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YEAR IN REVIEW –

MEDIA AND ENTERTAINMENT LAW

2016 – JUNE 2017

U.S. SUPREME COURT YEAR IN REVIEW

The United States Supreme Court has taken up several cases this term having important implications in the areas of media and intellectual property law, two of which have been decided and one of which is pending.

Matal v. Tam & Packingham v. North Carolina

On June 19, 2017, the Supreme Court struck down two statutes as unconstitutional abridgements on First Amendment speech. In *Matal v. Tam*, the Court held that the Lanham Act's disparagement clause amounted to viewpoint-based discrimination on speech and was unconstitutional, clearing the way for Asian-American rock band "The Slants" to obtain a trademark registration (and for the Washington Redskins to get theirs back). In *Packingham v. North Carolina*, the Supreme Court struck down a North Carolina statute prohibiting registered sex offenders from accessing Facebook and other Internet sites where children are eligible to be members. In that case, a registered sex offender was prosecuted after boasting on Facebook that a traffic ticket had been dismissed.

Star Athletica, L.L.C. v. Varsity Brands, Inc.

On March 22, 2017, the Court issued its opinion in *Star Athletica, L.L.C. v. Varsity Brands, Inc.,* in which it resolved confusion among the Circuits regarding the copyrightability of artistic designs on useful articles. The opinion, importantly, found that artistic designs are copyrightable even when incorporated into useful articles such as cheerleading uniforms and other pieces of clothing.

In affirming the copyrightability of Varsity's colorful designs on its cheerleading uniforms, the Court cleared up confusion among the various Circuits regarding where the line should be drawn between copyrightable expressive aspects of useful articles and uncopyrightable functional aspects. The Court held that features incorporated into the designs of useful articles are copyrightable when: (1) they can be perceived as two- or three-dimensional works of art separate from the article; and (2) they would qualify for copyright protection if "imagined separately" from the useful article. The Court thus found that Varsity's creative arrangement of chevrons, shapes, colors, and lines on the surface of its cheerleading uniforms were copyrightable, but that functional aspects of clothing designs such as the cut, shape, and dimensions would not be entitled to copyright protection.

The decision not only has important implications for the fashion industry, but also has potential to impact other industries where expression and function converge, including industries such as 3-D printing.

TEXAS SUPREME COURT YEAR IN REVIEW

This year, the Supreme Court of Texas issued several opinions likely to have a significant, and positive, impact on media companies and defamation defendants throughout the state. Four are particularly noteworthy. First, in *Brady v. Klentzman*, the Court stressed the plaintiff's burden to demonstrate falsity in defamation cases arising out of reporting on issues of public concern, highlighting the "logical nexus" requirement for allegedly defamatory details about a newsworthy topic. *ExxonMobil Pipeline Co. v. Coleman* and *D Magazine Partners, L.P. v. Rosenthal* both provided additional guidance regarding the Texas Citizens Participation Act (TCPA), Texas' Anti-SLAPP statute. Finally, in *Exxon Mobil Corp. v. Rincones*, the Court rejected the theory of compelled self-defamation.

Brady v. Klentzman

The Supreme Court of Texas handed media defendants a key victory earlier this year in B*rady v. Klentzman*[1]. Brady arose after the West Fort Bend Star published an article suggesting that the son of the Chief Deputy of the Fort Bend County Sheriff's Department received preferential treatment by law enforcement on multiple occasions. The son sued alleging that the article included false and defamatory details about years-old incidents and omitted key details of his interactions with law enforcement, The jury found the newspaper and reporter liable and awarded the plaintiff damages in excess of one million dollars, which was later reduced to $280,000.

The court of appeals reversed, holding that the trial court improperly placed the burden of proving the truth of the statements on the media defendants, rather than requiring the plaintiff to prove the falsity of the statements. Nevertheless, the court 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.

By a 5-4 vote, the Supreme Court affirmed the court of appeals' decision. Central to the Court's analysis was the determination that the allegedly defamatory article was about an issue of public concern—even the background details about the plaintiff's past (embarrassing) interactions with law enforcement. The Court held that allegedly defamatory details of a particular news story can be reasonably included as a matter of public concern if they have a "logical nexus" to the "general subject matter" of the article. In this case, the Court concluded that the son's behavior was the impetus for his father's alleged abuses of his authority, and therefore had such a nexus; accordingly, the actual malice standard was appropriate. Notably, the Court also emphasized that courts should avoid becoming "involved in deciding the newsworthiness of specific details in a newsworthy story," or making "editorial decisions for the media regarding information directly related to matters of public concern."

