



## MEDIA, ENTERTAINMENT AND FIRST AMENDMENT NEWSLETTER

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Jason Bloom

### **Supreme Court May Decide Whether Litigants Must Await Copyright Registration Decision Before Filing Suit**

Jason Bloom

This term, the U.S. Supreme Court may decide an issue that has been perplexing district and circuit courts for decades—whether a copyright claimant must wait on the Copyright Office to issue (or deny) a registration certificate before filing a suit for copyright infringement. The issue has led to a split among the circuits, with the Fifth and Ninth holding that copyright claimants need only file an application, deposit, and fee in order to file suit (the “application approach”) and the Third, Seventh, Tenth, and Eleventh Circuits holding that claimants must await a registration decision from the Copyright Office—a process that can take 7 to 15 months (the “registration approach”).

The case before the Court is *Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC*. Fourth Estate is a news organization that had licensed Wall-Street.com to publish content on its website. When the license expired, Wall-Street.com continued publishing 244 of Fourth Estate’s articles in a manner that Fourth Estate contended violated its copyright interests. Although Fourth Estate had not obtained copyright registration certificates for many of the articles, it filed applications upon discovering the infringement, and promptly filed suit before the Copyright Office had made a registration decision. The district court dismissed the lawsuit on the ground that it could not be filed until a registration decision had been made, and the Eleventh Circuit affirmed. Fourth Estate petitioned the case to the U.S. Supreme Court, which granted certiorari.

### **Ambiguity in the Copyright Act**

The dispute arises from section 411(a) of the Copyright Act, which holds that a suit alleging infringement of a copyright in a U.S. work cannot be instituted until “registration...has been made in accordance with this title.” Courts and litigants dispute whether “has been made” refers to action by the copyright claimant in

submitting the application, deposit, and fee, or action by the Copyright Office in issuing a registration certificate. The Copyright Act is not much help, as it refers to the making of registration at various times as action by the copyright owner and at others as action by the Copyright Office.

Complicating matters, section 411(a) provides that even if, after receiving a copyright application, deposit, and fee, the Copyright Office refuses registration, the applicant shall still have the right to sue. Therefore, claimants under the “registration approach” are not required to obtain issuance of registration certificate, but are rather required to await a decision from the Copyright Office. That would seem to suggest that “registration...has been made” refers to something other than the issuance of a registration certificate. Moreover, section 410(d) provides that a copyright registration’s effective date is the date the application, deposit, and fee are received by the Copyright Office. There is therefore plenty of ambiguity in the Act to support both interpretations.

### **Policy Largely Favors the Application Approach**

Although policy will not necessarily win the day, public policy largely favors the application approach over the registration approach—especially from the perspective of copyright claimants. First, under normal circumstances, it can take the Copyright Office between 7 and 15 months to issue or deny a registration certificate. Such delay is widely viewed as unreasonable in light of the fact that the Copyright Office grants more than 97 percent of all copyright applications filed. And, the delay can be prejudicial to claimants who require prompt injunctive relief or who are running up against the Copyright Act’s 3-year statute of limitations. And, requiring claimants to wait several months for the Copyright Office to make a registration decision makes even less sense in light of

the fact that claimants are entitled to sue regardless of whether the Copyright Office grants or denies registration.

It is true, as those supporting the registration approach argue, that the Copyright Office will expedite registration decisions if claimants pay an additional fee of \$800. In such cases, the Copyright Office endeavors to issue registration decisions within seven days of application, but there is no guarantee as to timing, and the process can often take much longer. Moreover, while an additional \$800 fee may be a drop in the bucket for corporate claimants willing to pursue copyright litigation, such a fee can be burdensome to individual and non-profit litigants, and can even burden well-funded litigants when there are hundreds of copyrighted works at issue. For example, if Fourth Estate were required to pay an additional \$800 expedited fee for each of the 244 works on which it sued, the total fee would have been \$195,200.

