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Donald J. Trump is a Libel Bully but also a Libel Loser

SUSAN E. SEAGER

Donald J. Trump is a libel bully. Like most bullies, he's also a loser, to borrow from Trump's vocabulary.

Trump and his companies have been involved in a mind-boggling 4,000 lawsuits over the last 30 years and sent countless threatening cease-and-desist letters to journalists and critics.¹

But the GOP presidential nominee and his companies have never won a single speech-related case filed in a public court.

This article examines seven speech-related cases brought by Trump and his companies, which include four dismissals on the merits, two voluntary withdrawals, and one lone victory in an arbitration won by default. Media defense lawyers would do well to remind Trump of his sorry record in speech-related cases filed in public courts when responding to bullying libel cease-and-desist letters.

Trump's lawsuits are worthy of a comedy routine, as when Trump sued HBO comedian Bill Maher for suckering Trump into sending his birth certificate to prove he was not the "spawn" of an orangutan, and Trump hit back with a \$5-million breach-of-contract lawsuit, only to withdraw it after the *Hollywood Reporter* ridiculed it. Can anyone say *Hustler v. Falwell*?²

Orangutans and joking aside, this examination of Trump's libel losses also provides a powerful illustration of why more

states need to enact anti-SLAPP laws to discourage libel bullies like Trump from filing frivolous lawsuits to chill speech about matters of public concern and run up legal tabs for journalists and critics.

Trump Sues Architecture Critic

Trump filed his first and crankiest libel lawsuit in 1984 against the *Chicago Tribune* and the newspaper's Pulitzer Prize-winning architecture critic, Paul Gapp. Trump filed his libel lawsuit in the U.S. District Court in the Southern District of New York.³ Trump claimed he suffered \$500 million in damages.⁴

Gapp, who won the Pulitzer Prize for criticism in 1979, dared to publish a "Design" column in the *Sunday Tribune Magazine* on August 12, 1984 ridiculing Trump's proposal to build the tallest building in the world: a 150-story, nearly 2,000-foot tall skyscraper on a landfill at the southeast end of Manhattan.⁵

Gapp wrote that Trump's planned office tower was "one of the silliest things anyone could inflict on New York or any other city" and a kind of "Guinness Book of World Records architecture." Gapp's column said the "only remotely appealing aspect" of Trump's planned office tower was that it would "not be done in the Fence Post Style of the 1970s." The architect critic slammed the already-built Trump Tower as a "skyscraper offering condos, office space and a kitschy shopping atrium of blinding flamboyance." Gapp

(Continued on page 5)

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FROM THE CHAIR

During the current election, Republican candidate Donald Trump has threatened to sue the press more times than any other presidential candidate in history. His criticism of journalists has, in many ways, mirrored the language he has used against his Democrat opponent, former Secretary of State Hillary Clinton. He has characterized the media as “hostile,” “dishonest” and “crooked.” And he has threatened to appoint a special prosecutor to investigate and “jail” Secretary Clinton.

But while his rhetoric toward the press has been more heated than hers, both presidential candidates have hardly given journalists the type of access to their campaigns that the public deserves. White House correspondent Anita Kumar, with McClatchy Newspapers, recently spoke to the National Press Club about her difficulties covering Secretary Clinton’s presidential campaign. Unlike prior presidential elections where the press pool traveled with the candidate and even rode on the candidates’ planes from stump to stump, Ms. Kumar says Secretary Clinton does not provide journalists with advanced copies of her itinerary and often blocks the press pool from traveling with her. Ms. Kumar notes that Secretary Clinton left reporters scrambling to find her, after she took ill and abruptly disappeared from a 9/11 commemoration ceremony.

Mr. Trump also sharply limits press access to his campaign, as detailed in a CNN report this past summer. The report described a “blacklist” of journalists who were either barred from attending rallies, or stripped of press credentials, ensuring they had no contact with the candidate. According to CNN, Mr. Trump’s ban sometimes extended to entire news organizations, such as *The Washington Post*, *The Huffington Post*, *Univision*, *BuzzFeed*, *Politico*, and *The Daily Beast*.



Carolyn Y. Forrest

While efforts to limit press coverage of a presidential campaign are disturbing (as are characterizations of the press as dishonest), limits on access once a candidate reaches the White House are even more disturbing. A president who is hostile to or afraid of the press can find many impactful ways to limit press access, which, of course, inhibits the rights of citizens to participate in and be informed about the operations of our federal government.

Indeed, Mr. Trump directly assaulted the media earlier this year when he announced that, if elected president, he would “open up our libel laws” because, right now, he believes the press is “totally protected.” Trump was criticizing the U.S. Supreme Court’s 1964 decision in *New York Times v. Sullivan*, which first articulated the standard for liability that a public official – and in later rulings, a public figure like Trump – must meet to prevail in a libel suit. Trump announced his own new standard for liability: “when they [the press] write purposely negative and horrible and false articles, we can sue them and win lots of money.”

Ironically, the Trump rule of libel law sounds a lot like the standard in *Sullivan*, which requires a public official or public figure plaintiff to prove that a defamatory and false statement was published with knowledge of its falsity or with reckless disregard for the truth or falsity of the statement. Nonetheless, Trump thinks his articulation would make it easier for public officials and public figures to prevail in a libel suit, which, in and of itself, is a seriously disturbing goal.

While there is almost no threat to *Sullivan* given the current composition of the Supreme Court, all of that could change with the next president. For the past 45 years, whenever there has been an ideological split on the Supreme Court, more often than not, the deci-

sion has favored the conservative position, opines constitutional scholar Erwin Chemerinsky, Dean, Distinguished Professor of Law, and Raymond Pike Professor of First Amendment Law at the University of California, Irvine School of Law, in a recently published essay in the *ABA Journal*. However, with the passing of Justice Antonin Scalia, there are now an equal number of justices appointed by Democrats and Republicans. We know the next president will appoint a replacement for Justice Scalia, but what about Justice Ruth Bader Ginsberg, who will turn 84 next year, Justice Anthony Kennedy, who will turn 81, and Justice Stephen Breyer, who will turn 79?

According to a Harvard Journal of Law and Public Policy study published in 2006, the average age of retirement for a Supreme Court justice has been 78.7 since 1971. Prior to 1971, the average age for justices to leave the bench was 68.3. Thus, the next president, particularly if he or she serves two terms, will have the power to transform the Supreme Court and likely will have the opportunity to impact decisions on press freedoms and campaign finance reform, among other issues, such as healthcare and voting rights, for the next generation.

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Less discussed, but arguably more important, is the President's power to transform the entire federal judiciary. According to an essay in the *National Review* by Alfred Regnery, chairman of the board of trustees of the Intercollegiate Studies Institute, appointments to the federal judiciary is the "sleeping issue" of this election year. Noting that the federal courts of appeal decide more than 27,000 cases each year and, by contrast, the Supreme Court hears only about 80 cases, Regnery believes that citizens and corporations are more directly impacted in their daily lives by the decisions of the lower federal courts.

Thus far, President Barack Obama, because of the number of vacancies and retirements during his two terms, already has appointed one-third of the current federal judiciary, according to the Alliance for Justice. (He would have appointed more, but the Senate has confirmed only 78% of his nominations. By contrast, the Senate confirmed a whopping 91% of President George W. Bush's nominees during his eight years in office.) Significantly, President Obama has appointed more minorities, women and gays to the bench than any other predecessor, including President Bill Clinton, says the Pew Research Center. However, as a result of the Senate's refusal to confirm most of the judicial nominees during the past two years, leaving 92 vacancies, and assuming the Republican-led Senate continues its refusal to hold votes on the President's pending 56 nominees, the next President will likely have more judicial seats to fill than President Obama did.

One only has to review President Obama's actions regarding the Freedom of Information Act to understand the impact next President could have on the ability of the average citizen to learn what our federal government is doing with our tax dollars. On his first day in office in 2009, President Obama issued a memo to the heads of executive departments and federal agencies stating that Freedom of Information Act is "the most prominent expression of profound national commitment to ensuring an open Government." He directed the departments and agencies to "adopt a

presumption in favor of disclosure, in order to renew their commitment to the principles embodied by FOIA, and to usher in a new era of open Government." He further advised that, "[i]n the face of doubt, openness prevails."

Yet, President Obama's seeming commitment to openness fell flat, according to an Associated Press study showing the record-setting number of times the federal government resisted FOIA requests in 2015 and 2014. The AP found that federal agencies claimed they didn't have any responsive documents in 16% of all cases in 2015 and censored or claimed not to have responsive documents 77% of the time. The Environmental Protection Agency's regional office for New York and New Jersey responded that it had no responsive records 58% of the time in 2015, while the FBI gave that response 39% of the time and the U.S. Customs and Border Protection gave it 34% of the time. In one egregious example, the State Department at first claimed it didn't have any records responsive to Gawker's request for emails sent to journalists by an aide of former Secretary Clinton. However, after the now-defunct Gawker filed suit, the agency miraculously found 90,000 responsive emails. The AP also determined that, in one-third of the cases where federal agencies were sued during 2014, they were forced to acknowledge that their initial decisions to withhold or censor records were improper under the law. By the end of 2014, the AP says the federal government had increased its backlog of unanswered FOIA requests by 55% to more than 200,000 unanswered requests.

Even more disturbing is the White House's aggressive effort to thwart congressional reforms to improve FOIA. *Vice News* reported earlier this year that the Freedom of the Press Foundation, a nonprofit that supports journalism in the public interest, obtained documents through a FOIA request that show the White House "strongly opposed passage" of the FOIA Oversight and Implementation Act of 2014, which received bi-partisan support in the House, and would have codified into law President Obama's

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FOIA memorandum requiring agencies to “adopt a presumption in favor of disclosure.” Did you just do a double take? The administration had a chance to have the President’s FOIA memo made into law, but fought it, claiming the bill’s passage would increase the existing FOIA backlog of unanswered requests and increase costs astronomically.

Secretary Clinton, of course, has made a lot of news with her practice of keeping records secret. The private email server she used in her home for official State Department business gave her, and not the State Department, the power to control which emails were archived as part of the federal record, which were produced in response to government inquiries and subpoenas, and which were reviewed for possible disclosure in response to FOIA requests. And, as critics feared, *The New York Times* recently reported that, three weeks after the House issued a subpoena for emails related to the 2012 attacks in Benghazi, Libya, and directed that Secretary Clinton’s emails be preserved, a specialist working for Mrs. Clinton deleted an archive of emails that the specialist claims were supposed to have been deleted a year earlier. In total, over 31,000 emails were deleted from Mrs. Clinton’s server. Although Secretary Clinton is quoted in the FBI’s report as not knowing about the deletions, the fact remains that the public will never know the content of those communications.

Our next President also will appoint the next Attorney General, who has the power to determine whether and when reporters are subpoenaed, served search warrants or even prosecuted in connection with government leak cases. President Obama’s Justice Department’s activity illustrates how important that appointment can be for journalists. In 2013, the Justice Department investigated FOX News chief Washington correspondent James Rosen in a probe of the potentially criminal leak of classified documents. With then Attorney General Eric Holder’s approval, the Justice Department’s search warrant affidavit named Mr. Rosen a criminal co-conspirator, threatening to criminal-

ize routine newsgathering activities.

After widespread criticism for the Rosen warrant, and the Justice Department’s secret issuance of subpoenas to the Associated Press and its reporters for their telephone records, then-Attorney General Holder and the Justice Department issued a July 2013 report on its “Review of News Media Guidelines.” The Report declared that the Justice Department’s policy had been and remained that “members of the news media will not be subject to prosecution based solely on newsgathering activities.” It also declared a number of other positive reforms, including that subpoenaing news media would be used “only as a last resort” after “all reasonable alternative steps” had been taken. The revised Guidelines also said a journalist’s emails and phone records would be subpoenaed only if the journalist is the subject of a criminal investigation. Could a new Attorney General undo these important changes?

There can be no question during this campaign season, the First Amendment literally hangs in the balance as we decide who will be the next leader of our country. With so much at stake, it is our duty as citizens (and as media law attorneys), during every election cycle, to carefully examine the First Amendment record of any candidate who presents himself or herself as fit to protect these cherished freedoms. In a well-researched, thoughtful and entertaining article entitled, “Donald J. Trump is a Libel Bully, but also a Libel Loser,” Forum member Susan Seager examined the many libel lawsuits that Mr. Trump has filed (and a few he only threatened to file) to support her thesis that anti-SLAPP statutes are needed in every state to ensure that powerful (or wealthy) people and companies cannot use the threat of a lawsuit to silence speech with which they disagree. Anti-SLAPP statutes, which protect speakers from “Strategic Lawsuits Against Public Participation,” provide a process for obtaining an early dismissal of an otherwise meritless libel lawsuit, resulting in lower costs of litigation for the defendant. In fact, many of these statutes either allow or require reimbursement of attorneys’ fees for the

victor.

With no trace of irony, the American Bar Association, of which this Forum is a part, insisted on revisions before it would allow the Forum to publish Ms. Seager’s article in its newsletter, *Communications Lawyer*. Although many of the past Chairpersons of the Forum deemed the requested revisions to be substantial and unnecessary, the ABA said the “minor edits” were required, in part, because the “inflammatory language” in the article would “increase the risk of the ABA being sued by Mr. Trump.” The article described Mr. Trump as a “libel bully” and stated that, “Like most bullies, he’s also a loser, to borrow from Trump’s vocabulary.” After describing one of the libel lawsuits that Mr. Trump lost, Ms. Seager concludes that, it’s “No wonder Trump wants to change libel law; he doesn’t understand it.” Similarly, in discussing a libel claim, disguised as a breach-of-contract claim, filed against Bill Maher, the host of HBO’s *Real Time*, Ms. Seager opined that Mr. Trump has “zero sense of humor.” The political satirist jokingly taunted that, if Mr. Trump could prove that he was not the “spawn of his mother having sex with an orangutan,” the host would donate \$5 million to charity. After Mr. Trump proffered his birth certificate, the host refused to donate any money and the lawsuit followed, but shortly thereafter was voluntarily dismissed.

The ABA says Ms. Seager’s colorful characterizations and opinions transformed a “legitimate scholarly article into a partisan attack” creating “the perception that the ABA is aligning with one political party against the other and will hurt [the ABA’s] credibility with members.”

Ms. Seager ultimately pulled the article from the ABA, but she was not silenced. The unedited article was published instead by the Media Law Resource Center, which ensures that everyone who is interested (both in assessing Mr. Trump’s record and the ABA’s actions), will be able to judge for themselves. The episode has led to critical coverage of the ABA in the *New York Times*, *Law 360* and elsewhere, with several former Forum Chairper-

sons denouncing the ABA's decision.

The ABA's censorship of Ms. Seager's article has created the unfortunate perception that the ABA does not champion and protect robust debate, criticism and free speech about the election for the highest office in our country and those who seek to occupy it. During this election season, where attacks on the press and press freedoms have been central issues, it was important for the ABA to stand up for freedom of the press.

Epilogue:

Following my submission of this column, which was finalized after the *Times* article was published, the ABA sent me its press release responding to these events. The ABA's statement calls the edits "suggestions" and says ABA policy does not give staff the authority to prevent an entity from publishing an article.

However, the ABA conveyed a very different message to *Communications Lawyer* editors and Forum leaders. An October 13, 2016 email made clear the edits were not mere suggestions: "The ABA has determined that we cannot publish the Trump article because it is deemed to be too political and the ABA has to be strictly non-partisan."

Given the ABA's reversal of its decision that it would not publish the article, the Forum resubmitted it for publication in its uncensored version and it appears in this issue. Although the ABA did not admit it made any mistakes, ultimately the Libel Bullies did not prevail and the First Amendment was not silenced.

Donald J. Trump is a Libel Bully but also a Libel Loser

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wrote that Trump's claim that the 150-story skyscraper would architecturally balance the two World Trade Center towers on the opposite side of lower Manhattan was mere "eyewash."⁶

Gapp also gave an interview to the *Wall Street Journal*, telling a reporter that Trump's plan was "aesthetically lousy" and complaining that the central part of Chicago "has already been

loused up by giant-ism."

Trump filed a libel lawsuit in New York, claiming that Gapp's criticisms in the *Tribune* and the *Journal* were false and defamatory.

