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Friday, July 27, 2012

Litigation

Federal judge parts ways with state Supreme Court in First Amendment case

In an order taking aim at the state Supreme Court's reading of free speech protections, a Los Angeles federal judge has rejected a motion to bar a man from repeating defamatory statements.

Federal judge parts ways with state Supreme Court in First Amendment case

By Ben Adlin

In an order taking aim at the state Supreme Court's reading of free speech protections, a Los Angeles federal judge has rejected a motion to bar a man from repeating defamatory statements he made about sunglasses maker Oakley Inc., ruling that "injunctions of speech in defamation cases are impermissible under the First Amendment."

Free speech experts are calling U.S. District Court Judge Dean D. Pregerson's July 20 order a "direct rebuff" to California precedent.

"It doesn't look like he's distinguishing it; it looks like he's just disagreeing with it," said Peter Scheer, executive director of the nonprofit First Amendment Coalition.

'If this case were in Superior Court in California, you wouldn't get this result.' - Peter Scheer

Oakley had sought to muzzle a former consultant, Sean McWilliams, who had distributed emails with numerous claims, including allegations the company created pornographic images of him and hired "Blackwater thugs" to intimidate him. Pregerson previously ruled the comments were defamatory. *Oakley v. McWilliams*, CV09-07666 (C.D. Cal., filed Oct. 22, 2009).

In a motion for a permanent injunction, Oakley's lawyers at Solana Beach-based Weeks, Kaufman, Nelson & Johnson sought to forbid McWilliams from repeating his statements. They justified the request by drawing on a 2007 state Supreme Court opinion that held the "right to free speech would not be infringed by a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory." *Balboa Island Village Inn Inc. v. Lemen*, S127904.

But Pregerson disagreed with that finding. Drawing heavily from arguments in a law review article by constitutional law scholar and UC Irvine School of Law Dean Erwin Chemerinsky, he concluded such an injunction would run into a number of practical and constitutional obstacles.

"The injunction here, like injunctions against defamation in general, would also be ineffective, overbroad, or both," the ruling says.

For example, Pregerson wrote, if he were to prohibit McWilliams from repeating the specific defamatory words or phrases, the man could simply use different words to make the same points.

"If a court enjoined the word 'thief,' would related words like pilferer, looter, pillager, plunderer, poacher, and rustler also support the finding of willfulness necessary to hold the speaker in contempt?" he wrote. "What about bandit? Pirate?"

Attorneys concerned about impact of court cutbacks on cases

In a time when ongoing budget cuts are forcing state courts to trim their services, attorneys are increasingly concerned about whether those cutbacks will impact the outcome of their newly-filed lawsuits.

Government

Judge allows case over CalPERS benefits to proceed

A retired state worker has standing to pursue a case alleging the head of California's prison health care system set up an illegal arrangement with the state's court administration to "spike" his retirement.

Entertainment & Sports

'Dark Knight' comes under Chinese scrutiny

After the deadly shooting at a midnight screening of "The Dark Knight Rises" last week, Warner Bros. pulled premieres around the world. Now the studio faces the question of the blockbuster's fate in fast-growing China.

Government

Legislation irks state's public defenders

A fight has erupted over a state Assembly bill that would alter a nearly century-old law that governs who can be appointed Los Angeles County's public defender.

CHAMPIONS OF JUSTICE

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Alternative Dispute Resolution

Alice D. Sullivan

In 2007, Alice D. Sullivan was sole arbitrator in a dispute between an international concert producer and then-"king of pop" Michael Jackson over his cancellation of some performances in Europe and Asia.

Law Practice

Former Dewey & LeBoeuf partners negotiate on clawback litigation

Former executive members of Dewey & LeBoeuf LLP will have to pay more out of their pockets if

A broader injunction barring all similar statements would be unconstitutionally overbroad, he wrote. It would forbid speech before determining whether it is in fact defamatory or require courts to be "perpetual censors," endlessly weighing in on whether speech is sufficiently similar to the enjoined speech.

As a federal judge, Pregerson is not bound by state court precedent, said Scheer at the First Amendment Coalition.

"The judge is basically exercising his prerogative as a judge in federal court to fundamentally disagree with and disregard the decision by the California Supreme Court," he said. "If this case were in superior court in California, you wouldn't get this result."

Douglas E. Mirell, a partner at Loeb & Loeb LLP who deals with First Amendment issues, called the decision "audacious but appropriate."

"The U.S. Supreme Court has never opined that a permanent injunction on defamatory speech is constitutional," he said. The question came before the U.S. Supreme Court in *Tory v. Cochran*, in which famed lawyer Johnnie L. Cochran Jr. sued a former client for libel. After Cochran's death in 2005, however, justices decided the case on a separate issue. *Tory et al. v. Cochran*, 544 U.S. 734 (2005).

"I think this is an invitation by him to the Supreme Court to actually decide the issue," Mirell added, but "whether this is a decision that Oakley chooses to take up to the U.S. Supreme court is another question."

An Oakley attorney, Gregory K. Nelson of Weeks, Kaufman, Nelson & Johnson, said his clients "have not decided whether or not to pursue any appealable avenues at this point," declining to comment further.

As a matter of law, said Thomas Jefferson School of Law Professor Marybeth Herald, Pregerson's was the right decision.

"I think it was more the California Supreme Court that was off-base, and the district court's opinion really does bring it back to traditional First Amendment jurisprudence," Herald said.

In a separate order, Pregerson limited other kinds of conduct by McWilliams, approving an injunction enjoining him from initiating contact with or impersonating Oakley personnel and barring him from establishing an email account or domain name explicitly referencing the plaintiffs.

McWilliams could not be reached for comment Thursday. He is representing himself in the action, and, according to court documents, claims he is living overseas.

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they want to join in on the estate's revised partnership compensation agreement and avoid potential clawback lawsuits.

Labor/Employment

Background checks not always front-and-center in the hiring process

Employment lawyers wonder why some large companies fail to engage in thorough background checks of senior company officers when such checks are becoming cheaper and easier to do.

Law Practice

Irell & Manella LLP sponsors first endowed chair for Public Counsel

Irell & Manella LLP has established the first-ever endowed chair for pro bono law firm Public Counsel, the firm announced Thursday.

Corporate

Getting rid of the boilerplate confidentiality agreement



In light of recent court decisions, mergers & acquisitions lawyers need to take a closer look at their confidentiality agreements and do away with boilerplate contracts. By **Richard Climan** and **Keith Flaum** of Weil, Gotsham & Manges LLP

Letter to the Editor

Navigating the 'guideposts'

A defendant's wealth has always been an essential consideration in imposing punitive damages under California law. By **James L. Oberman**

Zoning, Planning and Use

'Grandfathered-in,' and other costly misconceptions about real estate

The term "Grandfather Clause" has been applied to laws that allow application of an old rule to an existing situation, while a new rule applies to all future situations. By **Ellia Thompson** of CA Land Use Professionals LLP

Alternative Dispute Resolution

Mediation is the message

Regardless of where the fault lies, if ever there was an argument for mediation, then surely the McCourt case must have been a prime example. By **Paul Tweed** of JAMS International

Preparing clients for mediation: the big 10 issues

It's surprising how many times I encounter clients in mediation who have no clue about the process and are completely unprepared to participate in a constructive and meaningful way. By **Robert Mann** of ADR Services

Education

Educating all of our children

The Government Accountability Office just issued a report that demonstrated that children with