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Fifth Circuit Holds the TCPA Does Not Apply to Federal Court Diversity Cases

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On August 23, 2019, the United States Court of Appeals for the Fifth Circuit issued its long-awaited opinion in *Klocke v. Watson*, 17-11320, 2019 WL 3977545, at *1 (5th Cir. Aug. 23, 2019), holding that the Texas Citizens Participation Act ("TCPA") does not apply to diversity cases in federal court. This decision settles a split manifested across dozens of cases at the district courts.

By ruling that the TCPA does not apply to diversity cases in federal court, the Fifth Circuit foreclosed an otherwise potent weapon used by defendants throughout Texas in trade secrets litigation. Because of the TCPA's extremely broad application, defendants in trade secrets cases, for example, often asserted that claims alleging the misappropriation of trade secrets and related causes of action were based on and related to the defendant's freedom to speak freely on all topics, including the trade secrets at issue, and its freedom to associate with competitors, and therefore such claims should be dismissed under the TCPA. Such arguments are now foreclosed by this ruling, at least in federal court.

Nevertheless, the Fifth Circuit's holdings in *Klocke* may be soon revisited, as new provisions of the TCPA went into effect September 1 that repealed and replaced some of the burden-shifting framework that the Fifth Circuit held conflicted with the Federal Rules of Civil Procedure. The statute's September 1 amendments also dramatically reduce the TCPA's applicability to trade secret cases regardless of where they are filed.

Background

The TCPA is an anti-SLAPP (Strategic Lawsuit Against Public Participation) statute allowing litigants to seek early dismissal of a lawsuit if the legal action is based on, relates to, or is in response to a party's exercise of the constitutional right of free speech, right to petition, or right of association. Like other states, Texas enacted the TCPA to address concerns over the increasing use of lawsuits to chill the exercise of First Amendment rights. As it applied up until September 1, a movant was required to show by a preponderance of the evidence that the TCPA applied. If a movant was successful, a non-movant was then required to show by "clear and specific evidence" each element of its prima facie case or face mandatory dismissal, fees, and sanctions. If a movant was successful, a movant could still obtain dismissal fees and sanctions if the movant could show by a preponderance of the evidence each essential element of a valid defense to the non-movant's claim.

Case Facts

Thomas Klocke was a student at the University of Texas at Arlington who tragically committed suicide in June 2016 after being refused permission to graduate while the University investigated allegations made by fellow student Nicholas Watson that Klocke harassed Watson based on his sexual orientation. Thomas Klocke's father, as administrator of his son's estate, filed suit against the University for possible Title IX violations and against Watson alleging common law defamation and

defamation *per se*. Watson moved to dismiss the defamation claims under the TCPA, alleging the lawsuit was based on, related to, and in response to his freedom of speech rights.

The district court granted Watson's motion to dismiss, holding the TCPA applicable in federal court, and awarded Watson attorneys' fees and sanctions pursuant to the TCPA. Klocke appealed, arguing that the TCPA conflicts with the Federal Rules. The Fifth Circuit agreed with Klocke, reversing and remanding the district court's judgment for further proceedings.

The Ruling

Breaking with its recent practice of declining to rule on whether, and to what extent, the TCPA applies in federal court, the Fifth Circuit directly held the TCPA does not apply in diversity cases in federal court. While the opinion applies expressly to federal diversity cases, the Fifth Circuit's reasoning equally applies to any case filed in federal court, including those based on supplemental or federal question jurisdiction, although the latter set of cases are likely excluded from the TCPA's application due to the Supremacy Clause of the U.S. Constitution.

In reaching this decision, the Fifth Circuit found most persuasive the D.C. Circuit's reasoning in *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-34, that Rules 12 and 56, governing dismissal and summary judgment respectively, answer the same question as the TCPA: namely, what are the circumstances under which a court must dismiss a case before trial? The Fifth Circuit analyzed the issue under the framework of *Abbas* and *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010), which hold that state rules conflict with federal procedural rules when they impose additional procedural requirements not found in the federal rules. The Fifth Circuit found that the TCPA and the Federal Rules "answer the same question" because each specifies requirements for a case to proceed at the same stage of litigation.

Specifically, the Fifth Circuit found:

1. The TCPA's "clear and specific evidence" standard exceeds the pleading requirements of Rules 8 and 12 and the evidentiary requirements of Rule 56, and therefore must yield. Further, it requires the court to weigh evidence "by a preponderance of the evidence" prior to the parties conducting discovery, thereby imposing weighing requirements not found in the Federal Rules, and thus conflicts with them;

2. The TCPA answers the same question as the Rules 12 and 56 because they all involve when the court must dismiss a case before trial;

3. The Fifth Circuit relied on the United States Supreme Court's ruling in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), to make clear that the federal rules impose comprehensive, not minimum, pleading requirements, and states may not superimpose additional requirements on the federal rules; and

4. Under the rule of orderliness, the Fifth Circuit concluded it was not bound by its prior decision in *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009), where the Fifth Circuit upheld the dismissal of a lawsuit under Louisiana's anti-SLAPP statute, because *Henry* preceded the Supreme Court's *Shady Grove* decision, subsequent Fifth Circuit rulings declined to hold *Henry* controlling on the applicability of the TCPA, and because *Henry* addressed Louisiana's anti-SLAPP statute, rather than the TCPA.

Applicability to Cases Moving Forward

The impact of the *Klocke* case ultimately may be limited. On September 1, 2019, H.B. No. 2730 went into effect, which changed several key provisions of the TCPA. In addition to changing the scope of several key definitions, the amendments included removing the requirement that the movant must show by a "preponderance of the evidence" that the TCPA applied or each essential element of a valid defense to the non-movant's claim. These evidentiary burdens were replaced by more amorphous language stating that a movant only needed to "demonstrate" the TCPA's applicability and to "establish" an affirmative defense or that it was entitled to judgment as a matter of law.

It is likely, however, that *Klocke*'s holding, if not all of its reasoning, will be upheld by a future Fifth Circuit panel addressing the new TCPA language. While the "preponderance of the evidence" language in the TCPA has been removed for the

movant, the "clear and specific evidence" standard for the non-movant remains, language which the Fifth Circuit held constitutes an "evidentiary weighing requirement[] not found in the Federal Rules" and which "exceeds the plaintiff's Rule 56 burden to defeat summary judgment." Accordingly, a future Fifth Circuit panel may likely conclude that the TCPA remains inapplicable to cases in federal court.

Regardless of how the Fifth Circuit rules on TCPA cases in general, its applicability to trade secret cases has been much narrowed by the September 1 amendments. Specifically, the new provisions state that the TCPA does not apply to a legal action arising from an officer-director, employee-employer, or independent contractor relationship that seeks recovery for misappropriation of trade secrets or corporate opportunities. While this does not eliminate all conceivable trade secret claims from the TCPA's grasp, it greatly reduces the number, whether in state or federal court.

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