Trump added an implication allegation, alleging that the *Tribune's* artist's conception of his planned building made the proposed skyscraper look like "an atrocious, ugly monstrosity" – injecting words that were never used by Gapp – and claimed that Gapp's statements and the *Tribune* illustration "torpedoed his plans" to build the office tower.⁷

The *Tribune* and Gapp filed a Rule 12(b)(6) motion to dismiss on the grounds that Gapp's statements and the artist's rendering were protected opinions, and U.S. District Judge Edward Weinfeld agreed, granting the motion to dismiss.⁸

Judge Weinfeld gave Trump a lesson in the First Amendment and politics: "Men in public life ... must accept as an incident of their service harsh criticism, oftentimes unfair and unjustified – at times false and defamatory – and this is particularly so when their activities or performance may ... stir deep controversy" "*De gustibus non est disputandum*, there is no disputing about tastes."⁹

Judge Weinfeld, then 84, reaffirmed the First Amendment rule that "[e]xpressions of one's opinion of another, however unreasonable, or vituperative, since they cannot be subjected to the test of truth or falsity, cannot be held libelous and are entitled to absolute immunity from liability under the First Amendment."¹⁰

Judge Weinfeld explained that opinions expressed in the form of "rhetorical hyperbole," "rigorous epithets," and "the most pejorative of terms" are protected from liability, so long as the opinions do not veer to into factual accusations, such as accusing someone of a crime, unethical conduct, or the lack of professional integrity in a manner that would be proved true or false.¹¹

Judge Weinfeld stated that "this court has no doubt that the statements contained in the *Tribune* article are expressions of opinion."¹² The court held that the "Design" heading and title

"architecture critic" informed the reader that the article "embodies commentary" and is "cast in subjective terms," especially since calling a building "one of the silliest things" and not "appealing" are "highly personal and subjective" judgments." While "many ... would disagree with Mr. Gapp's view ... there is no way the Court could instruct a jury on the process of evaluating whether [a] statement is true" when it comes to such "aesthetic matters."¹³

The court also rejected Trump's claim that the *Tribune's* artist's rendering of the proposed tower was "false" because it allegedly misrepresented his architectural plan.

Judge Weinfeld held that the sketch was not factual because it was described as an "artist's conception" and even if the drawing did imply that the planned 150-story tower was "an atrocious, ugly monstrosity," this is "precisely the same sort of individual, subjective aesthetic opinion" that is not capable of being subjected to "factual proof."¹⁴

The court also called out Trump's doublespeak to which the American public is now quite familiar.

Trump argued that the artist's illustration in the *Tribune* did not accurately depict "his proposal" for the building's specific "tapered" design, but "at the same time" Trump was "equally vehement in declaring that he has no plans and has not even engaged an architect." Judge Weinfeld said: "Plaintiff cannot have it both ways."¹⁵

Of course this was not painless victory for the *Chicago Tribune*; it spent \$60,000 in legal fees to win the motion to dismiss.¹⁶

New York's anti-SLAPP statute is limited to claims arising from the right to petition the government, and does not protect speech outside of government proceedings, so the *Tribune* and Gapp could not use the statute to dismiss the libel claim. If New York had an Anti-SLAPP statute that protected speech about matters of public concern, the *Tribune* and Gapp could have argued that they were being sued over speech about a matter of public concern and brought a quick motion to dismiss based on their absolute immunity for opinion and sought

reimbursement of their \$60,000 in legal fees from Trump.¹⁷

Trump Sues Book Author for Saying He is not a Billionaire

Trump's next big libel lawsuit was filed in New Jersey state court more than 20 years later.

This time, Trump alleged a whopping \$5 billion in damages¹⁸ in his 2006 libel lawsuit against book author Timothy O'Brien and his book publishers, Time Warner Book Group, Inc. and Warner Books, Inc.¹⁹

Trump's lawsuit claimed that O'Brien's 2005 book, *TrumpNation, The Art of Being The Donald*, falsely reported that Trump was "only" worth between \$150 million to \$250 million, nowhere near the net worth claimed by Trump, which ranged from \$4 billion to \$5 billion to \$6 billion to \$9.5 billion.²⁰ Trump sued for libel, claiming he was really, really worth billions of dollars.

Once again, Mr. Trump saw his libel lawsuit tossed out of court, this time by New Jersey Superior Court Judge Michele M. Fox, who granted the defendants' motion for summary judgment based on no actual malice, which was affirmed by a New Jersey appellate court.²¹ "Nothing suggests that O'Brien was subjectively aware of the falsity of his source's figures or that he had actual doubts as to the information's accuracy," the New Jersey appellate court ruled.²²

The appellate court concluded that "there is no doubt that Trump is a public figure" and that he failed to meet his burden of proving the book's statements about his net worth millions was false was published with actual malice.²³ "Nothing suggests that O'Brien was subjectively aware of the falsity of his source's figures or that he had actual doubts as to the information's accuracy," the New Jersey appellate court ruled.²⁴

The court held that O'Brien, an experienced financial reporter and then the *Sunday Business* section editor at the *New York Times*, relied on three confidential sources who gave "remarkably similar" estimates of Trump's actual net worth of between \$150 million to \$250 million.²⁵

Earlier in the litigation, a different trial court judge ordered O'Brien to produce the names of his confidential sources, but the New Jersey appellate court reversed, holding that the New Jersey's qualified reporter's privilege protected O'Brien's right to keep the identities of his confidential sources.²⁶ O'Brien produced his notes from his interviews of those confidential sources in discovery, however.

The appellate court also rejected Trump's argument that O'Brien published with knowing falsity because O'Brien rejected the financial information provided by Trump before the book was published.

The court found that "it is undisputable that Trump's estimates of his own worth changed substantially over time and thus [Trump] failed to provide a reliable source" to O'Brien to rebut the confidential sources.²⁷

Trump and his accountant were their own worst enemies in their depositions. The accountant who prepared Trump's 2004 Statement of Financial Condition admitted at his deposition that he never verified whether Trump had been honest in listing all his debts and liabilities for the accountant's report, which Trump had provided to O'Brien for the book.²⁸

Trump was even more unreliable in his testimony about his net worth:

Q Now Mr. Trump, have you always been completely truthful in your public statements about your net worth of properties?

A I try.

Q Have you ever been not truthful?

A My net worth fluctuates, and it goes up and down with markets and with attitudes and feelings, even my own feelings but I try.

Q Let me just understand that a little bit. Let's talk about that for a second. You said that the net worth goes up and down based on your own feelings?

A Yes²⁹

The court concluded that "Trump's estimates of his own worth changed substantially over time and *thus failed to provide ... reliable*" evidence that

proved O'Brien's book false.³⁰ In other words, Trump ran to the court complaining that the book falsely debunked Trump's claim of being a billionaire but utterly failed to provide any reliable evidence to prove falsity.

Trump later complained about the dismissal of the lawsuit, displaying his misunderstanding of the law of public figure and actual malice. "Essentially, the judge just said, 'Trump is too famous,'" he told the Atlantic magazine in 2013. "'He's so famous that you're allowed to say anything you want about him.'"³¹ No wonder Trump wants to change libel law; he doesn't understand it.

Trump later boasted to the *Washington Post* that he didn't mind losing after five years of litigation. "I spent a couple of bucks on legal fees but they spent a whole lot more. I did it to make [O'Brien's] life miserable, which I'm happy about."³²

That, ladies and gentlemen, is a paradigm SLAPP lawsuit: good at harassing and draining the bank accounts of critics, but ultimately a loser in court. New Jersey does not have an anti-SLAPP statute.

Trump University Sues Former Student

In 2010, Trump switched gears and filed a libel suit on behalf of Trump University, his for-profit real estate "school." Trump U filed a \$1-million libel lawsuit in 2010 in the U.S. District Court for the Southern District of San Diego against Tarla Makaeff, a former Trump U student, yoga instructor, and whistleblower.³³

Trump U filed its libel lawsuit against Makaeff after she filed a class-action lawsuit as the lead plaintiff against Trump U and Trump for alleged deceptive business practices. In her class-action lawsuit, she claimed she was tricked into raising her credit card limit, ostensibly to buy real estate, but then Trump U persuaded her to use her credit card to pay nearly \$35,000 to enroll in an "elite" Trump U class.³⁴

Trump U sued Makaeff for her pre-litigation statements about Trump U when she posted on internet message boards and wrote a letter to the Better Business Bureau and her bank request-

ing a \$5,100 refund for services charged by Trump U. Trump U claimed that she defamed the school by claiming in her letters that that Trump U and its affiliates engaged in “fraudulent business practices,” “deceptive business practices,” “grand larceny,” “predatory behavior,” “criminal” business practices, and used “trickery” and “fraud” to persuade her to open a new credit card, which she called “grand larceny” and “identity theft.”³⁵

Makaeff took advantage of California’s anti-SLAPP statute to file a special motion to strike Trump U’s libel counterclaim. The California statute allows defendants to bring quick motions to strike speech-related claims that target speech about a matter of public concern and are meritless because the plaintiff cannot show a probability of prevailing.³⁶

Makaeff argued that Trump U’s claim was subject to dismissal under the two-part test of the anti-SLAPP statute because: (1) the claim arose from her exercise of speech about a matter of public concern – Trump U’s deceptive business practices and her statements about consumer protection; and (2) Trump U could not show a “probability of prevailing” on the merits of the defamation claim because Trump U was a public figure lacking evidence that Makaeff published with actual malice.³⁷

U.S. District Judge Irma Gonzalez, who was initially assigned to the case, held that Trump U’s libel claim came under the protection of the anti-SLAPP statute because the claim arose from Makaeff’s statements about “consumer protection information,” which was a matter of public concern. But Judge Gonzalez denied Makaeff’s anti-SLAPP motion on the grounds that Trump U was not a public figure and had established a probability of prevailing on its libel claim under the negligence standard for private figures.³⁸

The Ninth Circuit Court of Appeals affirmed the lower court’s holding that Trump U’s libel claim came under the protection of the anti-SLAPP statute, but reversed the lower court’s holding that Trump U was a private figure, and held that the for-profit school is a limited purpose public figure due to its use

of “aggressive advertising campaign” on the internet, newspapers, and radio, and sent the case back to the district court to decide if Trump U could prove actual malice.³⁹

On remand, the case was assigned to U.S. District Judge Gonzalo P. Curiel, who granted Makaeff’s anti-SLAPP motion and dismissed Trump’s \$1-million libel claim in 2014. The court held that Trump U could not meet his burden of showing a probability of prevailing because Makaeff believed the truth of her statements and Trump lacked evidence that Makaeff’s statements were made with actual malice.⁴⁰

The court also ordered Trump U to pay nearly \$800,000 for Makaeff’s attorney’s fees and costs.⁴¹ The legal fees order is on hold pending the outcome of the class action lawsuit.

Six years into her class-action lawsuit, which has still not gone to trial, Makaeff was shell-shocked how she had been “put through the wringer,” developed health problems, and was having a hard time finding work due to the high-profile nature of the case, and she was permitted by Judge Curiel to withdraw as lead plaintiff in 2016.⁴²

As for Judge Curiel, he has been subjected to repeated verbal attacks by Trump, who called the judge “a hater of Donald Trump” with “hostility toward me.” Trump incorrectly claimed that the Indiana-born Latino judge was “Spanish” and “Mexican” and contends that the judge is biased against Trump due to his campaign pledge to build a wall between the United States and Mexico. Trump never filed a recusal motion, and has hinted that he might bring a “civil” lawsuit against Curiel after the election.⁴³

Trump Sues Miss Pennsylvania

Trump’s corporate lawyer Michael Cohen recently cited the sole Trump & Co. defamation victory – a default judgment – to bully another reporter.

“Do you want to destroy your life?” Cohen asked a *Daily Beast* reporter last year. “It’s going to be my privilege to serve it to you on a silver platter like I did that idiot from Pennsylvania in Miss USA, because I think you are dumber than she is.” Cohen said.

“Sheena Monnin, another one that wanted to defame Mr. Trump and ended up with a \$5 million judgment. That’s going to be nothing compared to what I do to you.... So I’m warning you, tread very fucking lightly, because what I’m going to do to you is going to be fucking disgusting. You understand me?”⁴⁴

Monnin, a former Miss Pennsylvania, tangled with Trump when she entered the 2012 Miss USA Pageant along with 50 other contestants, and was soon eliminated.⁴⁵

While waiting in the wings during the telecast, Monnin claims that another contestant confided that she had seen a list of the five finalists and the ultimate winner – Miss Rhode Island – and the outcome had been predetermined by pageant officials.⁴⁶

The next day, Monnin told her agent she was resigning from her post as 2012 Miss Pennsylvania and from the Miss Universe pageant because she believed the Miss USA pageant was “rigged” and because she did not agree with the pageant’s decision to allow transgendered contestants.

Monnin posted on her Facebook page about her resignation, saying she was quitting “an organization I consider to be fraudulent, lacking in morals, inconsistent and in many ways trashy.”⁴⁷ The next day, Monnin posted on her Facebook page the details about the reputed list, saying the “show must be rigged” and was “dishonest.”⁴⁸

Trump, who helps run the Miss USA pageant as an equity partner with the Miss Universe L.P. company, quickly escalated the dispute by appearing on *Good Morning America* to refute Monnin’s Facebook claims, saying she had “loser’s remorse” and that her allegations were “disgraceful.” Monnin responded by appearing on *The Today Show* to explain and repeat her allegations from her Facebook page.

Trump’s Miss Universe pageant filed a \$10-million claim against Monnin with JAMS, the private arbitration service mandated by Monnin’s Miss USA contract, asserting claims against Monnin for defamation, tortious interference with prospective economic advantage, and breach of contract.⁴⁹

Monnin said she got bad advice from her lawyer, who repeatedly told her that she was not required to attend the arbitration, only to tell Monnin later that he could not represent her because he was not admitted to practice law in New York.⁵⁰

With Monnin and her attorney absent from the arbitration proceeding, no one provided any evidence to rebut testimony that Miss USA supposedly suffered \$5 million in damages because the oil company BP, formerly known as British Petroleum, allegedly backed out of its reputed plan to provide a \$5-million sponsorship fee due to BP's alleged concern about Monnin's allegations.⁵¹

The JAMS arbitrator, retired U.S. Magistrate Judge Theodore H. Katz, held that Monnin's statements were false, defamatory, and published "with actual malice," and awarded the Miss Universe Company its full \$5 million defamation damages claim.⁵² The arbitrator dismissed the tortious interference and contract claims.

Monnin filed a motion in the U.S. District Court for the Southern District of New York to vacate the \$5-million defamation award, arguing that Monnin failed to receive proper notice of the arbitration, received ineffective counsel from her lawyer, the arbitrator exceeded his authority and exhibited "manifest disregard for the law" by finding liability without any evidence that BP cited Monnin's comments as the reason for withdrawing its planned pageant sponsorship.⁵³

As Monnin pointed out, the arbitrator awarded the full \$5-million sponsorship fee award to Trump's pageant company even though no one from BP testified at the arbitration. The arbitrator relied solely on hearsay testimony from a Miss USA pageant employee who testified that BP withdrew its \$5 million sponsorship fee.⁵⁴

Although this was not raised by Monnin, the arbitrator appeared to apply the negligence standard instead of the required actual malice standard when he cited the following evidence of Monnin's actual malice: she made "malicious" statements as a "disgruntled contestant," her "rigged" allegation was "highly improbable," she "made

no attempt to seek verification" of her claim with other sources, she failed to respond to discovery demands, failed to appear to argue the truth of her statements, and lost by default.⁵⁵

On July 2, 2013, U.S. District Judge J. Paul Oetken rejected all of Monnin's challenges and affirmed the arbitrator's \$5 million default judgment. While Judge Oetken expressed "[s]ympathy" that Monnin "is suffering from her poor choice of counsel" and agreed that her lawyer acted "unconscionably," he declined to vacate the judgment because that the arbitrator relied on evidence to support his decision and the "apparent inequity" of the default judgment was not enough for the federal court vacate the judgment under the very protective rules for arbitration awards.⁵⁶

Monnin later sued her former New Jersey lawyer for malpractice in Camden County (New Jersey) Superior Court in 2013,⁵⁷ and her father, Phillip Monnin, contends his daughter did not pay "a penny" of the \$5 million judgment when Trump's attorney filed a notice of satisfaction of the full \$5 million *Miss Universe L.P. v. Monnin* arbitration award.⁵⁸

For Trump to boast about winning this arbitration claim is misleading. The arbitrator never heard any rebuttal to the factual allegations and legal theories made by Trump's pageant company, the judgment was not subject to the full appellate review available to litigants in public courts, and Monnin's attorney acted "unconscionably."

