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PRACTICE GROUP
NEWSLETTER
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LITIGATION

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IN THIS NEWSLETTER:

In this issue, we report on some recent developments in the areas of commercial, employment, and intellectual property law. We also provide practical advice that may help you avoid costly litigation.

"Our tradition is based on unparalleled client service, individual attention, adding value and a strategic approach to every situation."

COMMERCIAL LAW:

BLOGGERS MAY NOT BE ENTITLED TO THE "REPORTER'S PRIVILEGE"

A reporter's right to keep sources confidential came into mainstream debate in July 2005 when Judith Miller, a reporter for the *New York Times*, was jailed for refusing to disclose her source to a grand jury that was investigating the leak of a covert CIA operative's name.

Ms. Miller cited "reporter's privilege" as justification for her silence. Although the reporter's privilege is well documented in cases involving traditional newspapers, its application in the digital world is unsettled. However, the scope and application of this privilege to bloggers is crucially important given the soaring rate at which blogs are relied upon for information.

On January 13, 2012, an Illinois state court determined in the case *Johns-Byrne Co. v. TechnoBuffalo LLC* that the reporter's privilege did not apply to a blogger writing a post on the blog TechnoBuffalo. TechnoBuffalo has over a million readers and provides information on how to use certain technology-related devices, and also provides sneak peaks of upcoming technology. The Johns-Bryne Company (J-B) sued TechnoBuffalo because it believed that one of J-B's employees had disclosed confidential information to TechnoBuffalo's bloggers, and J-B sought to force the blog to disclose its source. The court determined that, unlike newspapers or periodicals in regular circulation, the blog TechnoBuffalo did not qualify as a "news medium" under the Illinois statute, nor did its bloggers qualify as "reporters." The court was influenced by both the narrow definition of what constituted a "news medium" under the Illinois statute and the type of content on the blog. In its reasoning, the court considered the content of TechnoBuffalo's blog posts generally, as well as the fact that the blog post at issue concerned the disclosure of a not-yet-released smartphone. In doing so, the court stated that the posts did not "encourage a well-informed citizenry" (or did not constitute "news") because TechnoBuffalo's content included posts about subjects such as smartphones that were not yet publicly available.

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BLOGGERS MAY NOT BE ENTITLED TO THE "REPORTER'S PRIVILEGE" *>> continued from page 1*

The categorization of information as "news," or as encouraging a "well-informed citizenry," is highly subjective. That said, this decision may understandably outrage the blogging community, especially since a broad reading of the decision suggests that a blog without a "regular circulation" would not be considered a "news medium" under the Illinois statute, regardless of the content.

>> The Bottom Line

What may not be news to one person may still be news to others. However, before posting on a blog, every blogger needs to consider whether that blog will qualify as a "news medium" and whether a judge is likely to consider the post to be "news." This is especially true when the blog post contains information from a confidential source. At the same time, if a company's confidential or trade secret information is being disclosed to the public on a blog, that company needs to find ways to minimize the significance of the blog post as legitimate "news." Finally, this case serves as a reminder of the need to re-examine laws enacted prior to the internet revolution in order to ensure that the legal system meets the needs of our society in the 21st century.

A RECENT COURT DECISION DETERMINED THAT, UNLIKE NEWSPAPERS OR PERIODICALS IN REGULAR CIRCULATION, A BLOG DID NOT QUALIFY AS A "NEWS MEDIUM," NOR DID ITS BLOGGERS QUALIFY AS "REPORTERS."

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DAVIS & GILBERT INTELLECTUAL PROPERTY LITIGATION BREAKFAST SEMINAR

Litigating Publicity Rights Claims:

From Arenas to Zooey:
Recent Attempts to Expand Publicity Rights

THURSDAY, APRIL 26

As you may have seen in the media, there have been a string of recent litigations concerning right of publicity claims by celebrities and public figures, including Lindsay Lohan, Zooey Deschanel, Kim Kardashian and NBA star Gilbert Arenas. In light of these and other cases and with so many new marketing and media platforms using celebrity images, it is important for marketers and their agencies to know how to accurately evaluate the risk posed by the use of celebrities and public figures in marketing and promotional efforts. This informative seminar will provide an update on right of publicity law with a focus on recent efforts by celebrities and public figures to expand their publicity rights and how content creators and providers have responded. This program will cover, among other things:

- How recent court decisions have evaluated right of publicity or related claims, such as false endorsement, in various contexts, including look-a-like and first-name claims as well as efforts by celebrities to prevent close acquaintances from free-riding on their fame
- How to assess damages arising out of right of publicity and related claims
- Effective defenses and settlement strategies

SPEAKERS:

Neal H. Klausner,
Partner, IP Litigation

Dominick Cromartie,
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For details regarding this seminar or to register, please contact:

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COMMERCIAL LAW:

IS THERE TOLLING OF CLASS ACTION STATUTES OF REPOSE? ONLY TIME WILL TELL.