ExxonMobil Pipeline Co. v. Coleman

In *ExxonMobil Pipeline Co. v. Coleman*[2], the Supreme Court addressed the question of whether privately communicated speech could satisfy the Texas Citizens Participation Act's requirement that speech activity relate to a matter of public concern. Following its prior ruling in *Lippincott v. Whisenhunt*,[3] the Supreme Court again determined that even private communications can implicate the TCPA.

Travis Coleman was an employee of the ExxonMobil Pipeline Company. During his employment at ExxonMobil, one of his duties was to perform a required inspection

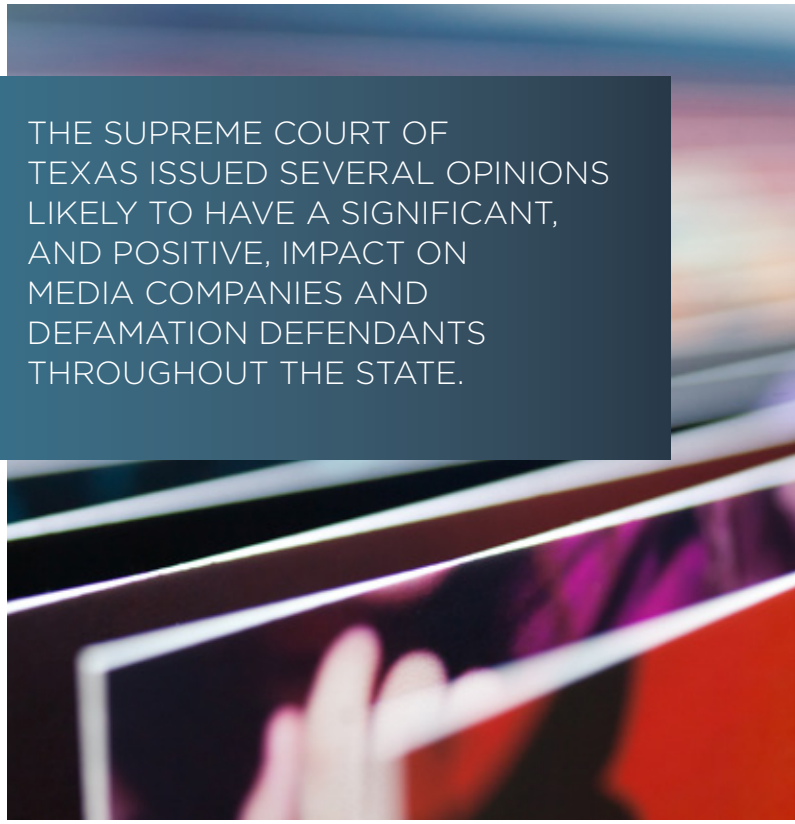
process known as "gauging the tanks." Coleman was terminated in 2012 for allegedly failing to gauge a particular tank. In response to this termination. Coleman sued ExxonMobil and several supervisors, alleging that certain private communications among ExxonMobil employees that led to his termination, were false and defamatory. Defendant ExxonMobil—represented by Haynes and Boone attorneys Nina Cortell, Jason Bloom, and Alicia Calzada—filed an Anti-SLAPP motion to dismiss, which the trial court denied. On appeal, the Court of Appeals affirmed, holding that the communications were related to Coleman's job performance alone, and that communications about his failure to properly gauge the tanks were not of public concern and that the potential health, safety, and environmental risks associated with his failure "did not transform the challenged communication about a private employment matter into a public concern."[4]

The Supreme Court reversed. The Court held that despite their non-public nature, the communications at issue "still related to a matter of public concern because they concerned Coleman's alleged failure to gauge a particular tank, which was required, at least in part, to reduce the environmental, health, and safety impacts of the operations of the facility.[5] The Court reiterated its holding in Lippincott that there is no requirement in the TCPA that the form of the communications be public.

D Magazine Partners, L.P. v. Rosenthal

Like *Coleman, D Magazine*[6] provided an opportunity for the Court to interpret provisions of the TCPA. In *D Magazine*, a Dallas-area resident brought suit against the publication after it ran an article that referred to her as a "welfare queen." The article suggested that she was receiving welfare benefits from the state while living a luxurious lifestyle that suggested that she was abusing the program.

Rosenthal brought an action against the magazine for defamation. The trial court dismissed two causes of action—violations of the Deceptive Trade Practices – Consumer Protection Act (DTPA) and Identity Theft Enforcement and Protection Act (ITEPA)—but denied the magazine's Anti-SLAPP motion as to plaintiff's defamation claim. The Court of Appeals affirmed.



