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MEDIA, ENTERTAINMENT AND FIRST AMENDMENT NEWSLETTER

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A Congressional Anti-Gag Maneuver: Senate Unanimously Approves the Consumer Review Freedom Act

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On December 14, 2015, the United States Senate unanimously approved The Consumer Review Freedom Act (the "**Act**").[1] The proposed law, if passed, would outlaw so-called "gag clauses," contract provisions used by businesses that prohibit or restrict a consumer's ability to write reviews of products and services.

Gag clauses are contract provisions that impose fines on consumers who write negative reviews, or that transfer copyright ownership in any review written about a particular business to that business. This latter strategy gives the business the right to have reviews removed from third-party review websites and forums, such as Yelp.com, under the Digital Millennium Copyright Act ("**DMCA**").

The proposed law would protect consumers like John Palmer and Jennifer Kulas (Palmer), the husband and wife plaintiffs in *Palmer v. KlearGear*,[2] who made a purchase costing less than $20 from online retailer KlearGear.com. When her purchase didn't arrive and the order was cancelled, Jennifer posted a negative review of KlearGear online. Several years later, KlearGear found the negative review and fined John Palmer $3,500 – a "Non-Disparagement" Fee included in the KlearGear Terms of Sale. When the Palmers didn't pay, KlearGear turned over the questionable debt to a collection agency, which reported the delinquency to credit bureaus. The Palmers sued, and after KlearGear did not appear to defend itself, the district court granted the Palmers judgment by default.

On November 4, 2015, Jen Palmer testified before the U.S. Senate Committee on Commerce, Science and Transportation, pleading with Congress to ban clauses like those used against her by KlearGear, which she claimed "lead to the silencing of ordinary people and to bullying tactics. . . ."[3]

IN THE NEWS

- Laura Prather becomes board certified in Civil Appellate Law
- New Practice Group members: Nick Nelson and Sally Dahlstrom

If passed into law, the proposed law would give the Federal Trade Commission and State Attorneys General authority to take action against businesses that attempt to use contract provisions to stifle honest but negative reviews.

The proposed law specifically excludes contracts between employers and their employees and independent contractors, and also provides for website operators' continued ability to include terms in contracts that reserve the right to remove certain reviews from their websites, including those that are unlawful, false, misleading or that contain confidential information.

The proposed law has been referred to the House of Representatives Subcommittee on Commerce, Manufacturing, and Trade, and must pass a House vote before it becomes law. Once passed, the proposed law requires that the Federal Trade Commission provide businesses with best practices for compliance. Until then, businesses would be wise to use caution in drafting terms and conditions impacting consumer reviews.

[1] S. 2044, 114th Cong. (2015).

[2] *Palmer et al. v. KlearGear.com et al.,* No. 1:13-cv-00175 (D. Utah, filed Dec. 18, 2013).

[3] *Zero Stars: How Gagging Honest Reviews Harms Consumers and the Economy: Hearing on S. 2044 Before the S. Comm. On Commerce, Science & Transportation,* 114th Cong. (2015) (testimony of Jennifer Kulas Palmer).

Fifth Circuit Finds No First Amendment Violation for Denial of Discretionary Film Funding

Catherine Robb

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On December 28, 2015, the Fifth Circuit Court of Appeals upheld a Texas District Court's ruling that Texas' denial of state funding to the film "Machete Kills" under Texas' film incentives program did not violate the First Amendment or Texas Constitution. Pursuant to the State's Moving Industry Image Incentive Program ("**Incentive Program**"), a grant program to promote film, television, and multimedia industries in Texas, the state may deny funding to a project that contains "inappropriate content or content that portrays Texas or Texans in a negative fashion." After determining that "Machete Kills" contained "inappropriate content," the state denied "Machete Kills"' grant request, leading the production company for "Machete Kills" to sue the current and former Texas Film Commissioners for injunctive, declaratory, and monetary relief – claiming that the denial was based on viewpoint discrimination, thus violating the film production company's First Amendment rights. In affirming the district court, the Fifth Circuit held that it is not clearly established that the First Amendment requires a state with an incentive program like the one at issue to fund films that cast the state in a negative light. Specifically, the court found that the state's denial did not prevent the production company from filming, producing, or distributing the film, and did not prevent the production company's speech or hinder the production company's First Amendment expression. The court went on to state that the discretionary nature of the program allowed the state to selectively fund some programs to the exclusion of others without violating the United States or Texas Constitutions.