Trump Sues Maher About Orangutan Joke

Trump has zero sense of humor. But, boy, can he file a hilarious lawsuit! He proved that much when he sued HBO *Real Time* cable television show host Maher for not making good on Maher's *joke* that Maher would donate \$5 million to charity if the orange-haired and orange-tinged Trump could provide a birth certificate showing that Trump was not the "spawn of his mother having sex with an orangutan."⁵⁹

At the time, Trump was exploring a run for the GOP presidential nomination and Maher made his donation joke

as part of his political comedy shtick ridiculing Trump's "racist" and false "birther" claim that President Obama, our first African American president, was born in Kenya, not the United States, and Trump's offer to pay \$5 million to charity if Obama produced his birth certificate.⁶⁰

Trump's lawyer responded by sending Maher a copy of Trump's birth certificate, "demonstrating he is the son of Fred Trump, not an orangutan," and a "formal acceptance" letter directing Maher to divvy up his \$5 million donation among five charities.⁶¹

When Maher did not cut a donation check, Trump filed a \$5-million "breach of contract" lawsuit in Los Angeles Superior Court against Maher.⁶² Exhibit A of his lack of a sense of humor (literally it was Exhibit A): Trump attached a transcript of Maher's appearance on the *Tonight Show with Jay Leno* to prove Trump thought Maher's offer was serious, including Maher's offer to "donate to a charity of his choice . . . Hair Club for Men, The Institute for Incurable Douche-bag-ery. Whatever charity!"⁶³

Trump thought it was important to state in his lawsuit that a 2011 *Newsweek* poll showed he would "enjoy the support of 41% of voters in a hypothetical race against President Obama."⁶⁴

Trump was roundly ridiculed by the *Hollywood Reporter* for filing such a frivolous lawsuit.⁶⁵

It was obvious to media lawyers that Maher could seek a quick dismissal under the U.S. Supreme Court decision *Hustler*, which held that statements about a public figure reasonably understood to be a caricature, parody, or satire – a joke – are not actionable under any theory of liability claiming a falsehood.⁶⁶

Maher also had a very good chance of winning an anti-SLAPP motion under California's anti-SLAPP statute. Although Trump's lawsuit against Maher was labeled a "breach of contract" lawsuit, Trump's lawsuit targeted Maher's speech about a matter of public concern – Maher's critique of Trump's "racist," anti-Obama birther campaign while Trump explored a presidential bid⁶⁷ As it turns out, Trump's birther

campaign likely helped catapult Trump to the GOP presidential nomination three years later.

Shortly after filing his frivolous lawsuit against Maher, Trump quickly withdrew it, and his lawyer said he would refile an amended complaint.⁶⁸ He never did.

Trump Hotel Sues Bartender and Culinary Unions

By 2015, Trump was an actual GOP candidate for the presidential nomination and more aggressive in using lawsuits to chill negative speech about him. He was probably fed up with losing libel claims and being blocked by the First Amendment and became more creative trying to avoid the defamation label and his old foe, the First Amendment.

On October 5, 2015, Trump gave a campaign speech at the Treasure Island Hotel & Casino, a rival hotel. Outside the hotel, culinary workers and bartenders trying to organize a union at the Trump Hotel Las Vegas handed out flyers saying that Treasure Island Hotel & Casino employed unionized workers while Trump “refused to agree to a fair process for workers at his hotel to form a union.” The workers’ flyers asked “If Trump chooses to stay at a union hotel, why can’t Trump Hotel workers choose to form a union.”

Trump sued the culinary and bartender labor unions that organized the protest in U.S. District Court in the District of Nevada, claiming the flyers hurt his hotel’s reputation by falsely implying that he had not stayed at his own hotel due to lesser quality. Instead of suing for libel, the companies sued the unions for violating Section 43(a) of the federal Lanham Act for alleged false advertising and for violating Nevada’s deceptive trade practices law. Trump sued in the name of his hotel companies, Trump Ruffin Commercial LLC and Trump Ruffin Tower I LLC.⁶⁹

There was just one problem with the Trump hotel lawsuit, according Chief U.S. District Court Judge Gloria M. Navarro. To make out a case for false advertising, Trump’s hotel needed to allege that the workers’ allegedly false statements were “commercial speech,”

that is, to propose a commercial transaction.

The court found that even if the workers’ statements were “intended to, and would have the tendency to cause harm to the reputation of Trump Hotel Las Vegas,” the workers’ statements did not qualify as commercial speech under the Lanham Act because they were not proposing a commercial transaction.

Judge Navarro dismissed the Lanham Act claim without prejudice on August 8, 2016, holding that the Trump’s hotel companies failed to allege that the labor unions were engaged in commercial speech, and dismissed the state law claim due to lack of jurisdiction.⁷⁰ The Trump hotel companies chose not to file an amended complaint and voluntarily dismissed the lawsuit,⁷¹ and the court closed the case.

Once again, Trump’s attempt to escape the burdens of libel law and the First Amendment by pleading a non-libel claim failed.

Trump Sues to Make Clear He is not a Racist Mass Murderer

Not only does Trump lack a sense of humor, he doesn’t know from rhetorical hyperbole. We got the message loud and clear from Trump’s \$2.5 billion lawsuit against television network Univision Networks & Studios, Inc. and its programming chief Albert Ciurana.

In his 2015 lawsuit, Trump filed claims for breach of contract, intentional interference with contractual relationships, and defamation arising from the Spanish-language network’s decision to stop airing Trump’s beauty pageants after Trump stated during his presidential campaign announcement that Mexican immigrants were “rapists” and criminals.

Trump alleged that he was defamed to the tune of \$1 billion by Ciurana’s Instagram post of Trump’s photo side-by-side with a photo of accused Southern white supremacist mass murderer Dylann Roof with the caption “Sin commentaries,” or “No comments.”⁷² Ciurana posted the Instagram photos shortly after Trump’s “rapists” and criminals statement, and later apologized.

Trump claimed that given the “target

audience” of Ciurana’s post, “a reasonable person could understand that Mr. Ciurana to be stating that Mr. Trump had committed heinous acts similar to Roof, and/or that Mr. Trump had incited others to commit similar heinous acts.”⁷³

Without an ounce of irony, Trump wanted to make it clear in his lawsuit that he is not a racist mass murderer: “This statement [the alleged implication of the Instagram post] is patently false,” Trump alleged, “because as Defendants well knew (*or should have known*) at the time (*and still*) Mr. Trump has never committed heinous acts similar to Roof’s and never incited Roof or anyone else to commit such heinous acts.”⁷⁴

Univision and Ciurana filed a motion to dismiss, arguing that the Instagram post was not a statement of fact, but a “visual satire” and an expression of a personal opinion by Ciurana, a Mexican immigrant himself, about Trump’s qualifications as a candidate for president, which is quintessential political speech protected by the First Amendment. The defendants chided Trump for not remembering that he lost his first defamation case against the *Chicago Tribune* for failing to understand the protection of opinion.

Univision and Ciurana also argued that the satirical post simply compared the two men’s similar frowns and hair, and that it would be a “stretch” and “far from plausible” that the post conveyed that both Roof and Trump “hold comparably racist views,” but even if that was the message, this message still would be protected opinion.⁷⁵ The breach of contract claim was frivolous, Univision argued, because Trump had already breached the contract by pushing away all the advertisers and viewers of the planned first-ever Spanish-language version of Trump’s beauty pageants with his offensive comments about Mexican immigrants who formed a large part of the Univision audience.

Shortly before oral argument on the motion to dismiss, Trump and co-plaintiff Miss Universe L.P., LLLP filed a notice of voluntary dismissal of their lawsuit with prejudice on Feb. 11, 2016, depriving us of what promised to be a very interesting oral argument. The

parties announced a confidential settlement of the lawsuit but only mentioned the settlement of the contract claim,⁷⁶ so I count the dismissal of the defamation claim as another loss to Trump.

More Anti-SLAPP Statutes Are Needed

Trump has pledged to get revenge on the First Amendment. Trump has promised “to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.”⁷⁷

Trump’s campaign pledge misrepresents and misunderstands libel law. The First Amendment already punishes “purposely ... false articles” about powerful public figures like Trump and his companies. It’s called publishing with actual malice.⁷⁸ Trump has never been able to prove actual malice in a public trial court.

Trump’s speech-targeting lawsuits filed in public courts were doomed to failure because the First Amendment protects good-faith reporting about public figures (that is, published without actual malice) and immunizes subjective opinions and jokes, even if they are “negative” and “horrible,” as Trump complains.

Journalists and whistleblowers may have won dismissal of Trump’s libel lawsuits, but at significant cost of time, energy, and money.

State legislatures should enact more anti-SLAPP statutes allowing defendants to quickly dismiss meritless lawsuits targeting speech about matters of public concern.⁷⁹ Over two dozen states have enacted these statutes.⁸⁰ A federal anti-SLAPP law has been proposed. Many state statutes require plaintiffs like Trump to pay the prevailing defendant’s legal fees, as Trump University discovered in California when the court granted a former student’s anti-SLAPP motion dismissing the school’s flawed libel claim and ordered Trump University to pay nearly \$800,000 in attorney’s fees.⁸¹

These anti-SLAPP laws, while not perfect, would help discourage frivolous libel lawsuits favored by Trump & Co. Instead of labeling frivolous, speech-targeting lawsuits “SLAPP suits,” perhaps we should call them

“Trump Suits.”

Endnotes

1. A 2016 study by *USA TODAY* located over 4,000 lawsuits filed by or against Trump and his companies over three decades, an unprecedented number for a presidential nominee. *USA TODAY* located seven speech-related lawsuits or arbitrations filed by Trump and his companies. *USA TODAY Network: Dive into Donald Trump’s thousands of lawsuits*, *USA TODAY*, <http://usatoday.com/pages/interactives/trump-lawsuits/>, Nick Penzenstadler, *New USA TODAY interactive database shows Trump lawsuits surpass 4,000*, *USA TODAY* (July 7, 2016), <http://www.usatoday.com/story/news/politics/onpolitics/2016/07/07/new-usa-today-interactive-database-shows-trump-lawsuits-surpass-4000/86809010/>. This article examines the seven speech-related lawsuits or arbitration proceedings brought by Trump and his companies discussed by *USA TODAY* and located in an independent search by the author.

2. 485 U.S. 46, 56-57 (1988) (statements not reasonably understood as stating facts – in this instance a parody liquor-and-sex advertisement in *Hustler* magazine poking fun at the Rev. Jerry Falwell – are not actionable under any theory of liability based on an alleged “false” publication, even if the statements are “offensive” and “vulgar”).

3. *Trump v. Chicago Tribune Co.*, 616 F. Supp. 1434 (S.D.N.Y. 1985) (*Trump I*).

4. Nat Hentoff, *Citizen Trump*, *WASH. POST* (Oct. 19, 1985), <http://www.washingtonpost.com/archive/politics/1985/10/19/citizen-trump/88efc4ba-6c1e-4226-8924-4101-8a60f5478/>

5. *Trump I*, 616 F. Supp. at 1434.

6. *Id.* at 1435.

7. *Id.*

8. *Id.* at 1436.

9. *Id.*

10. *Id.* at 1435 (citations and quotations omitted).

11. *Id.*, citing *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) and *Greenbelt Pub. Assn v. Bresler*, 398 U.S. 6, 14 (1970). Although Judge Weinfeld’s decision in *Trump v. Chicago Tribune Co.* was issued in 1985, before

the U.S. Supreme Court narrowed its protection for opinions in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), Judge Weinfeld’s decision was based on the protection for non-factual, hyperbolic opinions and remains good law.

12. *Trump I*, 616 F. Supp. at 1436.

13. *Id.*

14. *Id.* at 1438.

15. *Id.*

16. Hentoff, *supra* note 4.

17. SLAPP suits are meritless lawsuits that target speech about a matter of public concern. SLAPP is an acronym for Strategic Litigation Against Public Participation. See generally Cal. Civ. Proc. Code § 425.16.

18. Paul Farhi, *What really gets under Trump’s skin? A reporter questioning his net worth*, *WASH. POST* (March 8, 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3ee-e4c2-11e5-bofd-073d5930a7b7_story.html

19. *Trump v. O’Brien*, 29 A.3d 1090, 1092 (N.J. Super. Ct. App. Div. 2011) (*Trump II*).

20. *Id.* at 1092-1093.

21. *Id.* at 1094-1095.

22. *Id.* at 1101.

23. *Id.*

24. *Id.* at 1101.

25. *Id.* at 1092, 1097.

26. *Id.* at 1094, citing *Trump v. O’Brien*, 958 A.2d 85 (N.J. Super. Ct. App. Div. 2008) (*Trump III*) (defendants did not have to disclose confidential source identities).

27. *Id.* at 1099-1100.

28. *Id.* at 1099.

29. *Id.*

30. *Id.* (emphasis added).

31. Farhi, *supra* note 18.

32. *Id.*

33. *Makaeff v. Trump University, LLC*, 715 F.3d 254, 260 (9th Cir. 2013) (*Makaeff I*).

34. *Id.*

35. *Id.*

36. Cal. Civ. Proc. Code § 425.16.

37. *Id.* at 260-261, citing Cal. Civ. Proc. Code § 425.16.

38. *Id.*

39. *Id.* at 268, 271-272.

40. *Makaeff v. Trump University, LLC*, No. 10-cv-00940, ECF No. 328

(S.D. Cal. June 17, 2014) (*Makaeff II*).

41. *Makaeff v. Trump University, LLC*, No. 10-cv-00940, ECF No. 331 (S.D. Cal. April 9, 2015) (*Makaeff III*) (awarding \$790,083.40 in fees and \$8,695.81 in costs).

42. *Makaeff v. Trump University, LLC*, No. 10-cv-00940, ECF No. 472 (S.D. Cal. March 21, 2016) (*Makaeff IV*).

43. Maureen Groppe, *What Trump has said about Judge Curiel*, INDYSTAR (June 11, 2016), <http://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge-curiel/85641242/>

44. *Trump Lawyer Bragged: I 'Destroyed' a Beauty Queen's Life*, DAILY BEAST (July 31, 2015), <http://thedailybeast.com/articles/2015/07/31/trump-lawyer-bragged-i-destroyed-a-beauty-queen-s-life.html>.

45. *Miss Universe L.P., LLLP v. Monnin*, 952 F.Supp.2d 591, 594 (S.D.N.Y. 2013) (*Monnin I*).

46. *Id.* at 594-95.

47. *Id.* at 595.

48. *Id.* at 596.

49. *Id.* at 597.

50. *Id.* at 603-606.

51. *Id.* at 598.

52. *Id.* at 598.

53. *Id.* at 600-610. See also *Miss Universe L.P., LLLP v. Monnin*, No. 12-cv-09174, ECF No. 17 (S.D.N.Y. Feb. 5, 2013).

54. *Miss Universe L.P., LLLP v. Monnin*, No. 12-cv-09174, ECF No. 17 (S.D.N.Y. Feb. 5, 2013).

55. *Miss Universe L.P., LLLP v. Monnin*, No. 12-cv-09174, ECF No. 1 (S.D.N.Y. Dec. 17, 2012).

56. *Monnin I*, 952 F.Supp.2d at 610.

57. *Monnin v. Klineburger & Nussy*, No. L-4505-13 (Nov. 4, 2013 N.J. Super. Ct., Camden Cty); see also Joshua Alston, *Pageant Queen Blames NJ Firm For \$5M Miss Universe Win*, LAW360 (Nov. 8, 2013), <http://www.law360.com/articles/487678/pageant-queen-blames-nj-firm-for-5m-miss-universe-win>

58. Nick Penzenstadler, *Trump, Bill Maher and Miss Pennsylvania: The 'I'll sue you' effect*, USA TODAY (July 11, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/2016/07/11/trump-bill-maher-and-miss-pennsylvania-ll-sue-you-effect/85877342/>; see also

Miss Universe L.P., LLLP v. Monnin, No. 1:12-cv-09174, ECF No. 27 (S.D.N.Y. Aug. 15, 2014).