In the current economic climate, securities class actions and related "piggyback" individual lawsuits are very much on the minds of in-house counsel and executives at financial institutions and other public companies. Companies that are named as defendants in these cases are, of course, vigilant about enforcing their rights under the various statutes of limitations that apply to these actions.

In the landmark 1974 case *American Pipe v. Utah*, the U.S. Supreme Court ruled that once a class action complaint is filed, the statute of limitations is tolled — put on hold, so to speak — for all purported class members until the court decides whether to certify the class. This makes it considerably easier for plaintiffs not wishing to join the class action to bring follow-on individual actions since they have more time to do so. Recent decisions by New York federal courts have created a significant open question as to whether the tolling rule applies to statutes of repose.

Like statutes of limitations, statutes of repose limit the timeframe within which an action may be brought. Unlike statutes of limitations, statutes of repose begin to run when a specific event occurs, regardless of whether a claim arose or an injury occurred at that moment. And unlike statutes of limitations, statutes of repose are not susceptible to certain grounds for tolling, such as where a plaintiff was unaware it might have a claim due to misleading conduct of the defendant. Statutes of repose are found in various areas of law, most notably federal securities law and product liability. The Securities Act of 1933, for example, has a statute of repose barring claims brought more than three years after the securities were offered or sold.

In a significant development earlier this year, two New York federal courts ruled that there was no *American Pipe* tolling of the statute of repose in actions brought under the Securities Act, reasoning that the language of the statute of repose is absolute and unaffected by an "equitable" doctrine such as *American Pipe* tolling. (See *Footbridge v. Countrywide Financial* and *In re Lehman Bros*.) However, more recently, two other New York federal courts in *In re Morgan Stanley* and *International Fund Management v. Citigroup* held just the opposite – reasoning that *American Pipe* tolling is a legal rule consistent with the rules governing class actions, and therefore the Securities Act statute of repose was properly tolled.

>> The Bottom Line

The plot has thickened as to whether statutes of repose are subject to *American Pipe* tolling, and there may be an important decision from the Second Circuit coming down the pike. Companies that might be susceptible to class actions in areas such as securities law, and any other areas involving statutes of repose, should keep a close eye on these developments.

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Recent decisions by New York federal courts have created a significant open question as to whether the tolling rule applies to statutes of repose.

EMPLOYMENT LAW:

LIMITS OF *CONCEPCION*: WILL CLASS ACTION WAIVERS BE UPHELD BY THE LOWER COURTS?

A recent decision from the Southern District of New York suggests that the lower courts may continue to call into doubt the enforceability of arbitration clause class action waivers.

In our Summer 2011 newsletter (click here to view), we noted the potentially far-reaching implications of *AT&T Mobility v. Concepcion*, a U.S. Supreme Court decision which upheld the enforceability of an arbitration clause class action waiver. These clauses require individual arbitration of claims arising out of a contract, as opposed to a class action litigation.

The *Concepcion* decision, which held that the Federal Arbitration Act (the FAA) preempted a state law holding class action waivers unconscionable, cast doubt as to whether numerous court decisions holding class action waivers unenforceable remained good law.

A recent decision from the Southern District of New York, however, suggests that *Concepcion's* reach may ultimately prove limited, particularly in cases involving class action claims arising under federal law. In *Raniere v. Citigroup Inc.*, *et al.*, the plaintiffs, a purported class of Citigroup employees, brought claims under the Fair Labor Standards Act (the FLSA) and state labor law, seeking allegedly unpaid overtime wages. Citigroup moved to compel arbitration of the employees' claims, citing the company's employee handbook, which contained an arbitration clause and class action waiver with respect to FLSA claims. In opposition, the employees contended that the provision was invalid pursuant to a well-established Second Circuit precedent holding arbitration claims unenforceable when enforcement would prevent plaintiffs from asserting their statutory rights to pursue their claims. An individual arbitration requirement, they contended, would infringe their statutory rights, due to the prohibitive cost of litigating each employee's claims on an individual basis. In response, Citigroup contended that *Concepcion* had effectively overruled the Second Circuit's longstanding precedent, and therefore the waiver provision should be enforced.

Notably, the *Raniere* court distinguished *Concepcion*, concluding that the Supreme Court's decision addressed only whether the FAA preempted state laws holding class action waivers unenforceable. *Concepcion* therefore had no bearing on the enforceability of the purported waiver of class action claims under the FLSA, a federal statute. Accordingly, the court held the company's arbitration clause unenforceable because the statutory right to pursue class action claims under the FLSA could not be contractually waived.