Another argument in favor of the application approach is that it is more in line with international law and, more specifically, the Berne Convention, an international agreement to which the United States acceded in 1988. Article 5(2) of the Berne Convention provides that “[t]he enjoyment and the exercise of [copyright] rights shall not be subject to any formality . . .” In accordance with Berne, sections 102(a) and 408 of the Copyright Act provide that copyright ownership subsists from the moment a copyrightable work is fixed in a tangible medium, regardless of whether the work is ever registered. Yet, requiring a copyright owner to await receipt of a registration certificate from the Copyright Office before filing suit contravenes Berne by adding an administrative obstacle to copyright enforcement. In fact, few countries in the world require that claimants even file an application before filing suit, much less that they receive a registration decision from the Copyright Office. Accordingly, the Copyright Act’s registration

requirement specifically only applies to U.S. works, meaning that owners of foreign works may file suit in the U.S. without applying for registration. The registration approach thus only disadvantages U.S. claimants.

There are, of course, policy arguments in favor of the registration approach. For one, although courts are not bound by the Copyright Office's registration decisions, Courts may benefit at the forefront from knowing whether the Copyright Office believes a work is copyrightable. However, the Copyright Office grants more than 97 percent of applications and, given the typical length of federal court litigation, it is likely that a Court following the application approach will know the Copyright Office's view well before a case reaches trial. And, in any event, Courts are always able to stay litigation while they await a decision from the Copyright Office in close cases.

Another argument in favor of the registration approach is that the public benefits from having a national registry of copyrighted works, and the registration approach incentivizes early registration. While this may be true to some degree, the Copyright Act contains other incentives for registration, including that attorneys' fees and statutory damages are generally only available with respect to works registered prior to the commencement of infringement or within three months of publication.

### Outcome

The case was argued to the Supreme Court on January 8, 2019, and a decision is expected before the end of June. At oral argument, the justices seemed to favor the registration approach from a statutory interpretation perspective but also seemed to embrace the policy arguments favoring the application approach. If nothing else, the decision will finally resolve the application-registration debate

and bring further uniformity to the application of the Copyright Act. Perhaps, even if the registration approach wins the day on statutory construction grounds, Congress will be prompted to amend the Copyright Act to bring it in line with good policy and international law.

Haynes and Boone signed on to an amicus brief on behalf of the International Trademark Association favoring the application approach discussed herein. That brief can be found [here](#).

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### U.S. Supreme Court's Denial of Actress's Petition Highlights First Amendment Protection of Docudramas

Chrissy Hocker

The U.S. Supreme Court denied certiorari this month



Chrissy  
Hocker

to Olivia de Havilland, the 102-year-old retired actress famous for her roles in such films as "Gone With the Wind" and "The Adventures of Robin Hood."<sup>1</sup>

De Havilland appealed a decision<sup>2</sup> from a California appellate court that dismissed her suit against the creators

and producers of the television miniseries "Feud: Bette and Joan" under California's anti-SLAPP law, a law designed to reduce frivolous lawsuits based on activity protected by the First Amendment.<sup>3</sup> The denial of certiorari leaves in place an opinion that delivered a major win for docudrama creators who take artistic license depicting public figures and highlights the availability of quick dismissal of certain suits under California's anti-SLAPP law.

The first season of "Feud"—a docudrama covering famous celebrity quarrels—tells the story of the

infamous rivalry between the now-deceased actresses Joan Crawford and Bette Davis, played by Jessica Lange and Susan Sarandon respectively.<sup>4</sup> Actress Catherine Zeta-Jones portrays de Havilland in “Feud”—a real-life friend and confidante of Bette Davis—in a limited role that totals less than 17 minutes of screen time over the eight-episode season.<sup>5</sup>

After the season aired, de Havilland sued “Feud”’s creators and producers, FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc. (collectively FX), claiming they violated Civil Code section 3344, California’s statutory right of publicity, based on their use of de Havilland’s name and likeness without her consent.<sup>6</sup> De Havilland also asserted a false light claim based on the show’s portrayal of her saying and doing things that she claims are offensive and never happened.<sup>7</sup> De Havilland claims she was “falsely portrayed as a gossip who . . . shares intimate details on-camera about her close friend, Bette Davis, calls her sister a ‘bitch’ to others in her profession, and makes snide remarks about Frank Sinatra’s alcohol consumption.”<sup>8</sup>