59. *Trump v. Maher*, No. BC 499537 (Los Angeles Super. Ct. Feb. 4, 2013), http://www.hollywoodreporter.com/sites/default/files/custom/Documents/ESQ/Trump_Maher.pdf.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at Exhibit A.

64. *Id.*

65. Eriq Gardner, *Why Donald Trump is Likely to Lose a Lawsuit Against Bill Maher (Analysis)*, HOLLYWOOD REPORTER (Feb. 3, 2013), <http://hollywoodreporter.com/thr-esq-why-donald-trump-is-lose-417806>.

66. *Hustler*, 485 U.S. at 56-57.

67. See Cal. Civ. Code § 425.16(e) (4) (allowing defendant to bring anti-SLAPP motion to dismiss “a claim” arising from speech “in connection with a public issue or an issue of public interest”).

68. Eriq Gardner, *Donald Trump Withdraws Bill Maher Lawsuit*, HOLLYWOOD REPORTER (April 3, 2013), <http://hollywoodreporter.com/thr-esq-donald-trump-withdraws-bill-maher-432675>.

69. *Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226*, No. 15-cv-01984, ECF No. 1 (D. Nev.).

70. *Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226*, No. 15-cv-01984, 2016 WL 4208437 (D. Nev. Aug. 8, 2016).

71. *Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226*, No. 15-cv-01984, ECF No. 21. (D. Nev. Aug. 17, 2016).

72. *Miss Universe L.P., LLLP v. Univision Networks & Studios, Inc.*, No. 15-cv-05377, ECF No. 22 (S.D.N.Y. Nov. 6, 2015).

73. *Id.*

74. *Id.* (emphasis added).

75. *Miss Universe L.P., LLLP v. Univision Networks & Studios, Inc.*, No. 15-cv-05377, ECF No. 25 (S.D.N.Y. Dec. 4, 2015).

76. Nick Niedzwiadek, *Donald*

Trump, Univision Settle Lawsuit over Miss Universe Pageant, WALL STREET JOURNAL (Feb. 11, 2016), <http://www.wsj.com/articles/donald-trump-univision-settle-lawsuit-over-miss-universe-pagaent-1455220440>; see also joint statement, <http://corporate.univision.com/2016/02/donald-j-trump-and-univision-reach-settlement/>

77. Trump declared the following at his Feb. 26, 2016 campaign rally in Fort Worth, Texas: “I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We’re going to open up those libel laws. So when the *New York Times* writes a hit piece which is a total disgrace or when the *Washington Post*, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they’re totally protected.” Hadas Gold, *Donald Trump: We’re going to ‘open up’ libel laws*, POLITICO (Feb. 26, 2016), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>

78. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (public official must prove actual malice to win libel case); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 346 (1974) (same for public figure).

79. E.g., Cal. Civ. Code § 425.16.

80. State-by-state guide, Reporters Committee for Freedom of the Press, <https://www.rcfp.org/slapp-stick-fighting-frivolous-lawsuits-against-journalists/state-state-guide>

81. *Makaeff III*, relying on Cal. Civ. Proc. Code § 425.16(c)(1) (“a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs”) (emphasis added).

As Body-Worn Cameras Proliferate, States' Access Restrictions Defeat Their Purpose

STEVE ZANSBERG

Beginning with the murder of Michael Brown in Ferguson, MI, the in-custody death of Freddie Gray, in Baltimore, MD, and several subsequent high-profile deaths (primarily of African American men) at the hands of police, the conduct of America's law enforcement has been the focus of intense public interest and attendant media attention.¹ In December 2014, President Obama urged Congress to provide 75 million dollars to deploy 50,000 Body Worn Cameras ("BWCs") as part of an effort to restore the public's trust. Although several police departments across the nation had earlier deployed BWCs, the political pressure caused by these events² greatly accelerated the trend toward widespread BWC adoption.

According to a January 2016 survey by the Major Cities Chiefs Association and Major County Sheriffs' Association,³ approximately half of the 70 major metropolitan police departments surveyed had begun the process of deploying police body worn cameras, but 95% are committed to do so in the future. With the rapid spread of BWC systems, generating millions of hours of video each week, questions arise about whether, and when, the public should be provided access to these recordings (as well as whether civilians captured on such recordings have reasonable expectations of privacy in those recordings and/or a right to be informed about, and to object to, their being recorded by police).⁴

Privacy Rights of Civilians Asserted as Basis to Withhold Public Access

In October, 2013, the ACLU released its White Paper, *Police Body-Mounted Cameras: With Right Policies in Place*,

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a Win for All, which recommended that BWC recordings of police interactions with members of the public, in public settings (like city streets or sidewalks) be presumed confidential, in light of the civilians' purportedly reasonable expectations of privacy in such recordings.

In March 2015, the ACLU released a second, revised version of its White Paper, that still adheres to the view that members of the public have a constitutionally protected expectation of privacy with respect to being recorded by police officers without the citizens' consent, photographically or aurally, while they were located on public streets, sidewalks, or other public places.⁵ Thus, under the ACLU's proposed policy only those BWC recordings that are "flagged," because they capture controversial interactions between police and citizens, or contain evidence that a crime has been committed, are to be retained for any significant period of time and possibly made available for public inspection.⁶ All other BWC recordings are to be destroyed quickly and never made publicly available.

Notably, various task forces and other policy study groups considering BWC policies specifically cited the ACLU's White Paper as a basis for recommending limited or restricted public access to BWC recordings.⁷

Media Organizations Weigh In

As state legislatures in several states were considering bills to determine the scope of public access to police BWC recordings, a series of position papers urging a strong presumption of public access were issued by media organizations and academics. First, in April, 2015, the Radio and Television Digital News Association issued its position statement, expressly disagreeing with the ACLU's position, and declaring:

RTDNA believes there must be a general presumption of free and

open access to these videos in order to preserve the public transparency necessary to ensure their purpose is accomplished.

Legitimate concerns over privacy issues can be addressed under existing law. A court could determine if these issues require certain parts of the video be withheld or electronically altered to protect an individual's right to privacy in a particular circumstance.⁸

In May 2015, the Media Law Resource Center promulgated its Model Policy on Police Body Camera Recording Access.⁹ The MLRC's Model Policy urges policymakers and law enforcement agencies to categorize *all* BWC recordings as "public records" presumptively available for public inspection and copying, subject to existing statutory exemptions and exclusions embodied in applicable state open records laws.¹⁰

Disagreeing with the ACLU's White Paper, the MLRC's Model Policy "is grounded on a well-recognized body of law holding that individuals do *not* have a reasonable expectation of privacy with respect to their being photographed, videotaped, or recorded without their consent when they are visible to the human eye and audible to the human ear in any public place."¹¹ Also, rather than limiting the BWC recordings that are "flagged" for public inspection because of the particular activity captured on the tape, the MLRC Model Policy recognized that all conduct of peace officers discharging their official duties, while on the job, are inherently of legitimate public interest and concern.¹² Thus, the MLRC's Model Policy extends a presumption of public access to *all* police BWC footage of individuals filmed on a public street, park, sidewalk, or private business location that is readily accessible to the public.

However, BWC recordings of indi-

viduals inside their homes, apartments, places of residence or other private property, in contrast, are not subject to that same presumption of public access, unless the conduct recorded is itself a legitimate matter of public concern. The MLRC Model Policy urges custodians of BWC recordings to redact highly personal and private information from the recordings prior to disclosing them to the public, and that members of the public should be provided an opportunity for expeditious judicial review of any governmental decision to withhold BWC recordings in whole or in part.

In December 2015, The Media Freedom & Information Access Clinic of The Floyd Abrams Institute for Freedom of Expression at Yale Law School published a White Paper entitled “Police Body Cam Footage: Just Another Public Record.”¹³ As its title indicates, the White Paper states:

Issues regarding body cam footage are adequately addressed through nonexemption safeguards and new technology solutions. State legislatures should not amend their existing Freedom of Information (FOI) laws to restrict access to body cam footage. Body cam footage should be treated the same as other public records.¹⁴

State Legislatures Favor Privacy Interests Over Public Accountability

According to BillTrack50, “So far this year [(2016)], twelve states — Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, North Carolina, North Dakota, South Carolina, Texas and Utah — passed laws concerning public access to the footage.” In addition to that list, Kansas, Minnesota, Missouri, and New Hampshire also passed legislation in 2016 restricting public access to BWC recordings.¹⁵ Although the state statutes vary in some significant respects, in general, (with one notable exception — Oklahoma), state legislators gave much greater weight to the concerns of civilians’ privacy rights and to protecting ongoing criminal investigations from interference than to the transparency and public accountability benefits of providing public exposure to recordings

of official police conduct:

Connecticut’s law exempts BWC recordings of incidents involving a victim of domestic or sexual abuse; or a homicide, suicide, or fatal accident if disclosure could constitute “an unwarranted invasion of personal privacy.”¹⁶

Florida’s law declares a BWC recording exempt from disclosure if taken inside a private residence; a health care, mental health, or social services facility; or any place “that a reasonable person would expect to be private.”¹⁷ Louisiana’s law similarly allows law enforcement agencies to withhold any BWC that they believe would “violate an individual’s reasonable expectation of privacy” or is part of an ongoing investigation. Similarly, North Dakota’s statute exempts from disclosure BWC footage recorded “in a private place.”¹⁸

Several states have categorically exempted all BWC recordings from their public records laws, unless certain specified circumstances are present: For example, in South Carolina, “data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.”¹⁹ Disclosure is permitted at the discretion of the South Carolina Law Enforcement Division.²⁰ Similarly, in 2016, Kansas exempted all BWC recordings from mandatory disclosure under its public records law, by defining them as “criminal investigation records.”²¹ Such records may be ordered disclosed to the public if a court finds certain factors have been met.

Starting in January, 2017, New Hampshire law will prohibit the release of BWC recordings to the public unless they depict restraint or use of force by a police officer, discharge of a weapon or “an encounter that results in an arrest for a felony-level offense.”²² Minnesota’s recently passed law exempts all BWC recordings, including use of force by police, unless such force results in “substantial bodily harm”; recordings may be released if a police officer discharges her/his firearm or if the citizen subject requests it be disclosed. However, police are also given discretion to redact or withhold BWC footage if it is deemed “clearly offensive to common sensibilities.”²³

Oregon’s law exempts BWC recordings unless disclosure is “in the public interest.”²⁴ In Illinois, most body-worn camera footage is statutorily exempt from public disclosure; only footage that has been flagged because of its content may be disclosed in certain circumstances.²⁵ And in Texas, all BWC recordings are exempt from public disclosure except where used as evidence in a criminal case.²⁶ As of October 1, 2016, North Carolina’s law requires a court order before any BWC recordings (or dash cam footage) may be released to the press or the public.²⁷ Had this law been in effect in September 2016, the video recordings of the shooting death of Keith Lamont Scott at the hands of Charlotte police could not have been released without a judicial order authorizing it.

Missouri’s recently passed legislation²⁸ prohibits public release of BWC and dash cam footage during an ongoing investigation, and thereafter bars the release of BWC recordings taken in “nonpublic locations,” such as homes, schools and medical facilities, unless a court finds that such disclosure would not be “reasonably likely to bring shame or humiliation to a person of ordinary sensibilities.” Even if the court orders that BWC footage recorded in a “nonpublic location” be made available to the records requester, the statute prohibits the press or public from republishing the footage, or even summarizing its contents, without providing 10 days’ notice of such publication to all non-law-enforcement persons depicted in the video (and authorizes those notified to seek an injunction against the publication). The Missouri statute creates a private right of action for civil damages resulting from any violation of that provision. The statute also presumptively closes any BWC recording of a crime scene in which a deceased person is shown “in a state of dismemberment, decapitation, or similar mutilation, including, without limitation, where the deceased person’s genitalia are exposed.”

Perhaps the most transparency-promoting state statute to date is the law enacted in Oklahoma in 2015. Title 51 section 24A.8 subsection 10a of Okla-

homa's statutes declares that public records, subject to public inspection include "Audio and video recordings from recording equipment attached to the person of a law enforcement officer that depict . . . recordings in the public interest that may materially aid a determination of whether law enforcement officers are appropriately performing their duties as public servants."²⁹

In addition to these state statutes, numerous cities and police departments have adopted their own policies and protocols regarding public access to, and preservation of, BWC videos. The Reporters Committee for Freedom of the Press has compiled these policies, nationwide, on an extremely helpful interactive map on its website.³⁰

Two Roadblocks to the Success of BWC Programs: Secrecy and Cost

In the April 2015 *Media Law Letter*, MLRC's Executive Director (and former Forum Chair) George Freeman stated "the whole point of requiring police to wear body cameras is to have [the police] operate with the knowledge that their conduct is being watched, not only by their fellow officers, but by the public whom they've sworn to protect and serve."³¹ As the editorial board of the *Washington Post* aptly put it:

Body cameras and the policies governing release of videos are still in development, and [police] departments across the country are grappling with issues of privacy, costs and technology. What authorities need to realize is that **the cause of improving accountability, transparency and public trust is undercut when footage is not released**, sending the message that there is something to hide.³²

Notably, Chuck Wexler, the Executive Director of the Police Executive Research Forum concurs:

[W]ith certain limited exceptions . . . body-worn camera video footage should be made available to the public upon request—not only because the videos are public records but also because doing so enables police departments to demonstrate transparency and openness in their interactions with members of the community.³³

Another serious impediment to the successful implementation of BWC programs is financial cost. Not only are the camera units expensive, police departments have increasingly recognized that the financial burden of storing, retaining, cataloging, and redacting the thousands of hours of footage that BWCs generate every month, is far outstrips the initial cost of purchasing the camera themselves. Indeed, in a 2014 survey conducted by the Police Executive Research Forum, 39 percent of police departments that did not use BWCs cited cost as the primary reason for non-adoption.³⁴ For example, the police department in Cleveland, Ohio expects to spend up to \$3.3 million over five years outfitting its officers with 1,500 body cameras and storing the data those cameras record.³⁵ Recently a number of police departments across the nation have abandoned their prior use of BWCs, declaring that the costs associated with storage and processing are simply unaffordable.³⁶

Better Policies and Cheaper Storage Technology Needed for BWCs to Succeed

BWCs unquestionably are an important component of law enforcement's "tool belt" to both collect and generate evidence for use in criminal prosecutions and to hold the "men and women in blue" accountable to the public they serve. The latter objective cannot be accomplished without providing the public with access to the recordings made by BWCs. However, to date, the majority of state legislatures that have addressed the issue have greatly restricted (or outright denied) the public's ability to review the recordings. And, in those jurisdictions that have mandated public access and lengthy retention periods, some police departments have abandoned their use of BWCs because the costs of retaining the recordings is, as one police chief put it, "crippling."³⁷

Solutions to the cost problem should be sought, so that this valuable technological tool does not become merely a passing, short-lived experiment in greater transparency and accountability.

Endnotes

1. The Supreme Court has rec-

ognized that "[t]he public . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." *Waller v. Georgia*, 467 U.S. 39, 47 (1984); see also *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984) ("The public has a vital interest in the integrity of those commissioned to enforce the law.").

2. See Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. Times (updated Jul. 7, 2016), <http://nyti.ms/1IMtFWL> (collecting videos of the shootings of, *inter alia*, Eric Garner, Laquan McDonald, Samuel Dubose, Sandra Bland, Freddie Gray, Philando Castile, Alton Sterling, Walter Scott, Tamir Rice, and Michael Brown)

3. Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, *Governing* (Jan. 26, 2016) available at <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html>

4. See, e.g. Peter Hermann & Aaron C. Davis, *As police body cameras catch on, a debate surfaces: Who gets to watch?*, *Wash. Post* (Apr. 17, 2015), http://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html.

