of leaked Afghan War reports legitimized moves to deny First Amendment protection to those who publish leaked government documents, including a plan to exclude leakers from the federal shield law.<sup>155</sup> In the courts, the Second Circuit not only questioned whether reporters believe they are “on some kind of pedestal” and why cross-examination of them is “so limiting,”<sup>156</sup> but also upheld an order requiring release of hundreds of hours of outtakes from a political documentary that normally

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151. The banks also sued theflyonthewall.com for copyright infringement; theflyonthewall.com conceded that its actions constituted copyright infringement and that an injunction was appropriate on that basis.

152. *Barclays Capital*, 700 F. Supp. 2d at 316, 336.

153. *Id.* at 348.

154. The House passed the Federal Free Flow of Information Act in March 2009, but the Senate Judiciary Committee debated its scope for months before a compromise with the intelligence community and the Obama administration passed 14–5 in December 2009. See *Federal Shield Law Passes Senate Committee*, 15 SILHA BULL. 40 (Fall 2009).

155. Wikileaks’ publication of confidential Afghanistan war documents resulted in a proposal to amend the Act to expressly exclude websites that publish leaked government documents without editorial control. *Wikileaks Controversy Highlights Debate over Shield Law*, WASH. POST, Aug. 21, 2010; *Wikileaks’ Document Dump Sparks Debate*, 15 SILHA BULL. 1, 3–4 (Summer 2010); Cristina Abello, *Leaked War Documents Spark Federal Shield Law Revisions*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Aug. 4, 2010), <http://www.rcfp.org/newsitems/index.php?i=11511>.

156. Daniel Skallman, *Second Circuit Case Could Weaken Reporter’s Rights*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Sept. 25, 2010), <http://www.rcfp.org/newsitems/index.php?i=11570>.

would have received a high degree of protection.<sup>157</sup> A federal district court blocked interlocutory appeal of its refusal to quash a press subpoena on grounds that a reporter seeking appellate review must first be cited for contempt.<sup>158</sup>

Federal law enforcement officers ignored both the privilege and the thirty-year-old Privacy Protection Act in unlawfully seizing computers and other protected materials from the newsrooms of online and student journalists,<sup>159</sup> forcing one student editor to choose between downloading 962 photographs to disk or having every computer in the newsroom seized, thereby shutting down operations.<sup>160</sup> REACT, the government-sponsored “Rapid Enforcement Allied Computer Team,” seized the computers and servers from Gawker Media’s Gizmodo website for publishing information about a prototype iPhone that was left in a bar by an Apple employee.<sup>161</sup>

On a more positive note, the Tenth Circuit permitted a former deputy district attorney to be sued individually for authorizing the search of a student journalist’s home merely because his professor did not appreciate being parodied in an irreverent online newspaper called *The Howling Pig*.<sup>162</sup> However, even the winning cases are cause for concern given the cost to fight them, especially because they are disproportionately directed to student journalists.

### B. State Governments Protect the News and Those Who Report It

Two additional states, Kansas and Wisconsin, enacted their first reporter’s shield laws, and a third state, Maryland (which enacted the first state shield law in 1892), expanded the coverage of its statute to expressly protect online and student journalists. These new laws encapsulate the ongoing debate over the proper scope of protection for online and student publications, as well as whether the recipient of such protections should be the reporter or the business that published the article.

The Kansas law focused on the reporter, covering “information or the source [thereof]” procured by “a journalist” when “acting as a journalist,”<sup>163</sup>

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157. See *In re Application of Chevron Corp.*, 2010 WL 2891202, at \*1 (S.D.N.Y. 2010); Patrick File, *Appeals Court Narrows, Upholds Subpoena for Film Outtakes*, 15 SILHA BULL. 19 (Summer 2010); Ellen Biltz, *Filmmaker Must Turn over Unused Footage: Judge Limited Chevron’s Expansive Request to Three Categories*, 34 NEWS MEDIA & L. 14 (Summer 2010).

158. *In re Subpoenas to Daily News, L.P.*, 2010 WL 2490990, at \*2 (S.D.N.Y. 2010).

159. The statute, 42 U.S.C. § 2000aa, requires the use of a subpoena rather than a search warrant to obtain evidence from a newsroom, and was enacted in response to the Supreme Court’s decision in *Zurcher v. Stanford Daily*, 436 U.S. 537 (1978).