FX filed a motion to strike the suit under California’s anti-SLAPP law, arguing that de Havilland’s claims were made in an effort to curtail FX’s exercise of its right of free speech under the First Amendment.<sup>9</sup> FX filed several declarations in support of its motion, including one from Ryan Murphy, a co-creator, executive producer, writer, and director of “Feud,” who stated that Zeta-Jones’s portrayal of de Havilland was intended to be that of “a wise, respectful friend and counselor to Bette Davis, and a Hollywood icon with a unique perspective on the past.”<sup>10</sup>

The trial court denied FX’s motion, and FX sought immediate review.<sup>11</sup> The California court of appeal reversed and dismissed de Havilland’s suit.<sup>12</sup> The court noted that generally, a plaintiff’s claims need only have “minimal merit”<sup>13</sup> to survive an anti-SLAPP motion, but because de Havilland is a public figure, she was required to demonstrate by clear and convincing evidence that FX acted with actual malice in order to defeat the motion to strike her false light claim.<sup>14</sup> In order to show actual malice on behalf of a docudrama’s creators, de

Havilland was required to show that FX “intended to convey [a] defamatory impression,” that is “that FX either deliberately cast her statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that it knew or acted in reckless disregard of whether its words would be interpreted by the average reader as defamatory statements of fact.”<sup>15</sup> The court pointed to Murphy’s declaration in holding that de Havilland had not met this high burden.<sup>16</sup> In addition, the court did not consider the remarks attributed to de Havilland to be highly offensive.<sup>17</sup>

As to her statutory right-of-publicity claim, the court held that the First Amendment protected Feud, even though the creators did not obtain de Havilland’s permission or provide compensation for using her name and likeness.<sup>18</sup> The court stated: “*Feud* is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.”<sup>19</sup> In any event, the court reasoned, “Feud” did not violate section 3344 because it was “transformative” and derived its value not from de Havilland’s fame, but from the “creativity, skill, and reputation of *Feud*’s creators and actors.”<sup>20</sup> The Supreme Court of California declined to review the case.

In her petition for certiorari, de Havilland claimed that the lower court adopted a new and sweeping rule that “the First Amendment grants absolute protection for knowing or recklessly published false statements in docudrama format.”<sup>21</sup> She also asserted that the court of appeal’s opinion questioned section 3344’s validity under the First Amendment.<sup>22</sup> In its response, FX disputed that the court of appeals had created a new standard; it argued the court faithfully applied the traditional actual malice test consistent with First Amendment jurisprudence regarding public figures.<sup>23</sup> FX also contended that this case was a poor vehicle to examine the application of the First Amendment to right-of-publicity claims under section 3344 because the court of appeal did not decide this issue and was skeptical as to whether that statute even applied.<sup>24</sup>

The U.S. Supreme Court denied de Havilland's petition for certiorari without stating its reasoning.<sup>25</sup> This denial should comfort Hollywood creatives who look to portray a public figure in their next work: the California court's opinion indicates that if a docudrama creator can show that he or she had no defamatory intent—even if the depiction of the public figure includes inaccuracies—that creator will likely achieve early dismissal of a resulting false light claim under California's anti-SLAPP law. In addition, the remaining opinion highlights the First Amendment's protection of an artistic depiction of a real person, even when the creator does not obtain that person's permission or offer compensation.

<sup>1</sup> *De Havilland v. FX Networks, LLC*, No. 18-453, 2019 WL 113121, at \*1 (U.S. Jan. 7, 2019).

<sup>2</sup> See *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625 (2018), cert denied, No. 18-453, 2019 WL 113121 (U.S. Jan. 7, 2019).

<sup>3</sup> See generally CAL. CIV. PROC. CODE § 425.16. "SLAPP" is an acronym that stands for strategic lawsuit against public participation.

<sup>4</sup> See IMDB, "Feud" (last visited Jan. 22, 2019).

<sup>5</sup> *De Havilland*, 230 Cal. Rptr. 3d at 631.

<sup>6</sup> See CAL. CIV. PROC. CODE § 3344(a) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.").

<sup>7</sup> See *de Havilland*, 230 Cal. Rptr. 3d at 642 ("False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.") (citation omitted). *De Havilland* also asserted claims of misappropriation and unjust enrichment. The court of appeal analyzed the misappropriation and the right-of-publicity claim together, see *id.* at 635–36, and it denied the unjust enrichment claim because her other claims failed. *Id.* at 646–47.