5. Subsequently, the ACLU promulgated a Model Act Regulating Use of Wearable Body Cameras by Law Enforcement, available at <https://www.aclu.org/model-act-regulating-use-wearable-body-cameras-law-enforcement>. It is derived from an earlier Model Act promulgated by the International Municipal Lawyers Association, available at <http://www.aele.org/imla-bwc.pdf>.

6. The ACLU's White Paper states, "The use of recordings should be allowed only in internal and external investigations of misconduct, and where the police have reasonable suspicion that a recording contains evidence of a crime," and it asserts that "[u]nredacted, unflagged recordings should not be disclosed without the consent of the subject [because t]hese are recordings where there is no indication of police

misconduct or evidence of a crime, so the public oversight value is low.”

7. See, e.g. Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, U.S. Dep’t of Justice Office of Community Oriented Policing Programs (2014), <http://1.usa.gov/1s7UIxl>; Leadership Conference on Civil and Human Rights, *Civil Rights Principles on Body Worn Cameras* (May 2015), <http://www.civilrights.org/press/2015/body-camera-principles.html>; Marc Jonathan Blitz, *Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats*, (Am. Const. Soc’y May 13, 2015), [https://www.acslaw.org/sites/default/files/Blitz - On-Body Cameras - Issue Brief.pdf](https://www.acslaw.org/sites/default/files/Blitz_-_On-Body_Cameras_-_Issue_Brief.pdf).

8. Mike Cavender, *Police body cams: The new FOIA fight*, Radio Television Digital News Ass’n (Apr. 22, 2015), <http://www.rtdna.org/article/police-body-cams-the-new-foia-fight#VT25mLLnYZ4>

9. <https://www.doj.state.wi.us/sites/default/files/policebwcrecordings.pdf>

10. The MLRC’s Model Policy presumes that the vast majority of state records statutes create a presumption of public access to *all* records that memorialize or document the official conduct of public agency activities, with narrowly-crafted exemptions. Thus, the MLRC’s Model Policy was not intended to endorse those states’ statutes that exempt all police “investigative records” from public inspection. See, e.g., Cal. Gov. Code § 6524(f).

11. See, e.g., *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981) (“On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. *Neither is it such an invasion to take his photograph in such a place*” (emphasis added) (internal marks and citation omitted)); *Dempsey v. Nat’l Enquirer*, 702 F. Supp. 927, 931 (D. Me. 1988) (“[T]aking a photograph of the plaintiff in a public place cannot constitute an invasion of privacy based on intrusion upon the seclusion of another”); *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13-14 (S.D. Ohio 1983) (dismissing claim

based on photographs taken of plaintiff on public sidewalk); *Restatement* (Second) of Torts § 652B cmt. c (1977) (“[T]here is no liability [for invasion of privacy] . . . for observing [a person] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.”).

Of course, “[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.” *Restatement* (Second) of Torts § 652B cmt. c.

12. See, e.g., *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997) (“Performance of police duties and investigations of their performance is a matter of great public importance.”); *Cassidy v. American Broad. Cos.*, 377 N.E.2d 126, 132 (Ill. Ct. App. 1978) (“the conduct of a policeman on duty is legitimately and necessarily an area upon which public interest may and should be focused”); *City of Loveland v. Loveland Pub. Corp.*, No. 03CV513, 2003 WL 23741694, *2 (Larimer Cty. Dist. Ct. June 16, 2003) (recognizing the public’s “legitimate and compelling interest in ensuring that its police officers properly perform their official duties”).

13. The White Paper is available at <http://isp.yale.edu/sites/default/files/publications/police-body-camera-footage-just-another-public-record.pdf>

14. *Id.* at 5.

15. See Sophie Murguia, *More states set privacy restrictions on body-cam video* (RCFP, June 29, 2016), available at <https://www.rcfp.org/browse-media-law-resources/news/more-states-set-privacy-restrictions-bodycam-video>

16. Conn. Gen. Stat. Ann. § 29-6d(g).

17. Fla. Stat. § 119.071(2)(l).

18. N.D. Cent. Code § 44-04-18.7(9).

19. S.C. Gen. Stat. § 23-1-240(G)(1).

20. S.C. Gen. Stat. § 23-1-240(G)(2)-(5).

21. Kan. Stat. Ann. § 45-221(a)(10)(A)-(F).

22. HB 1548.

23. S.F. No. 498.

24. Or. Rev. Stat. § 192.501(40).

25. 50 ILCS 706/10-20(b).

26. Tex. Occ. Code § 1701.661(c)-(d).

27. House Bill 972.

28. SB 732.

29. Okla. Stat. Title 51 § 24.A.8(A)(10) (2016).

30. <http://www.rcfp.org/bodycams>. Other helpful compendia of state and local policies have been produced by the D.C. Coalition for Open Government, <http://dcogc.github.io/bwc/browse/>; the Urban Institute, <http://apps.urban.org/features/body-camera/>; and the Brennan Center for Justice at New York University’s School of Law, <https://www.brennancenter.org/body-cam-city-map>. In addition, Americans for Effective Law Enforcement has assembled an impressive compendium of policies, research studies, and articles concerning BWCs, available at <http://www.aele.org/bwc-info.html>.

31. See also Kelly Freund, Note, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, Colum. J. L. & Soc. Probs. 91 (2015) (advocating for citizen-initiated access to BWC footage to promote public trust in law enforcement), available at <http://www.columbia.edu/cu/jlsp/pdf/Dec2015/Freund.pdf>; Bryce Clayton Newell, *Collateral Visibility: A Socio-Legal Study of Police Body Camera Adoption, Privacy, and Public Disclosure in Washington State*, Indiana L. J. [forthcoming] (July 18, 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2740377##.

32. *After A Fatal Shooting, D.C. Police Choose Accountability In Releasing Body-Cam Video*, Wash. Post (July 15, 2016); see also S. Zansberg, *Why We Shouldn’t Hide What Police Body Cameras Show*, Governing (Aug. 29, 2016), (emphasis added) <http://www.governing.com/gov-institute/voices/col-police-body-camera-recordings-transparency.html>

33. Police Executives Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, U.S. Dep’t of Justice at vi (2014), available at [Communications Lawyer □ Fall 2016 □ 15](http://1.</p></div><div data-bbox=)

[usa.gov/1s7UIxl](http://1.usa.gov/1s7UIxl). See also S. Zansberg, *Why We Shouldn't Hide What Police Body Cameras Show*, *Governing* (Aug. 29, 2016), <http://www.governing.com/gov-institute/voices/col-police-body-camera-recordings-transparency.html>

34. Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, at 31 (2014), <http://1.usa.gov/1s7UIxl>.

35. Associated Press, *Cost for Cleveland Body Camera Program Could Rise to \$3.3 Million over 5 Years*, *Contract Shows*, May 7, 2015, <http://www.foxnews.com/us/2015/05/07/cost-for-cleveland-body-camera-program-could->

[rise-to-33-million-over-5-years/](http://www.foxnews.com/us/2015/05/07/cost-for-cleveland-body-camera-program-could-rise-to-33-million-over-5-years/).

36. See, e.g., Rick Callahan, *Some Police Departments Shelve Body Cameras, Cite Data Costs*, *Assoc. Press* Sept. 10, 2016, <http://www.wtsp.com/news/some-police-departments-shelve-body-cameras-cite-data-costs/316448042>; Eric D. Lawrence and Christina Hall, *Costs of Police Body Cameras Raise Concern*, *Detroit Free Press* (June 7, 2016), <http://www.freep.com/story/news/local/michigan/2016/06/06/police-body-cameras-high-costs/85356518/>; Lucas Mearian, *As Police Move to Adopt Body Cams, Storage Costs Set to Skyrocket*, *Computerworld* (Sept. 3, 2015), <http://www.computerworld.com/article/2979627/cloud-storage/>

[as-police-move-to-adopt-body-cams-storage-costs-set-to-skyrocket.html](http://www.computerworld.com/article/2979627/cloud-storage/as-police-move-to-adopt-body-cams-storage-costs-set-to-skyrocket.html); see also *Police body cameras: Compromise on storing data*, *Waterbury Republican American* (Sept. 13, 2016), <http://www.rep-am.com/opinion/editorials/2016/09/13/police-body-cameras/> (“The history of data storage and miniaturization practically guarantees that it eventually will be possible to preserve practically all data for long periods.”).

37. Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, at 32 (quoting Chief Aden of the Greenville, N.C. police), <http://1.usa.gov/1s7UIxl>.

California’s anti-SLAPP Statute is Available Against “Mixed” Conduct Claims: Applying the California Supreme Court’s Decision in *Baral v. Schnitt*

THOMAS R. BURKE

This summer the California Supreme Court in *Baral v. Schnitt*, 1 Cal. 5th 376 (2016), decided how the state’s anti-SLAPP statute (Cal. C.C.P. § 425.16 *et seq.*) operates in “mixed” conduct situations, in which a plaintiff’s cause of action combines allegations about a defendant that are protected by the statute along with allegations of *unprotected* activity.¹ California’s anti-SLAPP statute provides that “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech . . . shall be subject to a special motion to strike, unless the court determines . . . there is a probability that the plaintiff will prevail on the claim.”² For over a decade, California’s trial and appellate courts lacked clear guidance on how to handle such “mixed” claim

situations.³ Courts that followed *Mann v. Quality Old Time Service, Inc.*,⁴ (the “*Mann*” rule) allowed an anti-SLAPP motion *only* if the plaintiff’s entire cause of action would be dismissed.⁵ Other courts permitted a defendant to file an anti-SLAPP motion to dismiss only the discrete portions of a plaintiff’s cause of action that arose from the defendant’s protected activities.⁶ This growing split of appellate authority led to anomalous results.⁷ Without explicit direction from the state’s Supreme Court, California’s appellate courts and practitioners were left to read tea leaves.⁸

On August 1, 2016, in a straight-forward opinion authored by Justice Carol Corrigan, writing for the unanimous court, the *Baral* Court evaluated the meaning of the word “cause of action” in the context of the anti-SLAPP statute. “Viewing the term in its statutory context, we conclude that the Legislature used ‘cause of action’ in a particular way in section 425.16 (b)(1), targeting only claims that are based on the conduct protected by the statute.”⁹ Rejecting the *Mann* rule, the Supreme

Court in *Baral* unanimously held that the anti-SLAPP statute is available to strike any portion of a cause of action that arises from a defendant’s protected petitioning or free speech activities regardless of whether the plaintiff’s *entire* cause of action or claim is dismissed. As the Court put it: “Section 425.16 is not concerned with how a complaint is framed, or how the primary right theory might define a cause of action. While an anti-SLAPP motion may challenge any claim for relief founded on allegations of protected activity, it does not reach claims based on unprotected activity.”¹⁰

In *Baral*, the Court chose substance over form – ensuring that a plaintiff cannot simply game their complaint and avoid an anti-SLAPP motion by artfully combining alleged protected and unprotected conduct by a defendant. In allowing an anti-SLAPP motion to reach any portions of a plaintiff’s claim that is based on a defendant’s protected activities, the Court emphasized the importance of the anti-SLAPP statute’s role in dismissing claims based on protected activity early

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in litigation. The Court explained that “[T]he *Mann* court’s reading of section 425.16 (b) does not withstand scrutiny. Its refusal to permit anti-SLAPP motions to reach distinct claims within pleaded counts undermines the central purpose of the statute: screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery.”¹¹ Rather than curb the growing use of the anti-SLAPP statute by litigants, the ruling embraces use of the anti-SLAPP statute against even portions of claims for relief, a broad construction of the statute, as the Legislature expressly instructed.¹²

Why *Baral v. Schnitt* Matters

Admittedly, how to dissect “mixed” conduct claims consistently with the anti-SLAPP statute is a topic to which few lawyers warm quickly. Yet the Supreme Court’s unanimous ruling in *Baral* is vital. A plaintiff’s ability to artfully draft a complaint will no longer allow a plaintiff to avoid an anti-SLAPP motion. After all, California’s anti-SLAPP statute is an extremely powerful law: it provides for an early potential dismissal of the plaintiff’s claims, an automatic stay of discovery, an interlocutory appeal if the motion is denied and mandatory attorneys’ fees award if the motion is granted.¹³ For media defendants in particular, the Court in *Baral* provides explicit guidance that in the typical lawsuit for libel involving challenges to multiple statements from the same publication, an anti-SLAPP motion should be available to strike allegations regarding statements that are not actionable regardless of how the complaint is styled.¹⁴

Examples of how a plaintiff’s styling of their complaint could avoid the reach of the statute – intentionally or not – underscores the significance of the *Baral* opinion. For example, a complaint for libel might be drafted in two different ways. A plaintiff might allege separate causes of action or claims for each of the defendant’s alleged statements or combine them in one claim and if the defendant’s underlying conduct arose from the exercise of the defendant’s petitioning or free

speech activities the anti-SLAPP statute would be available. However, the same plaintiff could instead include allegations of both protected and unprotected conduct by the defendant within the same claim. In that scenario, under the *Mann* rule, if any portion of the plaintiff’s claims was viable the anti-SLAPP motion would be denied in its entirety.

Indeed, this is precisely what happened in the underlying facts of *Mann*. There, a company in the business of maintaining industrial water systems sued two competitors for defamation, trade libel, interference with contractual relationship, and intentional interference with prospective economic advantage after the defendants allegedly made disparaging remarks to the company’s customers and also allegedly falsely reported the corporation’s purported illegal acts to interested governmental agencies. The defendants’ anti-SLAPP motion was denied because although the reports they allegedly made to government agencies were protected by the anti-SLAPP statute, their alleged remarks to the plaintiff’s customers were not. The *Mann* rule arose from this “mixed” conduct scenario. Because the alleged conduct of the defendants was pled together and the plaintiff was able to demonstrate a probability of prevailing on the allegations about the defendants’ disparaging comments to plaintiff’s customers, the entire anti-SLAPP motion was defeated.¹⁵

The underlying facts involved in *Baral v. Schnitt* involved far more explicit efforts to avoid the anti-SLAPP statute. In *Baral*, after the defendant had already successfully used the anti-SLAPP motion to defeat claims for defamation regarding the creation, publication and a refusal to correct an allegedly defamatory audit report, the plaintiff abandoned his appeal of the adverse ruling on the anti-SLAPP motion and simply re-alleged *the same conduct* in an amended complaint under a new paragraph heading that also included conduct that was unprotected by the anti-SLAPP statute. Following this redrafting, after proving up the validity of the unprotected claims and in reliance on the *Mann* rule, *Baral* defeated the anti-SLAPP motion in the

trial court and the court of appeal until the Supreme Court ultimately reversed those rulings.

In short, before *Baral v. Schnitt*, a plaintiff could potentially defeat a defendant’s anti-SLAPP motion – intentionally or not – by creatively drafting the complaint.

How *Baral v. Schnitt* Should be Applied Going Forward

Appreciating a need for clarity for California’s courts and practitioners “in this sometimes difficult area of pretrial procedure,” Justice Corrigan offered the following guidance on how the anti-SLAPP statute is to be applied following the Court’s ruling in *Baral*:

At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff’s showing if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.¹⁶

The Court in *Baral* rejected concerns that defendants would use anti-SLAPP motions to target “fragmentary allegations, no matter how insignificant.” Calling this contention “misplaced,” the Court emphasized that allegations in a complaint that are “merely incidental” or “collateral” are not subject to an anti-SLAPP motion.¹⁷ “[A]llegations of protected activity that merely provide context, without supporting a claim for

recovery, cannot be stricken under the anti-SLAPP statute.”¹⁸

As it fashioned its rule for the handling “mixed” claims, the Court in *Baral* also favorably observed how the Fourth Appellate District in *Cho v. Chang*¹⁹ struck a portion of a plaintiff’s claim using the anti-SLAPP statute while allowing the remainder of the complaint to proceed.²⁰ *Cho v. Chang* offers a practical example of how *Baral* may apply in practice going forward.

