

CLIENT MEMORANDUM

New York Appeals Court Holds that Distressed News Service Cannot be Compelled to Reveal Sources

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Last week, in *Murray Energy Corp. v. Reorg Research, Inc.*¹, a New York appellate court held that Reorg Research (“Reorg”) – a subscription-based service that provides market intelligence about distressed companies – was protected by New York’s Shield Law.² This decision reversed a lower court ruling³ and protected Reorg from having to divulge the identities of anonymous sources that had provided it with confidential information.

The decision provides greater certainty that the protections afforded to traditional journalists extend to services that adopt similar subscription-based business models – including services like Reorg covering the distressed market.

¹ No. 15779/16, -- N.Y.S.3d --, 2017 WL 2977781 (App. Div. 1st Dep’t July 13, 2017).

² N.Y. Civ. Rights Law § 79-h (McKinney 1990).

³ 47 N.Y.S.3d 871 (N.Y. Sup. Ct. Feb. 14, 2017). See Willkie Client Alert, “New York Court Requires Distressed Market Intelligence News Service to Divulge Confidential Sources” (May 23, 2017).

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Background

The appeal concerned a series of articles that Reorg had published about confidential restructuring negotiations between Murray Energy Corp. (“Murray”) and a group of Murray’s investors. The articles included information from several anonymous sources that Murray believed had been disclosed in violation of confidentiality agreements that its investors had entered into in connection with the restructuring discussions. Murray sued Reorg to obtain the identities of the anonymous sources and copies of their correspondence. In response, Reorg argued that it was entitled to the protections of the Shield Law, which codifies and expands the common-law reporter’s privilege.

On February 14, 2017, the New York trial court concluded that the Shield Law did not extend to Reorg because its articles were not “news intended for dissemination to the public,” as they were provided only to a limited group of subscribers who were prohibited by the terms of use from sharing such information.

The Appellate Decision

On appeal, a unanimous panel for the Appellate Division, First Department disagreed and reversed the lower court’s decision. Contrary to the lower court, the appellate court concluded that Reorg’s articles were entitled to the protections of the Shield Law even though Reorg’s content was not provided to the general public, but rather to a limited subscriber base that paid relatively high subscription fees and agreed to contractual restrictions from further disseminating its content. The Court noted that these features were “not uncommon among, and were essential to the economic viability of, specialty or niche publications that target relatively narrow audiences by focusing on a topic not ordinarily covered by the general news media,” and “the alternative is not broader coverage, but no coverage at all.”

The Court further concluded that the public benefitted secondarily from the information because, even though the information was provided to a limited audience, it found its way to the parties most interested in and able to benefit from this type of information. The fact that Reorg exercised independence and editorial control over its content further supported the application of the Shield Law.

Accordingly, the Court concluded that the lower court’s analysis – which conditioned the coverage of the Shield Law on a fact-intensive inquiry concerning subscription numbers, fees and terms – was unworkable and created uncertainty that could have a “chilling” effect, which was contrary to New York’s long tradition of providing the “utmost protection of freedom of the press.”

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