<sup>8</sup> PETITION FOR WRIT OF CERTIORARI (PETITION), No. 18-453, at 5.

<sup>9</sup> See CAL. CIV. PROC. CODE § 425.16(a).

<sup>10</sup> *De Havilland*, 230 Cal. Rptr. 3d at 646

<sup>11</sup> See CAL. CIV. PROC. CODE § 425.16(i) (providing for the interlocutory appeal of an order granting or denying a motion to strike).

<sup>12</sup> *De Havilland*, 230 Cal. Rptr. 3d at 647.

<sup>13</sup> *Id.* at 634–35 (citing *Navellier v. Sletten*, 124 Cal. Rptr. 2d 530 (2003)).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 646 (citing *Dodds v. Am. Broadcasting Co.*, 145 F.3d 1053, 1063–64 (9th Cir. 1998); *Good Gov't Grp. of Seal Beach, Inc. v. Superior Court*, 150 Cal. Rptr. 258, 263–64 (Cal. 1978)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 643–46.

<sup>18</sup> *Id.* at 637–39.

<sup>19</sup> *Id.* at 638 (internal quotations marks omitted).

<sup>20</sup> *Id.* at 641–42 (applying the "transformative" test articulated in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 106 Cal. Rptr. 126 (Cal. 2001)) (internal quotation marks omitted).

<sup>21</sup> PETITION at 1.

<sup>22</sup> *Id.*

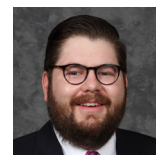
<sup>23</sup> BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (RESPONSE), No. 18-453, at 16–18.

<sup>24</sup> *Id.* at 22–24.

<sup>25</sup> See *De Havilland*, 2019 WL 113121, at \*1.

## ***Iancu v. Brunetti*: FUCT Trademark Battle Heads to the Supreme Courts**

Wesley Lewis



Wesley Lewis

This January, the Supreme Court granted the United States Patent and Trademark Office's petition for a writ of certiorari in the long-running trademark dispute over the L.A.-based fashion label FUCT. This case follows closely in the footsteps of *Matal v. Tam*, in which the

Supreme Court struck down the Lanham Act's bar on the registration of disparaging trademarks. Like *Tam*, *Brunetti* involves a similar First Amendment challenge to Section 2(a) of the Lanham Act, this time addressing the constitutionality of the Act's bar on the registration of "scandalous" trademarks.

Erik Brunetti and Natas Kaupas founded FUCT in 1990. The high-end label is considered a forerunner of the modern streetwear movement and is known for pushing the boundaries of good taste, often by featuring risqué or explicit imagery on its clothing. For the first two decades of the brand's existence, Brunetti did not attempt to obtain federal trademark registration

of the FUCT mark. Then, in 2011, two individuals filed an intent-to-use application for the mark for use on clothing; the application was later assigned to Brunetti and subsequently amended to include allegations of Brunetti's actual use of the brand.

The examining attorney refused to register the mark, citing Section 2(a) of the Lanham Act. Section 2(a) provides, in relevant part, that the PTO may refuse to register a trademark that "[c]onsists of or comprises immoral, deceptive, or scandalous matter . . ." He/She observed that FUCT is a homophone of the past tense of a profane expletive and is therefore unsuitable for federal registration. Brunetti appealed this determination to the Trademark Trial and Appeals Board (TTAB), which affirmed the examining attorney's refusal. In reaching its decision, the TTAB relied on dictionary definitions and observed that Brunetti often used the mark in the context of "extreme nihilism—displaying an unending succession of anti-social imagery of executions, despair, violent and bloody scenes . . . and dozens of examples of other imagery lacking in taste." The mark, it concluded, was scandalous and properly refused registration.

Brunetti appealed this decision to the Federal Circuit. While the case was pending before the Court of Appeals, the Supreme Court issued its ruling in *Matal v. Tam*, in which all eight Justices who participated in the decision agreed that the Lanham Act's provision barring disparaging trademarks violated the First Amendment. After the parties concluded supplemental briefing and re-argument in light of *Tam*, the Federal Circuit reversed course. Although the Federal Circuit agreed that the mark was vulgar and therefore scandalous, Judge Kimberly Moore, writing for the Court, held that "Section 2(a)'s bar on registering immoral or scandalous marks is an unconstitutional restriction of free speech" and reversed the Board's holding that FUCT was unregistrable. Relying heavily on *Tam*, the Federal Circuit determined that Section 2(a)'s ban on immoral or scandalous marks did not survive the strict scrutiny demanded by the First Amendment—or even, for that matter, the lesser intermediate scrutiny standard

afforded to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 (1980).