The Supreme Court affirmed much of the lower court's ruling, noting that Rosenthal had established a *prima facie* case of the magazine's negligence in publishing the article. However, *D Magazine*, represented by Haynes and Boone lawyers Jason Bloom, Thomas J. Williams, and Ryan Paulsen, successfully argued that it was nonetheless entitled to attorney's fees after the trial court dismissed plaintiff's related DTPA and ITEPA claims. The Supreme Court reasoned that each of the dismissed causes of action "constituted a 'legal action' under the TCPA's broad definition of the term . . . [and] *D Magazine* was therefore entitled to an award of reasonable attorney's fees."[7] The Court explicitly declined to express an opinion on how the continuation of a defamation claim would affect the proper fee amount, leaving that question for the trial court on remand.[8]

Exxon Mobil Corp. v. Rincones

In *Exxon Mobil Corp. v. Rincones*,[9] the Supreme Court reiterated that Texas does not recognize a claim for

compelled self-defamation. Rincones was employed by WHM, an independent contractor that Defendant Exxon uses to build and repair catalyst refinery systems. Exxon requires that its independent contractors meet certain substance abuse testing requirements, including random drug testing for employees. Rincones was selected to submit to a random drug test, which indicated the presence of marijuana in his system, and he was placed on inactive status.

Rincones sued his employer Exxon Mobil (represented by Haynes and Boone attorneys Nina Cortell, Ryan Paulsen, and Polly Fohn); and the drug-testing administratorfor multiple claims, including "compelled self-defamation." So-called "self-defamation" is premised on the theory that a former employee's publication of a defamatory statement to a third party can satisfy the "publication" element of a defamation claim "because the former employee is effectively compelled to publish the defamatory statement to prospective employers when asked why he left his former employment."[10] The court of appeals reversed the trial court's take-nothing judgment and reinstated nine of Rincones' claims.

The Supreme Court, "joining an emerging majority of state courts that have considered the issue," "expressly decline[d] to recognize a theory of compelled self-defamation in Texas."[11] The Court held that the rejection of compelled self-defamation was "a natural extension" of the well-established rule in Texas that "that if the publication of which the plaintiff complains was consented to, authorized, invited or procured by the plaintiff, he cannot recover for injuries sustained by reason of the publication."[12]

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[1] *Brady v. Klentzman*, No. 15-0056, 2017 WL 387217 (Tex. Jan. 27, 2017), reh'g denied (June 2, 2017).
[2] 512 S.W.3d 895 (Tex. 2017).
[3] 462 S.W.3d 507 (Tex. 2015).
[4] 512 S.W.3d at 900 (internal quotations omitted).
[5] *Id.* at 901.
[6] No. 15-0790, 2017 WL 1041234 (Tex. Mar. 17, 2017).
[7] *Id.* at *10.
[8] *Id.*
[9] *Exxon Mobil Corp. v. Rincones,* No. 15-0240, 2017 WL 2324710 (Tex. May 26, 2017).
[10] *Id.* at *3.
[11] *Id.* at *4.
[12] *Id.* (quoting *Lyle v. Waddle*, 188 S.W.2d 770, 772 (Tex. 1945)).

WINNERS AND LOSERS FROM THE 2017 TEXAS LEGISLATIVE SESSION

The 2017 legislature was a painful one for open government advocates. But while some bills that would have supported journalists and provided for a more open government died a heartbreaking death, others that would have severely compromised free speech protections in Texas were staved off.

The work related to this session began almost the moment the 2015 session ended. There were two major initiatives during the interim. First, after an onslaught of bills threatening newspaper public notice in 2015, there was an interim committee, charged with examining the issue. Second, open government advocates and representatives of government agencies formed a joint task force to find ways to help make the Public Information Act work better and to address recent court rulings which narrowed the right of the public to access information about government. Haynes and Boone attorneys, Laura Prather, Alicia Calzada, and Wesley Lewis were integral in driving both efforts on behalf of our clients.