In *Cho v. Chang*, a lawsuit was brought by a female employee against a male co-worker and their employer for sexual harassment and related torts. The co-worker, Cho, then filed a cross-complaint for defamation and intentional infliction of emotional distress against Chang, alleging that Chang had defamed him in a report that she made to their employer detailing her alleged sexual assault and harassment (and was later the basis of a discrimination claim that she filed with government agencies) and also when Chang spoke with co-workers about Cho’s alleged behavior. This was a classic “mixed” conduct case as the cross-complaint combined both protected and unprotected conduct: Chang’s writing to the State was protected by the anti-SLAPP statute; her alleged comments about Cho that she allegedly made to her co-workers were not. After reviewing the extensive split of California appellate authority on the handling of “mixed” conduct claims, the appellate court affirmed the trial court’s granting of Chang’s anti-SLAPP motion in part, dismissing only the portion of Cho’s cross-complaint that challenged Chang’s report filed with the State, which the Court determined was constitutionally-protected petitioning and free speech activity. The court observed: “[i]t would make little sense if the anti-SLAPP law could be defeated by a pleading . . . in which several claims are combined into a single cause of action, some alleging protected activity and some not.”²¹ After all, in such a case, “[s]triking the entire cause of action would plainly be inconsistent with the purposes of the statute,” but “[s]triking the claims that invoke protected activity but allowing those alleging nonprotected activity to

remain would defeat none of them.”²² The appellate court noted that the trial court’s “ruling makes sense, and renders justice to both sides.”²³

Some commentators have opined that *Baral* may prompt an increase in the filing of anti-SLAPP motions – a prospect that critics of the growing popularity of anti-SLAPP motions in the trial and appellate courts will not relish. However, the California Supreme Court’s unanimous ruling in *Baral* – in combination with its opinion in *City of Montebello v. Vasquez*²⁴ (issued one week later) in which the California Supreme Court re-emphasized that exemptions to the anti-SLAPP statute are to be narrowly construed so that the anti-SLAPP statute itself is broadly construed – make clear that the anti-SLAPP statute remains broadly available to litigants who face claims that are based on their constitutionally-protected petitioning and free speech activities.

Endnotes

1. In *Baral v. Schnitt*, Mr. Burke and his DWT colleagues Rochelle Wilcox, Jason Harrow and John Freed filed an amicus brief on behalf of Los Angeles Times Communications LLC, Reporters Committee for Freedom of the Press, The First Amendment Coalition, The McClatchy Company, First Look Media, Inc., The Associated Press, News Corporation, Dow Jones & Co., Inc., The New York Times Company, Cable News Network, Inc., ABC, Inc. (including ABC News, KABC-TV, KGO-TV and KFSN-TV), The Hearst Corporation, Bloomberg, L.P. and CBS Broadcasting, Inc.

2. Cal. Civ. Proc. § 425.16, subd. (b) (1).

3. In the Petition for Review filed by David Schnitt on March 16, 2015, counsel for Mr. Schnitt pointed out that California’s lower appellate courts had addressed the legal issue resolved in *Baral* no fewer than 14 separate times since May of 2011.

4. 120 Cal. App. 4th 90 (2004).

5. See, e.g., *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.*, 137 Cal. App. 4th 1118-1125 (2006); *Platypus Wear, Inc. v. Goldberg*, 166 Cal. App. 4th 772, 786 (2008);

Haight Ashbury Free Clinics, Inc. v. Happening House Ventures, 184 Cal. App. 4th 1539, 1554 (2010); *Wallace v. McCubbin*, 196 Cal. App. 4th 1169, 1196-1212 (2011); *M.F. Farming, Co. v. Couch Distributing Co., Inc.*, 207 Cal. App. 4th 180, 198 (2012); *Burrill v. Nair*, 217 Cal. App. 4th 357, 379 (2013).

6. See e.g., *Haight Ashbury Free Clinics, Inc.*, 184 Cal. App. 4th at 1556-1557 (conc. & dis. opn. of Needham, J.); *City of Colton v. Singletary*, 206 Cal. App. 4th 751 (2012); *Cho v. Chang*, 219 Cal. App. 4th 521, 526-527 (2013).

7. Justice Needham of California’s First Appellate District was an early critic of the *Mann* rule and his separate opinion filed in *Haight Ashbury Free Clinics, Inc.*, 184 Cal. App. 4th at 1556-1557 proved prescient of the Supreme Court’s ruling in *Baral*: “The upshot of *Mann* is that a plaintiff may freely make utterly meritless attacks on a defendant’s exercise of free speech and petition, if the plaintiff has also alleged some nonprotected activity that supports the cause of action. This is plainly inconsistent with the anti-SLAPP statute’s purpose of curbing lawsuits that chill the valid exercise of free speech.”

8. Following the Supreme Court’s rulings in *Taus v. Loftus*, 40 Cal. 4th 683 (2007) and *Oasis West Realty, LLC v. Goldman*, 51 Cal. App. 4th 811 (2011) – neither of which, ironically, involved a mixed cause of action – lower courts attempted to discern the Supreme Court’s guidance on the “mixed” conduct question, some believing that *Oasis* amounted to an implicit disapproval of *Taus* and signaling the Court’s support of the *Mann* rule. See e.g., *Wallace*, 196 Cal. App. 4th at 1196-1212; *Burrill*, 217 Cal. App. 4th at 380. In *Baral*, Justice Corrigan set the record straight (see 1 Cal. 5th at 388-392), after dryly observing that, “[c]learly, our decisions in *Taus* and *Oasis* have occasioned some confusion in the Courts of Appeal.” 1 Cal. 5th at 388.

9. 1 Cal. 5th at 382.

10. *Id.*

11. 1 Cal. 5th at 392.

12. Cal. Civ. Proc. § 425.16 (a) (“The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of

public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.”)

13. Cal. Civ. Proc. § 425.16 *et. seq.*

14. 1 Cal. 5th at 392-393 (*citing to Shiveley v. Bozanich*, 31 Cal. 4th 1230, 1242 (2003) (each separate defamatory statement gives rise to a new cause of action)).

15. *Mann*, 120 Cal. App. 4th at 100-101.

16. 1 Cal. 5th at 396.

17. 1 Cal. 5th at 394; *see e.g., Wallace*, 196 Cal. App. 4th at 1187; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 672-673 (2005); *Episcopal*

Church Cases, 45 Cal. 4th 467, 477-478 (2009).

18. *Baral*, 1 Cal. 5th at 394.

19. *Cho*, 219 Cal. App. 4th 521.

20. *Baral*, 1 Cal. 5th at 387-388.

21. *Cho*, 219 Cal. App. 4th at 526.

22. *Id.* In the unpublished portion of the court’s opinion, the court of appeal affirmed the denial of Chang’s motion for attorneys’ fees after the trial court found that her partially successful anti-SLAPP motion “produced nothing of consequence.” *Cho*, 219 Cal. App. 4th at 525. However, with other anti-SLAPP motions, attorneys’ fees should be awarded unless “the results of the motion were minimal and insignificant” so that the defendant did not achieve any “practical benefit”

bringing the motion. *Mann v. Quality Old Time Service, Inc.*, 139 Cal. App. 4th 328, 340 (2006).

23. *Cho*, 219 Cal. App. 4th at 527.

24. 1 Cal. 5th 409, 419-420 (2016) (“[E]xpansive interpretation of exemptions from the anti-SLAPP statute is inconsistent with the Legislature’s express intent that the statute’s core provisions “shall be construed broadly.” (*Simpson Strong-Tie Co. v. Gore* (2010) 49 Cal. 4th 12, 22 [commercial speech exemption of § 425.17, subd. (c)]; *Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal. 4th 309, 316 [public interest exemption of § 425.17, subd. (b)].)”)

Seeing Stars: Courts and Congress Consider Whether to Knock Out Online Ratings Defamation Claims

JAMES J. MCGUIRE, DEANNA K. SHULLMAN AND ALLISON KIRKWOOD SIMPSON

Today, nearly anything can be – and already is – rated online. Online ratings are widely available not just for books¹ and movies² and hotels,³ but for everything from drywall contractors⁴ to brain surgeons.⁵ Even lawyers are rated online.⁶ Judges, too.⁷

Online *ratings*, as opposed to online *reviews*, typically involve ranking systems of one sort or another. For instance, organizations such as the Better Business Bureau grade local businesses with letter grades, from A+ (highest) to F (lowest). Yelp rates “local businesses like dentists, hair stylists and mechanics” using a system of 1 to 5 stars.⁸ The same 1 to 5 star-rating system is used by consumers to evaluate books, music, movies, and television programs on Amazon.com. Rotten Tomatoes rates movies using its “Tomatometer,” which

identifies the percentage of approved critics who positively reviewed a particular movie.⁹

Not surprisingly, rating websites and those whose post on them repeatedly have been the targets of defamation lawsuits and take-down demands. But the road to victory for such plaintiffs is not an easy one. Review and rating websites are largely protected from liability under the Communications Decency Act. Consumers who post ratings or reviews often do so anonymously, and it can be difficult for defamation plaintiffs to learn their identities. When a consumer’s identity is discovered, the use of online rating systems typically is not actionable in defamation. And although some retailers have attempted to impose harsh non-disparagement terms on their customers, there is a strong trend toward making such terms unenforceable.

The CDA and Anonymous Speakers

No one wants to receive a poor rating online. But for the lawyer rated

on Avvo as a 1 or 2 (out of 10), or the Company saddled by the Better Business Bureau with a D+ grade, is a defamation lawsuit the best response? Not usually.

If the target of the lawsuit is the website itself, a successful defamation claim is subject to the protections afforded by the Communications Decency Act. Section 230 of the CDA provides a formidable barrier to suit against rating and review websites. But its safeguards do not guarantee that websites will avoid entanglement in legal disputes over online ratings. When the target of a defamation suit is the anonymous consumer who posted the negative rating, websites often face subpoenas directed at unmasking the anonymous poster who published the rating.

For twenty years, Section 230 of the CDA has immunized interactive service providers from claims based upon the content of statements created by third parties.¹⁰ The immunity afforded by

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Section 230 reinforced the established common law principle that the distributors of third-party content – e.g., book stores, libraries, newsstands – are not liable in defamation because they are mere conduits for third-party content, not its authors.¹¹ Congress enacted Section 230 to ensure the principle would apply to all Internet Service Providers (“ISPs”), even those that attempted to be “Good Samaritans” by regulating the content of their websites.¹² Websites hosting forums for user-generated content are the quintessential example of an immunized ISP.

Section 230, however, has not dissuaded some plaintiffs from directing their claims about negative ratings at the website itself, often using novel legal theories in hopes of avoiding CDA immunity. Two recent cases in the Ninth Circuit offer examples.

*Consumer Cellular, Inc. v. ConsumerAffairs.com*¹³ is a decision from the Oregon district court, where the plaintiff, a cell phone service provider, sued a consumer affairs website claiming the website manipulated online star ratings to harm certain providers but benefit others who paid fees to become “accredited members.”¹⁴ According to the plaintiff, the website chose not to publish certain positive ratings of the plaintiff in order to lower the plaintiff’s overall star rating.¹⁵ The trial court declined to dismiss the defamation claim on Section 230 grounds, finding that the claim was premised not on third-party content but on the website’s own conduct in calculating the business’s star-rating.¹⁶ The Court found that the website’s rating of the plaintiff (1.5 out of 5 stars) was the website’s “own factual representation(s) regarding [users’] expressions of opinions” and thus Section 230 did not apply.¹⁷ The decision has been appealed to the Ninth Circuit.¹⁸

Consumer Cellular challenges long-established jurisprudence that immunizes ISPs from claims premised upon a website’s exercise of its editorial judgment, such as whether to publish, screen, or delete third party content.¹⁹ How the Ninth Circuit will view the *Consumer Cellular* case remains to be seen, but its September 2016 decision

in *Kimzey v. Yelp!, Inc.*²⁰ may foreshadow challenges facing the *Consumer Cellular* plaintiff on its defamation claim. In *Kimzey*, the website Yelp displayed a one-star rating of the plaintiff’s locksmith business, which the plaintiff claimed Yelp culled from another website and transformed into its own speech.²¹ The Court rejected as implausible the complaint’s “threadbare allegations” that Yelp fabricated the rating, but also held that the website’s decision to publish the review on Yelp was immunized under the CDA even if it originated on another site.²²

The plaintiff also claimed Yelp was not immune because it created the content by transforming it to fit into a star-rating system that Yelp designed, thereby making Yelp the author or creator of the rating system. The Ninth Circuit likewise rejected this theory. While expressly declining to embrace the premise that a one-star rating could be defamatory, the appellate court held “the rating system does absolutely nothing to enhance the defamatory sting of the message beyond the words offered by the user.”²³ The rating, based on input from third parties that Yelp reduced to an aggregate, was user-generated and did not constitute content creation.²⁴ Accordingly, Section 230 protected Yelp’s rating system.

Although the Ninth Circuit has signaled that Section 230 immunity extends to rankings assigned by websites based on user generated content, websites often cannot avoid some involvement in online ratings suits for the simple reason that they are in possession of information that could unmask the original speaker. Given the First Amendment protection for speakers who wish to remain anonymous,²⁵ web publishers frequently find themselves front and center in disputes about balancing anonymous speech rights against the plaintiff’s right to have his day in court.

While most websites include language in their terms of use or privacy policies that permit the disclosure of account information in response to a subpoena, they also have a business incentive to protect the anonymous users in order to encourage free expression

on the website and, in turn, keep the website relevant and active. As a result, even though they usually are immune from defamation suits themselves, websites may find themselves fighting against disclosure of anonymous users by arguing the merits (or lack thereof) of the underlying defamation claim.

There are two tests used most often for deciding whether to reveal an anonymous speaker, arising from the decisions in *Dendrite Int’l v. Doe*²⁶ and *Doe v. Cahill*.²⁷ Under the *Dendrite* standard, a plaintiff seeking to compel disclosure of an anonymous speaker’s identity must (a) make reasonable efforts to give the defendant speakers notice and an opportunity to defend his anonymity; (b) specifically identify the allegedly actionable speech or conduct; (c) state a claim against each speaker based on each statement; (d) produce competent evidence supporting the claims; and (e) satisfy the court that the balance of potential harm to plaintiff outweighs the damage caused to speakers from the infringement on their constitutionally protected right to anonymous speech.²⁸ The *Cahill* standard likewise requires reasonable efforts to notify the defendant and competent evidentiary support (i.e., evidence sufficient to defeat a summary judgment motion directed at the defamation claim) before such discovery will be permitted. But the *Cahill* Court rejected the balancing prong of the *Dendrite* test as already incorporated into the summary judgment standard.²⁹ In the more than ten years since *Cahill* was decided, a uniform standard has failed to emerge, and in many jurisdictions websites are left to advocate for anonymity on a case-by-case basis. As a result, those websites willing to stand up for the anonymity of their user generated content providers must frequently argue the underlying merits of the claim and address the question of whether a low rating (1 out of 5 stars, for example) is actionable as a matter of law.

Rating Systems

Given the strong defense that the CDA provides for websites, plaintiffs upset about online ratings may have little option but to sue the consumer who

posted the negative rating or review (assuming the plaintiffs can satisfy the *Dendritel Cahill* standards and identify the consumer). But consumers who utilize online rating systems have their own strong defense to defamation claims. Indeed, the case law is nearly uniform in holding that such rating systems cannot support a defamation claim for the simple reason that a one-star or similarly abstract rating necessarily reflects “subjective assessments . . . that are not verifiable,” and thus they are not statements of objective or “provable facts.”³⁰ There is no way of knowing whether a doctor deserves a one, two, or five star rating, because there is no objective way to determine what qualities matter to every reviewer or how those qualities are subjectively rated. Whether a service deserves a particular number of stars is a classic matter of opinion rather than fact.

