

Bloggers Get Same Speech Protections As Press: 9th Circ.

By **Michael Lipkin**

Law360, Los Angeles (January 17, 2014, 5:49 PM ET) -- Bloggers and others who speak on issues of public concern are entitled to the same free-speech protections as traditional journalists, a Ninth Circuit panel ruled Friday, finding a trustee that a blogger had criticized for its role in a real estate bankruptcy needed to show the blogger had acted negligently.

Writing for a unanimous panel, U.S. Circuit Judge Andrew D. Hurwitz reversed part of a lower court decision that found Obsidian Finance Group LLC did not need to show fault to establish liability against blogger Crystal Cox. Cox had accused Obsidian of tax fraud in its role as trustee in a real estate bankruptcy case, and was hit with a \$2.5 million defamation verdict in 2011 over her posts.

But the trial court erred in not granting Cox certain First Amendment protections, the panel ruled Friday, citing U.S. Supreme Court cases that held the institutional press did not have greater constitutional privileges than other speakers.

“As the Supreme Court has accurately warned, a First Amendment distinction between the institutional press and other speakers is unworkable,” the opinion said. “In defamation cases, the public-figure status of a plaintiff and the public importance of the statement at issue — not the identity of the speaker — provide the First Amendment touchstones.”

According to Obsidian's January 2011 complaint, Cox accused Obsidian of tax fraud when it collected and liquidated the assets of investment company Summit Accommodators, calling Obsidian trustee Kevin Padrick a “thug and a thief hiding behind the skirt tails of a corrupt unmonitored bankruptcy court system.”

Cox argued that the distinction between anyone who shares information with the public and traditional print and broadcast media has blurred, entitling any such speaker to be protected from defamation suits unless it can be proved that they acted negligently. Because the district court judge did not inform the jury about the negligence requirement, Cox is entitled to a new trial, Friday's decision said.

“The protections of the First Amendment do not turn on whether the defendant was a trained journalist, [was] formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings or tried to get both sides of a story,” the opinion said.

Obsidian had also argued that it did not need to prove negligence because Cox's blog posts did not

involve a public concern. But the court ruled that Cox wrote to readers at large about issues of public importance.

“The allegations against Padrick and his company raised questions about whether they were failing to protect the defrauded investors because they were in league with their original clients,” the opinion said.

Cox’s attorney praised the decision for finding the First Amendment protects bloggers as much as it does professional reporters.

“The First Amendment protects all who use ‘the press,’ in the sense of the printing press and its technological heirs, and not just the few who are members of the business that we now call ‘the press,’” said Eugene Volokh, an academic affiliate at Mayer Brown LLP and founder of the popular legal blog The Volokh Conspiracy.

Meanwhile, an attorney for Obsidian claimed Cox had a history of seeking payoffs in exchange for retracting similar allegations, according to the opinion, and that Cox had admitted her post was untrue.

“Ms. Cox’s false and defamatory statements have caused substantial damage to our clients, and we are evaluating our options with respect to the court’s decision,” Steven Wilker of Tonkon Torp LLP said.

Judges Andrew D. Hurwitz, Arthur L. Alarcon and Milan D. Smith Jr. sat on the panel for the Ninth Circuit.

Obsidian is represented by Steven Wilker, Robyn Aoyagi and David Aman of Tonkon Torp LLP.

Cox is represented by Eugene Volokh of Mayer Brown LLP.

The cases are Obsidian Finance Group LLC et al. v. Crystal Cox, case number 12-35238 and 12-35319, in the U.S. Court of Appeals for the Ninth Circuit.

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