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Recent Developments: Cohen v. Cowles Media Co.: First Amendment Does Not Prohibit an Informant from Recovering Damages under State's Promissory Estoppel Law for Newspaper's Breach of Promise of Confidentiality

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sure. *Id.* at 472.

Chief Judge Murphy wrote the opinion for the court of appeals. In deciding the first issue, the court first gathered a working background in the plain meaning of the term " bodily injury" as written in the policy description. It acknowledged that without a finding of " bodily injury," coverage would not be triggered. The court found that " [w]hile the definition of bodily injury *includes* sickness and disease . . . the definition also specifically includes injury to the body . . . ." *Mitchell*, 595 A.2d at 475-76 (quoting *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 451 F.Supp. 1230, 1242 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980) (emphasis in original)). The court also found authority that most jurisdictions have defined " bodily injury" to include any " localized abnormal condition." *Mitchell*, 595 A.2d at 476. The court also looked to Black's Law Dictionary 159 (5th ed. 1979), which stated that " bodily injury . . . [g]enerally refers only to injury to the body, or to . . . diseases contracted by the injured as a result of injury." *Id.* These findings illustrated that because a distinction existed between the occurrence of " bodily injury" and the resulting manifestation of sickness or disease, the terminology " sickness or disease" did not determine *when* an injury took place, but only that some injury *did exist*. *Id.* The question of " when" was an issue for medical experts.

Consequently, the court of appeals next looked to the affidavits of the medical experts, Craighead and Epstein. *Id.* The court noted that they were in general agreement as to their findings, except as to the initial incidence of " bodily injury." *Id.* The court took an interest in the particular field of each expert, just as the Supreme Court of Illinois did in *Zurich Ins. Co. v. Raymark Indus.*, 514 N.E.2d 150 (Ill. 1987).

The court recognized that the issue presented in *Zurich* was identical to the one presented before the court in *Mitchell*. *Mitchell*, 595 A.2d at 476. Nine physicians testified extensively, and there was disagreement between the pathologists and the clinicians as to when an injury occurred in asbestos cases. The clinicians conceded that damage might occur upon inhalation, but they also noted that the lung is capable of repairing itself so that not every inhalation precipitates disease. *Id.* at 477 (citing *Zurich*, 514 N.E.2d at 156). Without symptoms, they argued, it would be impossible to determine with accuracy exactly when a disease began. Therefore, it should follow that a disease would have to be diagnosed by its symptoms before it could constitute a " bodily injury." *Id.* This argument, however, did not sway the Illinois court which concluded that once asbestos fibers are inhaled, bodily injury occurs, and nothing within the insurance policy requires diagnosis nor does it require identification of that injury within the policy period. Simply stated, only the *injury* must take place within the policy coverage, not the subsequently-manifested disease. *Id.*

Extending this analysis, the Maryland Court of Appeals noted that mere exposure to asbestos without injury does not trigger coverage. *Id.* at 478. However, upon the diagnosis of a disease, the courts will look back to the time of initial exposure to determine when the bodily injury occurred. *Id.*

In this writer's opinion, an interesting situation would have arisen if a person had been diagnosed under the insured's valid policy. When looking retroactively to the point of bodily injury, however, the initial inhalation of asbestos predated the policy coverage. It is unclear whether coverage would be allowed even if the insured product clearly aggravated an otherwise pre-existing asbestos-related mild lung condition. Technically, no injury actually " occurred" as defined by the Maryland Casualty policy. Also, if the process to develop lung disease from asbestos is not immediate, it would appear to be very difficult, if not impossible, to decipher which inhalation precipitated the disease, i.e., was it the asbestos in his own home, a neighbors home, at work, etc. It would seem that unless *actual initial* causation could be shown, coverage would not be triggered.

The significance of *Mitchell v. Maryland Casualty Co.* rests with its possible application to other disease related cases where exposure to a condition is relevant, such as AIDS or Hepatitis B in hospitals and other facilities dealing with blood. For now, Maryland's stance on asbestos-related insurance coverage is to be determined from the moment of initial exposure, so long as a disease manifests itself as a result. This is a policy which protects both consumers and installers from unknown dangers which we may not yet have the technology to detect. It places the burden temporarily upon insurance companies who can best afford the risk of using new materials and devices, and in turn, through their own influence, can pressure the manufacturers to work harder to safeguard the public.