160. Cristina Abello, *Newsroom Searches Occurring Despite Law*, 34 NEWS MEDIA & L. 16 (Summer 2010); Geoff Pipoly, *Update: Settlement Reached in Student Paper Search and Seizure*, 15 SILHA BULL. 31 (Summer 2010).

161. Abello, *supra* note 161.

162. *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2010).

163. KAN. STAT. ANN. § 60-481 (2010).

including those writing for an “online journal in the regular business of newsgathering and disseminating news or information to the public.”<sup>164</sup> Wisconsin focused on the “business or organization,” protecting those that, “by means of print, broadcast, photographic, mechanical, electronic, or other medium,” disseminate “news or information,” including “a newspaper, magazine, or other periodical; book publisher; news agency; wire service; radio or television station or network; cable or satellite network, service, or carrier; or audio or audiovisual production company,”<sup>165</sup> as well as those working for any such entity.<sup>166</sup> Maryland took the middle road, covering those acting in a “news gathering or news disseminating capacity,” if they are “enrolled as a student in an institution of postsecondary education” or “employed by the news media,”<sup>167</sup> including those using “electronic means of disseminating news and information to the public.”<sup>168</sup>

State court decisions considering the reporter’s privilege typically focused on the precise language of the state’s shield law or the applicable First Amendment balancing test. For example, the New Jersey appellate court upheld a trial court ruling, reported in last year’s Annual Review, that a blogger was not engaged in gathering or disseminating news, as required by the state’s shield law and the First Amendment, when she posted comments on a third party’s Internet bulletin board.<sup>169</sup> The state Supreme Court has accepted the defendant’s appeal, limited to “those issues relating to the New Jersey Shield Law and the First Amendment.”<sup>170</sup>

In contrast, the New Hampshire Supreme Court ruled that a mortgage lender that posted comparative information about mortgage loans on its website qualified as a member of the press under New Hampshire’s constitutional reporter’s privilege because the website served an informative function and contributed to the flow of information to the public.<sup>171</sup> That court vacated the trial court’s disclosure order because the trial court failed to balance the First Amendment rights of the media against the rights of the person seeking the information.<sup>172</sup> A District of Columbia judge quashed a subpoena to a nonparty reporter for unpublished interviews

164. *Id.* § 60-480(a).

165. WIS. STAT. ANN. § 885.14(1)(a) (2010).

166. *Id.* § 885.14(1)(b).

167. MD. CODE ANN., CTS. & JUD. PROC. § 9-112(b)(1) & (2) (West 2010).

168. *Id.* § 9-112(a)(1)–(9).

169. *Too Much Media v. Hale*, 993 A.2d 845, 860–62 (N.J. Super. App. Div. 2010).

170. *Too Much Media v. Hale*, 3 A.3d 1224 (2010); Michael Booth, *N.J. High Court to Review if Web Posters Can Invoke Shield Law*, L. TECH. NEWS, Sept. 20, 2010.

171. *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus.*, 999 A.2d 184, 189 (N.H. 2010).

172. *Id.* at 190–91 (citing *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595–98 (1st Cir. 1980)).

because the defendants failed to satisfy the D.C. Circuit's balancing test, which is "more demanding . . . when the burden is sought to be imposed upon a third party . . . reporter."<sup>173</sup>

In an unusual case, a Michigan federal court denied a motion to reconsider its previous ruling that *Detroit Free Press* reporter Richard Convertino was entitled to rely on the Fifth Amendment in refusing to disclose the source of a Justice Department leak, finding that "his fear of self-incrimination is well-founded."<sup>174</sup>

