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MEDIA, ENTERTAINMENT AND FIRST AMENDMENT NEWSLETTER

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IN THE NEWS

Haynes and Boone Obtains Anti-SLAPP Reversal From Texas Supreme Court
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Texas Supreme Court Roundup: A Mixed Bag for Media and Open-Government Advocates

The first weeks of 2017 saw legal issues affecting the media taking center stage, both nationally and in Texas. Already this year, the Texas Supreme Court issued two notable decisions that may have a significant impact on Texas media organizations defending libel suits and those seeking information under the Texas Public Information Act (TPIA), and the results are mixed.

Brady v. Klentzman: Setting the Proper Burden of Proof for Media Defamation Cases

Steven C. Messer

Steven Messer

Brady v. Klentzman arose from a newspaper article that detailed alleged preferential treatment given to the son of a high ranking officer in the Fort Bend County Sherriff's Department. In one incident, the son was given a citation for minor-in-possession of alcohol and, according to the article, the young man's father had continually contacted the officers who issued the citation, implying that the father had attempted to interfere with the investigation and stating that the citing officers were intimidated.

In a second incident, the son and his brother allegedly drove a car to their own home while being followed by a state Department of Public Safety trooper. The article reported that dash cam video showed that the son was so unruly and intoxicated that he had to be handcuffed and put in the backseat of the DPS vehicle, and yet the trooper let the son go with a warning. Tapes of the county's radio system revealed that the Fort Bend County Sherriff had alerted the son's father that he needed to get home to deal with an "incident" and the county dispatcher avoided broadcasting the name of the father's other son over the radio.

The son sued for defamation, alleging that the article's depiction of him as a criminal who used his father's connections to avoid justice was defamatory. The son alleged that the article omitted key details about the incidents, including that he was eventually acquitted of the minor-in-possession charge. The jury found the newspaper liable and awarded $50,000 in mental anguish and loss-of-reputation damages jointly against the newspaper and the reporter, $30,000 in exemplary damages against the reporter, and $1,000,000 in exemplary damages against the newspaper, which the trial judge reduced to $200,000.

The media defendants appealed, arguing that because the article involved a media defendant's statement on a matter of public concern, the trial court erred in placing the burden of proving the truth of the statements on them, instead of placing the burden on the son to prove that the statements were false. The media defendants also argued that there was no evidence of loss of reputation or mental anguish damages. The court of appeals agreed that the burden of proof was improperly placed on the media defendants, but concluded that there was evidence to sustain the jury's damages findings, and remanded the case for a new trial. Both sides appealed to the Texas Supreme Court, the plaintiff arguing that the trial court judgment should be affirmed, the defendants arguing that the case should be reversed with judgment rendered in their favor, rather than remanded for a new trial. By a 5-4 vote, the Supreme Court affirmed the Court of Appeals' decision.

The Supreme Court first addressed whether the article truly addressed a matter of public concern. The son argued that the details of his behavior were not logically related to his father's actions and were only intended to embarrass him. The Court disagreed, reasoning that while not all details in an article about a matter of concern are also a matter of public concern, as long as the details possess a "logical nexus" to the matter of public concern, they too are considered a matter of public concern. In this case, the Court concluded, the son's behavior was the impetus for his father's alleged abuses. The Court also noted that courts should avoid becoming "involved in deciding the newsworthiness of specific details in a newsworthy story," and avoid making "editorial decisions for the media regarding information directly related to matters of public concern."

UPCOMING EVENTS

Jason Bloom

Fighting FOI Denials
Investigative Reporters & Editors Watchdog Workshop
March 10, 2017
Dallas, Texas

Fake News Panel
Dallas Bar Association Media Relations Committee
May 16, 2017
Dallas, Texas

Trademark Law and the First Amendment
Bill of Rights: Litigating the Constitution Seminar
May 26, 2017
Austin, Texas

Laura Prather

State Bar of Texas: Advanced Administrative Law Course
Update on Texas Public Information Loss
June 1, 2017
Austin, Texas

Texas Bar College Summer School 2017
CPRC: Chapter 27
July 14, 2017
Galveston, Texas

State Bar of Texas: Advanced Government Law 2017
CPRC: Chapter 27
July 27-28, 2017
Austin, Texas

That was the good news for the media defendants, but the bad news was that the Court held that some evidence supported the jury's award of damages, therefore agreeing with the Court of Appeals that remand for a new trial was proper. The Supreme Court found evidence of loss-of-reputation damages in a few isolated pieces of testimony, such as:

- The father testified, with little elaboration, that he had located people in the community with a negative impression of his son.
- The son testified that he was forced to resign from his job, implying that the resignation was caused by his employer seeing the article. He was later rehired.
- The son testified that his friends told him that the article made him look like a criminal.