- Kenneth Goldsmith

Cohen v. Cowles Media Co.: FIRST AMENDMENT DOES NOT PROHIBIT AN INFORMANT FROM RECOVERING DAMAGES UNDER STATE'S PROMISSORY ESTOPPEL LAW FOR NEWSPAPER'S BREACH OF PROMISE OF CONFIDENTIALITY.

In *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991), the United States Supreme Court held that the First Amendment does not prohibit an informant from recovering damages under a state's generally applicable promissory estoppel law for a newspaper's breach of a promise of confidentiality given in exchange for information. The Court based its decision on the theory that laws of

general applicability are not offensive to the First Amendment merely because their enforcement has incidental effects on a newspaper's ability to gather and report the news. In so ruling, the Court distinguished the facts of this case from those in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), where the court held that there could be no cause of action against a newspaper for publishing lawfully obtained and truthful information about a matter of public significance, absent state interest of the highest order.

In 1982, Dan Cohen ("Cohen") approached reporters from two newspapers owned by respondent, Cowles Media Company. Cohen, a Republican campaign worker in Minnesota, offered the reporters disparaging information concerning the Democratic candidate for Lieutenant Governor in return for a promise of confidentiality. The reporters took the information and agreed to keep Cohen's identity a secret. The two newspapers subsequently decided to include Cohen's name in their stories and to identify him as the source of their information. Cohen was fired the same day the stories appeared.

Cohen filed suit against the newspapers in Minnesota state court, alleging fraudulent misrepresentation and breach of contract. Respondents argued that the First Amendment barred recovery. A jury returned a verdict in Cohen's favor and awarded him both compensatory and punitive damages. The Minnesota Court of Appeals upheld the trial court's award of compensatory damages, but reversed the award of punitive damages on the basis that Cohen had not established a cause of action for fraudulent misrepresentation. The Minnesota Supreme Court reversed the compensatory damage award, but went on to consider whether Cohen could recover under promissory estoppel, a theory which had not been advanced by either party at trial or on appeal. The court concluded that enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights. The United States Supreme Court granted certiorari in order to consider the First Amendment implications of the case.

The Supreme Court began its analysis by rejecting respondents' arguments for dismissal based on a lack of subject matter jurisdiction. The Court concluded that, although the promissory estoppel theory had not been presented by the parties in the courts below, the Minnesota Supreme Court had created a federal question by considering and deciding its applicability in relation to federal law. *Cohen*, 111 S. Ct. at 2517 (citing *Orr v. Orr*, 440 U.S. 268, 274-75 (1979)). In addition, the Court noted that respondents had themselves relied upon the protections of the First Amendment as a defense in the lower courts. *Cohen*, 111 S. Ct. at 2517.

The Court then turned to the question of whether First Amendment protections could be triggered by a private cause of action for promissory estoppel. Recognizing that in order to do so, a private cause of action must constitute " state action" within the meaning of the Fourteenth Amendment, the Court looked to such cases as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court concluded that " the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." *Cohen*, 111 S. Ct. at 2517. Addressing promissory estoppel in particular, the Court reasoned that because the state law doctrine of promissory estoppel created obligations never explicitly assumed by the parties, it was necessary for the courts of that state to enforce such obligations, which constituted " state action" for purposes of the Fourteenth Amendment. *Id.* at 2518.

The Court next considered whether the First Amendment precluded recovery under a state's promissory estoppel doctrine in cases where a promise of confidentiality had been broken. Respondents argued that under *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), state officials could not punish a news organization for publication of lawfully obtained, truthful information of public significance, absent a need to further a state interest of the highest order. *Cohen*, 111 S. Ct. at 2518. The majority of the Court agreed that while this proposition was " unexceptionable," *Smith* was distinguishable from the case at bar as it dealt with state-imposed limitations on what could be published, not self-imposed limitations arising out of an agreement. *Cohen*, 111 S. Ct. at 2518-19. In addition, the Court questioned the " lawfulness" of obtaining information by means of promises which are later broken. *Id.* at 2519.

The Court cited several cases which held that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. *Id.* at 2518. The Court expressed " little doubt" that Minnesota's doctrine of promissory estoppel was a law of general applicability, and that enforcement of such a law against the press should not have been subject to stricter scrutiny than if it were enforced against other persons or organizations within the state. *Id.* at 2518-19. Accordingly, the judgment of the Minnesota Supreme Court was reversed, and the case was remanded for further proceedings on the issue of whether Cohen had established a promissory estoppel claim under Minnesota law.