>> The Bottom Line

Raniere's narrow interpretation of *Concepcion* offers an early indication that the lower courts may continue to call into doubt the enforceability of arbitration clause class action waivers. Indeed, the Southern District has just recently reinforced *Raniere* by holding once again that a class action waiver clause impermissibly infringed plaintiffs' statutory rights to pursue FLSA claims as a class (see *Sutherland v. Ernst & Young LLP*). Although *Concepcion* suggests a growing acceptance of such waiver provisions by the Supreme Court, it remains to be seen whether *Concepcion* – a decision susceptible to narrow interpretation – will be embraced by the lower courts.

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INTELLECTUAL PROPERTY:

NBA PLAYER'S BROAD PUBLICITY RIGHTS CLAIM OVER A REALITY TV SHOW "REJECTED"

Reality television shows depicting the daily lives of well-to-do housewives are not a new phenomenon, and have been made famous by Bravo's iterations of its "Real Housewives" series. But should these reality television shows be allowed to feature people who had a relationship with a celebrity if the show does not have the celebrity's permission?

NBA basketball player Gilbert Arenas certainly did not think so. He asked a California trial court to enjoin his ex-girlfriend, Laura Govan, from appearing on the reality television show "Basketball Wives: Los Angeles" (BWLA) because he claimed that her inclusion would violate his publicity rights either by mentioning his name or alluding to his relationship with Govan. Arenas claimed that Govan was selected to appear on the show solely because of her connection to him. The trial court denied his request and Arenas then appealed.

In what initially looked like an open path to the basket for Arenas, the appellate court, agreeing with the trial court, adopted a broad view of celebrities' publicity rights, finding that BWLA is likely to use Arenas' identity for commercial gain. It was immaterial whether BWLA would focus on the women's relationships with one another and their personal lives. The court found that the fact that Arenas' name was likely to be used was sufficient for Arenas to assert that the show was improperly attempting to free-ride on his celebrity.

But, although the appellate court found that Arenas' publicity rights included preventing close acquaintances from free-riding on his fame, it also affirmed the trial court's finding that there must be limits to a celebrity's ability to control the use of his or her identity. So the court held that because BWLA is about "women who have or have had relationships with basketball players rather than the players themselves," any allusion to Arenas would be "transformative" (i.e., the value of the work would not derive primarily from Arenas' fame), which was a defense against his publicity rights claims. In doing so, the court noted that BWLA claimed in its press release that the show features a "group of dynamic women with relationships to some of the biggest basketball players in the game," and listed some of the connections between women appearing on the show and professional basketball players (e.g., "Kimsha Artest (wife of Ron Artest, Los Angeles Lakers)"). Notably, the press release omitted Govan's connection to Arenas.

The appellate court also found that the public-interest defense trumped Arenas' publicity rights claims. The public interest attaches to people who, by their accomplishments or mode of living, draw attention. Entertainment shows receive the same public interest protection as factual news reports, including advertising and promotion of their episodes. Arenas' publicity rights claims were trumped by BWLA's right to show stories about him that were in the

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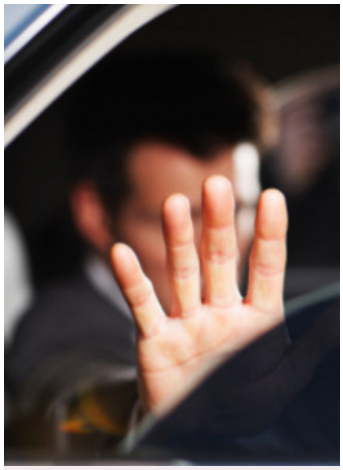

BROADCASTERS AND MARKETERS SHOULD BE LEERY ABOUT USING INDIVIDUALS WHOSE COMMERCIAL VALUE IS DERIVED SOLELY FROM THEIR CONNECTIONS WITH CELEBRITIES, UNLESS THE USE IS CLEARLY TRANSFORMATIVE OR IN THE PUBLIC INTEREST.

NBA PLAYER'S BROAD PUBLICITY RIGHTS CLAIM OVER A REALITY TV SHOW "REJECTED" *>> continued from page 5*

public interest. Indeed, the court noted that Arenas has a significant following on Twitter, which contained mundane tweets concerning Arenas' hygiene habits. Arenas' Twitter following contradicted his claim that his personal life outside of basketball was not in the public interest.

>> The Bottom Line

The court's decision shows a willingness in the Ninth Circuit to broadly interpret celebrities' publicity rights, finding that these protections may extend to an NBA player's attempt to prevent an ex-girlfriend from discussing their relationship on a reality television show. But these publicity rights will be trumped by the public's right to hear ex-girlfriends discuss their relationships regardless of whether this gossip is made in a news report or a reality television show. Even though the Ninth Circuit ultimately rejected Arenas' attempt to expand his publicity rights, broadcasters and marketers should be leery about using individuals whose commercial value is derived solely from their connections with celebrities, unless the use is clearly transformative or in the public interest.

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