The PTO filed a petition for *certiorari*, arguing that Section 2(a) does not run afoul of the First Amendment because federal registration of a mark is not a prerequisite for use of that mark in commerce. Rather, the PTO argued, the scandalous-marks provision merely establishes a lawful eligibility requirement for federal registration of that mark. The PTO also argued that the Supreme Court's earlier decision in *Tam* is largely not controlling; while all eight Justices agreed that trademark registration confers important legal rights and benefits and does not constitute "government speech," the remainder of the Court's decision was split between two opinions, neither of which gained the support of a majority. Justice Kennedy, writing separately from Justice Alito's plurality opinion, opined that the Lanham Act's disparagement provision was viewpoint-based discrimination but expressly reserved "the question of how other provisions of the Lanham Act should be analyzed under the First Amendment."

In response to the PTO's petition, Brunetti conceded that Supreme Court review was appropriate, arguing instead that the Federal Circuit's decision was correctly decided and should be affirmed. Specifically, Brunetti argued that the scandalous-material bar in Section 2(a) is not a content-neutral rule that rejects all profanity, but instead is selectively employed to refuse certain applications based on the level of perceived offensiveness. Brunetti further argued that the PTO's refusal to register Brunetti's mark constituted impermissible viewpoint discrimination and that the scandalous provision was impermissibly vague.

On January 4, 2019, the Supreme Court granted the PTO's petition. Certainly, the Supreme Court's potential willingness to strike down an additional provision of the Lanham Act on First Amendment grounds indicates that it is sensitive to the significant free-speech concerns associated with content-based limitations on eligibility for federal trademark registration. Indeed,

many of the concerns regarding government regulation of disparaging marks articulated in *Tam* arguably apply with equal force in the context of scandalous marks. Still, while many expect the Supreme Court to come down in a manner consistent with its earlier ruling in *Tam*, the downfall of Section 2(a)'s bar on scandalous trademark registrations may not be a foregone conclusion. For one thing, it is well settled that "obscenity is not within the area of constitutionally protected speech or press," *Roth v. United States*, 354 U.S. 476, 492-93 (1957), and as a result, the Court may be skeptical of First Amendment arguments in support of Section 2(a)'s unconstitutionality in light of the arguably obscene context in which Brunetti employs his mark. Furthermore, although *Tam* was only recently decided in 2017, the makeup of the Court has shifted significantly with the addition of Justices Gorsuch (who did not participate in the discussion or decision of *Tam*) and Kavanaugh. Oral argument is expected to be held this spring.

## Does the Texas Anti-SLAPP Law Apply in Federal Court? . . . Stay Tuned

Laura Prather



Laura Prather

Courts' views of whether state anti-SLAPP statutes apply in federal court continue to be a judicial checkerboard across the country, and the United States Supreme Court again in December declined to take the opportunity to clarify the issue. See *Americulture, Inc. v. Los Lobos*, Docket No. 18-89, cert. denied (December 3, 2018).

Since Texas considers itself its own country, not surprisingly, the state has its own judicial checkerboard as to whether the Texas Citizens Participation Act ("TCPA") applies in federal court. The Southern and Northern district courts have applied the TCPA, while the Eastern and Western district courts have refused to do so. This inconsistent approach by the Texas courts

was further evidenced in a January decision by Eastern District Judge Amos Mazzant – his third such ruling. See *Star Sys. Int'l Ltd. v. Neology, Inc.*, 4:18-CV-00574, 2019 WL 215933 (E.D. Tex. Jan. 16, 2019) (Mazzant, J.); see also *Thoroughbred Ventures, LLC v. Disman*, No. 4:18-CV-00318, 2018 WL 3472717 (E.D. Tex. July 19, 2018) (Mazzant, J.); *Van Dyke v. Retzlaff*, No. 4:18-CV-247, 2018 WL 4261193 (E.D. Tex. July 24, 2018) (Mazzant, J.).