The dissent argued that none of this evidence actually established a cause and effect relationship between the article and a loss of reputation, and also noted that there had been no testimony that the son's daily routine was interrupted, a required element of mental anguish damages.

The Court's decision on the scope of a "matter of public concern" is positive news for media defendants, as is the reaffirmation that plaintiffs suing media defendants for defamation bear the burden of proving falsity. Less encouraging, however, is the Court's decision on damages, allowing a finding of damages on a scant record, which, as the dissent argued, seems out of step with how damages are scrutinized in other types of tort claims.

Paxton v. City of Dallas: Attorney-Client Privilege and Missed Deadlines Under the TPIA

Wesley Lewis

Wesley Lewis

The TPIA establishes a presumption of access to government information but also carves out certain exceptions to the public-disclosure requirement, including an exception for information protected by attorney-client privilege. The statute also sets out a procedural system for governmental bodies seeking to withhold requested information to request a ruling from the Texas Attorney General's office.

Ordinarily, a governmental body seeking to withhold information requested under the TPIA must seek an Attorney General's ruling "no later than the tenth business day after the date of receiving the written request," and failure to do so renders the information presumptively subject to disclosure "unless there is a *compelling reason* to withhold the information."

Paxton v. City of Dallas involved a governmental body's failure to timely request Attorney General decisions when it sought to withhold information under the attorney-client privilege. The City of Dallas received two separate information requests, one relating to a landfill and one to a convention-center hotel. The City contended that at least some of the requested information was subject to the attorney-client privilege, but it did not seek an Attorney General's decision until after ten business days from its receipt of the requests.

Nevertheless, the City argued that it had a "compelling reason" to withhold the requested information, in part because disclosure of some of the requested information "would prejudice [its] bargaining position" for particular transactions. In both cases, the

Attorney General issued a letter ruling rejecting the City's arguments, concluding that the TPIA required disclosure of the requested information because the City's request for ruling was submitted after the applicable deadlines.

In a 7-2 decision, the Supreme Court held that the fact that the requested public information was covered by the attorney-client privilege—a fact that was undisputed—itself satisfied the "compelling reason" burden under the TPIA. Justice Eva Guzman, writing for the majority, noted the importance of protecting the attorney-client privilege in promoting full and frank communications between government attorneys and policymakers. As a result, Justice Guzman wrote, "[d]epriving the privilege of its force…compromises the public's interest at both discrete and systemic levels."

In dissent, Justice Jeff Boyd argued that, "[u]nder the Court's holding, establishing the exception will always constitute a compelling reason…obliterat[ing] the sole method by which the Act compels the government to timely and properly assert the attorney-client privilege." He defended the TPIA's approach to reconciling the competing interests of disclosure and privilege, noting that by allowing the government to promptly assert its privileges and request an Attorney General decision, the TPIA allows for effective case-by-case balancing of the public's interest in disclosure and any resulting harm that could occur. Justice Boyd "conclude[d] that a 'compelling reason' is one that is so important and urgent that reasonable minds can only conclude that it clearly outweighs the Act's fundamental policy of ensuring that the public can promptly obtain public information from its governmental bodies," and that, in his view, the City failed to make such a showing.

By focusing on the nature of the requested information, rather than the governmental body's reasons for missing the deadlines, the Supreme Court has called into question the significance of the TPIA's deadlines and the consequences a governmental body may face if it misses a deadline. If the nature of the requested information can itself satisfy the "compelling reason" to withhold it, notwithstanding the governmental body's failure to comply with the TPIA's procedural requirements, then the Supreme Court's ruling threatens to create a loophole around the Act's prescribed approach to balancing the competing interests of prompt access to public information and confidentiality.

Federal Court Preliminarily Enjoins California Law that Prohibits Reporting Actors' Ages

Mary-Christine "M.C." Sungaila, Polly Graham Fohn, Natasha Breaux

M.C. Sungaila

Polly Graham Fohn

Natasha Breaux

IMDb.com, Inc. v. Becerra, No. 3:16-cv-6535-VC (N.D. Cal.)