## VII. INSURANCE

### A. *Lack of Carrier Control over Defense Can Prevent Insurer Liability for Failure to Settle*

Judges in recent years increasingly have shown their displeasure with the Fourth Estate's reporting of their activities by suing the press. One such suit underlay the only recent insurance coverage case arising from a media liability policy, *Mutual Insurance Co. v. Murphy*.<sup>175</sup> In the underlying action, Judge Ernest B. Murphy prevailed in his defamation suit against the *Boston Herald*, ultimately resulting in payment to Murphy of \$3,414,687, including post-judgment interest and costs after appeal.<sup>176</sup> Slightly more than a month after receiving payment, Judge Murphy sent a letter to Mutual Insurance Co., the *Herald's* insurer, demanding \$6.8 million for its failure to comply with its duty to effectuate a settlement under Massachusetts statutes, by refusing to settle immediately post judgment, and appealing instead.<sup>177</sup> The carrier responded by filing a declaratory judgment action, to which Judge Murphy counterclaimed.<sup>178</sup> In considering Mutual's motion for summary judgment, the court recognized that an insurer owes a duty to settle, not only to its insured, but also to third-party claimants,<sup>179</sup> but found that the carrier did not have the capacity to exercise the requisite control for the statutes to apply.<sup>180</sup> The court focused on policy language giving the *Herald* both the right to defend and the right to settle, and the policy's lack

173. *In re Subpoena to Goldberg*, 693 F. Supp. 2d 81, 88 (D.D.C. 2010).

174. *Convertino v. U.S. Dep't of Justice*, 2010 WL 523042 (E.D. Mich. Feb. 9, 2010).

175. 630 F. Supp. 2d 158 (D. Mass. 2009).

176. *Id.* at 161.

177. *Id.* The \$6.8 million demand was treble the amount of the jury verdict including interest. *Id.*

178. *Id.* Section 3 of Mass. Gen. Laws ch. 176D regulates unfair acts and practices in the business of insurance and explicitly forbids "unfair claim settlement practices." *Id.* at 163; MASS. GEN. LAWS ch. 176D, § 3(9). Conduct by insurers prohibited under Mass. Gen. Laws ch. 176D, § 3(9) gives rise to a cause of action under Mass. Gen. Laws 93A, § 9(1). *Id.*

179. *Murphy*, 630 F. Supp. 2d at 163 (citing *Clegg v. Butler*, 676 N.E.2d 1134 (Mass. 1997)).

180. *Id.* at 170.

of a “hammer clause,” defined as a clause that requires an insurer to seek the insured’s consent prior to settlement, and affords the carrier the ability to limit its exposure in the event the insured refuses to settle.<sup>181</sup> Because the *Herald* never indicated a willingness to settle, the carrier was unable to effect or otherwise force settlement per the policy terms.<sup>182</sup> While the court recognized that the carrier participated in the defense and recommended appellate counsel to the *Herald*, at no time did the carrier take control over either the settlement negotiations or the conduct of the case.<sup>183</sup>

## B. Defamation

### 1. Known Falsity Exclusion

In *Chrysler Insurance Co. v. Greenspoint Dodge of Houston, Inc.*,<sup>184</sup> the court imputed a corporate employee’s knowledge of falsity to the corporate defendant to exclude coverage for a defamation claim. Chrysler Insurance Company had issued a commercial general liability (CGL) policy to Greenspoint. The Texas Supreme Court noted that a corporation’s knowledge is not limited to what the officers knew, but that such knowledge extends to other employees, and in this case, the employee at issue was a “corporate vice principal.”<sup>185</sup> The court found that, notwithstanding the “separation of insureds” clause, the employee who uttered the defamatory statements was an “insured” under the plain policy terms, and, as such, his statements were those of his employer as a matter of law.<sup>186</sup> Because the employee had been found to have uttered the statements intentionally and with full knowledge of their falsity, the known-falsity exclusion applied and the carrier could not be liable for breach of the insurance agreement.<sup>187</sup>

The Supreme Court of Vermont came to the opposite conclusion in *Pharmacists Mutual Insurance Co. v. Myer*,<sup>188</sup> holding that the known-falsity exclusion did not bar coverage for a defamation claim under a homeowners’ liability policy (in contrast to the *Chrysler* court’s CGL policy). The underlying case involved various comments made by the insured in the aftermath of

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181. *Id.* at 166. The court also found Judge Murphy’s argument unpersuasive that the right of the carrier to associate counsel demonstrated control under the policy. *Id.* (citing *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730, 736 (7th Cir. 1976) (“The reservation of the option to ‘associate’ in the defense imposes no duties when that option is not exercised.”) and *Employers’ Liab. Assurance Corp. v. Hoechst Celanese Corp.*, 684 N.E.2d 600, 610 (Mass. Ct. App. 1997) (ruling that a nearly identical provision to that of the *Murphy* case “exempts the insurer from assuming charge of the defense and settlement of claims”).

182. *Id.* at 167.

183. *Id.* at 165–169.