Many ratings websites bolster the fact-opinion distinction through their terms of use. For instance, Barnes & Noble’s terms of use provide that “the Content, including User Created Content, available through the Barnes & Noble.com Site represents *the opinions and judgments* of the third party that provides such Content.”³¹ Avvo’s website states that “there are certain inherent limitations to the accuracy or currency” of information on the site, and that “legal and other information may be incomplete, may contain inaccuracies, or may be based on *opinion*.”³² While such disclaimers are not required to show that a rating system is subjective, they do “contribute to [the] general tenor of the entire work [that] negate[] the impression that [the speaker] was asserting an objective fact.”³³

Perhaps the leading case about defamation and rating systems is *Browne v. Avvo, Inc.*,³⁴ which concerned the Avvo website on which clients review and rate attorneys. Avvo assigns values to certain ratings criteria and then, using an undisclosed formula, creates a rating number for attorneys from 1 to 10.³⁵ In *Browne*, the plaintiff-attorney received a rating of only 5.5 out of 10. He claimed that the 5.5 rating was false and defamed him.³⁶

The key issue facing the court was

whether the 5.5 rating could “reasonably have been interpreted as stating actual facts” about the plaintiff.³⁷ Consistent with the Ninth Circuit’s recent approach in *Kimzey*, the court dismissed the defamation claim because the rating was not a statement of fact; rather it was “figurative” and represented, “in an abstracted form, some panoply of attributes and the values Avvo has assigned to them.” According to the court:

A user of the Avvo site would understand that ‘5.5’ is not a statement of fact. To the extent the numbers are tied to fuzzy descriptive phrases like ‘superb,’ ‘good,’ and ‘strong caution,’ a reasonable reader would understand that these phrases and their application to a particular attorney are subjective and . . . not sufficiently factual to be proved or disproved.³⁸

Because the numerical ratings on the Avvo website represent opinions, not facts, they are “virtually impossible to prove wrong” and cannot support a defamation claim.³⁹

Similarly, in *Seaton v. TripAdvisor, LLC*,⁴⁰ the plaintiff sued TripAdvisor for listing his hotel first on its website among “Dirtiest Hotels,” a list based upon reviews by travelers.⁴¹ The district court dismissed the complaint and the court of appeals affirmed, explaining that “the subjective weighing of factors cannot be proven false and therefore cannot be the basis of a defamation claim.”⁴² In other words, TripAdvisor’s list of “Dirtiest Hotels” “cannot reasonably be interpreted as stating, as an assertion of fact, that [plaintiff’s hotel] is the dirtiest hotel in America.”⁴³ Instead, the court ruled that the statement was one of “nonactionable opinion.”⁴⁴

The Better Business Bureau’s letter grading system also has been the subject of repeated defamation claims, but the courts have consistently rejected them. The BBB’s grading system, they have found, “is not sufficiently factual to be susceptible of being proven true or false.”⁴⁵

Not surprisingly, cases based upon unfavorable ratings sometimes arise from traditional, hardcopy publications, rather than online rating sites. Nevertheless, the courts in those cases

regularly reach the same result, holding that a rating that cannot reasonably be interpreted as stating objective facts cannot be proven true or false, and thus will not support a defamation claim. For instance, in *Compuware Corp. v. Moody’s Investors Services*,⁴⁶ a computer company claimed that it was defamed when Moody’s rated it “Ba1,” which is the “highest of Moody’s eleven non-investment grade (i.e., junk) ratings.”⁴⁷ The Sixth Circuit affirmed summary judgment for Moody’s, explaining that “statements that cannot reasonably [be] interpreted as stating facts” cannot support a defamation claim.⁴⁸ Moody’s ratings could not be proven false “because of the inherently subjective nature of Moody’s ratings calculation.”⁴⁹ Similarly, in *Aviation Charter, Inc. v. Aviation Research Group US*,⁵⁰ the defendant published safety ratings of aviation charter service providers and assigned its lowest rating, “Does Not Qualify,” to the plaintiff’s charter service.⁵¹ The Eighth Circuit affirmed summary judgment on plaintiff’s defamation claim because the rating was “not sufficiently factual to be susceptible of being proven true or false.”⁵²

For those defamation plaintiffs who either know the identity of the consumer who has published a negative rating online, or who are able to unmask the anonymous poster, the likelihood of successfully arguing that an abstract rating is actually a false statement of fact is slim. Courts across the country simply “do not embrace” the notion that such ratings constitute statements of provable fact.⁵³

Non-Disparagement Clauses in Consumer Contracts and Related Legislation

The lack of recourse against websites and users who provide low ratings of goods or services has inspired creative efforts to circumvent the protection against defamation liability. There can be little doubt that consumers rely on rating websites as credibility indicators of product and service quality. Businesses, especially small ones, are worried about negative online ratings and reviews, and some have attempted to suppress negative reviews – regardless of whether they are truthful – through

provisions in consumer contracts restricting such reviews. These non-disparagement or gag clauses aim to prohibit or restrict the consumer's ability to write and post negative reviews or ratings of a product, service, or business, and also purport to give the business the right to sue or fine consumers who post disparaging information. Rating a company as 1 out of 5 stars, or giving it a grade of F, would likely qualify as disparaging the company. By using non-disparagement clauses, businesses that have no real chance of demonstrating that an online rating system is a statement of fact hope to sidestep that obstacle (and others).

Non-disparagement clauses are relatively common in severance agreements, divorce settlements, settlement agreements, and other contexts. If crafted properly, they are enforceable because they were actually negotiated between the parties, are material to the agreement, and clearly define what is prohibited.⁵⁴ But their use to quash free speech in a consumer contract is controversial, and there is momentum to outlaw non-disparagement clauses in the consumer context.

Perhaps the best known case involving a consumer non-disparagement clause involved a couple from Utah who were fined \$3,500 by an online retailer for a comment they posted on RipoffReport.com.⁵⁵ In *Palmer v. KlearGear.com*, John Palmer purchased a keychain and a desk toy for less than \$20 from the online retailer.⁵⁶ As part of the transaction, KlearGear.com buried a non-disparagement and \$3,500 liquidated damages clause in a series of hyperlinks. The items that Palmer attempted to purchase never arrived.⁵⁷ Palmer and his wife, Jennifer Kulas, each attempted to contact the online retailer but were unable to do so.⁵⁸ Kulas then posted a review of the retailer on RipoffReport.com in which she criticized the inaccessibility of the customer service representatives and the overall handling of the order.⁵⁹ The review said in part that “[t]here is absolutely no way to get in touch with a physical human being. No extensions work.”⁶⁰

More than three years later, John Palmer received an email from

KlearGear.com saying Palmer would be fined \$3,500 if the negative review was not taken down within 72 hours.⁶¹ According to the email, Palmer violated a non-disparagement clause in the retailer's Terms of Sale and Use when his wife posted the critical review on RipoffReport.com.⁶² The text of the non-disparagement clause to which the email referred forbade KlearGear.com's customers from “taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees.”⁶³

When the couple refused to remove the review, the retailer reported the \$3,500 as an unpaid debt to credit reporting agencies.⁶⁴ The couple was unsuccessful in removing the delinquency from their credit report and it ultimately affected their ability to obtain a car loan, a credit card, and credit for home repairs.⁶⁵

On behalf of the couple, Public Citizen sued seeking a declaratory judgment that the clause was unconscionable and violated the First Amendment. KlearGear.com defaulted, and the Utah District Court ultimately held that KlearGear.com was liable to the plaintiffs for violating the federal Fair Credit Reporting Act, for defamation, for intentional interference with prospective contractual relations, and for intentional infliction of emotional distress.⁶⁶ The district court also declared that Palmer and Kulas owed no debt to KlearGear.com based on the non-disparagement clause and awarded them over \$300,000 in compensatory and punitive damages, along with costs and attorney fees.⁶⁷

In a recent case in the Middle District of Florida, the Federal Trade Commission sued Roca Labs, a seller of weight loss supplements, for misrepresenting the quality of its products and for misusing non-disparagement clauses.⁶⁸ Roca Labs warned purchasers, through package inserts shipped with products, that they agreed not to write any negative reviews about Roca Labs or its products, and would owe Roca Labs hundreds of dollars should they violate the non-disparagement clause.⁶⁹ Roca Labs also routinely made legal threats and filed lawsuits claiming that purchasers violated the

Terms and Conditions of purchase.⁷⁰ The FTC contended that the use of the non-disparagement clause constituted an unfair act or deceptive trade practice in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) and (n).⁷¹ This was the first time the FTC alleged that a seller's use of a non-disparagement provision is unfair under Section 5 of the FTC Act.⁷²

The district court entered a preliminary injunction against Roca Labs and its owners enjoining the defendants from imposing or enforcing a non-disparagement clause that would purport “to prohibit purchasers from speaking or publishing truthful or non-defamatory negative comments or reviews about defendants, their products, or their employees.”⁷³

In response to these types of cases and the increasing use of non-disparagement clauses in consumer contracts, two states have enacted laws that ban them. Effective January 1, 2015, California imposes civil penalties for a consumer contract that would waive “the consumer's right to make any statement regarding the seller or lessor or its employees or agents or concerning the goods or services.”⁷⁴ The California law also made it “unlawful to threaten or to seek to enforce” such a provision, or to “otherwise penalize” a consumer for making any such statement.⁷⁵ The law carries statutory penalties of \$2,500 for the first violation, and \$5,000 for each subsequent violation.⁷⁶ Willful, intentional, or reckless violations carry a maximum penalty of \$10,000.⁷⁷ Thus, the law protects consumers from unknowingly giving up their freedom to speak about their retail experiences; it also prevents them from being intimidated, penalized, or fined for exercising their First Amendment rights. The bill analysis states that the law was “particularly timely in light of recent examples where such clauses have been shockingly used by some businesses to intimidate consumers from expressing their reasonable opinions about the business' potentially inadequate goods or services” and points to the KlearGear.com case as one example of why the law was needed.⁷⁸ Because it was an open question as to whether a California court

would invalidate a consumer non-disparagement clause as unconscionable, the law was intended to help clarify that issue and avoid unnecessary litigation, expense, and “consumer trauma.”⁷⁹

Maryland became the second state to approve a ban on consumer non-disparagement clauses. Effective October 1, 2016, the law (called the “Nondisparagement Clauses in Consumer Contracts”) prohibits the inclusion of a provision in a consumer contract that waives the consumer’s right to make a statement concerning the seller, employees of the seller, or the consumer goods or services.⁸⁰ Under the law, which is substantially similar to the California law, a retailer may not threaten or seek enforcement of a non-disparagement clause, nor may it penalize a customer for making a statement about the retailer, service, or good. A violation of the law is considered to be an unfair and deceptive trade practice.⁸¹

Congress is considering a similar law at the federal level, the Consumer Review Freedom Act of 2015,⁸² which passed with bipartisan support in the Senate in December 2015. The bill would ban non-disparagement clauses in consumer contracts and prohibit penalties or fees being assessed against individuals who review a business or service. A violation of the law would be treated as an unfair or deceptive act or practice under the Federal Trade Commission Act. The FTC and the state attorneys general would have enforcement authority. The House of Representatives passed its own version of the bill, called the Consumer Review Fairness Act of 2016⁸³ in September 2016. The House Report on the bill discusses the *KlearGear.com* and *Roca Labs* cases as examples of why the legislation is necessary.⁸⁴ The only difference between the two bills (other than the name) is that the House bill appears to clarify the FTC’s enforcement authority. The House bill will proceed to the Senate so that the two bills may be reconciled. This reconciliation should be a fairly easy process considering the substantial similarity of the two bills.

As more and more companies worry about negative online reviews it is clear that neither courts nor legislatures are

particularly sympathetic to attempts to impose liability on consumers for rating goods or services online. Moreover, the public is not likely to do business with a company known for suing disappointed customers. And while the lack of legal recourse may leave businesses seeing stars, many websites allow businesses to respond to unfavorable ratings online.⁸⁵ As Justice Louis D. Brandeis famously observed in his *Whitney v. California* concurrence: “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”⁸⁶ Perhaps, for businesses, in reaching for the highest stars, the keyboard is more powerful than the complaint.

Endnotes

1. See, e.g., amazon.com; barnesandnoble.com.
2. See, e.g., rottentomatoes.com; metacritic.com; imdb.com.
3. See, e.g., tripadvisor.com; expedia.com; travelocity.com.
4. See, e.g., angieslist.com; yelp.com.
5. See, e.g., ratemds.com; vitals.com.
6. See, e.g., avvo.com; martindale.com.
7. See, e.g., therobingroom.com; robeprobe.com.
8. <https://www.yelp.com/about>.
9. <https://www.rottentomatoes.com/about/>.
10. 47 U.S.C. 230(c).
11. E.g., *Cubby v. Compuserve*, 776 F. Supp. 135 (S.D.N.Y. 1991) (finding that First Amendment precluded liability in defamation against “electronic library” based upon content provided by others); *Cardozo v. True*, 342 So.2d 1053, 1056 (Fla. 2d DCA 1977) (“distributors” of newspapers and periodicals cannot be even held legally responsible for defamatory material contained therein where the dealer did not know and reasonably could not have known that the publication contained defamatory material”).
12. *Zeran v. America Online, Inc.*, 129 F. 3d 327, 330 – 31 (4th Cir. 1997) (noting Section 230 was enacted, at least in part, to overturn *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995

WL 323710 (NY Sup. Ct. Trial. Div. May 24, 1995), which had refused to insulate a web publisher from liability for statements made by others on its web servers because the web host had engaged in efforts to control the substance of content on its servers, such as using automatic software screening programs and making public statements concerning its efforts to control the content of its bulletin boards).

13. Case No. 3:15-CV-1908-PK, 2016 WL 3176602 (D. Or. Feb. 29, 2016).

14. *Id.* at *4 - 5.

15. *Id.* at *1, *5. The claims included violation of the state’s unlawful trade practices statute, intention interference, RICO, and defamation.

16. *Id.* at *12.

17. *Id.* at *13. The Court also refused to dismiss the remainder of the claims, finding the plaintiff sufficiently alleged the website’s manipulation of consumer reviews and requests for fees in exchange for becoming an “accredited member” stated claims for unfair trade practices, interference, and RICO. *Id.*

18. *Consumer Affairs.com v. Consumer Cellular, Inc.*, Case No. 16-35514 (9th Cir. June 20, 2016).

19. E.g., *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (decisions relating to the monitoring, screening, and deletion of content are “quintessentially related to a publisher’s role” and thus immune); *Zeran*, 129 F.3d at 329 (4th Cir. 1997) (finding immunity despite publisher’s assurances that content would be removed); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 538-39 (E.D. Va. 2003) (applying immunity to request for injunction against allegedly defamatory content because such relief seeks to hold AOL liable for its failure to exercise its editorial discretion to remove content from its website), *aff’d* Case No. 03-1770, 2004 WL 60271 (4th Cir. March 24, 2004); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 41-43 (Wash. 2001) (Section 230 barred claim that defendant “promised to remove” offensive product reviews but then “failed to do so, and reposted the reviews rather than deleting them”); *Doe v. Am. Online, Inc.*, 718 So. 2d 385,

389 (Fla. 4th DCA 1998), *aff'd* 783 So. 2d 1010 (Fla. 2001) (“lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content-are barred”).

20. Case No. 14-35494, 2016 WL 4729492 (9th Cir. Sept. 12, 2016).

21. *Id.* at * 1-2, 4.

22. *Id.* at *4.

23. *Id.* at *5 (internal quotation omitted).

24. *Id.*

25. *E.g.*, See *Watchtower Bible & Tract Soc. of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).

26. 775 A.2d 756 (N.J. App. Div. 2001).

27. 884 A.2d 451 (Del. 2005)

28. 775 A.2d 756.

29. 884 A.2d 451.

30. *ZL Technologies, Inc. v. Gartner*, 709 F. Supp. 2d 789, 798 (N.D. Cal. 2010)

31. <http://www.barnesandnoble.com/h/help/about/terms-of-use> (emphasis added).

32. <https://www.avvo.com/support/terms> (emphasis added).

33. *ZL Technologies*, 709 F. Supp. 2d at 797 (internal quotation omitted).

34. 525 F. Supp. 2d 1249 (W.D. Wash. 2007).

35. *Id.* at 1252.

36. *Id.*

37. *Id.* at 1251 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)).

38. *Id.* at 1252 (emphasis added).

39. *Id.*

40. 728 F.3d 592 (6th Cir. 2013).

41. *Id.* at 594.

42. *Id.* at 600.

43. *Id.* at 598.

44. *Id.*

45. *Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234, 243 (Mo. Ct. App. 2011). See also *Better Bus.*

Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 357 (Tex. Ct. App. 2013) (Better Business Bureau’s “F” rating “cannot be defamatory because it is the Bureau’s self-described ‘opinion’ of the quality of John Moore’s services, which lacks a high degree of verifiability”; remanding for case to be dismissed); *Caribbean Cruise Line, Inc. v. Better Business Bureau of Palm Beach County*, Case No. 50-2012-CA010670 XXXX MB (Cir. Ct., Fifteenth Jud. Dist., Palm Beach County, Fla. June 14, 2013) (dismissing complaint because, “[a]s a matter of law, the consumer rating which forms the basis for all claims in Plaintiff’s Amended Complaint constitutes a statement of pure opinion which is absolutely protected under Florida law and the First Amendment to the United States Constitution”), *aff’d*, 169 So. 3d 164, 166 (Fla. 4th DCA 2015).

