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

By 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

(Continued on page 17)

(Continued from page 16)

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-CV-02941, 45 Media L. Rep. 1413 (S.D. Tex. 2017).

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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

(Continued on page 18)

(Continued from page 17)

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-17-CV-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.

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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.

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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