*Williams v. Cordillera* was the first case in which a federal court in the Fifth Circuit directly addressed the issue of whether the TCPA applies in federal court, holding that it does. 2014 WL 2611746 at \*1. In *Williams*, a high school teacher, who had repeatedly been accused of improper behavior with his students, filed a lawsuit in response to a local television station's investigative series about him. The defendant filed a TCPA motion to dismiss, and the plaintiff responded arguing that the TCPA does not apply in federal court.

In ruling on the motion, the court conducted an Erie analysis, determining that, although there were procedural components to the statute, "these procedural features are designed to prevent substantive consequences—the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law." The court then looked to the Fifth Circuit decision in *Henry v. Lake Charles American Press* in which Louisiana's anti-SLAPP law was applied, noting no material differences between the Louisiana and Texas statutes. 566 F.3d 164, 170 (5th Cir. 2009)

Since *Williams*, however, the Fifth Circuit has backpedaled from the ruling in *Henry*. In *Block v. Tanenhaus*, the Fifth Circuit emphasized that the statute's applicability remains "an open question" and entertained the possibility that "*Henry* could be interpreted as assuming the applicability of Article 971 for purpose of that case without deciding its applicability more generally." 867 F.3d 585, fn. 2 (5th Cir. 2017). Prior to *Block*, the Fifth Circuit had repeatedly assumed without deciding that the TCPA applies in

federal court. See, e.g., *Cuba v. Pylant*, 814 F.3d 701, 706 (5th Cir. 2016) (“To decide whether the appeals are timely, we first review the TCPA framework, which we assume—without deciding—controls as state substantive law in these diversity suits.”); *Culbertson v. Lykos*, 790 F.3d 608, 631 (5th Cir. 2015) (citing *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 753 (5th Cir. 2014)) (“We have not specifically held that the TCPA applies in federal court; at most we have assumed without deciding its applicability.”). In the absence of guidance from the Fifth Circuit, many district courts have followed the Fifth Circuit’s lead, side stepping the issue. See, e.g., *Rivers v. Johnson Custodial Home, Inc.*, No. A-14-CA-484-SS, 2014 WL 4199540, at \*1 (W.D. Tex. Aug. 22, 2014) (holding that the relevant speech was not protected by the TCPA rather than addressing whether the TCPA applies); *Culbertson v. Lykos*, No. 4:12-cv-03644, 2013 WL 4875069, at \*2 (S.D. Tex. Sept. 11, 2013) (electing to dismiss on Rule 12(b)(6) when faced with a TCPA motion and a Rule 12(b)(6) motion to dismiss). Those courts that have addressed the applicability of Texas’s anti-SLAPP statute in federal court have come to differing conclusions, creating a split of authority within the state and in some instances a split of authority within the districts themselves.

In the Northern District of Texas, Judge Sidney Fitzwater granted defendant’s TCPA motion as to several of plaintiff’s claims in *Charalambopoulos v. Grammer*, a defamation suit arising from allegations of domestic violence. No. 3:14-CV-2424-D, 2015 WL 390664, at \*28 (N.D. Tex. Jan. 29, 2015). One year later, in *Hammond v. Lovings*, the Western District of Texas dismissed an intentional infliction of emotional distress claim—which had been removed pursuant to the Federal Torts Claims Act—against several defendants pursuant to the TCPA. No. 15-cv-00579-RP, 2016 WL 9049579, at \*3 (W.D. Tex. May 25, 2016). In *Haynes v. Crenshaw*, the Eastern District of Texas adopted the reasoning of the *Williams* court, holding that the TCPA applies in federal court. 166 F. Supp. 3d 773, 777 (E.D. Tex. 2016). And, in *Forsterling v. A&E Television Networks, LLC*, Judge Lynn Hughes applied the TCPA to a case in which reality television show participants sued for, among other

things, their identity being displayed on a show about human trafficking. No. 4:16-CV02941, 45 Media L. Rep. 1413 (S.D. Tex. 2017).

Despite this apparent agreement (at one time) from each of the four Texas federal districts that the TCPA applied in federal court, the picture today is not that clear.