46. 499 F.3d 520 (6th Cir. 2006).

47. *Id.* at 524.

48. *Id.* at 529 (internal quotation omitted).

49. *Id.*

50. 416 F.3d 864 (8th Cir. 2005), *abrogation on other grounds recognized by Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 773 F.3d 58 (8th Cir. 2014).

51. *Id.* at 867.

52. *Id.* at 871 (internal quotation omitted).

53. *Kimzey v. Yelp!, Inc.*, Case No. 14-35494, 2016 WL 4729492, at *5 (9th Cir. Sept. 12, 2016).

54. See, e.g., *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 457 (5th Cir. 2005) (“It goes without saying that non-disparagement clauses are common in situations where two parties terminate their employment relationship by contract.”); *E.E.O.C. v. Severn Trent Services, Inc.*, 358 F.3d 438, 440 (7th Cir. 2004) (noting that private gag orders between private parties to a contract “appear to be fairly common” and discussing situation in which they arise and are enforceable).

55. *Palmer v. KlearGear.com*, No. 1:13-cv-00175-DB (D. Utah Dec. 18, 2013) (Dkt. 1).

56. *Id.* at ¶ 11.

57. *Id.* at ¶ 12.

58. *Id.* at ¶ 13.

59. *Id.* at ¶ 15.

60. <http://www.cnn.com/2013/12/02/tech/couple-fined-for-negative-review/> (published Dec. 26, 2013).

61. *Palmer*, Dkt. 1, ¶ 16.

62. *Id.*

63. *Id.* at ¶ 17.

64. *Id.* at ¶ 27.

65. *Id.* at ¶ 34.

66. *Palmer*, Dkt. 13.

67. *Palmer*, Dkt. 13 (May 5, 2014), Dkt. 17 (July 1, 2014).

68. *Federal Trade Commission v. Roca Labs, Inc.*, No. 8:15-cv-2231-T-35TBM (M.D. Fla. Sept. 24, 2015) (Dkt. 1).

69. *Id.* at ¶ 44.

70. *Id.*

71. *Id.* at ¶¶ 64-66.

72. <https://popehat.com/2015/09/29/in-roca-labs-case-ftc-takes-novel-stand-against-non-disparagement-clauses/> (published Sept. 29, 2015).

73. *Roca Labs*, Dkt. 38 at 7 (Oct. 29, 2015).

74. Cal. Civ. Code § 1670.8(a)(1).

75. Cal. Civ. Code § 1670.8(a)(2).

76. Cal. Civ. Code § 1670.8(c).

77. Cal. Civ. Code § 1670.8(d).

78. AB-2365 Assembly Floor Analysis (Aug. 13, 2014).

79. *Id.*

80. Maryland H.B. 131; Md. Code, Com. Law § 14-1325 (Oct. 1, 2016).

81. *Id.*

82. S.2044 (114th Congress 2015-2016).

83. H.R.5111 (114th Congress 2015-2016).

84. H. Rept. 114-731.

85. For example, businesses maintaining a Facebook page that receives an unfavorable rating can “comment” on the rating. See <http://www.facebook.com>. Ripoffreport.com allows the subject of an unfavorable report to post a “rebuttal” to the report. See <http://www.ripoffreport.com>. And many sites, such a vitals.com (a health-care provider ratings and review site), allow the subject of negative reviews to “report abuse.”

86. *Whitney v. California*, 47 S. Ct. 641 (1927).

The Laws of Influence

MICHAEL R. JUSTUS

“Influencers” make money (or get free stuff) by leveraging their popularity on social media networks to endorse third-party products. Influencers can be celebrities, athletes, experts, social media stars, or even pets, like the incomparable “Menswear Dog” on Instagram.¹

Influencers command an increasing role in many companies’ marketing strategies—a function of the explosive growth of social media and the ineffectiveness of traditional advertising in the face of ad-blocking, ad-skipping, and other technologies. As a result, influencers are also attracting increasing attention from regulators.

While the use of social media influencers may be a relatively new advertising technique, the relevant legal principles are actually well-developed and quite clear. An advertiser may lawfully compensate an influencer to endorse its product on social media. But the influencer cannot make any false, misleading, or unsubstantiated claims about the product. And the influencer must disclose the “material connection” to the advertiser, i.e., that it received compensation or free stuff in exchange for the endorsement. In social media, this disclosure commonly takes the form of hashtags like “#ad.” If an influencer does not play by these rules, the advertiser can be held legally responsible.

FTC Guidance

Simple legal principles, of course, may not always be greeted with simple fact patterns. Luckily, the Federal Trade Commission (FTC) provides real-world compliance examples in several helpful guides. The FTC’s “Endorsement Guides”² and corresponding “What People Are Asking” document³ detail the legal requirements for online

and offline endorsements and describe examples of when “material connection” disclosures are required.

Where a disclosure is required, the FTC’s “.com Disclosures” guide⁴ drills down on the characteristics of effective disclosures, again with real-world examples, including sample social media posts and hashtags. Depending on the overall context of the post, hashtags like “#ad” or “#sponsored” may do the trick, but “#spon” or “#thanks[brand]” may not. In fact, hashtag disclosures may be unnecessary if the content of the post itself makes the material connection clear, e.g., “Found my new favorite [product]! Thanks for the free sample @Brand!” (And disclosure practice gets really interesting in newer technologies, like live streaming video apps—can you anticipate what an influencer will say and when they will say it in a live stream, and do you even have the ability to add disclosures before, during and/or after the stream?)

In addition, FTC announced several settlements in the past two years that illustrate its enforcement priorities and provide further guidance for advertisers.

In 2014, FTC entered into a 20-year consent order with home security company ADT, LLC⁵ based on allegations that ADT’s paid influencers misrepresented their online and offline endorsements as independent product reviews. For example, FTC alleged that a prominent blogger known as “The Safety Mom” appeared on NBC’s *The Today Show* to tout ADT’s products, but failed to disclose that she is a paid ADT spokeswoman. The settlement requires ADT to disclose any material connections with endorsers in the future in compliance with FTC’s Endorsement Guides, to inform its endorsers of their duty to do the same, and to monitor the endorsers for compliance.

In early 2016, FTC entered into

a 20-year consent order with online entertainment network Machinima, Inc.,⁶ alleging that Machinima paid “gamer” influencers to post YouTube videos endorsing video game systems without proper disclosures of the material connection. Similar to the ADT settlement, Machinima must not misrepresent in any influencer campaign that the endorser is an independent user of the product, and it must ensure that all of its influencers are aware of their responsibility to make required disclosures and monitor its influencers’ representations and disclosures. The settlement also prohibits Machinima from compensating influencers who make misrepresentations or fail to make the required disclosures.

Also in early 2016, FTC entered into a 20-year consent order with retailer Lord & Taylor⁷ (“L&T”) based on allegations that L&T paid 50 online fashion influencers to post Instagram photographs of themselves wearing a dress from L&T’s Design Lab collection, and that the influencers failed to properly disclose that L&T had given each influencer the dress, and in some cases, thousands of dollars, in exchange for their endorsements. L&T contractually required the influencers to include “#DesignLab” and “@lordandtaylor” in their posts, and it reviewed and approved the influencers’ posts with respect to the required wording (but not with respect to the FTC’s endorsement or native ad requirements). FTC did not believe the attempted disclosures included in the influencers’ social media posts (i.e., “#DesignLab” and “@lordandtaylor”) were sufficient to identify the material connection to L&T. The settlement contained terms similar to ADT and Machinima, and included a detailed education, monitoring and compliance program require-

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ment. Among other things, L&T must implement a system to educate its endorsers on their responsibility and to monitor and review endorsers' representations. Each endorser must sign a statement acknowledging their responsibility to disclose any material connection to L&T, and L&T must terminate any endorser that fails to do so. The endorser may receive "one notice of a failure to disclose and an opportunity to cure the disclosure" if L&T reasonably determines the failure was inadvertent. L&T must also maintain reports sufficient to show its compliance with these monitoring requirements.

Most recently, in July 2016, FTC again addressed "gamer" influencers in a settlement with Warner Bros. Home Entertainment, Inc.⁸ relating to allegations that Warner Bros. paid "gamer" influencers to endorse the video game *Middle Earth: Shadow of Mordor* on YouTube and social media. Of particular note, some influencers included disclosures in the description box below their videos posted on YouTube, but the disclosures were "below the fold," i.e., viewers needed to click the "Show More" link for the disclosures to appear. FTC alleged such "below the fold" disclosures are not sufficiently conspicuous. The proposed 20-year consent order closely tracks the Lord and Taylor consent order terms, and includes a duty to monitor any entity (e.g., agency) hired by Warner Bros. to conduct an influencer campaign on its behalf for compliance with FTC endorsement requirements, and to immediately cease payment to any such entity if Warner Bros reasonably concludes that the entity is not in compliance.

NAD Guidance

The National Advertising Division of the Council of Better Business Bureaus (NAD) also recently issued an "influencer" decision. In *Goop, Inc.*,⁹ NAD held that online lifestyle publication Goop was responsible for claims regarding third-party dietary supplements sold on the Goop website and endorsed by Goop founder and celeb-

rity Gwyneth Paltrow. The products were featured as recipe ingredients in "GP's Morning Smoothie," which Ms. Paltrow allegedly drank every morning. The recipe and purchasing page for the products included efficacy claims regarding the dietary supplements (e.g., "sooth overworked muscles," "combat mental fogginess"). NAD held that Goop's inclusion of such claims and Ms. Paltrow's endorsement on its website rendered Goop responsible for verifying that the products actually provide the claimed benefits. (NAD did not review the claims on the merits, however, because Goop agreed to voluntarily discontinue the claims.) This case is notable in that the influencer (and her company) were the enforcement targets, rather than the manufacturer/source of the products like the FTC examples above.

More Regulatory Action on the Horizon?

Additional influencer enforcement actions may be on the way. At the recent NAD annual conference in New York, both FTC and NAD representatives specifically identified influencer campaigns as a priority moving forward.

Further, consumer advocacy groups have been pushing for enforcement action addressing influencers. For example, a September 2016 joint letter¹⁰ sent to FTC by four consumer advocacy groups alleged that over 100 prominent influencers systemically failed to disclose material connections to advertisers in paid endorsements on Instagram. The complaint named a wide variety of alleged offenders, including celebrities and athletes like the Kardashians, Lindsey Lohan, Dwight Howard, Rihanna, David Beckham, and Michael Phelps, and global brands like Puma, Ralph Lauren, Adidas, Chanel, L-Oreal, and Nike. Although FTC is not required to take action in response to the letter, it undoubtedly reviewed the letter with interest given its recent enforcement focus on influencer campaigns. It certainly would not be surprising to see further FTC and NAD action in this area.

Best Practices

Several best practices emerge from these guides and cases, and in particular

the recent FTC consent orders, which could be viewed as roadmaps for what FTC would like to see from all advertisers. First, and most obviously, follow the rules: tell the truth, don't mislead, confirm any claims are substantiated, and disclose any material connections between the influencer and advertiser. Second, advertisers should consider a written agreement with influencers specifically addressing, and requiring compliance with, the FTC guides and other applicable laws. Third, advertisers should consider implementing a system of monitoring and documenting influencers' compliance. Fourth, if advertisers hire agencies to run their influencer campaigns, they should consider including provisions in the agency agreement addressing the issues above and making clear the agencies' responsibilities with respect to obtaining contracts from, and monitoring, influencers.

Conclusion

Influencer campaigns are trending with advertisers and regulators. More enforcement actions and resulting guidance are sure to arrive. In the meantime, the significant legal guidance already available should allow for well-designed influencer campaigns to be both legally compliant and effective.

Endnotes

1. See <https://www.instagram.com/menswearadog>.
2. Available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.
3. Available at <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.
4. Available at <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.
5. *In the Matter of ADT LLC*, case documents available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3121/ad-llc-matter>.
6. *In the Matter of Machinima, Inc.*, case documents available at

<https://www.ftc.gov/enforcement/cases-proceedings/142-3090/machinima-inc-matter>.

7. *In the Matter of Lord & Taylor, LLC*, case documents available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor->

[llc-matter](https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter).

8. *In the Matter of Warner Bros. Home Entertainment, Inc.*, case documents available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter>.

9. *Goop, Inc. (Moon Juice Action Dust and Brain Dust Dietary Supplements)* Case No. 5977 (July 26, 2016)

10. Available at <http://www.citizen.org/documents/Letter-to-FTC-Instagram-Endorsements.pdf>.

Courtside

PAUL M. SMITH AND JESSICA RING AMUNSON

On June 16, 2016, the Supreme Court issued its decision in one of the most important copyright cases of the year, *Kirtsaeng v. John Wiley & Sons, Inc.* The case involved the question of what standard should be applied in deciding whether to award attorneys' fees to the prevailing party at the end of a copyright suit. Unlike the civil rights laws, the Copyright Act does not create a presumption that fees should be awarded to prevailing parties. Instead, it simply provides that a court "may . . . award a reasonable attorney's fee to the prevailing party,"¹ whether it be a plaintiff or a defendant. The question in the case was what standards should guide a court's decision-making when faced with a fee motion.

In *Kirtsaeng*, both the Southern District of New York and the Second Circuit had denied any award of fees to Kirtsaeng as the prevailing plaintiff in the underlying litigation, applying the Second Circuit's approach that primarily asks whether the losing party's case was "objectively reasonable." The underlying case had itself gone to the Supreme Court. It involved the question of whether it constituted copyright infringement for Kirtsaeng to buy American textbooks overseas at cheap prices and import them to the U.S. for a profitable resale. In a prior case, the Supreme Court had divided on that question by a vote of 4-4.² Revisiting

that question in *Kirtsaeng*, the Supreme Court ruled for the defendant, rejecting the Second Circuit's determination that the international arbitrage scheme was not authorized by the "first sale" rule under which purchasers of books generally are authorized to resell them without copyright concerns. The Supreme Court thus reversed the Second Circuit's ruling in favor of the plaintiff publisher, John Wiley & Sons, by a vote of 6-3.

Counsel Kirtsaeng then sought a very substantial fee award in the district court, primarily based on extensive work performed during the Supreme Court phase of the merits case. The Southern District followed the approach mandated by the Second Circuit, looking first at whether the legal position of John Wiley had been objectively reasonable and then asking whether there was some other reason to award fees despite the fact that Wiley had litigated reasonably. Finding no other reason, the court denied fees, and the Second Circuit affirmed. Kirtsaeng then persuaded the Supreme Court to take the case again, in order to clarify the standards governing copyright fee motions.

John Wiley argued for affirmance, saying that the Second Circuit's approach was right because it would deter those cases worthy of deterrence (where one party has an objectively unreasonable case), while encouraging the full litigation of cases where the applicable law is unclear. Kirtsaeng argued that he should be awarded fees because he was the victor in a case that clarified an

important aspect of copyright law.

The Supreme Court's decision agreed with the approach mandated by the Second Circuit, with its focus on objective reasonableness, while rejecting all of the arguments presented by Kirtsaeng. "The objective-reasonableness approach," the Court said, will encourage "useful copyright litigation" because "it encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation." However, despite adopting the standard advocated by John Wiley, the Court vacated and remanded for the lower courts to consider the fee application anew under the standard it had articulated. The Court emphasized that it was not saying there was anything wrong with the outcome previously reached.

Regardless of the particular outcome in this case, the main import of *Kirtsaeng* was its clarification of the standards for adjudicating copyright fee applications, which will bring a measure of national consistency. Second Circuit cases are likely to be cited quite a bit in cases around the country in light of the Supreme Court's endorsement of that Circuit's basic approach.

Endnotes

1. 17 U.S.C. § 505.
2. *See Costco Wholesale Corp. v. Omega S.A.*, 131 S. Ct. 565 (2010).

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