California Assembly Bill 1687 ("AB 1687"), which went into effect on January 1, 2017, requires certain entertainment websites to remove a paid subscriber's date of birth or age information upon request.[1] This law applies to IMDb, the world's largest online database of information about the entertainment industry. IMDb filed suit against the California Attorney General (the "AG") in the United States District Court for the Northern District of California, contending, among other things, that the law violates the First Amendment's free speech clause. On February 22, the court granted IMDb's motion for preliminary injunction, thereby enjoining enforcement of the law while the lawsuit is pending.

The California Legislature passed AB 1687 at the behest of the Screen Actors Guild – American Federation of Television and Radio Artists, which claimed the law will help combat age discrimination by employers against actors and other professionals in the entertainment industry. Allegedly, employers in the entertainment industry find out actors' and others professionals' ages from IMDb and then use that information to discriminate when hiring. The Screen Actors Guild intervened in the federal lawsuit, arguing that it is constitutional for the government to regulate such discrimination-facilitating conduct.

The AG defended AB 1687 by claiming that it only regulates economic contractual relationships between IMDb and its subscribers—not speech—and therefore First Amendment protection is not available. Even if it does regulate speech, the AG claimed that such speech is commercial speech and therefore afforded lesser First Amendment protection. That lesser standard is satisfied, according to the AG, because the law aids in preventing age discrimination and is no more extensive than necessary. AARP and AARP Foundation filed an amicus brief supporting the AG's and Screen Actors Guild's positions.

In its motion for preliminary injunction, IMDb pointed out that it has two sites: a paid subscription-based site tailored for use in hiring entertainment professionals, and a free public site. Subscribers control whether to list their age information on the subscription-based site. However, the public posts information on the public site, much like Wikipedia. IMDb claimed AB 1687 targets non-commercial speech because it targets factual information unconnected to a business transaction, particularly as to the public site. Because the law regulates non-commercial, content-based (age) speech, IMDb contended strict scrutiny of the law applies. According to IMDb, the law fails strict scrutiny because it is not narrowly tailored to combat age discrimination.

Haynes and Boone filed an *amicus* brief in support of a preliminary injunction on behalf of Dean Erwin Chemerinsky at University of California, Irvine School of Law, Eugene Volokh of UCLA Law School, and seven other First Amendment scholars, as well as the First Amendment Lawyers Association and the Reporters Committee for Freedom of the Press. These amici explained that the Supreme Court has repeatedly held it is unconstitutional to suppress the reporting of truthful information already in the public record. Amici further explained that unless AB 1687 is struck down, there will be virtually no limit to the government's ability to suppress the reporting of truthful information by other sources, including the print media. Electronic Frontier Foundation, the First Amendment Coalition, the Media Law Resource Center, the Wikimedia Foundation, and the Center For Democracy & Technology also filed an amicus brief in support of a preliminary injunction, contending the right to publish truthful information that pertains to a matter of public interest is not diminished because others may use that information for improper purposes.

In a strongly worded opinion issued February 22, 2017, the district court granted a preliminary injunction. The court stated that "it's difficult to imagine how AB 1687 could not violate the First Amendment." The court found AB 1687 restricts non-commercial speech on the basis of content and thus must satisfy strict scrutiny—that is, it must be "'actually necessary' to serve a compelling government interest." Although preventing age discrimination is a compelling goal, the court held that "the government ha[d] not shown how AB 1687 is 'necessary' to advance that goal." The court went so far as to state, "In fact, it's not clear how preventing one mere website from publishing age information could meaningfully combat discrimination at all." And even if it could, the Court said that "there are likely more direct, more effective, and less speech-restrictive ways of achieving the same end."

Despite the court's strongly worded opinion, the court battle over the law continues. In a statement published on its website, the Screen Actors Guild said that the preliminary injunction is "an early skirmish in what will be a long-term battle."[2] It vowed to "continue to fight until we achieve for actors and other entertainment industry professionals, the same rights to freedom from age discrimination in hiring enjoyed by other workers in other industries." Therefore, although AB 1687 cannot be enforced for now, the court battle over whether it violates the First Amendment's free speech clause likely will not be resolved for some time.

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[1] Cal. Civ. Code § 1798.83.5.

[2] *SAG-AFTRA Statement on IMDb Injunction, SAG-AFTRA* (February 22, 2017 at 4:02 p.m.).

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