184. 297 S.W.3d 248 (Tex. 2009).

185. *Id.* at 250.

186. *Id.* at 251–53.

187. *Id.* at 253–54.

188. 993 A.2d 413 (Vt. 2010).

a dispute over a sale of a condominium that went awry. The jury found that the insured made statements with “actual knowledge of falsity [or] reckless disregard of their probable falsity . . . or maliciously and with ill will.”<sup>189</sup> Following judgment for the third-party plaintiff in the defamation suit, the carrier filed a declaratory judgment action, and the insured counterclaimed alleging breach of the covenant of good faith and fair dealing, and that the policy was illusory. The homeowners’ policy included coverage for personal injury, but also incorporated a “known falsity” exclusion.<sup>190</sup> Ruling on the carrier’s summary judgment motion, the trial court concluded that, based on the trial interrogatories, the carrier was not liable for either defense of the appeal of the underlying jury verdict or the damage award, but was liable for the attorney fees incurred post tender and through trial.<sup>191</sup>

On appeal, the Supreme Court of Vermont noted that one of the two interrogatories under which liability was found against the insured was under a negligence standard.<sup>192</sup> The carrier argued that, because the underlying plaintiff had only characterized the insured’s actions at trial as intentional acts, the jury’s verdict should be read as finding the insured acted with knowledge of the falsity of the statements made, or had reason to believe his statements were false.<sup>193</sup> The insured responded by arguing that applying the carriers’ reasoning would essentially delete all coverage for defamation claims from the policy.<sup>194</sup> The court noted that a defendant may be found liable for defamation under either a negligence or intentional standard, depending on the law that applied.<sup>195</sup> The court ultimately ruled for the insured, finding that the trial court erred in granting summary judgment because the jury answered the question addressing negligence in the affirmative, and so it could not conclude that the offending statement was made with knowledge of its falsity.<sup>196</sup>

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189. *Id.* at 415.

190. The policy excluded coverage for personal injury “caused by the publication or statement made by . . . an insured, if the insured knew or had reason to believe that the publication or statement was false.” *Id.* at 416.

191. *Id.*

192. *Id.* at 417.

193. *Id.* at 417–18.

194. *Id.* at 418.

195. *Id.* The court cited the case of *Hingham Mutual Fire Insurance Co. v. Smith*, 865 N.E.2d 1168 (Mass. App. Ct. 2007) (holding that the known-loss exclusion applied only where there was a willful intent to deceive), as support, noting that the policy language and facts in that case were nearly identical to the instant action.

196. *Pharmacists Mut. Ins.*, 993 A.2d at 419. The court noted that the carrier was free to attempt to introduce evidence on remand that, notwithstanding the jury verdict, the statements were in fact made with knowledge of their falsity, but then went on to acknowledge the carrier would likely be unable to do so with regard to the indemnity obligation as it had failed to have the jury complete special interrogatories identifying those statements that were negligent and those that were intentional. *Id.* at 419–20.

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## 2. Failure to Conform Exclusions Under CGL Policies

Two courts ruled this year that statements made in advertising ran afoul of “failure to conform” exclusions. In *Harleysville Mutual Insurance Co. v. Buzz Off Insect Shield*, the insured had been found liable for false advertising surrounding the marketing of its line of insect-proof outdoor wear.<sup>197</sup> The underlying plaintiff was S.C. Johnson & Son, makers of Off insect spray.<sup>198</sup> The insured had marketed its product as superior to Off spray in protection against insect bites, and because it was not messy, among other assertions.<sup>199</sup> Off argued in response that there was no empirical evidence that the insured’s clothing line did anything to deter pesky insects, and, in fact, insect bites were common through the clothing.<sup>200</sup> The court ruled that these arguments were the crux of the claim, and that the insured’s “statements about its own products were literally not true.”<sup>201</sup> Although the false statements may have harmed the ability of S.C. Johnson to market and sell its product, the assertions at issue did not disparage S.C. Johnson’s products but rather made false statements about the insured’s own clothing line.<sup>202</sup> Thus, the court ruled that the policy’s “failure to conform” exclusion applied and that the carrier was not liable for breach of the policy terms.<sup>203</sup>