Interim Study on Public Notice leads to positive developments in the 2017 session

The Joint Interim Committee on Advertising and Public Notices held a hearing in the summer of 2016. Prior to the hearing, open government advocates worked closely with the committee, making the case for the need for public notice to stay in newspapers. The committee—co-chaired by Sen. Konni Burton and Rep. J.M. Lozano, ultimately agreed, noting in its report that "the Committee does not recommend removing the requirement that government entities place notice in a print media at this time." This recommendation stemmed in part from its findings that the print requirement "involves a third-party who both creates a lasting and reliable record of the notice and acts as a gatekeeper to ensure that governments post their notices correctly," and that while print circulation of newspapers has declined in recent years, the online presence of these media organizations has expanded dramatically. To address some of the varying information about spending on public notice, the committee recommended that political subdivisions be required to distinguish between public notice spending and other advertising, creating a line-item to get a clear picture of the costs of complying with the statutory requirements. As a direct result of this recommendation, SB 622, authored by Sen. Burton was passed requiring political subdivisions to provide a line item for public notice expenditures. The bill was signed by the Governor on June 9, 2017 and went into immediate effect. Further, relying on the work of the interim committee, other bills that threatened to take public notice out of newspapers were swiftly defeated this year.

Interim open government work yields benefits for government, but not for transparency

Since May, 2016, open government advocates worked with other stakeholders, including governmental entities and the Attorney General's office, to solve a variety of problems related to the Texas Public Information Act. The resulting platform of agreed upon bills offered by this task force was intended to both improve transparency and resolve problems facing government entities who respond to requestors. But while bills that helped the government generally passed, bills that would have resolved holes in the PIA caused by recent court rulings were met with extreme hostility in the House, even after being passed out of the Senate on two separate occasions.

The successful measures included HB 3107, dealing with burdensome requestors which, thanks to the task force, was crafted in a manner that shouldn't hamper journalists and valid requestors who use the PIA frequently. HB 2783 was also passed by the House and Senate, but was ultimately vetoed by Governor Abbott. It would have allowed a requestor to recover attorney's fees if a government entity voluntarily released the requested information after filing an answer to a suit against the entity, resolving the problem of entities refusing to release public information but then releasing it just prior to a final judgment against them as a method of avoiding attorney's fees.

Left on the cutting room floor were bills championed by open government champions in the legislature, including Sen. Kirk Watson, D-Austin, Rep. Giovanni Capriglione, R-Southlake, Rep. Todd Hunter, R-Corpus Christi, and Rep. Terry Canales, D-McAllen. The bills included measures to repair the PIA after unfavorable court rulings which now make it impossible for taxpayers to know about how their money is being spent on public contracts with private entities if the private company claims disclosure would put them at a competitive disadvantage. A famous example is the request to obtain information about how much the city of McAllen paid Enrique Iglesias for a performance at a money-losing parade. Billion-dollar corporations with extensive government contracts are taking advantage of the ruling and blocking critical information about the spending of taxpayer dollars. Similarly, under another recent Supreme Court ruling, the court has made it easier for nonprofits who contract with the government to block information about how taxpayer money is spent. A third bill was aimed at ensuring dates of birth in public information would be considered public to ensure accuracy in reporting, assist with banking and real estate transactions, verify background checks, among others. This information has been off-limits since a recent Austin Court of Appeals decision and is already impacting the ability to verify common names in business transactions and reporting. Bills filed this year would have restored the PIA statutorily to the standards in play before these court decisions.

Another bill that died in the House was one that has been agreed to the last two sessions and that would

have improved transparency by closing a loophole in accessing public information on private devices.

Despite dramatic testimony of the parents of a man who died in police custody who were unable to find out how their son died, a bill that would have eliminated the common "pending investigation" exemption to the PIA when all suspects are deceased, met its demise in the House. Even a simple measure that would have required governmental entities to respond to a PIA request when they have no responsive information or when they are relying on a previous determination was not allowed a committee vote. All of these measures failed in the House, in large part due to the refusal of the Government Transparency and Operations Committee, chaired by Rep. Gary Elkins, R-Houston, who was hostile to the requestor-focused bills and stalled hearings and refused to call votes on them. Sen. Watson attempted to resurrect the bills in a dramatic last-ditch effort by attaching the measures to a House bill, which was passed by the Senate unanimously. Unfortunately, pressure from Rep. Elkins and a subsequent procedural move by Rep. Lucio led to the demise of the Hail Mary pass upon its return to the House.

In one bright spot, advocates were able to secure a joint interim study on the Public Information Act, where these and other issues will be discussed and presented in 2019. The continued destruction of government transparency was aptly summed up at the end of the session by Rep. Canales, who gave a scathing personal privilege speech criticizing lawmakers who stood in the way of these measures which keep 25 million Texans in the dark about how their taxpayer money is spent.

Free speech advocates defeat efforts to dismantle First Amendment protections

Another bright spot for free speech advocates was the defensive success in blocking bills that would have been detrimental to the First Amendment. The trifecta of bills would have gutted Texas' strong anti-SLAPP law, attempted to change the standard for reporting on public figures, and undercut the reporter's privilege.