Much like the 5th Circuit, more recently, the tide has turned. Taking a different approach than the *Charalambopoulos* court, in *Insurance Safety Consultants LLC v. Nugent*, the Northern District of Texas opined that the TCPA was in conflict with Federal Rules of Civil Procedure 12 and 56; accordingly, the court refused to apply the TCPA to dismiss plaintiff’s claims arising under federal law. No. 3:15-CV-2183-B, 2016 WL 2958929, at \*5 (N.D. Tex. May 23, 2016).

In *Nugent*, an employer brought a claim under the two federal statutes, the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act, alleging the employee accessed an email account without permission. The employee responded by filing, among other things, a counterclaim that “reserved her right to request and enforce remedies” under the TCPA. The court acknowledged that the Fifth Circuit had never formally decided whether state anti-SLAPP statutes apply in federal court and looked instead to the reasoning of the D.C. Circuit in *Abbas v. Foreign Policy Group*. 783 F.3d 1328, 1333-36 (D.C. Cir. 2015).

In *Abbas*, the D.C. Circuit applied the *Hanna/Shady Grove* two-step test, finding Federal Rule 12 and 56 to be both valid and in conflict with D.C.’s anti-SLAPP statute. Finding the same conflict with the TCPA, the *Nugent* court held that the TCPA could not apply in federal court to federal claims.

In *Rudkin v. Roger Beasley Imports, Inc.*, Western District Judge Lee Yeakel also relied upon the reasoning in *Abbas* in holding the TCPA does not apply in federal court. No. A-17CV-849-LY, 2017 WL 6622561 (W.D. Tex. Dec. 28, 2017), report and recommendation approved,



No. A-17-CV-849-LY, 2018 WL 2122896 (W.D. Tex. Jan. 31, 2018). In denying the TCPA motion, the Court opined: “the TCPA contains procedural provisions setting forth deadlines to seek dismissal, deadlines to respond, and even deadlines for the court to rule, as well as appellate rights, and the recovery of attorney’s fees. It is a procedural statute and thus not applicable in federal court. Even if the statute is viewed to be somehow substantive, it still cannot be applied in federal court, as its provisions conflict with Rules 12 and 56, rules well within Congress’s rulemaking authority.”

The following year, Western District Judge Nick Pitman took the same approach in *N.P.U., Inc. v. Wilson Audio Specialties, Inc.*, 343 F. Supp. 3d 661 (W.D. Tex. 2018). And, the domino affect continues with the three rulings from Judge Mazzant in the last six months holding the TCPA does not apply in federal court.

In the coming months, the 5th Circuit could resolve this split of authority in Texas’ federal district courts in the *Klocke v. UT Arlington* case. No. 17-11320 (pending at the 5th Cir.) The case arises out of the death of a UT Arlington student who was subject to a grievance action after refusing the advances of a fellow student who was gay. The deceased student’s father filed a civil rights and defamation lawsuit against both the University and the student who made the advances. Summary judgment was granted in favor of the University, and a TCPA motion to dismiss was granted in favor of the defendant student. Klocke

appealed, and the 5th Circuit heard oral argument on September 5, 2018. See [http://www.ca5.uscourts.gov/OralArgRecordings/17/17-11320\\_9-5-2018.mp3](http://www.ca5.uscourts.gov/OralArgRecordings/17/17-11320_9-5-2018.mp3).

The panel consisted of former Chief Justice Edith Jones from Texas, Judge Barksdale from Mississippi, and newly appointed Judge Don Willett. Of the three, the judge with the least seniority, Judge Willett actually has the most experience applying the TCPA since he served on the Texas Supreme Court during the first seven years of the statute’s existence. Lawyers should keep their eyes out for a ruling in this case in the coming months and for a conclusion to the unanswered question whether the Texas anti-SLAPP statute applies in federal court.

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Haynes and Boone’s Media, Entertainment and First Amendment Practice Group has extensive experience representing major media clients across all platforms – including newspapers, magazines, broadcast and cable networks, production companies, and online content providers – in high-profile disputes. Our team brings deep knowledge to a broad range of matters, including libel, intellectual property, and access to information. Our lawyers present frequently on issues facing the industry and have been leaders in drafting legislation to address cutting-edge issues affecting free speech and transparency.

FEATURED SPEAKING ENGAGEMENTS

Laura Prather

**Texas State Bar's Advanced  
Trial Strategies CLE**

Panelist: Anti-SLAPP and  
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