In *Total Call International v. Peerless Insurance Co.*,<sup>204</sup> two competitors likewise disputed the factual basis for allegations made by an insured. Also insuring under a CGL policy, Peerless Insurance Company disclaimed coverage—stating that the underlying claims for harm to reputation and consumer fraud did not allege an advertising injury and that coverage was barred by the “failure to conform” exclusion in the policy. Total Call was a calling card company that advertised its products as providing a certain number of minutes for a certain price, which was inaccurate. The court ruled that, while the false advertisements may have reduced the plaintiff’s market share, they did not pertain directly to the underlying claimant and so could not constitute defamation, a covered offense. As such, they could not fall within the policy’s definition of “advertising injury.”<sup>205</sup> The court also ruled that the policy’s “failure to conform” exclusion applied to bar coverage for claims by both consumers and competitors for Total Call’s

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197. 692 S.E.2d 605 (N.C. 2010).

198. *Id.* at 608.

199. *Id.* at 608–09.

200. *Id.* at 621.

201. *Id.*

202. *Id.* at 622.

203. *Id.* at 623.

204. 104 Cal. Rptr. 3d 319 (2010).

205. *Id.* at 327.

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alleged misrepresentations about its product because the only question at issue relating to the advertisements was whether the product performed as promised.<sup>206</sup>

### C. Privacy

Courts across the nation continued to disagree on whether there is insurance coverage for “fax blasting” violations of the Telephone Consumer Protection Act (TCPA)<sup>207</sup> under liability policy provisions covering “oral or written publication of material that violates a person’s right of privacy” typically found in personal and advertising injury coverages.

In *State Farm General Insurance Co. v. JT’s Frames, Inc.*,<sup>208</sup> the California Court of Appeal held the policy provision defining advertising injury as “oral or written publication of material that violates a person’s right of privacy” did not provide coverage for the alleged unsolicited faxes that purportedly violated the recipient’s privacy right to seclusion.<sup>209</sup> Rather, the court found this provision would only provide coverage for faxes containing confidential information in violation of the underlying plaintiffs’ right to secrecy.<sup>210</sup> In the underlying action, JT’s Frames filed a class action suit in Illinois alleging that the Friedman Group sent 74,000 faxes to JT’s fax machine and to other companies. JT’s maintained that the Friedman Group violated the TCPA, committed conversion of fax ink and fax paper, and violated the Illinois Consumer Fraud and Deceptive Practices Act. On appeal in the coverage action, JT’s Frames (which had been assigned the coverage rights after resolution of the underlying action) argued that the underlying action involved violations of the TCPA, which protects the right to seclusion. State Farm argued that the only right of privacy potentially covered under its policy is the right to be free from the disclosure of personal or confidential information. The court of appeal agreed with State Farm, applying the “last antecedent rule.”<sup>211</sup> This rule provides that qualifying words, phrases, and clauses are to be applied to the words immediately preceding them and are not to be construed as extending to or including other words or meanings that are more remote.<sup>212</sup> Under the last antecedent rule, the court held that the phrase “that violates a person’s right

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206. *Id.* at 328.

207. 47 U.S.C. § 227.

208. 104 Cal. Rptr. 3d 573 (2010), *review denied* (Apr. 28, 2010).

209. *Id.* at 584–85.

210. *Id.* at 586–87.

211. *Id.* (following *ACS Sys., Inc., v. St. Paul Fire & Marine Ins. Co.*, 147 Cal. App. 4th 137 (2007) (holding no coverage for TCPA claims under policy providing coverage for “making known to any person or organization written or spoken material that violates an individual’s right of privacy”).

212. *Id.* at 586.

of privacy” must be construed to modify the word “material.”<sup>213</sup> Thus, to come within the policy’s definition of advertising injury, the content of the fax at issue must “violate a person’s right to privacy,” which would be the case only if the fax contained confidential information that violated a third party’s right to secrecy.<sup>214</sup> For context, the court of appeal also looked at the other offenses contained in the policy’s advertising injury definition and concluded that advertising injury coverage applies only to content-based claims, which fax-blasting claims are not.<sup>215</sup>