The libel bill would have attempted to make the fact that a plaintiff is a public figure or public official an affirmative defense, instead of a part of the plaintiff's case in chief. Since the 1964 landmark decision, *New York Times v. Sullivan*, the Supreme Court created a special category of libel plaintiffs—public officials and public figures—who cannot prevail in a libel claim unless they demonstrate that a defendant acted with "actual malice," defined as knowledge that the statement was false, or reckless disregard for the falsity of the statement. This same bill would have also required those who report on a public figure to either identify the public figure's status as such, or to expressly relate the reporting to official conduct, performance or fitness for office in order to take advantage of the "public figure" standard. The bills would also have limited the actual malice requirement to circumstances where the plaintiff is a public figure in the community where the "damage" occurred. Actual malice, and the related public figure status is the burden of the plaintiff, not the burden of the defendant, as mandated by the *New York Times* case, and each of these provisions would have turned this constitutional precedent on its head. While the bill would likely not have survived judicial scrutiny due to this flaw, it would have been costly to overturn such a statute judicially.

A second bill by the same sponsor would have severely limited the application of the reporter's privilege in Texas to disallow it from being asserted by those who have been involved in political campaigns or whose employers have made political contributions in the last five years.

In an even worse threat to journalists, a bill was introduced that would have gutted the Texas Citizens Participation Act, which is Texas' anti-SLAPP law. The bill would have revised the law in several negative ways, including so that an anti-SLAPP motion could only be filed if the legal action related to a party's "participation in government," which was not defined. In addition, while the TCPA does not require communication to be public in order to be eligible for dismissal under the law, the bill would have required the communication to be public. Finally, the bill would have removed detailed definitions that aid courts in determining the applicability of the statute. The bill would have so significantly narrowed the TCPA's protection to make it essentially meaningless to those who report on matters of public concern.

Fortunately, none of these measures passed. The general dysfunction of the legislature aided free speech advocates in blocking the worst attacks on the news media, but unfortunately it also combined with powerful forces to kill opportunities to repair the holes in the PIA, making the legislative session disappointing, but not as devastating as it could have been for the news media. Now begins the tough work of the interim—this time, making the case for a more open, and transparent government—to help shape the outcome of the 2019 session.

SPEAKING ENGAGEMENTS

LAURA LEE PRATHER

Trump v. the Press
American Bar Association Annual Conference
August 12, 2017 | New York, New York

Using the Anti-SLAPP Statute
Advanced Government Law TexasBar CLE
July 28, 2017 | Austin, Texas

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

Update on Texas Public Information Laws
Advanced Administrative Law TexasBar CLE
June 1, 2017 | Austin, Texas

Hot Issues in Anti-SLAPP Law
ABA 22nd Annual Forum on Communications Law Conference
February 10, 2017
New Orleans, Louisiana

ABA 20th Annual Media Advocacy Workshop
February 9, 2017
New Orleans, Louisiana

Texas Association of Broadcasters Legislative Agenda
TAB Legislative Day Conference
January 24, 2017 | Austin, Texas

Hot Issues in Anti-SLAPP Law
Media Law Resource Center Conference
September 22, 2016 | Reston, Virginia

THOMAS WILLIAMS

Open Government Laws
Texas Attorney General and Freedom of Information Foundation Seminar
November 16, 2016 | Denton, Texas

JASON BLOOM

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

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

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

WESLEY LEWIS

From Hulk Hogan to WikiLeaks: Law, Journalism, and the First Amendment
ILPC Spring Convention 2017
April 22, 2017 | Austin, Texas

Hot Issues in Social Media
ABA 22nd Annual Forum on Communications Law Conference
February 10, 2017
New Orleans, Louisiana

ALICIA CALZADA

Expanding Notions of Transformative Use and the Threat to Creators
Center for the Protection of Intellectual Property, Fourth Annual CPIP Summer Institute
July 11, 2017 | Beaver Creek, Colorado

RECENT PUBLICATIONS

Don't Mess with the First Amendment in Texas
Texas Supreme Court Historical Society
May 25, 2017
Alicia Calzada

Free Speech At Private Universities: Protected Or Not?
Law360
May 4, 2017
Mary-Christine "M.C." Sungaila, Polly Graham, Natasha Breaux

Media, Privacy, Defamation, and Advertising Law
Tort Trial & Insurance Practice Law Journal
April 18, 2017
Thomas Williams

MLRC Media Law Letter: Ten Questions to a Media Lawyer
MLRC Media Law Letter
March 8, 2017
Laura Prather

NEWSLETTERS

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