In one of two dissenting opinions, Justice Blackmun, who was joined by Justices Marshall and Souter, argued that the majority was misguided in their reliance upon cases such as *Associated Press v. NLRB*, 301 U.S. 103 (1937), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), because these cases

did not involve the imposition of liability based upon the content of speech. *Cohen*, 111 S. Ct. at 2520-21. Drawing instead upon *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), Justice Blackmun argued that in those cases where imposition of liability was based upon the content of speech, the state's interest in protecting its citizens had been found insufficient to remove such expressions from First Amendment protection. *Cohen*, 111 S. Ct. at 2521. The Minnesota Supreme Court decision made it clear, he concluded, that the state's interest in enforcing its promissory estoppel doctrine was far from compelling. *Id.* at 2522.

Justice Souter, in a dissent joined by Justices Marshall, Blackmun, and O'Connor, argued that the case did not fall within the line of cases cited by the majority which held the press to laws of general applicability. *Id.* He instead suggested compliance with the Court's methodology in earlier cases such as *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), where it was found necessary to " articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests . . . ." *Cohen*, 111 S. Ct. at 2522. According to Justice Souter, the public interest in being better informed and thus more prudently self-governed was paramount to the state's interest in enforcing a newspaper's promise of confidentiality. He admitted, however, that were Cohen's identity of less public concern, liability might not be constitutionally prohibited. *Id.* at 2523.

The Supreme Court's holding in *Cohen* will undoubtedly affect how reporters deal with their informants. Newspapers now have legal incentives to not disclose the identity of a confidential source, even when that person's identity is itself newsworthy. More importantly, this decision demonstrates the Court's reluctance to expand the boundaries of the news media's First Amendment privileges.

- Jason Shapiro

Baltimore Sun Co. v. Colbert: COURTROOM CLOSURE PRESUMPTIVELY VIOLATIVE OF FIRST AND FOURTEENTH AMENDMENTS ABSENT SPECIFIC FINDINGS SHOWING PREJUDICE TOWARDS DEFENDANT.

In *Baltimore Sun Co. v. Colbert*, 593 A.2d 224 (Md. 1991), the Court of Appeals of Maryland held that the public and media cannot be excluded from a preliminary criminal hearing without first being provided with an opportunity to argue against such closure. The court further held that all findings of fact supporting the courtroom closure and the sealing of the transcript must be made on the record.

Tyrone Michael Colbert was indicted for first degree murder and other related criminal charges. The State notified the defendant of its intention to seek the death penalty or alternatively, life without parole. Prior to trial, Colbert filed a motion to enforce a prior plea bargain agreement with the State.

At the hearing on the motion, Colbert requested that the hearing be closed to the public. The State objected to the closure because of the public's right to know about the subject matter. Nevertheless, the trial court held that the defendant's rights to a fair trial outweighed the public's right to be present at the hearing. A reporter for the Baltimore Sun Company ("Sun") also objected to the closure. The Sun reporter argued the paper had a constitutional and common law right to attend the hearings. The court stated that it would re-open the hearing when counsel for the Sun arrived. The court then ordered exclusion of everyone from the hearing, except for the parties and counsel.

Counsel for the Sun was unable to gain immediate access to the hearing, but when counsel was allowed into the courtroom, the judge refused to reopen the hearing. Counsel for the Sun then requested that the nature of the hearing be disclosed and the records of the proceedings be provided. When counsel's requests were denied, the Sun appealed the ruling, arguing that it had a constitutional and common law right to attend pretrial hearings and to examine pleadings. *Id.* at 227. The Court of Appeals of Maryland granted certiorari prior to consideration by the court of special appeals to determine two questions.

The court first addressed the issue of whether prior notice of a courtroom closure during a pretrial proceeding in a criminal case is required and whether an opportunity to oppose such closure is required. Second, the court determined whether the lower court violated the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Maryland Declaration of Rights in its hearing and sealing of the closure motion. *Id.* at 226.

The court began its analysis by stating that there is a general presumption of openness in criminal trial proceedings as guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Id.* at 227 (citing *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 573 (1980)). In concluding that the trial court erred in the present case, the court of appeals relied on a two-prong test developed in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). *Colbert*, 593 A.2d at 228. The court stated the test as first, " whether the place and process have historically been open to the press and general public[,]" and second, " whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* (quoting *Press Enterprise*, 478 U.S. at 8). Applying *Press Enterprise*, the court recognized that if the two-prong test is satisfied, there is a qualified right of access to a judicial pretrial proceeding, based on the First and Fourteenth Amendments