The holding in *JT’s Frames* seemed consistent with a fax-blasting coverage decision by the Seventh Circuit a few months earlier. In *Auto-Owners Insurance Co. v. Websolv Computing, Inc. (“Websolv”)*,<sup>216</sup> the Seventh Circuit applied Iowa law to find that the insured’s sending of a single-page unsolicited fax, allegedly in violation of the TCPA and the recipient’s seclusion-based right of privacy, was outside of a commercial general liability policy’s advertising injury coverage for violations of a person’s right of privacy through “publication” of oral or written material. The Seventh Circuit chose to follow its prior ruling in *American States Insurance Co. v. Capital Associates*,<sup>217</sup> in which it had attempted to construe Illinois law, even though Illinois state courts later chose to find coverage under similar policy language. The *Websolv* court based its ruling on the use of the word “publication” in the policy’s advertising injury definition, which it found narrowed the scope of covered “privacy rights” to secrecy-based rights, and on the focus of other provisions of the advertising injury definition on harm arising from advertising content, rather than on harm arising from the mere receipt of an advertisement.<sup>218</sup>

On the day after *JT’s Frames* was decided, the Florida Supreme Court construed similar policy language to reach an opposite conclusion in *Penzer v. Transportation Insurance Co.*<sup>219</sup> The underlying litigation involved a class

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213. *Id.*

214. *Id.* at 586–87. The court acknowledged that several courts have interpreted the language at issue here to cover fax-blasting claims (e.g., *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 182 Ohio App. 3d 311 (2009); *Terra Nova Ins. Co. v. Fray-Witzer*, 449 Mass. 406 (2007); *Valley Forge Ins. v. Swiderski Elec.*, 223 Ill. 2d 352 (2006); *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232 (Tex. App. 2004), abrogated in part on another ground in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007)), while it is following the line of other courts that have found this language does not provide coverage for TCPA claims (e.g., *Am. States Ins. v. Capital Assoc. Jackson Co.*, 392 F.3d 939 (7th Cir. 2004); *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543 (7th Cir. 2009); *Ace Rent-A-Car, Inc. v. Empire Fire & Marine Ins.*, 580 F. Supp. 2d 678 (N.D. Ill. 2008); *St. Paul Fire & Marine Ins. v. Brunswick Corp.*, 405 F. Supp. 2d 890 (N.D. Ill. 2005)).

215. *Id.* at 587–88.

216. 580 F. 3d 543.

217. 392 F.3d at 941 (applying Illinois law).

218. *Websolv*, 580 F.3d at 550–51.

219. 29 So. 3d 1000 (2010).

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action for more than 24,000 allegedly unsolicited facsimile advertisements that resolved in settlement and the defendant's assignment of its rights to insurance coverage to Penzer. Penzer then brought a declaratory judgment action against Transportation Insurance in the U.S. District Court for the Southern District of Florida. The district court ruled there was no coverage. On a certified question from the Eleventh Circuit on appeal, the Supreme Court of Florida held that TCPA violations fall within the scope of covered "oral or written publication of material that violates a person's right of privacy."<sup>220</sup> The *Penzer* court looked to dictionary definitions of "publication," "material," and "right," in conjunction with the meaning of "right of privacy" under Florida law, to determine the plain meaning of the policy language.<sup>221</sup> The court concluded that the "right of privacy" included the right to be left alone, i.e., a seclusion interest.<sup>222</sup> It refused to apply the last antecedent rule to bar coverage.<sup>223</sup> Even if the phrase "that violates a person's right of privacy" only modifies the term "material," the court found that a faxed advertisement, regardless of content, may constitute "material" that is offensive and violates the individual's right of privacy under the TCPA by intruding upon the recipient's seclusion.<sup>224</sup> As such, the court found there was coverage for the blast-fax class action suit under the policy's "advertising injury" definition.<sup>225</sup>

Carriers are increasingly attempting to draft around the legal uncertainty of coverage for fax-blasting TCPA claims. Thus, although cases construing the policy language discussed above may eventually disappear, a new round of coverage litigation may arise to construe the new policy terms and exclusionary language now used by most insurers. Further, even as companies reduce or eliminate blast-fax advertising campaigns, a recent spate of text-messaging-related TCPA actions, with potentially huge exposure, foreshadow further tough issues for businesses and insurance carriers based on uncertain coverage for these privacy-related actions.<sup>226</sup>

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220. *Id.* at 1003.

221. *Id.* at 1005–06.

222. *Id.* at 1006.

223. *Id.* at 1007.

224. *Id.* at 1007–08.

225. *Id.* at 1008.

226. *E.g.*, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (holding text messaging is a "call" under the TCPA).