Dallas Appeals Court Allows Libel Claim Against Columnist to Proceed

Thomas J. Williams and Nick Nelson

Thomas J. Williams

Nick Nelson

Public figure plaintiffs suing media entities for libel must prove, by clear and convincing evidence, that the defendant published a false and defamatory statement with "actual malice," i.e.,

with knowledge of its falsity or with reckless disregard for its truth or falsity. Even plaintiffs who are not public figures must establish actual malice to recover exemplary damages.

The actual malice standard is a high bar for plaintiffs, and one not often met. But in the recent case of *Tatum v. The Dallas Morning News, Inc.*, the Fifth District Court of Appeals in Dallas found that a plaintiff had at least raised a fact issue as to a newspaper's actual malice, and the detailed opinion contains important lessons for media organizations and attorneys who represent them.

In a column titled "Shrouding suicide leaves its dangers unaddressed," veteran *Dallas Morning News* columnist Steve Blow criticized the paid newspaper obituary of a "popular high school student." Blow wrote that the obituary attributed the teen's death to "injuries sustained in an automobile accident," but that in fact the teen's death "turned out to have been a suicide." Blow wrote that he was "troubled that we, as a society, allow suicide to remain cloaked in such secrecy, if not outright deception." The column did not name the deceased teen or the author of the obituary, but evidence indicated that friends of John and Mary Ann Tatum recognized that the column referred to the obituary they wrote about their teenage son Paul.

The Tatums sued the newspaper for libel and for violations of the Texas Deceptive Trade Practices Act. *The Dallas Morning News* moved for summary judgment, which the trial court granted.

On appeal, the Tatums presented evidence that their son had no history of mental illness, that he started behaving erratically in the hours after the accident, and that they reasonably believed he took his life as a result of the injuries he sustained in the accident. The Tatums alleged that Blow's column defamed them because ordinary readers could perceive it (i) to accuse them of using deception to "shroud"

UPCOMING SPEECHES

Laura Lee Prather

Capital Area Paralegal Association

Hot Issues in Anti-SLAPP Laws

January 27, 2016
Austin, Texas.

Laura Lee Prather
Alicia Calzada

American Bar Association Forum on Communications Law

Hot Issues in Anti-SLAPP and Other Legislation

February 4-6, 2016
Naples, Florida.

Thomas J. Williams

Fort Worth Business & Estate Council

Privacy

February 18, 2016
Fort Worth, Texas.

Paul's suicide in secrecy, (ii) to suggest that Paul suffered from mental illness and the Tatums turned a blind eye to it, and (iii) to suggest that the Tatums prevented a timely intervention that might have saved Paul's life. The Tatums alleged that Blow acted with actual malice in writing his critique of their son's obituary – an allegation which, if true, could justify an award of exemplary damages.

As a threshold issue, the Court of Appeals held that a reasonable person could find that people who knew the Tatums would reasonably understand that the column referred to them, notwithstanding the absence of their names or their son's name. But perhaps more surprising was the court's finding on the issue of actual malice. The court noted that failure to investigate generally is not enough to demonstrate actual malice but that "evidence that a failure to investigate was contrary to a speaker's usual practice and motivated by a desire to avoid the truth" may demonstrate the reckless disregard required for actual malice. The court found that in failing to contact the Tatums for comment before publishing his column, Blow appeared to have departed from his normal reporting practices. The court also found evidence that Blow "had a motive" to reject a more innocent explanation for the language of the obituary because of his desire to advance the theme of his column, namely a call for honesty when discussing suicide, and that further investigation would have revealed facts that would have "undercut the whole thrust of his column." Consequently, the court found a genuine issue of material fact as to actual malice, and unless the opinion is reversed or modified on further appeal, a jury will determine if Blow published his column with actual malice.

For the media, *Tatum* highlights the importance of reasonable investigation prior to publication – even for opinion columns – and of consistency in reporting from one story to the next. For legal practitioners, the opinion provides a competent summary of libel law in Texas, and flags pitfalls that can ensnare even seasoned media clients.

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